

STATE OF NEW YORK

5267

2021-2022 Regular Sessions

IN ASSEMBLY

February 12, 2021

Introduced by M. of A. WALKER -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law and the economic development law, in relation to the creation of the empire state music production credit and the empire state digital gaming media production credit; to repeal subdivision 13 of section 352 of the economic development law relating thereto; and providing for the repeal of certain provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The tax law is amended by adding a new section 45 to read
2 as follows:

3 § 45. Empire state music production credit. (a) Allowance of credit.
4 (1) A taxpayer which is a music production entity engaged in qualified
5 music production, or who is a sole proprietor of or a member of a part-
6 nership, which is a music production entity engaged in qualified music
7 production, and is subject to tax under article nine-A or twenty-two of
8 this chapter, shall be allowed a credit against such tax to be computed
9 as provided herein.

10 (2) The amount of the credit shall be the product (or pro rata share
11 of the product, in the case of a member of a partnership or limited
12 liability company) of twenty-five percent and the eligible production
13 costs of one or more qualified music productions.

14 (3) Eligible production costs for a qualified music production
15 incurred and paid in this state but outside such metropolitan commuter
16 transportation district shall be eligible for a credit of ten percent of
17 such eligible production costs in addition to the credit specified in
18 paragraph two of this subdivision.

19 (4) Eligible production costs shall not include those costs used by
20 the taxpayer or another taxpayer as the basis calculation of any other
21 tax credit allowed under this chapter or allowed in any other state.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD05076-01-1

1 (b) Allocation of credit. The aggregate amount of tax credits allowed
2 under this section, subdivision fifty-five of section two hundred ten-B
3 and subsection (kkk) of section six hundred six of this chapter in any
4 taxable year shall be fifty million dollars. The aggregate amount of
5 credits for any taxable year shall be distributed on a regional basis as
6 follows: fifty percent of the aggregate amount of credits shall be
7 available for qualified music productions that incur at least sixty
8 percent of eligible production costs for a qualified music production in
9 region one; twenty percent of the aggregate amount of credits shall be
10 available for qualified music productions that incur at least sixty
11 percent of eligible production costs for a qualified music production in
12 region two; and thirty percent of the aggregate amount of credits shall
13 be available for qualified music productions that incur at least sixty
14 percent of eligible production costs for a qualified music production in
15 region three. If such regional distribution is not fully allocated in
16 any taxable year, the remainder of such credits shall be available for
17 allocation to any region in the subsequent tax year. For the purposes
18 of this section region one shall contain the city of New York; region
19 two shall contain the counties of Westchester, Rockland, Nassau and
20 Suffolk; and region three shall contain any county not contained in
21 regions one and two. Such credit shall be allocated by the empire state
22 development corporation among taxpayers in order of priority based upon
23 the date of filing an application for allocation of music production
24 credits with such office. If the total amount of allocated credits
25 applied for in any particular year exceeds the aggregate amount of tax
26 credits allowed for such year under this section, such excess shall be
27 treated as having been applied for on the first day of the subsequent
28 taxable year.

29 (c) Definitions. As used in this section:

30 (1) "Music production" means the creation of a sound recording and any
31 related music video, either of which is intended for commercial release.
32 A "music production" does not include recordings that are primarily
33 spoken word or wildlife or nature sounds, or produced for instructional
34 use or advertising or promotional purposes.

35 (2) "Qualified music production" is a music production in which eligi-
36 ble production costs equal to or are in excess of seven thousand five
37 hundred dollars if incurred and paid in this state in the twelve months
38 preceding the date on which the credit is claimed. Provided, however, if
39 such production costs are incurred and paid outside the metropolitan
40 commuter transportation district in this state, such production costs
41 shall be equal to or in excess of three thousand seven hundred fifty
42 dollars to be a qualified music production for the purposes of this
43 paragraph.

44 (3) (A) "Eligible production costs for a qualified music production"
45 are costs incurred and paid in this state for tangible property and
46 services used in the production of qualified music production, as deter-
47 mined by the department of economic development, including, but not
48 limited to: (i) studio rental fees and related costs, (ii) instrument
49 and equipment rental fees, (iii) production session fees for musicians,
50 programmers, engineers, and technicians and (iv) mixing and mastering
51 services.

52 (B) Eligible production costs shall not include: (i) costs for tangi-
53 ble property or services used or performed outside of this state, (ii)
54 performance fees for featured artists or featured guest artists receiv-
55 ing royalties or advances on royalties or special performance fees
56 (other than those that would normally be collected by a performing

1 rights organization) pursuant to an agreement directly with the producer
 2 or employer, (iii) salaries or related compensation for producers or
 3 songwriters, (iv) composer, artist or producer residual royalties or
 4 advances, (v) licensing fees for samples, (vi) interpolations or other
 5 music clearance costs, (vii) mastering or post-production expenditures
 6 for projects that were not principally tracked and recorded in this
 7 state, (viii) any costs associated with manufacturing, duplication,
 8 packaging, distribution, promotion, marketing or touring not specif-
 9 ically outlined in this subparagraph, or (ix) local transportation
 10 expenditures directly related to music production and provided at or to
 11 the site of such music production. With respect to the production of a
 12 music video, eligible production costs are those defined in paragraph
 13 two of subdivision (b) of section twenty-four of this article. Such
 14 total production costs incurred and paid in this state shall be equal to
 15 or exceed seventy-five percent of total cost of an eligible production
 16 incurred and paid within and without this state.

17 (d) Cross-references. For applications of the credit provided for in
 18 this section, see the following provisions of this chapter:

19 (1) Article nine-A: section two hundred ten-B, subdivision fifty-five.

20 (2) Article twenty-two: section six hundred six, subsection (i), para-
 21 graph one, subparagraph (B), clause (xlvi).

22 (3) Article twenty-two: section six hundred six, subsection (kkk).

23 § 2. Section 210-B of the tax law is amended by adding a new subdivi-
 24 sion 55 to read as follows:

25 55. Empire state music production credit. (a) Allowance of credit. A
 26 taxpayer who is eligible pursuant to section forty-five of this chapter
 27 shall be allowed a credit to be computed as provided in such section
 28 forty-five against the tax imposed by this article.

29 (b) Application of credit. The credit allowed under this subdivision
 30 for any taxable year shall not reduce the tax due for such year to less
 31 than the amount prescribed in paragraph (d) of subdivision one of
 32 section two hundred ten of this article. Provided, however, that if the
 33 amount of the credit allowable under this subdivision for any taxable
 34 year reduces the tax to such amount, the excess shall be treated as an
 35 overpayment of tax to be credited or refunded in accordance with the
 36 provisions of section one thousand eighty-six of this chapter, provided,
 37 however, no interest shall be paid thereon.

38 § 3. Subparagraph (B) of paragraph 1 of subsection (i) of section 606
 39 of the tax law is amended by adding a new clause (xlvi) to read as
 40 follows:

41 <u>(xlvi) Empire state music</u>	<u>Amount of credit under</u>
42 <u>production credit under</u>	<u>subdivision fifty-five</u>
43 <u>subsection (kkk)</u>	<u>of section two hundred ten-B</u>

44 § 4. Section 606 of the tax law is amended by adding a new subsection
 45 (kkk) to read as follows:

46 (kkk) Empire state music production credit. (1) Allowance of credit. A
 47 taxpayer who is eligible pursuant to section forty-five of this chapter
 48 shall be allowed a credit to be computed as provided in such section
 49 forty-five against the tax imposed by this article.

50 (2) Application of credit. If the amount of the credit allowable under
 51 this subsection for any taxable year exceeds the taxpayer's tax for such
 52 year, the excess shall be treated as an overpayment of tax to be credit-
 53 ed or refunded as provided in section six hundred eighty-six of this
 54 article, provided, however, that no interest shall be paid thereon.

1 § 5. The tax law is amended by adding a new section 46 to read as
2 follows:

3 § 46. Empire state digital gaming media production credit. (a) Allow-
4 ance of credit. (1) A taxpayer which is a digital gaming media
5 production entity engaged in qualified digital gaming production,
6 or who is a sole proprietor of or a member of a partnership, which is a
7 digital gaming media production entity engaged in qualified digital
8 gaming media production, and is subject to tax under article nine-A or
9 twenty-two of this chapter, shall be allowed a credit against such tax
10 to be computed as provided herein.

11 (2) The amount of the credit shall be the product (or pro rata share
12 of the product, in the case of a member of a partnership or limited
13 liability company) of twenty-five percent and the eligible production
14 costs of one or more qualified digital gaming media productions.

15 (3) Eligible digital gaming media production costs for a qualified
16 digital gaming media production incurred and paid in this state but
17 outside such metropolitan commuter transportation district shall be
18 eligible for a credit of ten percent of such eligible production costs
19 in addition to the credit specified in paragraph two of this subdivi-
20 sion.

21 (4) Eligible production costs shall not include those costs used by
22 the taxpayer or another taxpayer as the basis calculation of any other
23 tax credit allowed under this chapter or allowed in any other state.

24 (b) Allocation of credit. The aggregate amount of tax credits allowed
25 under this section, subdivision fifty-six of section two hundred ten-B
26 and subsection (l11) of section six hundred six of this chapter in any
27 taxable year shall be fifty million dollars. The aggregate amount of
28 credits for any taxable year must be distributed on a regional basis as
29 follows: fifty percent of the aggregate amount of credits shall be
30 available for qualified digital gaming media productions that incur at
31 least sixty percent of eligible production costs for a qualified digital
32 gaming media production in region one; twenty percent of the aggregate
33 amount of credits shall be available for qualified digital gaming media
34 productions that incur at least sixty percent of eligible production
35 costs for a qualified digital gaming media production in region two; and
36 thirty percent of the aggregate amount of credits shall be available for
37 qualified digital gaming media productions that incur at least sixty
38 percent of eligible production costs for a qualified digital gaming
39 media production in region three. If such regional distribution is not
40 fully allocated in any taxable year, the remainder of such credits shall
41 be available for allocation to any region in the subsequent tax year.
42 For the purposes of this section region one shall contain the city of
43 New York; region two shall contain the counties of Westchester, Rock-
44 land, Nassau and Suffolk; and region three shall contain any county not
45 contained in regions one and two. Such credit shall be allocated by the
46 empire state development corporation among taxpayers in order of priori-
47 ty based upon the date of filing an application for allocation of
48 digital gaming media production credit with such office. If the total
49 amount of allocated credits applied for in any particular year exceeds
50 the aggregate amount of tax credits allowed for such year under this
51 section, such excess shall be treated as having been applied for on the
52 first day of the subsequent taxable year.

53 (c) Definitions. As used in this section:

54 (1) "Qualified digital gaming media production" means: (i) a website,
55 the digital media production costs of which are paid or incurred predo-
56 minately in connection with (A) video simulation, animation, text,

1 audio, graphics or similar gaming related property embodied in digital
2 format, and (B) interactive features of digital gaming (e.g., links,
3 message boards, communities or content manipulation); (ii) video or
4 interactive games produced primarily for distribution over the internet,
5 wireless network or successors thereto; (iii) animation, simulation or
6 embedded graphics digital gaming related software intended for commer-
7 cial distribution regardless of medium; and (iv) a digital gaming media
8 production in which qualified digital gaming media production costs
9 equal to or are in excess of seven thousand five hundred dollars if
10 incurred and paid in this state in twelve months preceding the date on
11 which the credit is claimed. Provided, however, if such production costs
12 are incurred and paid outside the metropolitan commuter transportation
13 district in this state, such production costs shall be equal to or in
14 excess of three thousand seven hundred fifty dollars to be a qualified
15 digital gaming media production for purposes of this paragraph. A quali-
16 fied digital gaming media production does not include a website, video,
17 interactive game or software that is used predominately for: electronic
18 commerce (retail or wholesale purposes other than the sale of video or
19 interactive games), gambling (including activities regulated by a New
20 York gaming agency), exclusive local consumption for entities not acces-
21 sible by the general public including industrial or other private
22 purposes, and political advocacy purposes.

23 (2) "Digital gaming media production costs" means any costs for prop-
24 erty used and wages or salaries paid to individuals directly employed
25 for services performed by those individuals directly and predominately
26 in the creation of a digital gaming media production or productions.
27 Digital gaming media production costs include but shall not be limited
28 to payments for property used and services performed directly and predo-
29 minately in the development (including concept creation), design,
30 production (including concept creation), design, production (including
31 testing), editing (including encoding) and compositing (including the
32 integration of digital files for interaction by end users) of digital
33 gaming media. Digital gaming media production costs shall not include
34 expenses incurred for the distribution, marketing, promotion, or adver-
35 tising content generated by end-users or other costs not directly and
36 predominately related to the creation, production or modification of
37 digital gaming media. In addition, salaries or other income distribution
38 related to the creation of digital gaming media for any person who
39 serves in the role of chief executive officer, chief financial officer,
40 president, treasurer or similar position shall not be included as
41 digital gaming media production costs. Furthermore, any income or other
42 distribution to any individual who holds an ownership interest in a
43 digital gaming media production entity shall not be included as digital
44 gaming media production costs.

45 (3) "Qualified digital gaming media production costs" means digital
46 gaming media production costs only to the extent such costs are attrib-
47 utable to the use of property or the performance of services by any
48 persons within the state directly and predominantly in the creation,
49 production or modification of digital gaming related media. Such total
50 production costs incurred and paid in this state shall be equal to or
51 exceed seventy-five percent of total cost of an eligible production
52 incurred and paid within and without this state.

53 (d) Cross-references. For application of the credit provided for in
54 this section, see the following provisions of this chapter:

55 (1) Article nine-A: section two hundred ten-B, subdivision fifty-six.

(2) Article twenty-two: section six hundred six, subsection (i), paragraph one, subparagraph (B), clause (xlvii).

(3) Article twenty-two: section six hundred six, subsection (111).

§ 6. Section 210-B of the tax law is amended by adding a new subdivision 56 to read as follows:

56. Empire state digital gaming media production credit. (a) Allowance of credit. A taxpayer who is eligible pursuant to section forty-six of this chapter shall be allowed a credit to be computed as provided in such section forty-six against the tax imposed by this article.

(b) Application of credit. The credit allowed under this subdivision for any taxable year shall not reduce the tax due for such year to less than the amount prescribed in paragraph (d) of subdivision one of section two hundred ten of this article. Provided, however, that if the amount of the credit allowable under this subdivision for any taxable year reduces the tax to such amount, the excess shall be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section one thousand eighty-six of this chapter, provided, however, no interest shall be paid thereon.

§ 7. Subparagraph (B) of paragraph 1 of subsection (i) of section 606 of the tax law is amended by adding a new clause (xlvii) to read as follows:

<u>(xlvii) Empire state digital</u>	<u>Amount of credit</u>
<u>gaming media production</u>	<u>under subdivision</u>
<u>credit under subsection (111)</u>	<u>fifty-six of section</u>
	<u>two hundred ten-B</u>

§ 8. Section 606 of the tax law is amended by adding a new subsection (111) to read as follows:

(111) Empire state digital gaming media production credit. (1) Allowance of credit. A taxpayer who is eligible pursuant to section forty-six of this chapter shall be allowed a credit to be computed as provided in such section forty-six against the tax imposed by this article.

(2) Application of credit. If the amount of the credit allowable under this subsection for any taxable year exceeds the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded as provided in section six hundred eighty-six of this article, provided, however, that no interest shall be paid thereon.

§ 9. The state commissioner of economic development, after consulting with the state commissioner of taxation and finance, shall promulgate regulations by December 31, 2021 to establish procedures for the allocation of tax credits as required by subdivision (a) of section 45 and subdivision (a) of section 46 of the tax law. Such rules and regulations shall include provisions describing the application process, the due dates for such applications, the standards which shall be used to evaluate the applications, the documentation that will be provided to taxpayers to substantiate to the New York state department of taxation and finance the amount of tax credits allocated to such taxpayers, under what conditions all or a portion of this tax credit may be revoked, and such other provisions as deemed necessary and appropriate. Notwithstanding any other provisions to the contrary in the state administrative procedure act, such rules and regulations may be adopted on an emergency basis if necessary to meet such December 31, 2021 deadline.

§ 10. Subdivision 13 of section 352 of the economic development law is REPEALED.

§ 11. Subdivisions 1, 3 and 5 of section 353 of the economic development law, subdivision 1 as amended by section 2 of part L of chapter 59

1 of the laws of 2020, subdivision 3 as separately amended by section 2 of
2 part K of chapter 59 of the laws of 2017 and section 2 of part ZZ of
3 chapter 59 of the laws of 2017 and subdivision 5 as amended by section 2
4 of part K of chapter 59 of the laws of 2015, are amended to read as
5 follows:

6 1. To be a participant in the excelsior jobs program, a business enti-
7 ty shall operate in New York state predominantly:

8 (a) as a financial services data center or a financial services back
9 office operation;

10 (b) in manufacturing;

11 (c) in software development and new media;

12 (d) in scientific research and development;

13 (e) in agriculture;

14 (f) in the creation or expansion of back office operations in the
15 state;

16 (g) in a distribution center;

17 (h) in an industry with significant potential for private-sector
18 economic growth and development in this state as established by the
19 commissioner in regulations promulgated pursuant to this article. In
20 promulgating such regulations the commissioner shall include job and
21 investment criteria;

22 (i) as an entertainment company;

23 (j) [~~in music production,~~

24 ~~(k)~~] as a life sciences company; or

25 [~~(l)~~] (k) as a company operating in one of the industries listed in
26 paragraphs (b) through (e) of this subdivision and engaging in a green
27 project as defined in section three hundred fifty-two of this article.

28 3. For the purposes of this article, in order to participate in the
29 excelsior jobs program, a business entity operating predominantly in
30 manufacturing must create at least five net new jobs; a business entity
31 operating predominately in agriculture must create at least five net new
32 jobs; a business entity operating predominantly as a financial service
33 data center or financial services customer back office operation must
34 create at least twenty-five net new jobs; a business entity operating
35 predominantly in scientific research and development must create at
36 least five net new jobs; a business entity operating predominantly in
37 software development must create at least five net new jobs; a business
38 entity creating or expanding back office operations must create at least
39 twenty-five net new jobs; [~~a business entity operating predominately in
40 music production must create at least five net new jobs,~~] a business
41 entity operating predominantly as an entertainment company must create
42 or obtain at least one hundred net new jobs; or a business entity oper-
43 ating predominantly as a distribution center in the state must create at
44 least fifty net new jobs, notwithstanding subdivision five of this
45 section; or a business entity operating predominately as a life sciences
46 company must create at least five net new jobs; or a business entity
47 must be a regionally significant project as defined in this article; or

48 5. A not-for-profit business entity, a business entity whose primary
49 function is the provision of services including personal services, busi-
50 ness services, or the provision of utilities, and a business entity
51 engaged predominantly in the retail or entertainment industry, other
52 than a business operating as an entertainment company as defined in this
53 article [~~and other than a business entity engaged in music production~~],
54 and a company engaged in the generation or distribution of electricity,
55 the distribution of natural gas, or the production of steam associated

1 with the generation of electricity are not eligible to receive the tax
2 credit described in this article.

3 § 12. Subdivision 23 of section 352 of the economic development law,
4 as amended by section 1 of part K of chapter 59 of the laws of 2017, is
5 amended to read as follows:

6 23. "Software development" means the creation of coded computer
7 instructions [~~or production or post-production of video games, as~~
8 ~~defined in subdivision one-a of section six hundred eleven of the gener-~~
9 ~~al business law, other than those embedded and used exclusively in~~
10 ~~advertising, promotional websites or microsites,~~] and [also] includes
11 new media as defined by the commissioner in regulations.

12 § 13. The economic development law is amended by adding a new section
13 243 to read as follows:

14 § 243. Reports on the music and digital gaming industries in New York.
15 1. The empire state development corporation shall file a report on a
16 biannual basis with the director of the division of the budget and the
17 chairpersons of the assembly ways and means committee and senate finance
18 committee. The report shall be filed no later than thirty days before
19 the mid-point and the end of the state fiscal year. The first report
20 shall cover the calendar half year that begins on January first, two
21 thousand twenty-three. Each report must contain the following informa-
22 tion for the covered calendar half year:

23 (a) the total dollar amount of credits allocated pursuant to sections
24 forty-five and forty-six of the tax law during the half year, broken
25 down by month;

26 (b) the number of music and digital gaming projects, which have been
27 allocated tax credits of less than one million dollars per project, and
28 the total dollar amount of credits allocated to those projects distrib-
29 uted by region pursuant to subdivision (b) of sections forty-five and
30 forty-six of the tax law;

31 (c) the number of music and digital gaming projects, which have been
32 allocated tax credits of more than one million dollars, and the total
33 dollar amount of credits allocated to those projects distributed by
34 region pursuant to subdivision (b) of sections forty-five and forty-six
35 of the tax law;

36 (d) a list of each eligible music and digital gaming project, which
37 has been allocated a tax credit enumerated by region pursuant to subdi-
38 vision (b) of sections forty-five and forty-six of the tax law, and for
39 each of those projects, (i) the estimated number of employees associated
40 with the project, (ii) the estimated qualifying costs for the projects,
41 (iii) the estimated total costs of the project, (iv) the credit eligible
42 employee hours for each project, and (v) total wages for such credit
43 eligible employee hours for each project; and

44 (e) (i) the name of each taxpayer allocated a tax credit for each
45 project and the county of residence or incorporation of such taxpayer
46 or, if the taxpayer does not reside or is not incorporated in New York,
47 the state of residence or incorporation; however, if the taxpayer claims
48 a tax credit because the taxpayer is a member of a limited liability
49 company, a partner in a partnership or a shareholder in a subchapter S
50 corporation, the name of each limited liability company, partnership or
51 subchapter S corporation earning any of those tax credits must be
52 included in the report instead of information about the taxpayer claim-
53 ing the tax credit, (ii) the amount of tax credit allocated to each
54 taxpayer; provided however, if the taxpayer claims a tax credit because
55 the taxpayer is a member of a limited liability company, a partner in a
56 partnership or a shareholder in a subchapter S corporation, the amount

1 of tax credit earned by each entity must be included in the report
2 instead of information about the taxpayer claiming the tax credit, and
3 (iii) information identifying the project associated with each taxpayer
4 for which a tax credit was claimed under section forty-five or forty-six
5 of the tax law.

6 2. The empire state development corporation shall file a report on a
7 triennial basis with the director of the division of the budget and the
8 chairpersons of the assembly ways and means committee and senate finance
9 committee. The first report shall be filed no later than March first,
10 two thousand twenty-five. The report must be prepared by an independent
11 third party auditor and include: (a) information regarding the empire
12 state music production credit and the empire state digital gaming
13 production credit programs including the efficiency of operations, reli-
14 ability of financial reporting, compliance with laws and regulations and
15 distribution of assets and funds; (b) an economic impact study prepared
16 by an independent third party of the program with special emphasis on
17 the regional impact by region and the total dollar amount of credits
18 allocated to those projects distributed by region pursuant to subdivi-
19 sion (b) of sections forty-five and forty-six of the tax law; and (c)
20 any other information or statistical information that the commissioner
21 of economic development deems to be useful in analyzing the effects of
22 the programs.

23 § 14. This act shall take effect immediately and shall apply to taxa-
24 ble years beginning on January 1, 2022 and before January 1, 2027;
25 provided that sections one through eight of this act shall expire and be
26 deemed repealed December 31, 2026.