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:

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

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

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

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

(4) Eligible production costs shall not include those costs used by the taxpayer or another taxpayer as the basis calculation of any other 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.

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

(c) Definitions. As used in this section:

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

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

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

(B) Eligible production costs shall not include: (i) costs for tangible property or services used or performed outside of this state, (ii) performance fees for featured artists or featured guest artists receiving royalties or advances on royalties or special performance fees (other than those that would normally be collected by a performing

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

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

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

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

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

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

55. Empire state music production credit. (a) Allowance of credit. A taxpayer who is eligible pursuant to section forty-five of this chapter shall be allowed a credit to be computed as provided in such section forty-five 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.

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

(xlvi) Empire state music production credit under subsection (kkk)	Amount of credit under subdivision fifty-five of section two hundred ten-B

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

(kkk) Empire state music production credit. (1) Allowance of credit. A taxpayer who is eligible pursuant to section forty-five of this chapter shall be allowed a credit to be computed as provided in such section forty-five 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.

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

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

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

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

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

(b) Allocation of credit. The aggregate amount of tax credits allowed under this section, subdivision fifty-six of section two hundred ten-B and subsection (lll) of section six hundred six of this chapter in any taxable year shall be fifty million dollars. The aggregate amount of credits for any taxable year must be distributed on a regional basis as follows: fifty percent of the aggregate amount of credits shall be available for qualified digital gaming media productions that incur at least sixty percent of eligible production costs for a qualified digital gaming media production in region one; twenty percent of the aggregate amount of credits shall be available for qualified digital gaming media productions that incur at least sixty percent of eligible production costs for a qualified digital gaming media production in region two; and thirty percent of the aggregate amount of credits shall be available for qualified digital gaming media productions that incur at least sixty percent of eligible production costs for a qualified digital gaming media production in region three. If such regional distribution is not fully allocated in any taxable year, the remainder of such credits shall be available for allocation to any region in the subsequent tax year. For the purposes of this section region one shall contain the city of New York; region two shall contain the counties of Westchester, Rockland, Nassau and Suffolk; and region three shall contain any county not contained in regions one and two. Such credit shall be allocated by the empire state development corporation among taxpayers in order of priority based upon the date of filing an application for allocation of digital gaming media production credit with such office. If the total amount of allocated credits applied for in any particular year exceeds the aggregate amount of tax credits allowed for such year under this section, such excess shall be treated as having been applied for on the first day of the subsequent taxable year.

(c) Definitions. As used in this section:

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

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

(2) "Digital gaming media production costs" means any costs for property used and wages or salaries paid to individuals directly employed for services performed by those individuals directly and predominately in the creation of a digital gaming media production or productions. Digital gaming media production costs include but shall not be limited to payments for property used and services performed directly and predominately in the development (including concept creation), design, production (including concept creation), design, production (including testing), editing (including encoding) and compositing (including the integration of digital files for interaction by end users) of digital gaming media. Digital gaming media production costs shall not include expenses incurred for the distribution, marketing, promotion, or advertising content generated by end-users or other costs not directly and predominately related to the creation, production or modification of digital gaming media. In addition, salaries or other income distribution related to the creation of digital gaming media for any person who serves in the role of chief executive officer, chief financial officer, president, treasurer or similar position shall not be included as digital gaming media production costs. Furthermore, any income or other distribution to any individual who holds an ownership interest in a digital gaming media production entity shall not be included as digital gaming media production costs.

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

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

(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 (lll).

§ 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:

(xlvii) Empire state digital gaming media production credit under subsection (lll)	Amount of credit under subdivision fifty-six of section two hundred ten-B

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

(lll) 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

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

1. To be a participant in the excelsior jobs program, a business entity shall operate in New York state predominantly:

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

(b) in manufacturing;

(c) in software development and new media;

(d) in scientific research and development;

(e) in agriculture;

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

(g) in a distribution center;

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

(i) as an entertainment company;

(j) [~~in music production;~~

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

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

3. For the purposes of this article, in order to participate in the excelsior jobs program, a business entity operating predominantly in manufacturing must create at least five net new jobs; a business entity operating predominately in agriculture must create at least five net new jobs; a business entity operating predominantly as a financial service data center or financial services customer back office operation must create at least twenty-five net new jobs; a business entity operating predominantly in scientific research and development must create at least five net new jobs; a business entity operating predominantly in software development must create at least five net new jobs; a business entity creating or expanding back office operations must create at least twenty-five net new jobs; [~~a business entity operating predominately in music production must create at least five net new jobs;~~] a business entity operating predominantly as an entertainment company must create or obtain at least one hundred net new jobs; or a business entity operating predominantly as a distribution center in the state must create at least fifty net new jobs, notwithstanding subdivision five of this section; or a business entity operating predominately as a life sciences company must create at least five net new jobs; or a business entity must be a regionally significant project as defined in this article; or

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

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

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

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

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

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

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

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

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

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

(e) (i) the name of each taxpayer allocated a tax credit for each project and the county of residence or incorporation of such taxpayer or, if the taxpayer does not reside or is not incorporated in New York, the state of residence or incorporation; however, if the taxpayer claims a tax credit because the taxpayer is a member of a limited liability company, a partner in a partnership or a shareholder in a subchapter S corporation, the name of each limited liability company, partnership or subchapter S corporation earning any of those tax credits must be included in the report instead of information about the taxpayer claiming the tax credit, (ii) the amount of tax credit allocated to each taxpayer; provided however, if the taxpayer claims a tax credit because the taxpayer is a member of a limited liability company, a partner in a partnership or a shareholder in a subchapter S corporation, the amount

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

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

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