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West Virginia

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Introduced January 16, 2020 Graves

WEST VIRGINIA LEGISLATURE 2020 REGULAR SESSION

Introduced House Bill 4382

By Delegates Graves, Higginbotham, Storch, Queen, Hanna, Kessinger, Hanshaw (Mr. Speaker), Barrett, Doyle, Skaff and Lovejoy

[Introduced January 16, 2020; Referred to the Committee on Finance]

A BILL to amend and reenact Section 11-13X-3, Section 11-13X-4, Section 11-13X-5, Section 11-13X-6, Section 11-13X-8, Section 11-13X-11, Section 11-13X-12, and Section 11-13X-13 of the Code of West Virginia, 1931, as amended, all relating to the West Virginia Film Industry Investment Act; reinstating the film investment tax credit; providing the coordination and management by the West Virginia development office; defining development office and multi-state distribution; excluding short-term depreciation from credit; raising the minimum threshold of cumulative annual expenditures necessary to qualify for credit; establishing an annual limit in credits available; requiring the development office to develop a database of locations, music, and other resources to be made available to film production teams; providing development office discretion to determine if project negatively portrays West Virginia; requiring state agencies to solicit bids from West Virginia vendors for film or video projects if available; and giving retroactive effect to film investment tax credit program.

Be it enacted by the Legislature of West Virginia:

ARTICLE 13X. WEST VIRGINIA FILM INDUSTRY INVESTMENT ACT.

Section 11-13X-3. Definitions.

(a) General. -- When used in this article, or in the administration of this article, terms defined in subsection (b) of this section have the meanings ascribed to them by this section, unless a different meaning is clearly required by the context in which the term is used.

(b) Terms defined. --

(1) "Commercial exploitation" means reasonable intent for public viewing for the delivery medium used.

(2) "Development office" means the West Virginia Development Office, which is a

division of the West Virginia Department of Commerce.

- ~~(2)~~ (3) "Direct production expenditure" means a transaction that occurs in the State of West Virginia or with a West Virginia vendor and includes:
- (A) Payment of wages, fees, and costs for related fringe benefits provided for talent, management or labor that are subject to West Virginia income tax;
 - (B) Payment to a personal services corporation for the services of a performing artist if:
 - (i) The personal services corporation is subject to West Virginia income tax on those payments; and
 - (ii) The performing artist receiving payments from the personal services corporation is subject to West Virginia income tax; and
 - (C) Any of the following provided by a vendor:
 - (i) The story and scenario to be used by a qualified project;
 - (ii) Set construction and operations, wardrobe, accessories, and related services;
 - (iii) Photography, sound synchronization, lighting, and related services;
 - (iv) Editing and related services;
 - (v) Rental of facilities and equipment;
 - (vi) Leasing of vehicles;
 - (vii) Food or lodging;
 - (viii) Airfare if purchased through a West Virginia-based travel agency or travel company;
 - (ix) Insurance coverage and bonding if purchased through a West Virginia-based insurance agent; and
 - (x) Other direct costs of producing a qualified project in accordance with generally accepted entertainment industry practices: ***Provided, That "direct production expenditure" shall not include depreciation of any item that has less than one full year of depreciable life .***
- ~~(3)~~ (4) "Eligible company" means a person or business entity engaged in the business of producing film industry productions. ***The term excludes state agencies.***
- ~~(4)~~ (5) "Feature length" means in excess of 40 minutes.
- ~~(5)~~ (6) "Film industry production" means a qualified project intended for reasonable national or international commercial exploitation.
- ~~(6)~~ ***"Film office" means the West Virginia Film Office, which is a division of the West Virginia Department of Commerce***
- ~~(7)~~ ***"Multi-state distribution" means reaching at least one other state besides West Virginia.***

- ~~(7)~~ **(8)** “Postproduction expenditure” means a transaction that occurs in West Virginia or with a West Virginia vendor after the completion of principal photography, including editing and negative cutting; Foley recording and sound effects; automatic dialogue replacement (also known as ADR or dubbing); special effects or visual effects, including computer-generated imagery or other effects; scoring and music editing; sound editing; beginning and end credits; soundtrack production; subtitling or addition of sound or visual effects; but not including an expenditure for advertising, marketing, distribution, or expense payments.
- ~~(8)~~ **(9)** “Qualified project” means a feature length theatrical or direct-to-video motion picture, a made- for-television motion picture, a commercial **or other promotional video**, a music video, commercial still photography, a television pilot program, a television series, and a television mini-series that incurs a **minimum of \$25,000 cumulative amount of \$50,000 in a calendar year** in direct production expenditures and post- production expenditures, as defined by this subsection, in West Virginia **or any combination of projects not previously claimed that would qualify for the credit except for cost, and that combined meets or exceeds the cumulative amount of \$50,000 in a calendar year.** The term excludes news or current affairs programming, a weather or market program, ~~an interview or~~ a talk show, a sporting event or show, an awards show, a gala, a production that solicits funds, a home shopping program, a program that primarily markets a product or service, political advertising, or a concert production.

A qualified project may be produced on any single media or multimedia program that:

- (A) Is fixed on film, digital medium, videotape, computer disk, laser disc, or other similar delivery medium;
 - (B) Can be viewed or reproduced;
 - (C) Is not intended to and does not violate Section 61-8C-1 et seq. of this code;
 - (D) Does not contain obscene matter or sexually explicit conduct, as defined by Section 61-8A-1 et seq. of this code;
 - (E) Is intended for reasonable commercial exploitation for the delivery medium used **whether delivery is in state or multi-state distribution;** and
 - (F) Does not contain content that, **in the sole discretion of the development office, negatively** portrays the state of West Virginia. ~~in a significantly derogatory manner~~
- ~~(9)~~ **(10)** “Tax Commissioner” means the West Virginia State Tax Commissioner or his or her designee.

Section 11-13X-4. Creation of the tax credit.

- (a) An eligible company may apply for, and the Tax Commissioner shall allow, a nonrefundable tax credit in an amount equal to the percentage specified in Section 11-13X-5 of this code of:
 - (1) Direct production expenditures incurred in West Virginia that are directly attributable to the production in West Virginia of a qualified project ~~and that~~ **which expenditures** occur in West Virginia or with a West Virginia vendor; and
 - (2) Postproduction expenditures incurred in West Virginia that are:

- (A) Directly attributable to the production of a qualified project;
 - (B) For services performed in West Virginia.
- (b) Expenditures utilized by an eligible company for purposes of calculating the tax credit authorized by this article shall in no event be utilized by the eligible company for the purpose **of** calculating or qualifying investment for claiming the economic opportunity tax credit authorized by Section 11-13Q-1 et seq. of this code or the manufacturing investment tax credit authorized by Section 11-13S-1 et seq. of this code.

Section 11-13X-5. Amount of credit allowed; limitation of the credits.

- (a) Base allowance. -- The amount of credit allowed to every eligible company, except as provided in subsection (b) of this section, is 27 percent.
- (b) Extra allowance for hiring of local workers. -- Any amount allowed in subsection (a) of this section shall be increased by an additional four percent if the eligible company, or its authorized payroll service company, employs 10 or more West Virginia residents as part of its full-time employees working in the state or as apprentices working in the state.
- (c) Application of the credits. -- The tax credit allowed under this section shall be applied to the eligible company's state tax liability as provided in Section 11-13X-7 of this code.
- (d) Limitation of the credits. -- No more than **\$5 \$10** million of the tax credits may be allocated by the **film development** office in any given West Virginia state fiscal year: ***Provided, That the development office may allocate a greater amount of credit for any feature length film produced with "West Virginia" in the title or if the subject of the film is clearly identified as West Virginia.*** The **film development** office shall allocate the tax credits in the order the applications therefor are received.

Section 11-13X-6. Requirements for credit.

- (a) In order for any eligible company to claim a tax credit under this article, it shall comply with the following requirements:
 - (1) If the qualified project contains production credits, the eligible company shall agree, upon request by the **film development** office, to recognize the State of West Virginia with the following acknowledgment in the end credit roll: "Filmed in West Virginia with assistance of the West Virginia Film Industry Investment Act";
 - (2) Apply to the **film development** office on forms and in the manner the **film development** office may prescribe; and
 - (3) If an eligible company submits a proposal to perform a qualified project for a state agency, the eligible company shall indicate its intention to claim the tax credit provided by this article.***
 - (3) (4)*** Submit to the **film development** office information required by the **film development** office to demonstrate conformity with the requirements of this section and shall agree in writing:
 - (A) To pay all obligations the eligible company has incurred in West Virginia; and

- (B) To delay filing of a claim for the tax credit authorized by this article until the **film development** office delivers written notification to the Tax Commissioner that the eligible company has fulfilled all requirements for the credit.

The **film development** office shall determine the eligibility of the company and the qualification of each project, and shall report this information to the Tax Commissioner in a manner and at times the **film development** office and the Tax Commissioner shall agree upon.

(b) Upon completion of a qualified project:

- (1) An eligible company shall have filed all required West Virginia tax reports and returns and paid any balance of West Virginia tax due on those returns;
 - (2) All claims for the tax credit shall be filed with an expense verification report prepared by an independent certified public accountant, utilizing "agreed upon procedures" which are prescribed by the **film development** office in accordance with generally accepted auditing standards in the United States. The certified public accountant will render a report as to the qualification of the credits, consistent with guidelines to be determined by the **film development** office and approved by the Tax Commissioner; and
 - (3) An eligible company claiming an extra allowance for employing local workers shall submit to the **film development** office documentation verifying West Virginia residency for all individuals claimed to qualify for the extra allowance. The documentation shall include the name, home address, and telephone number for all individuals used to qualify for the extra allowance.
- (c) If the requirements of this section have been complied with, the **film development** office shall approve the film tax credit and issue a document granting the appropriate tax credit to the eligible company and shall report this information to the Tax Commissioner.

Section 11-13X-8. Uses of credit; unused credit; carry forward; carry back prohibited; expiration and forfeiture of credit.

- (a) No credit is allowed under this section against any employer withholding taxes imposed by Section 11-21-1 et seq. of this code.
- (b) If the tax credit allowed under this article in any taxable year exceeds the sum of the taxes enumerated in subsections (b), (c), or (d) of Section 11-13X-7 of this code, for that taxable year, the excess may be applied against those taxes, in the order and manner stated in **Section 11-13X-7 of this code**, for succeeding taxable years until the earlier of the following:
 - (1) The full amount of the excess tax credit is used;
 - (2) The expiration of the second taxable year after the taxable year in which the expenditures occurred. The tax credit remaining thereafter is forfeited; or
 - (3) The excess tax credit is transferred or sold.
- (c) No carryback is allowed to a prior taxable year that does not have qualified expenditures for the amount of any unused portion of any annual credit allowance.
- (d) The transfer or sale of this credit does not extend the time in which the credit can be used. The carry forward period for credit that is transferred or sold begins on the date on which the credit was originally issued by the **film development** office.

- (e) Any tax credit certificate issued in accordance with this article, which has been issued to an eligible company, and to the extent not previously claimed against the tax of the eligible company or the owner of the certificate, may be transferred or sold by such eligible company to another West Virginia taxpayer, subject to the following conditions:
- (1) A single transfer or sale may involve one or more transferees, assignees or purchasers. A transfer or sale of the credits may involve multiple transfers to one or more transferees, assignees or purchasers;
 - (2) Transferors and sellers shall apply to the **film development** office for approval of any transfer, sale, or assignment of the tax credit. Any amount of the tax credit that has been transferred or assigned shall be subject to the same limitations and conditions that apply to the eligible company's or seller's entitlement, use and application of the credit. The application for sale, transfer or assignment of the credit shall include the transferor's tax credit balance prior to transfer, the credit certificate number, the name of the seller, the transferor's remaining tax credit balance after transfer, if any, all tax identification numbers for both transferor and transferee, the date of transfer, the amount transferred, a copy of the credit certificate and any other information required by the **film development** office or the Tax Commissioner.
 - (3) The **film development** office shall not approve the transfer or assignment of a tax credit if the seller or transferor has an outstanding tax obligation with the State of West Virginia for any prior taxable year.
- (f) The transferee, assignee or purchaser shall apply such credits in the same manner and against the same taxes as specified in this article.
- (g) For purposes of this chapter, any proceeds received by the eligible company or transferor for its assignment or sale of the tax credits allowed pursuant to this section are exempt from the West Virginia consumers sales and service tax, use tax, the corporate net income tax, and personal income tax.
- (h) The Tax Commissioner shall not seek recourse against the transferee for any portion of the credit that may be subsequently disqualified.

Failure to comply with this section will result in the disallowance of the tax credit until the seller or transferor is in full compliance.

Section 11-13X-11. Tax credit review and accountability.

- (a) Beginning on the first day of the third taxable year after the passage of this article and every two years thereafter, the **film development** office shall submit to the Governor, the President of the Senate and the Speaker of the House of Delegates a tax credit review and accountability report evaluating the cost effectiveness of the Film Industry Investment Act during the most recent two-year period for which information is available. The criteria to be evaluated shall include, but not **be** limited to, for each year of the two-year period:
- (1) The number of eligible companies claiming the credit;
 - (2) The dollar amount of tax credit certificates issued to taxpayers;
 - (3) The number of new businesses created by the tax credit;
 - (4) The number of new jobs, if any, created by the tax credit;

- (5) The amount of direct expenditures made on qualified projects; and
 - (6) The cost of the credit.
- (b) Eligible companies claiming the credit shall provide any information the Tax Commissioner and the **film development** office may require to prepare the report: Provided, That the information provided is subject to the confidentiality and disclosure provisions of Section 11-10-5d and Section 11-10-5s of this code. However, notwithstanding the provisions of Section 11-10-5d and Section 11-10-5s of this code, the Tax Department is hereby authorized to disclose to the **film and to the** development office such tax information as may be necessary to compile the report required by this section and the report required by Section 11-13X-12 of this code.

Section 11-13X-12. Economic development; **utilization of state locations, talent, and production companies.**

- (a) The West Virginia Development Office, in consultation and coordination with the appropriate public and private entities, shall promote, foster, encourage, and monitor the development of the film industry in this state as part of its comprehensive economic development strategy for West Virginia and report recommendations for expanding the industry in the state to the Governor and the Joint Committee on Government and Finance annually on or before December 1.
- (b) **The West Virginia Development Office shall coordinate with property owners, musicians, and other performers, and other managers of resources suitable for film production to develop a database of locations, music, and other resources available for incorporation into film projects. To the greatest feasible extent, the development office shall establish methods for interface with national and international databases of these resources that are available to, or used by, film and video production teams in the identification and selection of location, music, and other resources. The development office shall also implement means for property owners and for staff in the field to connect to the state's database and to submit entries or nominations thereto.**
- (c) **Every agency of the State of West Virginia that contracts for video production of advertising, promotional material, educational programs, or dramatic works shall obtain bids from West Virginia production companies and marketing businesses, if available, in the solicitation of vendors for such projects.**

Section 11-13X-13. Effective date, elimination of film tax credits, preservation of film tax credits earned prior to the sunset date; cessation of the West Virginia Film Office.

- (a) The credit allowed by this article shall be allowed upon eligible expenditures occurring after December 31, 2007.
- (b) The amendments to this article enacted in the year 2009 shall apply to all taxable years beginning after December 31, 2007, and shall apply with retroactive effect with relation to taxable years beginning prior to the date of passage of such amendments.
- (c) ~~No tax credits authorized under this article shall be issued following the effective date of legislation establishing this subsection, Section 11-13X-13(d), and Section 11-13X-13(e) of this code in the year 2018. Notwithstanding any provision of this article to the contrary, no entitlement to any tax credit under this article may result from, and no credit is available to any person for, expenditures incurred following the effective date of this subsection .~~

(d) ~~(c) Notwithstanding the provisions of Section 11-13X-13(c) of this code, film~~ **Film** tax credits to which a taxpayer has gained lawful entitlement prior to the effective date of this subsection, may continue to be applied against tax liabilities, subject to the conditions, limitations, and constraints applicable to such credit under this article, until exhausted or otherwise terminated in accordance with the terms of this article and this code. Film tax credits to which a taxpayer has gained lawful entitlement prior to the effective date of this subsection may be transferred in accordance with Section 11-13X-8 of this code, subject to the conditions, limitations, and constraints applicable to such credit under this article, until exhausted or otherwise terminated in accordance with the terms of this article and this code.

(e) ~~(d)~~ Effective July 1, 2018, all operations of the West Virginia Film Office shall cease. To the extent necessary to settle, finalize, and conclude business relating to outstanding film tax credits issued prior to the effective date of the bill, the Division of Tourism is hereby authorized to administer such duties for that limited purpose.

(e) The amendments to this article enacted in the year 2020 shall apply to all taxable years beginning after December 31, 2017, and shall apply with retroactive effect with relation to taxable years beginning prior to the date of passage of such amendments.

NOTE: The purpose of this bill is to restore the film tax credit program in West Virginia.