

HI S 2079 , Introduced

Hawaii

SUMMARY: Establishes a tax withholding requirement for all payments to loan out companies for services performed in the State for persons claiming the motion picture, digital media, and film production income tax credit; prohibits the defense of erroneous claim for refund or credit if the claim for refund was generated by a tax credit; sets the penalty for the erroneous claim for refund or credit generated by a tax credit at ten per cent; requires taxpayers claiming the motion picture, digital media/.~SAME AS:

Changes in Bill text reflected as:

~~Text Deleted~~

Text Added

~~Text Vetoed~~

Current Legislative Status

01/18/2022 PREFILED.

01/19/2022 INTRODUCED.

~

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January 18, 2022

Wakai

THE SENATE

S.B. NO.

2079

THIRTY-FIRST LEGISLATURE, 2022

STATE OF HAWAII

A BILL FOR AN ACT

RELATING TO TAXES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 235, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

” Section 235- Withholding of tax by persons claiming the motion picture, digital media, and film production income tax credit. (a) Every person claiming a tax credit pursuant to section 235-17 shall deduct and withhold, at the applicable rate, all payments to loan-out companies for services performed in Hawaii; provided that amounts withheld under to this section shall be allocated to the tax required to be paid pursuant to this chapter by the loan-out company's employees performing services in the State. Every person required to withhold a percentage of payment under this section is made liable for the tax associated with that payment and is relieved of liability for or upon the claim or demand of any other person for the amount of any payments to the (b) Every person required to withhold a percentage of payments under subsection (a) shall make a return of the amount withheld to the department of taxation quarterly.

(c) For the purposes of this chapter, “loan-out company” means a wholly-owned

entity formed on behalf of a person or persons, which serves as a separate entity that constitutes the person's or persons' means of entering a contact with a third party for the purpose of providing services to the third party. “

SECTION 2. Section 231-36.8, Hawaii Revised Statutes, is amended to read as follows:

”Section 231-36.8 Erroneous claim for refund or credit. (a) If a claim for refund or credit with respect to tax is made for an excessive amount, the person making the claim shall be liable for a penalty in an amount equal to twenty per cent of the excessive amount; provided that there shall be no penalty assessed where the penalty calculation under this section results in an amount of less than \$400.

(b) It shall be a defense to the penalty under this section that the claim for refund or credit had a reasonable basis. A person claiming the reasonable basis defense shall have the burden of proof to demonstrate the reasonableness of the claim.

(c) If the excessive amount claimed for refund or credit was generated by a tax credit:

(1) The defense provided under subsection (b) shall not be applicable; and

(2) The penalty imposed under subsection (a) shall be at ten per cent.

~~(e)~~ ***(d)*** This section shall be construed in accordance with regulations and judicial interpretations given to section 6676 of the Internal Revenue Code.

~~(d)~~ ***(e)*** For purposes of this section:

“Excessive amount” means the amount by which the amount of the claim for refund or credit for any taxable year exceeds the amount of the claim allowable for such taxable year.

“Reasonable basis” means a standard of care used in tax reporting that is significantly higher than not frivolous or not patently improper. A reasonable basis position will be more than arguable and based on at least one or more authorities of either state or federal tax administration. A position is considered to have a reasonable basis if a reasonable and well-informed analysis by a person knowledgeable in tax law would lead that person to conclude that the position has approximately a one-in-four, or greater, likelihood of being sustained on the merits. A reasonable basis includes innocent mistakes where the excessive amount is the result of inadvertence, mathematical error, or where otherwise defined as innocent by the director pursuant to a formal pronouncement issued without regard to chapter 91.

~~(e)~~ ***(f)*** This section shall not apply to any portion of an underpayment on which a penalty is imposed under section 231-36.6.“

SECTION 3. Section 235-17, Hawaii Revised Statutes, is amended to read as follows:

”Section 235-17 Motion picture, digital media, and film production income tax credit. (a) Any law to the contrary notwithstanding, there shall be allowed to each taxpayer subject to the taxes imposed by this chapter, an income tax credit that shall be deductible from the taxpayer's net income tax liability, if any, imposed by this chapter for the taxable year in which the credit is properly claimed. The amount of the credit shall be:

(1) Twenty per cent of the qualified production costs incurred by a qualified production in any county of the State with a population of over seven hundred thousand; or

(2) Twenty-five per cent of the qualified production costs incurred by a qualified production in any county of the State with a population of seven hundred thousand or less.

A qualified production occurring in more than one county may prorate its expenditures based upon the amounts spent in each county, if the population bases differ enough to change the percentage of tax credit.

In the case of a partnership, S corporation, estate, or trust, the tax credit allowable is for qualified production costs incurred by the entity for the taxable year. The cost upon which the tax credit is computed shall be determined at the entity level. Distribution and share of credit shall be determined by rule.

If a deduction is taken under section 179 (with respect to election to expense depreciable business

assets) of the Internal Revenue Code of 1986, as amended, no tax credit shall be allowed for those costs for which the deduction is taken.

The basis for eligible property for depreciation of accelerated cost recovery system purposes for state income taxes shall be reduced by the amount of credit allowable and claimed.

(b) The credit allowed under this section shall be claimed against the net income tax liability for the taxable year. For the purposes of this section, "net income tax liability" means net income tax liability reduced by all other credits allowed under this chapter.

(c) If the tax credit under this section exceeds the taxpayer's income tax liability, the excess of credits over liability shall be refunded to the taxpayer; provided that no refunds or payment on account of the tax credits allowed by this section shall be made for amounts less than \$1. All claims, including any amended claims, for tax credits under this section shall be filed on or before the end of the twelfth month following the close of the taxable year for which the credit may be claimed. Failure to comply with the foregoing provision shall constitute a waiver of the right to claim the credit.

(d) To qualify for this tax credit, a production shall:

(1) Meet the definition of a qualified production specified in subsection (m);

(2) Have qualified production costs totaling at least \$200,000;

(3) Provide the State a qualified Hawaii promotion, which shall be at a minimum, a shared-card, end-title screen credit, where applicable;

(4) Provide evidence of reasonable efforts to hire local talent and crew;

(5) Provide evidence when making any claim for products or services acquired or rendered outside of this State that reasonable efforts were unsuccessful to secure and use comparable products or services within this State; **and**

(6) Provide evidence of financial or in-kind contributions or educational or workforce development efforts, in partnership with related local industry labor organizations, educational institutions, or both, toward the furtherance of the local film and television and digital media industries.

(e) On or after July 1, 2006, no qualified production cost that has been financed by investments for which a credit was claimed by any taxpayer pursuant to section 235-110.9 is eligible for credits under this section.

(f) To receive the tax credit, the taxpayer shall first prequalify the production for the credit by registering with the department of business, economic development, and tourism during the development or preproduction stage.

(g) The director of taxation shall prepare forms as may be necessary to claim a credit under this section. The director may also require the taxpayer to furnish information to ascertain the validity of the claim for credit made under this section and may adopt rules necessary to effectuate the purposes of this section pursuant to chapter 91.

(h) Every taxpayer claiming a tax credit under this section for a qualified production **with qualified production costs that exceed \$1,000,000** shall, no later than ninety days following the end of each taxable year in which qualified production costs were expended, submit a written, sworn statement to the department of business, economic development, and tourism, together with a verification review by a qualified certified public accountant using procedures prescribed by the department of business, economic development, and tourism, identifying:

(1) All qualified production costs as provided by subsection (a), if any, incurred in the previous taxable year;

(2) The amount of tax credits claimed pursuant to this section, if any, in the previous taxable year; and

(3) The number of total hires versus the number of local hires by category and by county.

This information may be reported from the department of business, economic development, and tourism to the legislature ~~in redacted form~~ pursuant to subsection (i)(4).

(i) The department of business, economic development, and tourism shall:

(1) Maintain records of the names of the taxpayers and qualified productions thereof claiming the tax credits under subsection (a);

(2) Obtain and total the aggregate amounts of all qualified production costs per qualified production and per qualified production per taxable year;

(3) Provide a letter to the director of taxation specifying the amount of the tax credit per qualified production for each taxable year that a tax credit is claimed and the cumulative amount of the tax credit for all years claimed; and

(4) Submit a report to the legislature no later than twenty days prior to the convening of each regular session detailing the non-aggregated qualified production costs that form the basis of the tax credit claims and expenditures, itemized by taxpayer, in a redacted format to preserve the confidentiality **and which shall include the dollar amount claimed, name of company, and name of the qualified production** of the taxpayers claiming the credit.

Upon each determination required under this subsection, the department of business, economic development, and tourism shall issue a letter to the taxpayer, regarding the qualified production, specifying the qualified production costs and the tax credit amount qualified for in each taxable year a tax credit is claimed. The taxpayer for each qualified production shall file the letter with the taxpayer's tax return for the qualified production to the department of taxation. Notwithstanding the authority of the department of business, economic development, and tourism under this section, the director of taxation may audit and adjust the tax credit amount to conform to the information filed by the taxpayer.

(j) Total tax credits claimed per qualified production shall not exceed \$15,000,000.

(k) Qualified productions shall comply with subsections (d), (e), (f), and (h).

(l) The total amount of tax credits allowed under this section in any particular year shall be \$50,000,000; however, if the total amount of credits applied for in any particular year exceeds the aggregate amount of credits allowed for ~~such~~ **that** year under this section, the excess shall be treated as having been applied for in the subsequent year and shall be claimed in ~~such~~ **the subsequent** year; provided that no excess shall be allowed to be claimed after December 31, ~~2025~~ **2032**.

(m) Each qualified production shall withhold an amount equal to the general excise tax rate on manufacturing or producing, plus the applicable rate of county surcharge on general excise tax, from qualified production costs; provided that the amount withheld shall be remitted to the department of taxation to the credit of the general excise tax account of the loan-out company to whom the qualified production costs were paid or will be paid. The amount withheld shall be remitted no later than thirty calendar days after the qualified production costs are paid or incurred. Taxpayers who fail to comply with this subsection shall be subject to the applicable interest and penalties pursuant to chapter 231 and section 235-104.

~~(m)~~ **(n)** For the purposes of this section:

“Commercial”:

(1) Means an advertising message that is filmed using film, videotape, or digital media, for dissemination via television broadcast or theatrical distribution;

(2) Includes a series of advertising messages if all parts are produced at the same time over the course of six consecutive weeks; and

(3) Does not include an advertising message with Internet-only distribution.

“Digital media” means production methods and platforms directly related to the creation of cinematic imagery and content, specifically using digital means, including but not limited to digital cameras, digital sound equipment, and computers, to be delivered via film, videotape, interactive game platform, or other digital distribution media.

“Post-production” means production activities and services conducted after principal photography is completed, including but not limited to editing, film and video transfers,

duplication, transcoding, dubbing, subtitling, credits, closed captioning, audio production, special effects (visual and sound), graphics, and animation.

“Production” means a series of activities that are directly related to the creation of visual and cinematic imagery to be delivered via film, videotape, or digital media and to be sold, distributed, or displayed as entertainment or the advertisement of products for mass public consumption, including but not limited to scripting, casting, set design and construction, transportation, videography, photography, sound recording, interactive game design, and post-production.

“Qualified production”:

(1) Means a production, with expenditures in the State, for the total or partial production of a feature-length motion picture, short film, made-for-television movie, commercial, music video, interactive game, television series pilot, single season (up to twenty-two episodes) of a television series regularly filmed in the State (if the number of episodes per single season exceeds twenty-two, additional episodes for the same season shall constitute a separate qualified production), television special, single television episode that is not part of a television series regularly filmed or based in the State, national magazine show, or national talk show. For the purposes of subsections (d) and (j), each of the aforementioned qualified production categories shall constitute separate, individual qualified productions; and

(2) Does not include:

(A) News;

(B) Public affairs programs;

(C) Non-national magazine or talk shows;

(D) Televised sporting events or activities;

(E) Productions that solicit funds;

(F) Productions produced primarily for industrial, corporate, institutional, or other private purposes; and

(G) Productions that include any material or performance prohibited by chapter 712.

“Qualified production costs” means the costs incurred by a qualified production within the State that are subject to the general excise tax under chapter 237 or income tax under this chapter and that have not been financed by any investments for which a credit was or will be claimed pursuant to section 235-110.9. Qualified production costs include but are not limited to:

(1) Costs incurred during preproduction such as location scouting and related services;

(2) Costs of set construction and operations, purchases or rentals of wardrobe, props, accessories, food, office supplies, transportation, equipment, and related services;

(3) Wages or salaries of cast, crew, and musicians;

(4) Costs of photography, sound synchronization, lighting, and related services;

(5) Costs of editing, visual effects, music, other post-production, and related services;

(6) Rentals and fees for use of local facilities and locations, including rentals and fees for use of state and county facilities and locations that are not subject to general excise tax under chapter 237 or income tax under this chapter;

(7) Rentals of vehicles and lodging for cast and crew;

(8) Airfare for flights to or from Hawaii, and interisland flights;

(9) Insurance and bonding;

(10) Shipping of equipment and supplies to or from Hawaii, and interisland shipments; and

(11) Other direct production costs specified by the department in consultation with the department of business, economic development, and tourism;

provided that any government-imposed fines, penalties, or interest that are incurred by a qualified production within the State shall not be “qualified production costs”.

SECTION 4. Section 235-20.5, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

”(b) The moneys in the fund shall be used for the following purposes:

- (1) Issuing comfort letters, letter rulings, written opinions, and other guidance to taxpayers;
- (2) ~~Issuing certificates under section 235-110.9;~~ *Processing qualified production applications for the motion picture, digital media, and film production income tax credit provided under section 235-17;*
- (3) Administering the operations of the special enforcement section;
- (4) Funding support staff positions in the special enforcement section; and
- (5) Developing, implementing, and providing taxpayer education programs, including tax publications.“

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2022, and shall apply to payments made to a taxpayer or loan-out company after June 30, 2022.