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HOUSE BILL 404

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Ben Lujan

AN ACT

RELATING TO TAXATION; CLARIFYING CERTAIN PROVISIONS OF THE FILM PRODUCTION TAX CREDIT; PROVIDING FOR WITHHOLDING OF INCOME TAXES BY PASS-THROUGH ENTITIES; PROVIDING AN EXEMPTION FROM GROSS RECEIPTS TAXES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 7-2F-1 NMSA 1978 (being Laws 2002, Chapter 36, Section 1, as amended) is amended to read:

"7-2F-1. FILM PRODUCTION TAX CREDIT.--

A. The tax credit created by this section may be referred to as the "film production tax credit". An eligible film production company may apply for, and the taxation and revenue department may allow, a tax credit in an amount equal to the percentage specified in Subsection B of this section of:

(1) direct production expenditures made in New

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1 Mexico that:

2 (a) are directly attributable to the
3 production in New Mexico of a film or commercial audiovisual
4 product;

5 (b) are subject to taxation by the state
6 of New Mexico; and

7 (c) exclude direct production
8 expenditures for which another taxpayer claims the film
9 production tax credit; and

10 (2) postproduction expenditures made in New
11 Mexico that:

12 (a) are directly attributable to the
13 production of a commercial film or audiovisual product;

14 (b) are for services performed in New
15 Mexico;

16 (c) are subject to taxation by the state
17 of New Mexico; and

18 (d) exclude postproduction expenditures
19 for which another taxpayer claims the film production tax
20 credit.

21 B. Except as provided in Subsections C and J of
22 this section, the percentage to be applied in calculating the
23 amount of the film production tax credit is twenty-five
24 percent.

25 C. With respect to expenditures attributable to a
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1 production for which the film production company receives a tax
2 credit pursuant to the federal new markets tax credit program,
3 the percentage to be applied in calculating the film production
4 tax credit is twenty percent.

5 D. The film production tax credit shall not be
6 claimed with respect to direct production expenditures or
7 postproduction expenditures for which the film production
8 company has delivered a nontaxable transaction certificate
9 pursuant to Section 7-9-86 NMSA 1978.

10 E. A long-form narrative film production for which
11 the film production tax credit is claimed pursuant to Paragraph
12 (1) of Subsection A of this section shall contain an
13 acknowledgment that the production was filmed in New Mexico.

14 F. To be eligible for the film production tax
15 credit, a film production company shall submit to the New
16 Mexico film division of the economic development department
17 information required by the division to demonstrate conformity
18 with the requirements of this section and shall agree in
19 writing:

20 (1) to pay all obligations the film production
21 company has incurred in New Mexico;

22 (2) to publish at completion of principal
23 photography, a notice at least once a week for three
24 consecutive weeks in local newspapers in regions where filming
25 has taken place, to notify the public of the need to file

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1 creditor claims against the film production company [~~by a~~
2 ~~specified date~~] pursuant to requirements of the New Mexico film
3 division;

4 (3) that outstanding obligations are not
5 waived should a creditor fail to [~~file by the specified date~~]
6 notify the New Mexico film division; and

7 (4) to delay filing of a claim for the film
8 production tax credit until the New Mexico film division
9 delivers written notification to the taxation and revenue
10 department that the film production company has fulfilled all
11 requirements for the credit.

12 G. The New Mexico film division shall determine the
13 eligibility of the company and shall report this information to
14 the taxation and revenue department in a manner and at times
15 the economic development department and the taxation and
16 revenue department shall agree upon.

17 H. To receive a film production tax credit, a film
18 production company shall apply to the taxation and revenue
19 department on forms and in the manner the department may
20 prescribe. The application shall include a certification of
21 the amount of direct production expenditures or postproduction
22 expenditures made in New Mexico with respect to the film
23 production for which the film production company is seeking the
24 film production tax credit. If the requirements of this
25 section have been complied with, the taxation and revenue

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1 department shall approve the film production tax credit and
2 issue a document granting the tax credit.

3 I. The film production company may apply all or a
4 portion of the film production tax credit granted against
5 personal income tax liability or corporate income tax
6 liability. If the amount of the film production tax credit
7 claimed exceeds the film production company's tax liability for
8 the taxable year in which the credit is being claimed, the
9 excess shall be refunded.

10 J. As applied to direct production expenditures for
11 the services of performing artists, the film production tax
12 credit authorized by this section shall not exceed five million
13 dollars (\$5,000,000) for services rendered by all performing
14 artists in a production for which the film production tax
15 credit is claimed."

16 Section 2. Section 7-2F-2 NMSA 1978 (being Laws 2003,
17 Chapter 127, Section 2, as amended) is amended to read:

18 "7-2F-2. DEFINITIONS.--As used in Chapter 7, Article 2F
19 NMSA 1978:

20 A. "commercial audiovisual product" means a film or
21 a videogame intended for commercial exploitation;

22 B. "direct production expenditure" means a
23 transaction that is subject to taxation in New Mexico,
24 including:

25 (1) payment of wages, fringe benefits or fees

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1 for talent, management or labor to a person who is a New Mexico
2 resident for purposes of the Income Tax Act;

3 (2) payment to a [~~personal services~~
4 ~~corporation~~] film performing artist entity for the services of
5 a performing artist if the entity:

6 (a) [~~the personal services corporation~~]
7 pays gross receipts tax in New Mexico on the portion of those
8 payments qualifying for the tax credit; and

9 (b) [~~the performing artist receiving~~
10 ~~payments from the personal services corporation pays New Mexico~~
11 ~~income tax~~] deducts and remits withheld income tax pursuant to
12 Subsection D of Section 7-3-12 NMSA 1978; and

13 (3) any of the following provided by a vendor
14 that has an established physical presence in New Mexico, as
15 defined by rules of the economic development department:

16 (a) the story and scenario to be used
17 for a film;

18 (b) set construction and operations,
19 wardrobe, accessories and related services;

20 (c) photography, sound synchronization,
21 lighting and related services;

22 (d) editing and related services;

23 (e) rental of facilities and equipment;

24 (f) leasing of vehicles, not including
25 the chartering of aircraft for out-of-state transportation;

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1 however, New Mexico-based chartered aircraft for in-state
2 transportation directly attributable to the production shall be
3 considered a direct production expenditure;

4 (g) food or lodging;

5 (h) commercial airfare if purchased
6 through a New Mexico-based travel agency or travel company for
7 travel to and from New Mexico or within New Mexico that is
8 directly attributable to the production;

9 (i) insurance coverage and bonding if
10 purchased through a New Mexico-based insurance agent, broker or
11 bonding agent; and

12 (j) other direct costs of producing a
13 film in accordance with generally accepted entertainment
14 industry practice;

15 C. "federal new markets tax credit program" means
16 the tax credit program codified as Section 45D of the [~~United~~
17 ~~States~~] Internal Revenue Code [~~of 1986, as amended~~];

18 D. "film" means a single [~~media~~] medium or
19 multimedia program, excluding advertising messages other than
20 national or regional advertising messages intended for
21 exhibition, that:

22 (1) is fixed on film, digital medium,
23 videotape, computer disc, laser disc or other similar delivery
24 medium;

25 (2) can be viewed or reproduced;

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1 (3) is not intended to and does not violate a
2 provision of Chapter 30, Article 37 NMSA 1978; and

3 (4) is intended for reasonable commercial
4 exploitation for the delivery medium used;

5 E. "film performing artist entity" means a personal
6 service corporation or other business association that receives
7 payments for the services of a performing artist;

8 [~~E.~~] F. "film production company" means a person
9 that produces one or more films or videogames or any part of a
10 film [~~and~~] or videogame;

11 G. "Internal Revenue Code" means the Internal
12 Revenue Code of 1986, as amended;

13 H. "personal service corporation" means "personal
14 service corporation" as that term is defined in the Internal
15 Revenue Code; and

16 [~~F.~~] I. "postproduction expenditure" means an
17 expenditure for editing, Foley recording, automatic dialogue
18 replacement, sound editing, special effects, including
19 computer-generated imagery or other effects, scoring and music
20 editing, beginning and end credits, negative cutting,
21 soundtrack production, dubbing, subtitling or addition of sound
22 or visual effects; but not including an expenditure for
23 advertising, marketing, distribution or expense payments."

24 Section 3. Section 7-3-2 NMSA 1978 (being Laws 1990,
25 Chapter 64, Section 1, as amended) is amended to read:

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1 "7-3-2. DEFINITIONS.--As used in the Withholding Tax Act:

2 A. "department" means the taxation and revenue
3 department, the secretary of taxation and revenue or any
4 employee of the department exercising authority lawfully
5 delegated to that employee by the secretary;

6 B. "employee" means either an individual domiciled
7 within the state who performs services either within or without
8 the state for an employer or, to the extent permitted by law,
9 an individual domiciled outside of the state who performs
10 services within the state for an employer;

11 C. "employer" means a person, or an officer, agent
12 or employee of that person, having control of the payment of
13 wages, doing business in or deriving income from sources within
14 the state for whom an individual performs or performed any
15 service as the employee of that person, except that if the
16 person for whom the individual performs or performed the
17 services does not have control over the payment of the wages
18 for such services, "employer" means the person having control
19 of the payment of wages;

20 D. "film performing artist entity" means a personal
21 service corporation or other business association that receives
22 payments for the services of a performing artist for the
23 purposes of the film production tax credit;

24 [~~D.~~] E. "Internal Revenue Code" means the Internal
25 Revenue Code of 1986, as amended;

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1 ~~[E-]~~ F. "owner" means a partner in a partnership
2 not taxed as a corporation for federal income tax purposes for
3 the taxable year, a shareholder of an S corporation or of a
4 corporation other than an S corporation that is not taxed as a
5 corporation for federal income tax purposes for the taxable
6 year, a member of a limited liability company or any similar
7 person holding an ownership interest in any pass-through
8 entity;

9 ~~[F-]~~ G. "pass-through entity" means:

10 (1) a film performing artist entity; or

11 (2) any other business association other than:

12 ~~[1-]~~ (a) a sole proprietorship;

13 ~~[2-]~~ (b) an estate or trust that does
14 not distribute income to beneficiaries;

15 ~~[3-]~~ (c) a corporation, limited
16 liability company, partnership or other entity not a sole
17 proprietorship taxed as a corporation for federal income tax
18 purposes for the taxable year; or

19 ~~[4-]~~ (d) a partnership that is
20 organized as an investment partnership in which the partners'
21 income is derived solely from interest, dividends and sales of
22 securities;

23 H. "payee" means an individual to whom a payor is
24 making a pension or annuity payment;

25 ~~[G-]~~ I. "payor" means ~~[any]~~ a person making payment

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1 of a pension or annuity to an individual domiciled in New
2 Mexico;

3 ~~[H.]~~ J. "payroll period" means a period for which a
4 payment of wages is made to ~~[the]~~ an employee by ~~[his]~~ the
5 employee's employer;

6 ~~[I.]~~ K. "person" means any individual, club,
7 company, cooperative association, corporation, estate, firm,
8 joint venture, partnership, receiver, syndicate, trust or other
9 association, limited liability company, limited liability
10 partnership or gas, water or electric utility owned or operated
11 by a county or municipality and, to the extent permitted by
12 law, any federal, state or other governmental unit or
13 subdivision or an agency, department or instrumentality
14 thereof;

15 L. "personal service corporation" means "personal
16 service corporation" as that term is defined in the Internal
17 Revenue Code;

18 ~~[J.]~~ M. "wagerer" means any person who receives
19 winnings that are subject to withholding;

20 ~~[K.]~~ N. "wages" means remuneration in cash or other
21 form for services performed by an employee for an employer;

22 ~~[L.]~~ O. "winnings that are subject to withholding"
23 means "winnings which are subject to withholding" as that term
24 is defined in Section 3402 of the Internal Revenue Code;

25 ~~[M.]~~ P. "withholdee" means:

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1 (1) an individual domiciled in New Mexico
2 receiving a pension or annuity from which an amount of tax is
3 deducted and withheld pursuant to the Withholding Tax Act;

4 (2) an employee; and

5 (3) a wagerer; and

6 [N.] Q. "withholder" means a payor, an employer or
7 any person required to deduct and withhold from winnings that
8 are subject to withholding."

9 Section 4. Section 7-3-12 NMSA 1978 (being Laws 1999,
10 Chapter 14, Section 3, as amended) is amended to read:

11 "7-3-12. INFORMATION RETURN REQUIRED FROM PASS-THROUGH
12 ENTITY--WITHHOLDING.--

13 A. A pass-through entity doing business in this
14 state shall file an annual information return with the
15 department on or before the due date of the entity's federal
16 return for the taxable year. The information return shall be
17 signed by the business manager or one of the owners of the
18 pass-through entity.

19 B. The information return required by this section
20 shall contain all information required by the department,
21 including:

22 (1) the pass-through entity's gross income;

23 (2) the pass-through entity's net income;

24 (3) the amount of each owner's share of the
25 pass-through entity's net income; and

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1 (4) the name, address and tax identification
2 number of each owner entitled to a share of net income.

3 C. A pass-through entity shall provide to each of
4 its owners sufficient information to enable the owner to comply
5 with the provisions of the Income Tax Act and the Corporate
6 Income and Franchise Tax Act with respect to the owner's share
7 of net income.

8 ~~[D. The pass-through entity shall deduct and~~
9 ~~withhold from each nonresident owner's share of net income an~~
10 ~~amount equal to the owner's share of net income multiplied by a~~
11 ~~rate set by department regulation. In the case of an owner~~
12 ~~that is an individual or entity not taxed as a corporation for~~
13 ~~federal income tax purposes for the taxable year, the rate~~
14 ~~shall not exceed the rate for composite returns. In the case~~
15 ~~of an owner that is a corporation or other entity taxed as a~~
16 ~~corporation for the taxable year, the rate shall not exceed the~~
17 ~~maximum rate for corporate income tax.~~

18 E.] D. For each calendar quarter beginning on or
19 after January 1, 2010, a pass-through entity that is not a film
20 performing artist entity shall deduct and withhold from each
21 owner's share of net income for that quarter an amount equal to
22 the owner's share of that net income multiplied by a rate set
23 by a department directive that does not exceed:

24 (1) the highest rate for single individuals
25 provided in Section 7-2-7 NMSA 1978 in the case of an owner

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1 that is an individual or entity not taxed as a corporation for
2 federal income tax purposes for the taxable year; or

3 (2) the highest rate provided in Section
4 7-2A-5 NMSA 1978 in the case of an owner that is a corporation
5 or other entity taxed as a corporation for the taxable year.

6 E. For each calendar quarter beginning on or after
7 July 1, 2009, a pass-through entity that is a film performing
8 artist entity that is a personal service corporation shall
9 deduct and withhold in each quarter an amount equal to its
10 owner-employee's share of deemed net income for that quarter
11 multiplied by a rate set by a department directive that does
12 not exceed the highest rate for single individuals provided in
13 Section 7-2-7 NMSA 1978. For a quarter, all of the net income
14 for that quarter of a film performing artist entity that is a
15 personal service corporation is deemed to be the owner-
16 employee's share for that quarter.

17 F. For each calendar quarter beginning on or after
18 July 1, 2009, a pass-through entity that is a film performing
19 artist entity other than a personal service corporation shall
20 deduct and withhold in each quarter an amount equal to its net
21 income for the quarter multiplied by a rate set by a department
22 directive that does not exceed the highest rate for single
23 individuals provided in Section 7-2-7 NMSA 1978.

24 G. Prior to January 1, 2010, the provisions of
25 Subsections D, E and F of this section shall not apply with

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1 regard to:

2 (1) the share of net income of a
3 nonresidential owner that has executed an agreement in
4 accordance with rules or instructions of the department that
5 the owner will report and pay tax, if required, on its own
6 return pursuant to the Income Tax Act or the Corporate Income
7 and Franchise Tax Act;

8 (2) oil and gas proceeds subject to the Oil
9 and Gas Proceeds Withholding Tax Act; or

10 (3) a publicly traded partnership as defined
11 in Subsection (b) of Section 7704 of the Internal Revenue Code,
12 as may be amended or renumbered, that is not treated as a
13 corporation pursuant to that section.

14 H. Beginning on January 1, 2010, the provisions of
15 [Subsection D] Subsections D, E and F of this section shall not
16 apply with regard to:

17 ~~[(1) the share of net income of a nonresident~~
18 ~~owner that has executed an agreement in accordance with~~
19 ~~regulations or instructions of the department that the owner~~
20 ~~will report and pay tax, if required, on its own return~~
21 ~~pursuant to the Income Tax Act or the Corporate Income and~~
22 ~~Franchise Tax Act;~~

23 ~~(2)] (1) oil and gas proceeds subject to the~~
24 ~~Oil and Gas Proceeds Withholding Tax Act; or~~

25 ~~[(3)] (2) a publicly traded partnership as~~

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1 defined in Subsection (b) of Section 7704 of the Internal
2 Revenue Code, as may be amended or renumbered, and that is not
3 treated as a corporation pursuant to that section.

4 ~~[F-]~~ I. Amounts deducted from the owner's share of
5 net income under the provisions of this section shall be a
6 collected tax. ~~[No]~~ An owner shall not have a right of action
7 against the pass-through entity for any amount deducted and
8 withheld from the owner's share of net income.

9 J. When a pass-through entity has withheld and
10 deducted an amount pursuant to the Withholding Tax Act from the
11 net income of an owner that is also a pass-through entity, the
12 payee pass-through entity may take credit for the amount
13 withheld in determining any withholding obligation that the
14 payee pass-through entity may have pursuant to the Withholding
15 Tax Act."

16 Section 5. A new section of the Gross Receipts and
17 Compensating Tax Act is enacted to read:

18 "[NEW MATERIAL] EXEMPTION--GROSS RECEIPTS TAX--FILM
19 PERFORMING ARTIST ENTITY.--Receipts of a film performing artist
20 entity from another film performing artist entity for the
21 services of a performing artist shall be exempt from the gross
22 receipts tax. As used in this section, a "film performing
23 artist entity" is a personal service corporation or other
24 business association that receives payments for the services of
25 a performing artist for purposes of the film production tax

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1 credit."

2 Section 6. EFFECTIVE DATE.--The effective date of the
3 provisions of this act is July 1, 2009.

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