

AN ACT

RELATING TO THE PUBLIC PEACE, HEALTH, SAFETY AND WELFARE;
CREATING THE FILM PRODUCTION TAX CREDIT ACT; DISTRIBUTING
REFUNDABLE FILM PRODUCTION TAX CREDIT AMOUNTS OVER MULTIPLE
YEARS; SPECIFYING THE ANNUAL PAYOUT ON ACCRUED FILM PRODUCTION
TAX CREDITS; PROVIDING THAT THE FILM PRODUCTION TAX CREDIT
SHALL NOT APPLY TO CERTAIN EXPENDITURES; LIMITING THE AMOUNT
OF CERTAIN EXPENDITURES THAT QUALIFY FOR THE TAX CREDIT;
REQUIRING EXPENDITURES TO BE REPORTED WITHIN A CERTAIN TIME;
REQUIRING THE SUBMISSION OF AN AUDIT OF EXPENDITURES UNDER
CERTAIN CIRCUMSTANCES; PROVIDING FOR A PHYSICAL PRESENCE IN
NEW MEXICO OF VENDORS; PROVIDING FOR PERFORMING ARTIST
WITHHOLDING; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

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

SECTION 1. Section 7-1-68 NMSA 1978 (being Laws 1965,
Chapter 248, Section 69, as amended) is amended to read:

"7-1-68. INTEREST ON OVERPAYMENTS.--

A. As provided in this section, interest shall be
allowed and paid on the amount of tax overpaid by a person
that is subsequently refunded or credited to that person.

B. Interest on overpayments of tax shall accrue
and be paid at the rate established for individuals pursuant
to Section 6621 of the Internal Revenue Code, computed on a
daily basis; provided that if a different rate is specified by

a compact or other interstate agreement to which New Mexico is a party, that rate shall apply to amounts due under the compact or other agreement.

C. Unless otherwise provided by this section, interest on an overpayment not arising from an assessment by the department shall be paid from the date of the claim for refund until a date preceding by not more than thirty days the date of the credit or refund to any person; interest on an overpayment arising from an assessment by the department shall be paid from the date of overpayment until a date preceding by not more than thirty days the date of the credit or refund to any person.

D. No interest shall be allowed or paid with respect to an amount credited or refunded if:

(1) the amount of interest due is less than one dollar (\$1.00);

(2) the credit or refund is made within:

(a) fifty-five days of the date of the claim for refund of income tax, pursuant to either the Income Tax Act or the Corporate Income and Franchise Tax Act for the tax year immediately preceding the tax year in which the claim is made;

(b) seventy-five days of the date of the claim for refund of gasoline tax to users of gasoline off the highways; or

(c) one hundred twenty days of the date of the claim for refund of tax imposed pursuant to the Resources Excise Tax Act, the Severance Tax Act, the Oil and Gas Severance Tax Act, the Oil and Gas Conservation Tax Act, the Oil and Gas Emergency School Tax Act, the Oil and Gas Ad Valorem Production Tax Act, the Natural Gas Processors Tax Act or the Oil and Gas Production Equipment Ad Valorem Tax Act;

(3) the credit or refund is made within one hundred twenty days of the date of the claim for refund of income tax, pursuant to the Income Tax Act or the Corporate Income and Franchise Tax Act, for any tax year more than one year prior to the year in which the claim is made;

(4) Sections 6611(f) and 6611(g) of the Internal Revenue Code, as those sections may be amended or renumbered, prohibit payment of interest for federal income tax purposes;

(5) the credit or refund is made within sixty days of the date of the claim for refund of any tax other than income tax;

(6) the credit results from overpayments found in an audit of multiple reporting periods and applied to underpayments found in that audit or refunded as a net overpayment to the taxpayer pursuant to Section 7-1-29 NMSA 1978;

(7) the department applies the credit or

refund to an intercept program, to the taxpayer's estimated payment prior to the due date for the estimated payment or to offset prior liabilities of the taxpayer pursuant to Subsection E of Section 7-1-29 NMSA 1978;

(8) the credit or refund results from overpayments the department finds pursuant to Subsection F of Section 7-1-29 NMSA 1978 that exceed the refund claimed by the taxpayer on the return; or

(9) the refund results from a film production tax credit pursuant to Section 7-2F-1 NMSA 1978.

E. Nothing in this section shall be construed to require the payment of interest upon interest."

SECTION 2. 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, subject to the limitation in Subsection D of this section, 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 Mexico that:

(a) are directly attributable to the

production in New Mexico of a film or commercial audiovisual product;

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

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

(d) do not exceed the usual and customary cost of the goods or services acquired when purchased by unrelated parties. The secretary of taxation and revenue may determine the value of the goods or services for purposes of this section when the buyer and seller are affiliated persons or the sale or purchase is not an arm's length transaction; and

(2) postproduction expenditures made in New Mexico that:

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

(b) are for services performed in New Mexico;

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

(d) exclude postproduction expenditures for which another taxpayer claims the film production tax credit; and

(e) do not exceed the usual and customary cost of the goods or services acquired when purchased by unrelated parties. The secretary of taxation and revenue may determine the value of the goods or services for purposes of this section when the buyer and seller are affiliated persons or the sale or purchase is not an arm's length transaction.

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

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

D. A claim for film production tax credits shall be filed as part of a return filed pursuant to the Income Tax Act or the Corporate Income and Franchise Tax Act. The date a credit claim is received by the department shall determine the order that a credit claim is authorized for payment by the department. The aggregate amount of the film production tax credit claims that may be authorized for payment in any fiscal year is fifty million dollars (\$50,000,000) with respect to the direct production expenditures or postproduction

expenditures made on film or commercial audiovisual products. A film production company that submits a claim for a film production tax credit that is unable to receive the tax credit because the claims for the fiscal year exceed the limitation in this subsection shall be placed for the subsequent fiscal year at the front of a queue of film production tax credit claimants submitting claims in the subsequent fiscal year in the order of the date on which the credit was authorized for payment.

E. Credit claims authorized for payment pursuant to the Film Production Tax Credit Act shall be paid pursuant to provisions of the Tax Administration Act to the taxpayer as follows:

(1) a credit claim amount of less than two million dollars (\$2,000,000) per taxable year shall be paid immediately upon authorization for payment of the credit claim;

(2) a credit claim amount of two million dollars (\$2,000,000) or more but less than five million dollars (\$5,000,000) per taxable year shall be divided into two equal payments, with the first payment to be made immediately upon authorization of the payment of the credit claim and the second payment to be made twelve months following the date of the first payment; and

(3) a credit claim amount of five million

dollars (\$5,000,000) or more per taxable year shall be divided into three equal payments, with the first payment to be made immediately upon authorization of payment of the credit claim, the second payment to be made twelve months following the date of the first payment and the third payment to be made twenty-four months following the date of the first payment.

F. Any amount of a credit claim that is carried forward pursuant to Subsection E of this section shall be subject to the limit on the aggregate amount of credit claims that may be authorized for payment pursuant to Subsection D of this section in the fiscal year in which that amount is paid.

G. A credit claim shall only be considered received by the department if the credit claim is made on a complete tax return filed timely after the close of the taxable year. All direct production expenditures and postproduction expenditures incurred during the taxable year by a film production company shall be submitted as part of the same income tax return and paid pursuant to this section. A credit claim shall not be divided and submitted with multiple returns or in multiple years.

H. For purposes of determining the payment of credit claims pursuant to Subsection E of this section, the secretary of taxation and revenue may require that credit claims of affiliated persons be combined into one claim if necessary to accurately reflect closely integrated activities

of affiliated persons.

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

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

K. To be eligible for the film production tax credit, a film production company shall submit to the division information required by the division to demonstrate conformity with the requirements of this section, including detailed information on each direct production expenditure and each postproduction expenditure. A film production company shall provide to the division a projection of the film production tax credit claim the film production company plans to submit in the fiscal year. In addition, the film production company shall agree in writing:

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

(2) to publish, at completion of principal photography, a notice at least once a week for three consecutive weeks in local newspapers in regions where filming

has taken place to notify the public of the need to file creditor claims against the film production company by a specified date;

(3) that outstanding obligations are not waived should a creditor fail to file by the specified date; and

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

L. The division shall determine the eligibility of the company and shall report this information to the taxation and revenue department in a manner and at times the economic development department and the taxation and revenue department shall agree upon. The division shall also post on its web site all information provided by the film production company that does not reveal revenue, income or other information that may jeopardize the confidentiality of income tax returns, including that the division shall report monthly the projected amount of credit claims for the fiscal year.

M. To provide guidance to film production companies regarding the amount of credit capacity remaining in the fiscal year, the taxation and revenue department shall post monthly on that department's web site the aggregate

amount of credits claimed and processed for the fiscal year.

N. To receive a film production tax credit, a film production company shall apply to the taxation and revenue department on forms and in the manner the department may prescribe. The application shall include a certification of the amount of direct production expenditures or postproduction expenditures made in New Mexico with respect to the film production for which the film production company is seeking the film production tax credit; provided that for the film production tax credit, the application shall be submitted within one year of the date of the last direct production expenditure in New Mexico or the last postproduction expenditure in New Mexico. If the amount of the requested tax credit exceeds five million dollars (\$5,000,000), the application shall also include the results of an audit, conducted by a certified public accountant licensed to practice in New Mexico, verifying that the expenditures have been made in compliance with the requirements of this section. If the requirements of this section have been complied with, subject to the provisions of Subsection D of this section, the taxation and revenue department shall approve the film production tax credit and issue a document granting the tax credit.

O. The film production company may apply all or a portion of the film production tax credit granted against

personal income tax liability or corporate income tax liability. If the amount of the film production tax credit claimed exceeds the film production company's tax liability for the taxable year in which the credit is being claimed, the excess shall be refunded.

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

SECTION 3. A new section of Chapter 7, Article 2F NMSA 1978 is enacted to read:

"SHORT TITLE.--Chapter 7, Article 2F NMSA 1978 may be cited as the "Film Production Tax Credit Act"."

SECTION 4. Section 7-2F-2 NMSA 1978 (being Laws 2003, Chapter 127, Section 2, as amended) is amended to read:

"7-2F-2. DEFINITIONS.--As used in the Film Production Tax Credit Act:

A. "affiliated person" means a person who directly or indirectly owns or controls, is owned or controlled by or is under common ownership or control with another person through ownership of voting securities or other ownership interests representing a majority of the total voting power of the entity;

B. "commercial audiovisual product" means a film or a videogame intended for commercial exploitation;

C. "direct production expenditure":

(1) except as provided in Paragraph (2) of this subsection, means a transaction that is subject to taxation in New Mexico, including:

(a) payment of wages, fringe benefits or fees for talent, management or labor to a person who is a New Mexico resident;

(b) payment to a personal services business for the services of a performing artist if the personal services business: 1) pays gross receipts tax in New Mexico on the portion of those payments qualifying for the tax credit; and; 2) deducts and remits withheld income tax pursuant to Subsection I of Section 7-3A-3 NMSA 1978; and

(c) any of the following provided by a vendor: 1) the story and scenario to be used for a film; 2) set construction and operations, wardrobe, accessories and related services; 3) photography, sound synchronization, lighting and related services; 4) editing and related services; 5) rental of facilities and equipment; 6) leasing of vehicles, not including the chartering of aircraft for out-of-state transportation; however, New Mexico-based chartered aircraft for in-state transportation directly attributable to the production shall be considered a direct production

expenditure; provided that only the first one hundred dollars (\$100) of the daily expense of leasing a vehicle for passenger transportation on roadways in the state may be claimed as a direct production expenditure; 7) food or lodging; provided that only the first one hundred fifty dollars (\$150) of lodging per individual per day is eligible to be claimed as a direct production expenditure; 8) commercial airfare if purchased through a New Mexico-based travel agency or travel company for travel to and from New Mexico or within New Mexico that is directly attributable to the production; 9) insurance coverage and bonding if purchased through a New Mexico-based insurance agent, broker or bonding agent; and 10) other direct costs of producing a film in accordance with generally accepted entertainment industry practice; and

(2) does not include an expenditure for:

(a) a gift with a value greater than twenty-five dollars (\$25.00);

(b) artwork or jewelry, except that a work of art or a piece of jewelry may be a direct production expenditure if: 1) it is used in the film production; and 2) the expenditure is less than two thousand five hundred dollars (\$2,500); or

(c) entertainment, amusement or recreation;

D. "division" means the New Mexico film division

of the economic development department;

E. "federal new markets tax credit program" means the tax credit program codified as Section 45D of the United States Internal Revenue Code of 1986, as amended;

F. "film" means a single medium or multimedia program, excluding advertising messages other than national or regional advertising messages intended for exhibition, that:

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

(2) can be viewed or reproduced;

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

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

G. "film production company" means a person that produces one or more films or any part of a film;

H. "fiscal year" means the state fiscal year beginning on July 1;

I. "New Mexico resident" means an individual who is domiciled in this state during any part of the taxable year or an individual who is physically present in this state for one hundred eighty-five days or more during the taxable year; but any individual, other than someone who was physically present in the state for one hundred eighty-five days or more during

the taxable year and who, on or before the last day of the taxable year, changed the individual's place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state is not a resident for the purposes of the Film Production Tax Credit Act for periods after that change of abode;

J. "personal services business" means a business organization that receives payments for the services of a performing artist;

K. "physical presence" means a physical address in New Mexico, but does not include a post office box or other mail drop enterprise unless the physical presence is for a business and the business is providing mail services to a film production company from which a vendor conducts business, stores inventory or otherwise creates, assembles or offers for sale the product purchased or leased by a film production company;

L. "postproduction expenditure" means an expenditure for editing, Foley recording, automatic dialogue replacement, sound editing, special effects, including computer-generated imagery or other effects, scoring and music editing, beginning and end credits, negative cutting, soundtrack production, dubbing, subtitling or addition of sound or visual effects; but not including an expenditure for advertising, marketing, distribution or expense payments; and

M. "vendor" means a person selling goods or services that has a physical presence in New Mexico and is subject to gross receipts tax pursuant to the Gross Receipts and Compensating Tax Act and income tax pursuant to the Income Tax Act or corporate income tax pursuant to the Corporate Income and Franchise Tax Act."

SECTION 5. Section 7-3A-2 NMSA 1978 (being Laws 2003, Chapter 86, Section 5, as amended) is amended to read:

"7-3A-2. DEFINITIONS.--As used in the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act:

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

B. "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended;

C. "net income" means, for any pass-through entity, the income reported to an owner by the pass-through entity for federal income tax purposes, including ordinary business income or loss, net rental income or loss, guaranteed payments to a partner of a partnership, dividends, royalties and capital gain or loss, less associated deductions, plus interest earned on a state or local bond, less interest earned on a bond issued by the state of New Mexico or its political subdivisions, less income from obligations of the United

States less expenses incurred to earn that income; in the case of a subchapter S corporation, "net income" also includes income taxable to the corporation for federal income tax purposes;

D. "oil and gas" means crude oil, natural gas, liquid hydrocarbons or any combination thereof, or carbon dioxide;

E. "oil and gas proceeds" means any amount derived from oil and gas production from any well located in New Mexico and payable as royalty interest, overriding royalty interest, production payment interest, working interest or any other obligation expressed as a right to a specified interest in the cash proceeds received from the sale of oil and gas production or in the cash value of that production, subject to all taxes withheld therefrom pursuant to law; "oil and gas proceeds" excludes "net profits interest" and other types of interest the extent of which cannot be determined with reference to a specified share of the oil and gas production and excludes any amounts deducted by the remitter from payments to interest owners or paid by interest owners to the remitter that are for expenses related to the production from the well or cessation of production from the well for which the interest owner is liable;

F. "owner" means a partner in a partnership not taxed as a corporation for federal income tax purposes for the

taxable year, a shareholder of an S corporation or of a corporation other than an S corporation that is not taxed as a corporation for federal income tax purposes for the taxable year, a member of a limited liability company or any similar person holding an ownership interest in any pass-through entity. "Owner" also means a performing artist to whom payments are due from a personal services business;

G. "partnership" means a combination of persons, including a partnership, joint venture, common trust fund, association, pool or working agreement, or any other combination of persons that is treated as a partnership for federal income tax purposes;

H. "pass-through entity" means a personal services business or any other business association other than:

- (1) a sole proprietorship;
- (2) an estate or trust that does not distribute income to beneficiaries;
- (3) a corporation, limited liability company, partnership or other entity not a sole proprietorship taxed as a corporation for federal income tax purposes for the taxable year;
- (4) a partnership that is organized as an investment partnership in which the partners' income is derived solely from interest, dividends and sales of securities;

(5) a single member limited liability company that is treated as a disregarded entity for federal income tax purposes; or

(6) a publicly traded partnership as defined in Subsection (b) of Section 7704 of the Internal Revenue Code;

I. "person" means an individual, club, company, cooperative association, corporation, estate, firm, joint venture, partnership, receiver, syndicate, trust or other association, limited liability company, limited liability partnership or gas, water or electric utility owned or operated by a county or municipality and, to the extent permitted by law, a federal, state or other governmental unit or subdivision or an agency, a department or an instrumentality thereof;

J. "personal services business" means a business organization that receives payments for the services of a performing artist for purposes of the film production tax credit;

K. "remittee" means a person that is entitled to payment of oil and gas proceeds by a remitter; and

L. "remitter" means a person that pays oil and gas proceeds to any remittee."

SECTION 6. Section 7-3A-3 NMSA 1978 (being Laws 2003, Chapter 86, Section 6, as amended) is amended to read:

"7-3A-3. WITHHOLDING FROM OIL AND GAS PROCEEDS AND NET INCOME.--

A. Except as otherwise provided in this section, a remitter shall deduct and withhold from each payment of oil and gas proceeds being made to a remittee an amount equal to the rate specified in Subsection D of this section multiplied by the amount prior to withholding that otherwise would have been payable to the remittee.

B. Except as otherwise provided in this section, a pass-through entity shall deduct and withhold from each owner's share of net income for that quarter an amount equal to the rate specified in Subsection D of this section multiplied by the owner's share of that net income, reduced, but not below zero, by the amount required to be withheld from the owner's net income under Subsection A of this section.

C. The obligation to deduct and withhold from payments or net income as provided in Subsections A and B of this section does not apply to payments that are made to:

(1) a corporation whose principal place of business is in New Mexico or an individual who is a resident of New Mexico;

(2) the United States, this state or any agency, instrumentality or political subdivision of either;

(3) any federally recognized Indian nation, tribe or pueblo or any agency, instrumentality or political

subdivision thereof; or

(4) organizations that have been granted exemption from the federal income tax by the United States commissioner of internal revenue as organizations described in Section 501(c)(3) of the Internal Revenue Code.

D. Except as provided in Subsection I of this section, the rate of withholding shall be set by a department directive; provided that the rate may not exceed the higher of the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year or the maximum bracket rate set by Section 7-2A-5 NMSA 1978 for the taxable year; and provided further that remitters shall be given ninety days' notice of a change in the rate.

E. Except as provided in Subsection I of this section, if a pass-through entity has been in existence for at least one full taxable year prior to the current calendar year, the pass-through entity may use one-fourth of its total net income for the preceding full taxable year to compute the amount required to be deducted and withheld each quarter under Subsection B of this section.

F. If a remitter receives oil and gas proceeds from which an amount has been deducted and withheld pursuant to the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act or a pass-through entity has deducted and withheld an amount pursuant to the Oil and Gas Proceeds and

Pass-Through Entity Withholding Tax Act from the net income of an owner that is also a pass-through entity, the remitter or payee pass-through entity may take credit for that amount in determining the amount the remitter or payee pass-through entity must withhold and deduct pursuant to this section.

G. If the amount to be withheld from all payments to a remittee in a calendar quarter has not exceeded thirty dollars (\$30.00) and a payment to a remittee is less than ten dollars (\$10.00), no withholding is required. If the amount to be withheld from an owner's share of net income in any calendar quarter is less than thirty dollars (\$30.00), no withholding is required.

H. Except as provided in Subsection I of this section, at the option of a remitter or pass-through entity, a remitter or pass-through entity may agree with a remittee or an owner that the remittee or owner pay the amount that the remitter or pass-through entity would have been required to withhold and remit to the department on behalf of the remittee or owner pursuant to the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act. The payments by the remittee or owner shall be remitted on the dates set forth in Section 7-3A-6 NMSA 1978 on forms and in the manner required by the department.

I. Excluding wages, a personal services business shall deduct and withhold an amount equal to the owner's share

of net income multiplied by the highest rate for single individuals provided in Section 7-2-7 NMSA 1978."

SECTION 7. APPLICABILITY.--The provisions of Sections 5 and 6 of this act apply to amounts paid by a personal services business on and after July 1, 2011.

SECTION 8. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2011. _____

HTRC/HB
607 & 622
Page 24