



# West Virginia Film Industry Investment Act



## Governing Statute

WEST VIRGINIA CODE §§11-13X-1, et seq.

Eff. 7/1/2013

### §11-13X-1. Short title.

This article may be cited as the "West Virginia Film Industry Investment Act."

### §11-13X-2. Legislative findings and purpose.

The legislature finds that the encouragement of economic growth through the production of motion pictures and other commercial film or audiovisual projects in this state is in the public interest and promotes the general welfare of the people of this state. In order to encourage greater economic growth and development in this state, there is hereby enacted the West Virginia film industry investment act.

### §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) "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.
- (3) "Eligible company" means a person or business entity engaged in the business of producing film industry productions.
- (4) "Feature length" means in excess of forty minutes.
- (5) "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) "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) "Qualified project" means a feature length theatrical or direct-to-video motion picture, a made-for-television motion picture, a commercial, 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 in direct production expenditures and post-production expenditures, as defined by this subsection, in West Virginia. The term excludes news or current affairs programming, a weather or market program, an interview or 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 article eight-c, chapter sixty-one of this code;
  - (D) Does not contain obscene matter or sexually explicit conduct, as defined by article eight-a, chapter sixty-one of this code;
  - (E) Is intended for reasonable commercial exploitation for the delivery medium used; and
  - (F) Does not contain content that portrays the State of West Virginia in a significantly derogatory manner.
- (9) "Tax Commissioner" means the West Virginia State Tax Commissioner or his or her designee.

**§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 five of this article 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 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 calculating or qualifying investment for claiming the economic opportunity tax credit authorized by article thirteen-q of this chapter or the manufacturing investment tax credit authorized by article thirteen-s of this chapter.

**§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 twenty-seven 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 ten 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 seven of this article.

(d) Limitation of the credits. -- No more than \$5 million of the tax credits may be allocated by the film office in any given West Virginia state fiscal year. The film office shall allocate the tax credits in the order the applications therefor are received.

**§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 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 office on forms and in the manner the film office may prescribe; and

(3) Submit to the film office information required by the film 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 office delivers written notification to the Tax Commissioner that the eligible company has fulfilled all requirements for the credit.

The film 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 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 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 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 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 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.

#### **§11-13X-7. Application of credit to state taxes.**

(a) Credit allowed. --

Beginning in the taxable year that the expenditures permitted under section four of this article are incurred, eligible companies and owners of eligible companies, as described in subsection (d) of this section, are permitted a credit, as described in section five of this article, against the taxes imposed by articles twenty-three, twenty-four and twenty-one of this chapter, in that order, as specified in this section.

(b) Business franchise tax. --

The credit is first applied to reduce the taxes imposed by article twenty-three of this chapter for the taxable year, determined after application of the credits against tax provided in section seventeen of said article, but before application of any other allowable credits against tax.

(c) Corporation net income taxes. --

After application of subsection (b) of this section, any unused credit is next applied to reduce the taxes imposed by article twenty-four of this chapter for the taxable year, determined before application of allowable credits against tax.

(d) Personal income tax. --

(1) If the eligible taxpayer is an electing small business corporation (as defined in Section 1361 of the United States Internal Revenue Code of 1986, as amended), a partnership, a limited liability company that is treated as a partnership for federal income tax purposes or a sole proprietorship, then any unused credit, after application of subsections (b) and (c) of this subsection, is allowed as a credit against the taxes imposed by

article twenty-one of this chapter on the income from business or other activity subject to tax under article twenty-three of this chapter or on income of a sole proprietor attributable to the business.

(2) Electing small business corporations, limited liability companies, partnerships and other unincorporated organizations shall allocate the credit allowed by this article among its members in the same manner as profits and losses are allocated for the taxable year.

**§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 article twenty-one of this chapter.

(b) If the tax credit allowed under this article in any taxable year exceeds the sum of the taxes enumerated in subsection (b), (c) or (d), section seven of this article for that taxable year, the excess may be applied against those taxes, in the order and manner stated in section seven of this article, 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 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 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 office or the Tax Commissioner.

(3) The film 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 and use tax and from 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.

**§11-13X-9. Legislative rules.**

(a) The Tax Commissioner shall propose for promulgation rules pursuant to article three, chapter twenty-nine-a of this code as may be necessary to carry out the purposes of this article.

(b) The Secretary of the West Virginia Department of Commerce may propose for promulgation rules pursuant to article three, chapter twenty-nine-a of this code as may be necessary to carry out the purposes of this article.

**§11-13X-10. Burden of proof.**

The burden of proof is on the eligible company claiming the credit allowed by this article to establish by clear and convincing evidence that the eligible company or credit transferee is entitled to the amount of credit asserted for the taxable year.

**§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 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 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 office may require to prepare the report: Provided, That the information provided is subject to the confidentiality and disclosure provisions of section five-d and five-s, article ten of this chapter. However, notwithstanding the provisions of section five-d and five-s, article ten of this chapter, the Tax Department is hereby authorized to disclose to the film office 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 twelve of this article.

**§11-13X-12. Economic development.**

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 the first day of December.

**§11-13X-13. Effective date.**

(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.