

STATE OF NEW JERSEY

DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
MEMORANDUM

DATE: August 5, 2010

TO: Robert Romano  
Deputy Treasurer

FROM: Elizabeth Renaud  
Senior Deputy Attorney General

SUBJECT: Film Tax Credit  
DOL DKT. NO.: 10-0053

Pursuant to L. 2005, c. 345, as amended ("Act"), the division of Taxation and the New Jersey Economic Development authority may grant tax credits to offset Corporation Business Tax ("CBT") and Gross Income Tax ("GIT") liability to a taxpayer that has incurred qualifying costs making a film in New Jersey. The Act also allows a tax credit to offset CBT liability to a taxpayer who has incurred qualifying costs in making digital media in New Jersey. We have been asked to determine the impact of recent legislation on those credits, in particular you have asked about the meaning of L. 2010, c. 20, which in paragraph 2 amends the CBT portion of the Act and in paragraph 3 amends the GIT portion of the Act. This legislation provides in relevant part:

Notwithstanding the provisions of subsection f. of section 1 of P.L. 2005, c.345 (C.54:10A-5.39) or the provisions of any other law, rule, or regulation to the contrary, no credits, including tax credits allowed through the granting of tax credit transfer certificates, approved by the director and the authority pursuant to subsection a. of section 1 of P.L. 2005, c.345 and pursuant to section 2 of P.L. 2005, c.345 (C.54A:4-12) shall be allowed in State Fiscal Year 2011 to apply against the tax imposed pursuant to section 5 of P.L. 1945, c.162 (C.54:10A-5) and the tax imposed

pursuant to the "New Jersey Gross Income Tax Act," N.J.S. 54A:1-1 et seq., and no credits, including tax credits allowed through the granting of tax credit transfer certificates, approved by the director and the authority pursuant to subsection b. of section 1 of P.L. 2005, c.345 shall be allowed in State Fiscal Year 2011 to apply against the tax imposed pursuant to section 5 of P.L. 1945, c.162.

[L. 2010, c. 20, §2 (emphasis added)]

The next section of that law deals with the digital media tax credit. It provides:

Notwithstanding the provisions of subsection f. of section 2 of P.L. 2005, c.345 (C.54A:4-12) or the provisions of any other law, rule, or regulation to the contrary, no credits, including tax credits allowed through the granting of tax credit transfer certificates, approved by the director and the authority pursuant to subsection a. of section 2 of P.L. 2005, c.345 and pursuant to section 1 of P.L. 2005, c.345 (C.54:10A-5.39) shall be allowed in State Fiscal Year 2011 to apply against the tax imposed under N.J.S. 54A:1-1 et seq. and the tax imposed pursuant to section 5 of P.L. 1945, c.162 (C.54:10A-5).

[L. 2010, c.20 §3 (emphasis added)]

The questions that have arisen are whether these sections:

1. Prevent the EDA and Taxation from issuing new film and digital tax credits in FY 2011.
2. Prevent the EDA and Taxation from approving the transfer of tax credits in FY 2011.
3. Prevent a taxpayer from being able to claim the tax credit in the months that comprise FY 2011.
4. Prevent a taxpayer who currently holds a tax credit or a tax credit transfer certificate from claiming the tax credit to offset tax liability for a tax period that occurs prior to FY 2011, for instance could a tax

credit be used in July 2010 to offset tax liability for a taxpayer who is on a calendar year, whose tax period ended December 31, 2009?

5. Prevent a taxpayer who currently holds a tax credit or a tax credit transfer certificate from claiming the tax credit to offset tax liability for a tax period that ends during FY 2011, for instance could a tax credit be used in April 2011 to offset tax liability for a taxpayer who is on a calendar year, whose tax period ended December 31, 2010?
6. Prevent a taxpayer who currently holds a tax credit or a tax credit transfer certificate from claiming the tax credit to offset tax liability for a tax period that ends during FY 2011 even if the taxpayer actually pays the tax in FY 2012, for instance could a tax credit be used in September 2011 to offset tax liability for a taxpayer who is on a calendar year, whose tax period ended December 31, 2010, whose return is due in April 2011 and who asks for an extension to October 2011?

In addition we have been asked:

7. What is the effect of the suspension of the program on the use of tax credits after the suspension?

The following guidance is based on our review of the existing program, the plain language of the law, and a review of the assembly budget committee hearings. After looking at the legislative statement very closely, we have determined that it is inconsistent with the law, and we have therefore not been guided by the statement. N.J. Civil Service Assn. v. State, 88 N.J. 605, 615 (1982).

With respect to the above questions we have determined that the purpose of the new legislation is to prohibit a taxpayer from using any tax credit to offset tax liability in FY 2011. This prohibition, however, does not affect the EDA's and the Division of Taxation's ability, or even, arguably, their mandate, to issue new tax credits in FY 2011. Such credits cannot be redeemed in FY 2011, but may be "banked" and used after FY 2011 in the event that the suspension is not extended. Although this conclusion is inconsistent with the legislative statement, it is consistent with the plain language of the statute. The Sponsor's statement says:

"In terms of film and digital media, the bill temporarily suspends the corporation business tax and the gross income tax credits for qualified film production expenses and the corporation business tax credit for qualified digital media content production expenses by effectively reducing the existing annual tax credit caps from \$10 million per year for film and \$5 million per year for digital media content to \$0 for film and digital media content in State Fiscal Year 2011. The bill provides that the temporary suspension of tax credits applies to the authorization of new credits and the application of previously authorized credits in the upcoming fiscal year. It does not, however, affect the carryover of unused film and digital media tax credits previously allowed or which may be allowed following the suspension."

Despite the underscored language, we see no support in the language of the law for the conclusion that the statutory language suspends the authorization of new credits. The reference to reducing the annual tax credit cap to zero also is inconsistent with the statutory language and, thus, does not control the interpretation of the section. The amount of savings that will be realized from the suspension will be the amount of tax credit certificates that would have been used but will not be used in FY 2011. That amount is difficult to estimate.

The legislation does not affect the EDA's and the Divisions ability or mandate to allow a taxpayer to transfer its tax credit certificate for private financial assistance. A taxpayer will not be able to use such transfer certificates, however, to offset liability in FY 2011.

With regard to questions 3 through 6, the purpose of the new legislation is to prohibit a taxpayer from using any tax credit to offset tax liability in FY 2011. We read this to mean two things. First, regardless of when liability arises, as in the example in Question 4, no tax credit can be used by a taxpayer in the months that constitute FY 2011. The same answer applies for question 5. Second, with respect to question 6, even though the tax is not physically paid in FY 2011, it would seem

contrary to the intent of the law, which is to save money for the State, to allow a taxpayer to avoid the suspension merely by extending his payment date. Therefore, Taxation could issue an interpretation or guidance that if the tax liability should have been paid in FY 2011 based on the due date of the original return, an extension would not affect the suspension of the use of the tax credit. Also, the taxpayer should not "net" its estimated payment accompanying the extension request by any amount attributable to the credit.

With regard to question 7, the Act is silent about extending the number of tax periods for which the credits may be used, so it reasonably can be concluded that it was the intention of the Legislature not to so extend. The effect of the suspension therefore is to eliminate one of the tax periods during which the tax credit may be used.

This advice is intended to address the effect of the one year suspension of the program. It is not intended to address any possible extension of the suspension or termination of the tax credits, which might give rise to additional issues relating not only to this program, but to other grants of tax credits.

If you have any questions concerning this guidance, please do not hesitate to contact either AAG John Bender or myself.

E.R.

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