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Richard Stern

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ENGAGING AN APPROVED ACCOUNTING FIRM CAN EXPEDITE THE PROCESS

The New York State Film and Production Tax Credit is more robust and generous than ever, but also complex, and it differs in important respects from similar credits offered in other states. Understanding how the credit works, and what is required to apply for it, will help production companies realize the full benefits of the program.

Critics have said that the State's film tax credit is too expensive for the revenue it generates. An independent study by Camoin Associates found that the $1.2 billion in total tax credits given to studios for New York film production in 2013 and 2014 created 30,761 "direct" jobs, at a cost of $38,000 per job. Some have questioned whether the program covers its costs. But the state's sponsoring agency, Empire State Development, counters that studios spent an average $155,000 per job in New York, a figure that justifies the outlay, the agency says. The Camoin study reports that over the two years covered, the state received $1.1 billion in total tax revenue on total spending of $5 billion by the studios.

In spite of skepticism and criticism over the years, the State's film tax credit program has found a strong supporter in Governor Andrew Cuomo, who extended the credit through 2019 and increased the amount of credits provided. The program now offers $420 million in credits each year, covering up to 30 percent of qualified production costs, along with an accelerated application process.

The Basic Terms

The purpose of the New York State Film and Production Tax Credit is to attract film and television production and reap the economic rewards by creating a tax-favorable environment for production companies. Its goal is to generate more location work in New York, and to help generate business for New York-based production studios.

The basic terms of the program were (and are) relatively straightforward. They enable production companies to recover up to 30 percent of production and post-production costs back from the State, in the form of a refundable tax credit.

To qualify, film production has to be done at a qualified production facility. Prior to filming, an initial tax credit application needs to be prepared and sent to the State.

Certain above-the-line and below-the-line costs qualify if they are attributable to the production costs. Other costs, such as talent, writers, producers and director, do not qualify. But most production and post-production costs will qualify, except those for entertainment and for travel for out-of-town labor. New York State also includes post-production costs in the calculation of the credit.

There is also a separate post-production credit that applies even if the film was produced out of state. To claim this, a separate application must be filed just for the post-production costs that were incurred in New York.

The application is reviewed by the State, which calculates the amount of the credit. The credit is then reported to the production company. Since most films are produced via a partnership, the credit would be reported as a pass-through to the partners, who claim the credit as a refund on their personal returns. If the production costs are under $1 million, and that amount is not offset against an individual's tax liability, the refund can be claimed in a single year. If the costs are higher than $1 million, 50 percent of the unused credit must be carried forward to the following year.

Speeding up the application process

The program was immediately successful in attracting film and television production back to New York, but there were problems. The Governor's Office of Motion Picture and Television Development did not have a large staff to review the tax credit applications, which made for a slow application process. Enticing as the credit was, production companies that had to wait long periods to recover their costs often decided to take their work elsewhere.

As part of the current expansion of the program, the application process has been taken over by the Empire State Development Corporation, which is likely to have the staff and resources to speed the application process.

In addition, starting in 2015, the state is allowing any of 16 pre-qualified Certified Public Accounting (CPA) firms to review the application and file a supplemental report before it is submitted. This will also help the State speed up the approval process and issue the credits faster. The new provisions even allow companies that have filed their applications to withdraw and resubmit them along with the supplemental report prepared by the CPA.

That new application process – and, of course, the increase in available credits from $300 to $420 million per year – are the most significant changes to the Film Production Tax Credit Program. But there are

others. Additional credits, over and above the 30-percent threshold, are available to companies that do their production and post-production work in any of a large number of counties in upstate New York.

Navigating the program and optimizing the entity for optimal financial results

Film production tax credit programs are controversial – including New York's – and from a policy standpoint, questions are often raised about whether they attract enough business to offset the cost in tax revenue. Georgia's film production tax credit program continues, but other states including Louisiana and North Carolina are either curtailing their programs or capping the dollar amount available. New York's is one of the best of the currently available programs.

Producers who consider locating their work in New York State and applying for the credit should work with a CPA firm to accelerate the application and therefore get the credit sooner. But there are other benefits as well, including professional advice on how to structure your production entity.

For example, forming a corporation, even for a relatively small production, can have favorable results. If the structure remains a partnership, in which the credit flows directly to the individual partners, there is the risk that the State will reduce the amount of money in the credit if one of the partners has a large personal liability. That's not possible if the structure is a corporation – the full amount of the credit is refunded to the corporation. Structuring as a corporation is particularly useful in financing films – hedge funds prefer it. They are now lending money against the credit and want to make sure the full amount of the credit is received. In a partnership, that's not a certainty because of the potential for personal tax liability; there is also the unattractive prospect of waiting longer to realize the credit because there is another layer of processing – individuals have to file their tax returns and get the credit, then pass it back to their partners and investors. A corporation has no need to wait.

So when considering film or television production in New York, the best-practice steps are clear: Secure the services of a pre-qualified CPA firm. Then, engage it as a full business partner, not just to file the application but also to help think through the business and tax implications of your venture and structure it accordingly. The result is more likely to be a triumph – both artistic and financial.

About the Author

Richard Stern, CPA, is a Partner at Marks Paneth LLP. He advises clients in theater, media and entertainment, including the commercial, film and television industry, film equipment rental companies, and directors, editors and music producers.

Mr. Stern represents the firm as a member of the Association of Independent Commercial Producers (AICP) and the New York Production Alliance (NYPA).

He also deals with production tax credits available for the film, television and commercial industry in certain states.

Contact Richard Stern:
Phone: (212) 503-8861 Fax: (212) 503-8860
rstern@markspaneth.com

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