

---

---

# A BILL FOR AN ACT

RELATING TO TAXES.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1 SECTION 1. Chapter 235, Hawaii Revised Statutes, is  
2 amended by adding a new section to part I to be appropriately  
3 designated and to read as follows:  
4 "§235- Withholding of tax by persons claiming the  
5 motion picture, digital media, and film production income tax  
6 credit. (a) Every person making payment to a loan-out company  
7 and claiming a tax credit pursuant to section 235-17 shall  
8 deduct and withhold ten per cent of all payments made to the  
9 loan-out company for services performed in the State. The  
10 amounts withheld shall be remitted pursuant to subsection (b).  
11 The amounts withheld under this section shall be deemed to be a  
12 tax withholding for the benefit of the loan-out company's  
13 employee actually performing the service.  
14 (b) Every person subject to subsection (a) shall make a  
15 return of the amount withheld and file the return with the  
16 department of taxation no later than thirty calendar days from  
17 the date on which the payment was made to the loan-out company.



1 The taxes withheld shall be remitted with the return. The  
2 department of taxation shall prescribe the forms and procedures  
3 to administer this section.

4 (c) All taxes withheld pursuant to this section shall be  
5 held in trust by the person withholding for the State. If any  
6 person required to withhold and remit taxes under this section  
7 fails to withhold or remit the taxes, the person shall be liable  
8 for the failure as provided in section 235-64."

9 SECTION 2. Section 231-36.8, Hawaii Revised Statutes, is  
10 amended to read as follows:

11 "**§231-36.8 Erroneous claim for refund or credit.** (a) If  
12 a claim for refund or credit with respect to tax is made for an  
13 excessive amount, the person making the claim shall be liable  
14 for a penalty in an amount equal to twenty per cent of the  
15 excessive amount; provided that there shall be no penalty  
16 assessed where the penalty calculation under this section  
17 results in an amount of less than \$400.

18 (b) It shall be a defense to the penalty under this  
19 section that the claim for refund or credit had a reasonable  
20 basis. A person claiming the reasonable basis defense shall



1 have the burden of proof to demonstrate the reasonableness of  
2 the claim.

3 (c) If the excessive amount claimed for refund or credit  
4 was generated by a tax credit:

5 (1) The defense provided under subsection (b) shall not be  
6 applicable; and

7 (2) The penalty imposed under subsection (a) shall be at  
8 ten per cent.

9 ~~(e)~~ (d) This section shall be construed in accordance  
10 with regulations and judicial interpretations given to section  
11 6676 of the Internal Revenue Code.

12 ~~(d)~~ (e) For purposes of this section:

13 "Excessive amount" means the amount by which the amount of  
14 the claim for refund or credit for any taxable year exceeds the  
15 amount of the claim allowable for such taxable year.

16 "Reasonable basis" means a standard of care used in tax  
17 reporting that is significantly higher than not frivolous or not  
18 patently improper. A reasonable basis position will be more  
19 than arguable and based on at least one or more authorities of  
20 either state or federal tax administration. A position is  
21 considered to have a reasonable basis if a reasonable and well-



1 informed analysis by a person knowledgeable in tax law would  
 2 lead that person to conclude that the position has approximately  
 3 a one-in-four, or greater, likelihood of being sustained on the  
 4 merits. A reasonable basis includes innocent mistakes where the  
 5 excessive amount is the result of inadvertence, mathematical  
 6 error, or where otherwise defined as innocent by the director  
 7 pursuant to a formal pronouncement issued without regard to  
 8 chapter 91.

9       ~~(e)~~ (f) This section shall not apply to any portion of  
 10 an underpayment on which a penalty is imposed under section 231-  
 11 36.6."

12       SECTION 3. Section 235-1, Hawaii Revised Statutes, is  
 13 amended by adding a new definition to be appropriately inserted  
 14 and to read as follows:

15       "Loan-out company" means a wholly-owned entity formed on  
 16 behalf of a person that serves as a separate entity that  
 17 constitutes the person's means of entering a contact with a  
 18 third party for the purpose of providing services to the third  
 19 party."

20       SECTION 4. Section 235-17, Hawaii Revised Statutes, is  
 21 amended to read as follows:



1           **"§235-17 Motion picture, digital media, and film**  
2 **production income tax credit.** (a) Any law to the contrary  
3 notwithstanding, there shall be allowed to each taxpayer subject  
4 to the taxes imposed by this chapter, an income tax credit that  
5 shall be deductible from the taxpayer's net income tax  
6 liability, if any, imposed by this chapter for the taxable year  
7 in which the credit is properly claimed. The amount of the  
8 credit shall be:

- 9           (1) Twenty per cent of the qualified production costs  
10           incurred by a qualified production in any county of  
11           the State with a population of over seven hundred  
12           thousand; or  
13           (2) Twenty-five per cent of the qualified production costs  
14           incurred by a qualified production in any county of  
15           the State with a population of seven hundred thousand  
16           or less.

17 A qualified production occurring in more than one county may  
18 prorate its expenditures based upon the amounts spent in each  
19 county, if the population bases differ enough to change the  
20 percentage of tax credit.



1 In the case of a partnership, S corporation, estate, or  
2 trust, the tax credit allowable is for qualified production  
3 costs incurred by the entity for the taxable year. The cost  
4 upon which the tax credit is computed shall be determined at the  
5 entity level. Distribution and share of credit shall be  
6 determined by rule.

7 If a deduction is taken under section 179 (with respect to  
8 election to expense depreciable business assets) of the Internal  
9 Revenue Code of 1986, as amended, no tax credit shall be allowed  
10 for those costs for which the deduction is taken.

11 The basis for eligible property for depreciation of  
12 accelerated cost recovery system purposes for state income taxes  
13 shall be reduced by the amount of credit allowable and claimed.

14 (b) The credit allowed under this section shall be claimed  
15 against the net income tax liability for the taxable year. For  
16 the purposes of this section, "net income tax liability" means  
17 net income tax liability reduced by all other credits allowed  
18 under this chapter.

19 (c) If the tax credit under this section exceeds the  
20 taxpayer's income tax liability, the excess of credits over  
21 liability shall be refunded to the taxpayer; provided that no



1 refunds or payment on account of the tax credits allowed by this  
 2 section shall be made for amounts less than \$1. All claims,  
 3 including any amended claims, for tax credits under this section  
 4 shall be filed on or before the end of the twelfth month  
 5 following the close of the taxable year for which the credit may  
 6 be claimed. Failure to comply with the foregoing provision  
 7 shall constitute a waiver of the right to claim the credit.

8 (d) To qualify for this tax credit, a production shall:

- 9 (1) Meet the definition of a qualified production  
 10 specified in subsection [~~(m)~~] (n);
- 11 (2) Have qualified production costs totaling at least  
 12 \$200,000;
- 13 (3) Provide the State a qualified Hawaii promotion, which  
 14 shall be at a minimum, a shared-card, end-title screen  
 15 credit, where applicable;
- 16 (4) Provide evidence of reasonable efforts to hire local  
 17 talent and crew;
- 18 (5) Provide evidence when making any claim for products or  
 19 services acquired or rendered outside of this State  
 20 that reasonable efforts were unsuccessful to secure



1 and use comparable products or services within this  
2 State; and

3 (6) Provide evidence of financial or in-kind contributions  
4 or educational or workforce development efforts, in  
5 partnership with related local industry labor  
6 organizations, educational institutions, or both,  
7 toward the furtherance of the local film and  
8 television and digital media industries.

9 (e) On or after July 1, 2006, no qualified production cost  
10 that has been financed by investments for which a credit was  
11 claimed by any taxpayer pursuant to section 235-110.9 is  
12 eligible for credits under this section.

13 (f) To receive the tax credit, the taxpayer shall first  
14 prequalify the production for the credit by registering with the  
15 department of business, economic development, and tourism during  
16 the development or preproduction stage.

17 (g) The director of taxation shall prepare forms as may be  
18 necessary to claim a credit under this section. The director  
19 may also [~~require~~]:





- 1        (1) Require the taxpayer to furnish information to  
2            ascertain the validity of the claim for credit made  
3            under this section [~~and may adopt~~];
- 4        (2) Impose fees for processing qualified production  
5            applications for the motion picture, digital media,  
6            and film production income tax to be deposited into  
7            the tax administration special fund established  
8            pursuant to section 235-20.5; and
- 9        (3) Adopt rules necessary to effectuate the purposes of  
10           this section pursuant to chapter 91.
- 11        (h) Every taxpayer claiming a tax credit under this  
12        section for a qualified production shall, no later than ninety  
13        days following the end of each taxable year in which qualified  
14        production costs were expended, submit a written, sworn  
15        statement to the department of business, economic development,  
16        and tourism, together with a verification review by a qualified  
17        certified public accountant using procedures prescribed by the  
18        department of business, economic development, and tourism,  
19        identifying:



- 1 (1) All qualified production costs as provided by
- 2 subsection (a), if any, incurred in the previous
- 3 taxable year;
- 4 (2) The amount of tax credits claimed pursuant to this
- 5 section, if any, in the previous taxable year; and
- 6 (3) The number of total hires versus the number of local
- 7 hires by category and by county.

8 This information may be reported from the department of  
9 business, economic development, and tourism to the legislature  
10 [~~in redacted form~~] pursuant to subsection (i) (4).

11 (i) The department of business, economic development, and  
12 tourism shall:

- 13 (1) Maintain records of the names of the taxpayers and
- 14 qualified productions thereof claiming the tax credits
- 15 under subsection (a);
- 16 (2) Obtain and total the aggregate amounts of all
- 17 qualified production costs per qualified production
- 18 and per qualified production per taxable year;
- 19 (3) Provide a letter to the director of taxation
- 20 specifying the amount of the tax credit per qualified
- 21 production for each taxable year that a tax credit is

1           claimed and the cumulative amount of the tax credit  
2           for all years claimed; and  
3       (4)   Submit a report to the legislature no later than  
4           twenty days prior to the convening of each regular  
5           session detailing the non-aggregated qualified  
6           production costs that form the basis of the tax credit  
7           claims and expenditures, itemized by taxpayer, in a  
8           redacted format to preserve the confidentiality and  
9           which shall include the dollar amount claimed, name of  
10          company, and name of the qualified production of the  
11          taxpayers claiming the credit.

12           Upon each determination required under this subsection, the  
13   department of business, economic development, and tourism shall  
14   issue a letter to the taxpayer, regarding the qualified  
15   production, specifying the qualified production costs and the  
16   tax credit amount qualified for in each taxable year a tax  
17   credit is claimed. The taxpayer for each qualified production  
18   shall file the letter with the taxpayer's tax return for the  
19   qualified production to the department of taxation.  
20   Notwithstanding the authority of the department of business,  
21   economic development, and tourism under this section, the



1 director of taxation may audit and adjust the tax credit amount  
2 to conform to the information filed by the taxpayer.

3 (j) Total tax credits claimed per qualified production  
4 shall not exceed \$15,000,000.

5 (k) Qualified productions shall comply with subsections  
6 (d), (e), (f), and (h).

7 (l) The total amount of tax credits allowed under this  
8 section in any particular year shall be \$50,000,000; however, if  
9 the total amount of credits applied for in any particular year  
10 exceeds the aggregate amount of credits allowed for [~~such~~] that  
11 year under this section, the excess shall be treated as having  
12 been applied for in the subsequent year and shall be claimed in  
13 [~~such~~] the subsequent year; provided that no excess shall be  
14 allowed to be claimed after December 31, [~~2025-~~] 2032.

15 (m) Every person making payment to a loan-out company  
16 shall withhold an amount equal to 4.5 per cent of qualified  
17 production costs; provided that the amount withheld shall be  
18 remitted to the department of taxation to the credit of the  
19 general excise tax account of the loan-out company to whom the  
20 qualified production costs were paid or will be paid. The  
21 amount withheld shall be remitted no later than thirty calendar



1 days after the qualified production costs are paid or incurred.  
 2 Taxpayers who fail to comply with this subsection shall be  
 3 subject to the applicable interest and penalties pursuant to  
 4 chapter 231 and section 235-104.

5 [~~m~~] (n) For the purposes of this section:

6 "Commercial":

7 (1) Means an advertising message that is filmed using  
 8 film, videotape, or digital media, for dissemination  
 9 via television broadcast or theatrical distribution;

10 (2) Includes a series of advertising messages if all parts  
 11 are produced at the same time over the course of six  
 12 consecutive weeks; and

13 (3) Does not include an advertising message with  
 14 Internet-only distribution.

15 "Digital media" means production methods and platforms  
 16 directly related to the creation of cinematic imagery and  
 17 content, specifically using digital means, including but not  
 18 limited to digital cameras, digital sound equipment, and  
 19 computers, to be delivered via film, videotape, interactive game  
 20 platform, or other digital distribution media.



1 "Post-production" means production activities and services  
2 conducted after principal photography is completed, including  
3 but not limited to editing, film and video transfers,  
4 duplication, transcoding, dubbing, subtitling, credits, closed  
5 captioning, audio production, special effects (visual and  
6 sound), graphics, and animation.

7 "Production" means a series of activities that are directly  
8 related to the creation of visual and cinematic imagery to be  
9 delivered via film, videotape, or digital media and to be sold,  
10 distributed, or displayed as entertainment or the advertisement  
11 of products for mass public consumption, including but not  
12 limited to scripting, casting, set design and construction,  
13 transportation, videography, photography, sound recording,  
14 interactive game design, and post-production.

15 "Qualified production":

16 (1) Means a production, with expenditures in the State,  
17 for the total or partial production of a feature-  
18 length motion picture, short film, made-for-television  
19 movie, commercial, music video, interactive game,  
20 television series pilot, single season (up to  
21 twenty-two episodes) of a television series regularly



1           filmed in the State (if the number of episodes per  
2           single season exceeds twenty-two, additional episodes  
3           for the same season shall constitute a separate  
4           qualified production), television special, single  
5           television episode that is not part of a television  
6           series regularly filmed or based in the State,  
7           national magazine show, or national talk show. For  
8           the purposes of subsections (d) and (j), each of the  
9           aforementioned qualified production categories shall  
10          constitute separate, individual qualified productions;  
11          and

- 12          (2) Does not include:
- 13           (A) News;
  - 14           (B) Public affairs programs;
  - 15           (C) Non-national magazine or talk shows;
  - 16           (D) Televised sporting events or activities;
  - 17           (E) Productions that solicit funds;
  - 18           (F) Productions produced primarily for industrial,  
19           corporate, institutional, or other private  
20           purposes; and



1 (G) Productions that include any material or  
2 performance prohibited by chapter 712.

3 "Qualified production costs" means the costs incurred by a  
4 qualified production within the State that are subject to the  
5 general excise tax under chapter 237 or income tax under this  
6 chapter and that have not been financed by any investments for  
7 which a credit was or will be claimed pursuant to section  
8 235-110.9. Qualified production costs include but are not  
9 limited to:

- 10 (1) Costs incurred during preproduction such as location  
11 scouting and related services;
- 12 (2) Costs of set construction and operations, purchases or  
13 rentals of wardrobe, props, accessories, food, office  
14 supplies, transportation, equipment, and related  
15 services;
- 16 (3) Wages or salaries of cast, crew, and musicians;
- 17 (4) Costs of photography, sound synchronization, lighting,  
18 and related services;
- 19 (5) Costs of editing, visual effects, music, other post-  
20 production, and related services;





1 (6) Rentals and fees for use of local facilities and  
 2 locations, including rentals and fees for use of state  
 3 and county facilities and locations that are not  
 4 subject to general excise tax under chapter 237 or  
 5 income tax under this chapter;

6 (7) Rentals of vehicles and lodging for cast and crew;

7 (8) Airfare for flights to or from Hawaii, and interisland  
 8 flights;

9 (9) Insurance and bonding;

10 (10) Shipping of equipment and supplies to or from Hawaii,  
 11 and interisland shipments; and

12 (11) Other direct production costs specified by the  
 13 department in consultation with the department of  
 14 business, economic development, and tourism;

15 provided that any government-imposed fines, penalties, or  
 16 interest that are incurred by a qualified production within the  
 17 State shall not be "qualified production costs".

18 SECTION 5. Section 235-20.5, Hawaii Revised Statutes, is  
 19 amended by amending subsection (b) to read as follows:

20 "(b) The moneys in the fund shall be used for the  
 21 following purposes:



- 1 (1) Issuing comfort letters, letter rulings, written  
2 opinions, and other guidance to taxpayers;  
3 ~~[(2) Issuing certificates under [section] 235-110.9;]~~  
4 (2) Processing qualified production applications for the  
5 motion picture, digital media, and film production  
6 income tax credit pursuant to section 235-17;  
7 (3) Administering the operations of the special  
8 enforcement section;  
9 (4) Funding support staff positions in the special  
10 enforcement section; and  
11 (5) Developing, implementing, and providing taxpayer  
12 education programs, including tax publications."

13 SECTION 6. The department of taxation may establish four  
14 full-time equivalent (4.0 FTE) tax auditor positions to examine  
15 claims for the motion picture, digital media, and film  
16 production income tax credit pursuant to section 235-17, Hawaii  
17 Revised Statutes, and other tax expenditures.

18 SECTION 7. Statutory material to be repealed is bracketed  
19 and stricken. New statutory material is underscored.



1 SECTION 8. This Act shall take effect on July 1, 2022, and  
2 shall apply to payments made to a taxpayer or loan-out company  
3 after June 30, 2022.

4



**Report Title:**

Motion Picture, Digital Media, and Film Production Tax Credit;  
Loan-out Companies; Qualified Productions; Withholdings; Tax  
Administration Special Fund; Positions

**Description:**

Requires every person making payment to a loan-out company and claiming the film tax credit to withhold payments to loan-out companies. Prohibits the defense of erroneous claim for a refund or credit if the claim for refund was generated by a tax credit and sets the penalty for such case to ten per cent. Requires the report by DBEDT to include the dollar amount claimed, name of the company, and name of the qualified production of the taxpayer. Requires qualified taxpayers to withhold a certain amount and remit that amount. Amends the use of the tax administration special fund. Authorizes the department of taxation to establish four full-time equivalent tax auditor positions. (HD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

