

JAN 19 2022

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# 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 be appropriately designated  
3 and to read as follows:

4           "§235-       Withholding of tax by persons claiming the motion  
5 picture, digital media, and film production income tax credit.

6           (a) Every person claiming a tax credit pursuant to section  
7 235-17 shall deduct and withhold, at the applicable rate, all  
8 payments to loan-out companies for services performed in Hawaii;  
9 provided that amounts withheld under to this section shall be  
10 allocated to the tax required to be paid pursuant to this  
11 chapter by the loan-out company's employees performing services  
12 in the State. Every person required to withhold a percentage of  
13 payment under this section is made liable for the tax associated  
14 with that payment and is relieved of liability for or upon the  
15 claim or demand of any other person for the amount of any  
16 payments to the department made in accordance with this section.



1        (b) Every person required by this section to withhold a  
2 percentage of payments under subsection (a) shall make a return  
3 of the amount withheld to the department of taxation quarterly.

4        (c) For the purposes of this chapter, "loan-out company"  
5 means a wholly-owned entity formed on behalf of a person or  
6 persons, which serves as a separate entity that constitutes the  
7 person's or persons' means of entering a contact with a third  
8 party for the purpose of providing services to the third party."

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 235-17, Hawaii Revised Statutes, is  
13 amended to read as follows:

14       "**§235-17 Motion picture, digital media, and film**  
15 **production income tax credit.** (a) Any law to the contrary  
16 notwithstanding, there shall be allowed to each taxpayer subject  
17 to the taxes imposed by this chapter, an income tax credit that  
18 shall be deductible from the taxpayer's net income tax  
19 liability, if any, imposed by this chapter for the taxable year  
20 in which the credit is properly claimed. The amount of the  
21 credit shall be:



1           (1) Twenty per cent of the qualified production costs  
2           incurred by a qualified production in any county of  
3           the State with a population of over seven hundred  
4           thousand; or

5           (2) Twenty-five per cent of the qualified production costs  
6           incurred by a qualified production in any county of  
7           the State with a population of seven hundred thousand  
8           or less.

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

13           In the case of a partnership, S corporation, estate, or  
14 trust, the tax credit allowable is for qualified production  
15 costs incurred by the entity for the taxable year. The cost  
16 upon which the tax credit is computed shall be determined at the  
17 entity level. Distribution and share of credit shall be  
18 determined by rule.

19           If a deduction is taken under section 179 (with respect to  
20 election to expense depreciable business assets) of the Internal



1 Revenue Code of 1986, as amended, no tax credit shall be allowed  
2 for those costs for which the deduction is taken.

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

6 (b) The credit allowed under this section shall be claimed  
7 against the net income tax liability for the taxable year. For  
8 the purposes of this section, "net income tax liability" means  
9 net income tax liability reduced by all other credits allowed  
10 under this chapter.

11 (c) If the tax credit under this section exceeds the  
12 taxpayer's income tax liability, the excess of credits over  
13 liability shall be refunded to the taxpayer; provided that no  
14 refunds or payment on account of the tax credits allowed by this  
15 section shall be made for amounts less than \$1. All claims,  
16 including any amended claims, for tax credits under this section  
17 shall be filed on or before the end of the twelfth month  
18 following the close of the taxable year for which the credit may  
19 be claimed. Failure to comply with the foregoing provision  
20 shall constitute a waiver of the right to claim the credit.

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



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- 1           (1) Meet the definition of a qualified production  
2                   specified in subsection (m);
- 3           (2) Have qualified production costs totaling at least  
4                   \$200,000;
- 5           (3) Provide the State a qualified Hawaii promotion, which  
6                   shall be at a minimum, a shared-card, end-title screen  
7                   credit, where applicable;
- 8           (4) Provide evidence of reasonable efforts to hire local  
9                   talent and crew;
- 10          (5) Provide evidence when making any claim for products or  
11                   services acquired or rendered outside of this State  
12                   that reasonable efforts were unsuccessful to secure  
13                   and use comparable products or services within this  
14                   State; and
- 15          (6) Provide evidence of financial or in-kind contributions  
16                   or educational or workforce development efforts, in  
17                   partnership with related local industry labor  
18                   organizations, educational institutions, or both,  
19                   toward the furtherance of the local film and  
20                   television and digital media industries.



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

5 (f) To receive the tax credit, the taxpayer shall first  
6 prequalify the production for the credit by registering with the  
7 department of business, economic development, and tourism during  
8 the development or preproduction stage.

9 (g) The director of taxation shall prepare forms as may be  
10 necessary to claim a credit under this section. The director  
11 may also require the taxpayer to furnish information to  
12 ascertain the validity of the claim for credit made under this  
13 section and may adopt rules necessary to effectuate the purposes  
14 of this section pursuant to chapter 91.

15 (h) Every taxpayer claiming a tax credit under this  
16 section for a qualified production with qualified production  
17 costs that exceed \$1,000,000 shall, no later than ninety days  
18 following the end of each taxable year in which qualified  
19 production costs were expended, submit a written, sworn  
20 statement to the department of business, economic development,  
21 and tourism, together with a verification review by a qualified





1 certified public accountant using procedures prescribed by the  
2 department of business, economic development, and tourism,  
3 identifying:

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

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

14 (i) The department of business, economic development, and  
15 tourism shall:

- 16 (1) Maintain records of the names of the taxpayers and  
17 qualified productions thereof claiming the tax credits  
18 under subsection (a);
- 19 (2) Obtain and total the aggregate amounts of all  
20 qualified production costs per qualified production  
21 and per qualified production per taxable year;

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

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



1 qualified production to the department of taxation.  
2 Notwithstanding the authority of the department of business,  
3 economic development, and tourism under this section, the  
4 director of taxation may audit and adjust the tax credit amount  
5 to conform to the information filed by the taxpayer.

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

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

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

18 (m) Each qualified production shall withhold an amount  
19 equal to the general excise tax rate on manufacturing or  
20 producing, plus the applicable rate of county surcharge on  
21 general excise tax, from qualified production costs; provided



1 that the amount withheld shall be remitted to the department of  
2 taxation to the credit of the general excise tax account of the  
3 loan-out company to whom the qualified production costs were  
4 paid or will be paid. The amount withheld shall be remitted no  
5 later than thirty calendar days after the qualified production  
6 costs are paid or incurred. Taxpayers who fail to comply with  
7 this subsection shall be subject to the applicable interest and  
8 penalties pursuant to chapter 231 and section 235-104.

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

10 "Commercial":

- 11 (1) Means an advertising message that is filmed using  
12 film, videotape, or digital media, for dissemination  
13 via television broadcast or theatrical distribution;
- 14 (2) Includes a series of advertising messages if all parts  
15 are produced at the same time over the course of six  
16 consecutive weeks; and
- 17 (3) Does not include an advertising message with  
18 Internet-only distribution.

19 "Digital media" means production methods and platforms  
20 directly related to the creation of cinematic imagery and  
21 content, specifically using digital means, including but not



1 limited to digital cameras, digital sound equipment, and  
2 computers, to be delivered via film, videotape, interactive game  
3 platform, or other digital distribution media.

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

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

18 "Qualified production":

19 (1) Means a production, with expenditures in the State,  
20 for the total or partial production of a feature-  
21 length motion picture, short film, made-for-television



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

- 15 (2) Does not include:
- 16 (A) News;
  - 17 (B) Public affairs programs;
  - 18 (C) Non-national magazine or talk shows;
  - 19 (D) Televised sporting events or activities;
  - 20 (E) Productions that solicit funds;



1 (F) Productions produced primarily for industrial,  
2 corporate, institutional, or other private  
3 purposes; and

4 (G) Productions that include any material or  
5 performance prohibited by chapter 712.

6 "Qualified production costs" means the costs incurred by a  
7 qualified production within the State that are subject to the  
8 general excise tax under chapter 237 or income tax under this  
9 chapter and that have not been financed by any investments for  
10 which a credit was or will be claimed pursuant to section  
11 235-110.9. Qualified production costs include but are not  
12 limited to:

13 (1) Costs incurred during preproduction such as location  
14 scouting and related services;

15 (2) Costs of set construction and operations, purchases or  
16 rentals of wardrobe, props, accessories, food, office  
17 supplies, transportation, equipment, and related  
18 services;

19 (3) Wages or salaries of cast, crew, and musicians;

20 (4) Costs of photography, sound synchronization, lighting,  
21 and related services;



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- 1           (5) Costs of editing, visual effects, music, other post-
- 2           production, and related services;
- 3           (6) Rentals and fees for use of local facilities and
- 4           locations, including rentals and fees for use of state
- 5           and county facilities and locations that are not
- 6           subject to general excise tax under chapter 237 or
- 7           income tax under this chapter;
- 8           (7) Rentals of vehicles and lodging for cast and crew;
- 9           (8) Airfare for flights to or from Hawaii, and interisland
- 10          flights;
- 11          (9) Insurance and bonding;
- 12          (10) Shipping of equipment and supplies to or from Hawaii,
- 13          and interisland shipments; and
- 14          (11) Other direct production costs specified by the
- 15          department in consultation with the department of
- 16          business, economic development, and tourism;
- 17          provided that any government-imposed fines, penalties, or
- 18          interest that are incurred by a qualified production within the
- 19          State shall not be "qualified production costs".

20           SECTION 4. Section 235-20.5, Hawaii Revised Statutes, is  
21          amended by amending subsection (b) to read as follows:





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

3           (1) Issuing comfort letters, letter rulings, written  
4 opinions, and other guidance to taxpayers;

5           (2) [~~Issuing certificates under [section] 235-110.9;~~  
6           Processing qualified production applications for the  
7           motion picture, digital media, and film production  
8           income tax credit provided under section 235-17;

9           (3) Administering the operations of the special  
10 enforcement section;

11           (4) Funding support staff positions in the special  
12 enforcement section; and

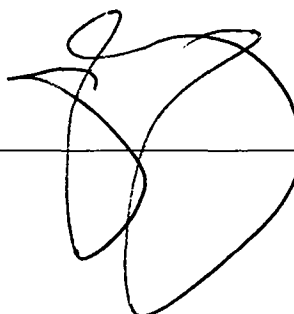
13           (5) Developing, implementing, and providing taxpayer  
14 education programs, including tax publications."

15           SECTION 5. Statutory material to be repealed is bracketed  
16 and stricken. New statutory material is underscored.

17           SECTION 6. This Act shall take effect on July 1, 2022, and  
18 shall apply to payments made to a taxpayer or loan-out company  
19 after June 30, 2022.

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INTRODUCED BY: \_\_\_\_\_



# S.B. NO. 2079

**Report Title:**

Taxes; Film Tax Credit; Tax Administration Special Fund

**Description:**

Establishes a tax withholding requirement for all payments to loan-out companies for services performed in Hawaii for persons claiming the motion picture, digital media, and film production income tax credit. Prohibits the defense of erroneous claim for refund or credit if the claim for refund was generated by a tax credit. Sets the penalty for the erroneous claim for refund or credit generated by a tax credit at ten per cent. Requires taxpayers claiming the motion picture, digital media, and film production income tax credit to submit a sworn statement and verification review to the Department of Business, Economic Development, and Tourism only if qualified production costs exceed \$1,000,000. Requires reports by the Department of Business, Economic Development, and Tourism to the Legislature on the motion picture, digital media, and film production income tax credit to identify the dollar amount claimed, name of company, and name of program claiming the credit. Extends the period during which excess credits may be claimed to December 31, 2032. Requires qualified taxpayers claiming the motion picture, digital media, and film production income tax credit to withhold a certain amount and remit that amount within thirty calendar days to the Department of Taxation to the credit of the general excise tax account of the loan-out company. Amends the uses of the Tax Administration Special Fund.

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

