

New Hampshire Department of Revenue Administration

Fiscal Note Quick Guide

17-0528

HB 581-FN, *establishing a credit against business profits taxes for media production expenditures in New Hampshire.*

House Ways & Means

This bill establishes a tax credit against the Business Profits Tax (BPT) for media production expenditures made in New Hampshire (NH). The tax credit is equal to 12.5% of the total aggregate payroll paid by the production company that constitutes NH source income when total production expenses incurred in NH equal or exceed \$25,000 during the taxable year. An additional tax credit is also available against the BPT equal to 12.5% of all NH production expenses, and qualified non-NH expenses, not including expenses used to claim the first credit, where the production company is eligible for the first credit and either: (1) NH production expenses exceed 50% of the total production expenses; (2) at least 50% of the total photography days of the film take place in NH; or (3) in excess of \$100,000 in eligible NH production expenses are incurred. Aggregate salary and compensation amounts for an individual in excess of \$2,000,000 shall not qualify for either of the tax credits against BPT under this bill.

In order to be eligible for one or both of the tax credits, the taxpayer must enter into an agreement with the Film Office. The Film Office, with the concurrence of the State Treasurer, will determine whether or not to enter into agreements with taxpayers.

The tax credit shall be used against BPT and may be carried forward to any of the 5 subsequent taxable years. The aggregate of the credit to all taxpayers claiming the credit shall not exceed \$10,000,000 for any fiscal year.

The maximum fiscal impact would be the \$10,000,000 limit that the law mandates as the aggregate total of credits allowed per fiscal year. The DRA has no way of knowing how many agreements the Film Office, in concurrence with the State Treasurer, would enter into or when the agreements would be effective.

If, as provided in the bill, an agreement can be entered into for photography beginning after December 31, 2016 and the application for a tax credit voucher must be filed within 90 days after the end of the annual period, the tax credits could be available for use for Tax Year 2017. Returns for Tax Year 2017 could be filed beginning March, 2018 so the fiscal impact of this bill could begin in the second half of FY 2018. However, should the taxpayers be calendar year filers and want to file on extension, the amount of credit taken would not be known until October or November of 2018, in FY2019.

All or any portion of tax credits issued may be transferred, sold or assigned to a NH resident taxpayer with BPT liabilities. If the full credit is not used it shall not be refunded, but carried

forwarded by the transferee, buyer or assignee for 5 subsequent taxable years. A statement shall be submitted to the Commissioner describing the amount of the eligible tax credit. The Commissioner shall provide the taxpayer a certificate of eligibility to transfer, sell, or assign the tax credits. No credit may be transferred, sold or assigned without a certificate.

This bill shall be prospectively repealed effective July 1, 2021. The department would incur additional administrative and IT costs to get the proposed program up and running. Included in the unknown costs would be the adoption of rules, developing a certificate process for the transferring of credits, revising BPT tax forms, creating tax credit vouchers and developing a list of audit professionals to certify claimed production expenses or costs.

This bill cannot be administered as written because page 1, lines 25 – 28 states: “(e) The aggregate of tax credits to all taxpayers claiming the credit under this paragraph shall not exceed \$10,000,000 for any fiscal year. If the commissioner determines the aggregate limit is claimed in any fiscal year the commissioner shall grant each taxpayer claiming the credit the proportional share of the maximum aggregate credit amount.” However, the proposed law does not create a tax credit program to which taxpayers can apply by a specific due date, after which proportional tax credits could be awarded. There is no mechanism for the DRA to award proportional credits and thus the \$10,000,000 aggregate credit limit cannot be fully implemented by the DRA.

This bill may result in an impermissible classification of taxpayers given the limited class of activities that it applies to, the various factors required to qualify for the credit, the elimination of certain classes of expenses and the need to enter into an agreement in order to be eligible for the credit. "Distinctions in tax treatment must rest upon reasonable classifications of property, not upon classification of taxpayers owning a common class of property." Opinion of Justices, 132 N.H. 777 (1990) citing Opinion of Justices, 115 N.H. 306 (1975). A review by a constitutional lawyer should be performed on this bill.