That's a Wrap on the West Virginia Film Tax Credit

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In 2008 West Virginia began offering tax credits for film, television, and commercial productions in the state. The West Virginia Film Industry Investment Act[1] passed almost unanimously during the 2007 legislative session, buoyed by support from West Virginia native and Hollywood star Jennifer Garner. By 2018, however, the film tax credit program and the West Virginia Film Office had been eliminated.

The typical three-act screenplay structure provides a nice template for discussing the credit's rise and fall.

Act 1 - Setup

The initial statutory language for the film tax credit established a nonrefundable tax credit based on a percentage of direct production expenditures incurred in West Virginia that were directly attributable to the in-state production of a qualified project. The program also applied to postproduction expenditures incurred in the state that were directly attributable to the production of a qualified project and were for services performed in West Virginia.[2] The credit applied to the business franchise tax (no longer imposed), the corporate net income tax, and the personal income tax.[3] In 2008, to make it more attractive to out-of-state production companies, the credit was made transferable - and most credits earned by out-of-state entities were in turn sold to in-state entities with West Virginia tax liabilities.[4]

Initially, the tax credit was 22 percent of qualified expenditures - with an additional 2 percent available if 10 or more West Virginia residents were full-time employees working in-state or apprentices working in-state for the production company, and another 2 percent if at least 25 percent of the full-time workforce of the film production company, or its authorized payroll service company, comprised of West Virginia residents. In 2010 the tax credit was

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increased to 27 percent, with an additional 4 percent available if 10 or more West Virginia residents were full-time employees working in-state or apprentices working in-state for the production company, making the program competitive with other state film tax credits.[5]

Throughout most of the life of the program, the qualified spend remained very low, with a production needing to incur a minimum of $25,000 of direct production expenditures to meet the requirements of a qualified project.[6] That low threshold led to 97 qualified productions being filmed in West Virginia between fiscal 2008 and 2016; however, only $15,016,560 in tax credits was issued in that time frame.[7] Originally, the statutory cap on the amount of tax credits available to be awarded in a single fiscal year was $10 million,[8] but the most awarded in a single fiscal year was $5,747,973 in fiscal 2012.[9] As a result, the cap was reduced to $5 million in 2013, and the additional $5 million was used to cover budget shortfalls plaguing the state at the time.[10]

Act 2 – Confrontation

In 2017 Gov. Jim Justice (R) in his first State of the State address introduced plans to cut approximately $30 million of spending from the state budget, with a portion based on eliminating the West Virginia Film Office and its modest annual budget of approximately $350,000 after 23 years of operations in the Mountain State. The governor's proposal would have also eliminated the film tax credit program and the $5 million budgeted for it.

Luckily for the Film Office and the film tax credit, there were bigger fish to fry during the 2017 legislative session, as the then-Democrat governor and Republican-controlled Legislature battled over tax increases and other budget issues. The proposed elimination of the Film Office and the credit got lost in the shuffle, and the program continued.

But the reprieve was short-lived. In December 2017 the Legislative Performance and Evaluation Research Division (the legislative auditor) provided a copy of the "Agency Review of the Department of Commerce, Specifically the West Virginia Film Office" to the commissioner of the Division of Tourism. Following a comprehensive

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review, the report recommended termination of the Film Office and the film tax credit. The recommendation was based on many factors, primarily that the credit had produced minimal economic benefit. The legislative auditor noted that only $15 million of tax credits had been issued over the program's 10-year span - with an estimated economic impact of $8.6 million over 10 years, or less than $1 million per year. Although there was a positive economic impact, the auditor determined that the minimal economic benefit - coupled with the film tax credit's "opportunity cost" - did not justify its continuation.

The legislative auditor's report identified other issues with the program, such as the fact that only three companies received almost 70 percent of the awarded film tax credits, and that out-of-state companies received approximately 90 percent of the issued tax credits. The auditor also said that credits were awarded to what he termed "unqualified productions" and that some questionable items were deemed to be "qualified expenditures."

Concurring with the legislative auditor's findings, the tourism commissioner supported eliminating the film office and the film tax credit program.

Act 3 - Resolution

The legislative audit signaled the end of the credit. S.B. 263, introduced January 12 at the governor's request, eliminates the film tax credit program and states that no film tax credits are authorized following the bill's January 26, 2018, effective date. Any credits that a taxpayer earned before the effective date may be applied against tax liabilities until exhausted or otherwise terminated, and the prior transferability authorization survived the repeal of the program. The bill sailed through the Legislature and was the first measure to pass both houses and be signed by Justice during the regular session.

In addition to eliminating the film tax credit, the bill ceases all operations of the West Virginia Film Office, effective July 1, and the West Virginia Division of Tourism is charged with administering the film tax credit program for settling, finalizing, and concluding any unfinished business.

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Epilogue

Ultimately, West Virginia's film tax credit fell victim to lawmakers' cautious approach when it was started. Limiting the tax credits that could be awarded in a single fiscal year to $10 million - and later $5 million - discouraged larger productions from considering West Virginia as a viable filming destination.[11] The low cap, coupled with the extremely low qualified spend of $25,000, led to mostly smaller productions being filmed in the state.[12]

As noted in the legislative auditor's report, West Virginia University's Bureau of Business and Economic Research determined that the multiplier effect for the West Virginia film industry is 1.411. The legislative auditor calculated the economic stimulus resulting from the film tax credit to be $6.1 million,[13] with the program having an estimated economic impact of $8.6 million over its 10 years. While the credit's impact was positive, it was determined that the effect was too slight to justify its continuation. Division of Tourism representatives contend that they can promote the film industry in West Virginia without film tax credits.

Before the elimination of the credit, the Film Office made a case for increasing the annual allotment to attract larger productions.[14] The legislative auditor, while recommending repeal, said that if the program were retained, the minimum in-state spend should be increased to $500,000 and the annual cap be raised to $15 million to attract large productions.

The legislative auditor and the Film Office both recognized that in the film tax credit world, states have a choice between "going big or going home." West Virginia chose to go home.

For more information, please contact any member of the Frost Brown Todd Tax practice group.

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[1] H.B. 3145, 2007 regular legislative session.

[2] W.Va. Code section 11-13X-4(a).

[3] W.Va. Code section 11-13X-7.

[4] W.Va. Code section 11-13X-8(e).

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[5] W.Va. Code section 11-13X-5.

[6] W.Va. Code section 11-13X-3(b)(8).

[7] West Virginia Film Office Tracking Data.

[8] W.Va. Code section 11-13X-5(d).

[9] West Virginia Film Office tracking data. The largest film production during the life of the program, the J.J. Abrams-directed Super 8, accounted for most of the awarded tax credits for fiscal 2012, with that production incurring almost 515 million of expenditures in West Virginia.

[10] H.B. 2514, 2013 regular legislative session.

[11] According to the legislative auditor, production companies incurred $49 million in direct and postproduction expenditures over the life of the program. The auditor subtracted from that amount more than $21 million of expenditures that went to out-of-state residents, $3.7 million for projects that were deemed unqualified, $15.1 million of awarded tax credits, and $3.1 million budgeted to the Film Office over the 10-year time frame.

[12] Of the 97 productions filmed in West Virginia between 2008 and 2016, only 13 had a budget of more than $400,000, per Film Office tracking data.

[13] According to the West Virginia Film Office's 2016 Annual Report's recommendations to expand the state's film industry, "production executives at several motion picture studios (for example, The Walt Disney Company, ABC Television Studios, Warner Bros., Paramount Pictures) as well as many other smaller studios, have repeatedly stated that they no longer look at West Virginia as a place to conduct business because their production budgets are too large for West Virginia's incentive program."

[14] The Film Office's 2016 Annual Report recommended, at a minimum, restoring the $10 million tax credit allocation.

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