

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA



FILED  
OSAH

DEC 18 2013

Kevin Westray, Legal Assistant

**SPITFIRE IMAGING, INC.,**

**Petitioner,**

v.

**GEORGIA DEPARTMENT OF  
ECONOMIC DEVELOPMENT,**

**Respondent.**

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: **Docket No.:**  
: **OSAH-GDED-DENX-1411896-60-Malihi**  
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: **Agency Reference No.**  
: **70112970000411080195**  
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**FINAL DECISION**

**I. INTRODUCTION**

Petitioner Spitfire Imaging, Inc., d.b.a. Spitfire Studios (“Spitfire”), appeals a denial by the Georgia Film, Music & Digital Entertainment Division of the Georgia Department of Economic Development (collectively the “Department”) of its Tax Credit Certification Application under the Georgia Entertainment Industry Investment Act. A hearing was held on November 6, 2013, and the record closed on December 5, 2013.<sup>1</sup> Tom Hamilton appeared for

<sup>1</sup> Respondent submitted post-hearing briefing on November 13, 2013, and Petitioner submitted a response on November 25, 2013. On December 3, 2013, Respondent filed objections to Petitioner’s submission, noting that the exhibits attached to Petitioner’s filing were not submitted as exhibits at the hearing. On December 5, 2013, Petitioner filed a reply to Respondent’s objections. As Petitioner failed to tender the exhibits attached to its brief at the hearing, the undersigned declines to admit Petitioner’s proposed exhibits. Nevertheless, as will be discussed *infra*, even if Petitioner’s proposed post-hearing exhibits were admitted and considered, the outcome of this decision would remain the same.

Petitioner.<sup>2</sup> Keilani Kimes-Parker, Esq., represented the Department. For the reasons stated below, the Department's decision to deny Tax Credit Certification is **AFFIRMED**.

## II. FINDINGS OF FACT

### 1.

Pursuant to the Georgia Entertainment Industry Investment Act, the State of Georgia allows production companies and their affiliates "that invest in a state certified production approved by the Department of Economic Development" to obtain an income tax credit if the company has invested certain base amounts within Georgia for qualified production activities. In order to obtain the tax credit, a party must first receive Tax Credit Certification from the Department. *Testimony of Alison Fibben*; O.C.G.A. § 48-7-40.26(c), (i).<sup>3</sup>

### Initial Application

### 2.

In 2008 Turner Broadcasting System, Inc. produced a film project entitled "Black in America," later televised by the Cable News Network, Inc. (hereinafter "CNN"). *Testimony of Alison Fibben*.

### 3.

In August of 2012, Petitioner Spitfire, claiming it was the production company for "Black in America," submitted a Tax Credit Certification Application to the Department.<sup>4</sup> The Department's Tax Credit Certification Application specified that only one production company

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<sup>2</sup> Petitioner had been represented by McCrary & Associates, P.C., who withdrew as counsel on October 25, 2013.

<sup>3</sup> Unless otherwise noted, all references to O.C.G.A. § 48-7-40.26 are to the amended version of the statute, effective on April 24, 2013.

<sup>4</sup> Although Spitfire's application was dated June 6, 2012, Ms. Fibben testified that she received the application in August of 2012.

could receive Tax Credit Certification for a project, and further indicated that “[i]f a production company hires another production company to complete the project as a ‘work for hire,’ the two production companies must agree who will obtain certification and be eligible to claim the credits.” In addition, the Tax Credit Certification Application provided that “the production company applying for certification must include an agreement signed by both production companies indicating which company has the right to receive certification for the project.” Spitfire’s initial application explicitly stated that it was not applying for certification as a “work for hire” for another production company. *Exhibit R-C.*

4.

Alison Fibben is a project manager for the Georgia Film, Music & Digital Entertainment Division of the Department of Economic Development (also the “Film Office”) who reviews initial applications for Tax Credit Certification. Ms. Fibben reviewed Spitfire’s application for Tax Credit Certification submitted in August of 2012 (hereinafter the “initial application”). *Testimony of Alison Fibben.*

5.

Pursuant to her work as a project manager, Ms. Fibben was aware that Turner Broadcasting System, Inc. (also “Turner”) had produced “Black in America.” In reviewing Spitfire’s initial application, Ms. Fibben sought to determine whether Spitfire was a “work for hire” producer of the project, or merely a “work for hire” service provider. A “work for hire” producer facilitates production of a project, whereas a “work for hire” service provider simply provides a service to a project’s production company, such as post-production services. Although a “work for hire” service provider may film portions of the footage to be incorporated into a final project by a production company, it is a production company that creates the final

product. “Work for hire” service providers are not, and have never been, eligible for Tax Credit Certification. *Testimony of Alison Fibben; Testimony of Elmer Stancil; Testimony of Lee Thomas.*

6.

On September 24, 2012, Ms. Fibben sent a letter to Spitfire denying Tax Credit Certification for “Black in America.” Ms. Fibben determined “Black in America” did not qualify for a Film Tax Credit Certification pursuant to Ga. Comp. R. & Regs. r. 159-1-1-.03 (2010).<sup>5</sup> Ms. Fibben’s letter details the relevant language of the regulation as follows:

Certain categories of projects do not qualify for the Film Tax Credit or the Georgia Entertainment Promotion including, but not limited to, the following:

. . . .

Promos or interstitials promoting or marketing entertainment content that was not produced in Georgia;

. . . .

Productions performed strictly “for hire”, unless the hiring party waives its right to claim the tax credits;

. . . .

Development costs, marketing and promotion expenses, distribution expenses, or any expenses incurred prior to preproduction or after post production of a feature film, television production or video game. . . .

*Exhibit R-C.*

7.

On October 22, 2012, Spitfire appealed Ms. Fibben’s denial by submitting a letter to the Department’s Manager of Community and Government Relations. Spitfire asserted that it had

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<sup>5</sup> Although Petitioner maintains that the Department erroneously applied rules and regulations which went into effect in 2013, Ga. Comp. R. & Regs. r. 159-1-1-.03 was enacted in 2010 and made applicable to taxable years beginning on or after January 1, 2008. *Respondent’s Brief on Applicable Rules and Regulations, Exhibits M and N.*

“created actual production footage used in the body of the series special.” According to Spitfire, the footage was used “for the open, close and as segment transitions to and from commercial breaks during the actual program.” In addition, Spitfire noted that “[a]ll documentation related to the productions in question, as well as copies of the productions, are available upon request.”

*Exhibit R-E.*

8.

On December 20, 2012 the Film Office again declined to certify “Black in America,” finding the production was:

[P]roduced by Spitfire Studios for Turner Broadcasting, Inc. By law only one of the parties involved in these contracted agreements can receive Georgia Film Tax Credits. Production companies involved in these contracted agreements must provide documentation as to which party in the agreement can earn the Georgia Film Tax Credit. No document was provided for this application by Spitfire Studios.

*Exhibit R-G.*

9.

On March 27, 2013, Amanda Brown, Turner’s Tax Director, contacted Ms. Fibben by email to inform her that:

Turner did not take benefit for the expenditures that Spitfire is seeking approval for in the amount of \$166,344.<sup>6</sup> Turner will not apply for this [“Black in America”] project or expenditures. Please let me know if you should need any additional information from Turner related to the pending approval of this project for Spitfire.

*Testimony of Ms. Fibben; Exhibit R-I.*

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<sup>6</sup> This amount differs from the total budget listed in the application: \$167,446.00. *Exhibit R- C.*

10.

After she received Ms. Brown's email, Ms. Fibben requested additional information as to what Spitfire's role had been in the project. Ms. Brown's response stated that her review of the project invoices indicated that Spitfire "definitely . . . did shots for us related to the 'Black in America' piece," and stated her "[assumption] that [Turner] took [Spitfire's] shoots and worked [them] into the final piece, which I am positive included shoots from many locations." She confirmed that Turner had paid Spitfire \$166,344 for the work they had performed. *Testimony of Ms. Fibben; Exhibit R-I.*

### **Second Application**

11.

Spitfire refiled an application for Tax Credit Certification for "Black in America" (the "second application") on or about March 29, 2013. The second application again described the project as involving the "creat[ion] of actual production footage used in the body of [the "Black in America"] CNN special. . . . the primary purpose of the live action was for the open, close, and as segment transitions to and from commercial breaks." *Exhibit R-H.*

12.

Although a service company may be integral to the creation of a final product, it is not the producer of the final product, and thus is not eligible for the film tax credit. Based on information she received from Spitfire and Amanda Brown at Turner, Ms. Fibben understood that Spitfire had created openings, closings, and transitional segments for "Black in America." She again concluded that Turner was the producer of the series and that Spitfire was an ineligible "work for hire" service company employed by Turner. *Testimony of Ms. Fibben.*

13.

On April 3, 2013, Ms. Fibben denied Spitfire's second application.<sup>7</sup> Specifically, her denial letter provided:

Spitfire Studios performed work as a service company provider to the producer, Turner Broadcasting. Spitfire Studios did not produce the episode CNN Black in America. As stated on the application, Spitfire provided only a portion of content for the show and provided post-production services. This distinction is different than a "work-for-hire" whereby one production company contracts with another production company to engage in qualified production activities pursuant to a production services agreement.

*Exhibit R-H* (emphasis added). The letter also referred to Ga. Comp. R. & Regs. r. 159-1-1-.05(2) (2010), noting that "[w]ork-for-hire service companies . . . are not eligible to receive the tax credit."<sup>8</sup> *Exhibit R-H*.

14.

Ms. Fibben testified that even if Spitfire had demonstrated that it was a "work for hire" production company, it would not have qualified for Tax Credit Certification because it did not submit the agreement required under the Department's rules and regulations between the producer and "work for hire" production company. *Testimony of Ms. Fibben*.

#### **Department Review**

15.

On April 30, 2013, Spitfire appealed Ms. Fibben's April 3, 2013, decision to Elmer Stancil, the Department's Director of Government Relations and Policy. Mr. Stancil reviews Ms. Fibben's denials of Tax Credit Certification.

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<sup>7</sup> Although in its post-hearing briefing Petitioner suggested this was the third application Spitfire submitted to the Film Office, there was no evidence presented at the hearing of another "second" application such that this application would constitute the third application submitted.

<sup>8</sup> The rule banning service companies from obtaining Tax Credit Certification was promulgated in 2010 and applicable to taxable years beginning on or after January 1, 2008.

16.

As noted, in relation to both its initial and second applications, Spitfire acknowledged that its footage had been used in certain portions of “Black in America,” specifically “for the open, close, and as segment transitions to and from commercial breaks.” *Exhibits R-E; R-H*. In contrast, in the letter of appeal sent to Mr. Stancil, Spitfire maintained that CNN had awarded it the production contract for “Black in America,” and in doing so had given the company “total control . . . to produce all princip[al] filming and production in Georgia for the series.” The letter of appeal detailed Spitfire’s responsibilities in producing the film and offered to supply “wrap books,” at the Department’s request, for its inspection. *Exhibit R-J*.

17.

Mr. Stancil denied Spitfire’s appeal, stating that:

From the documents provided, the ‘Black in America’ project was produced by Spitfire Studios for Turner Broadcasting, Inc. By law, only one of the parties involved in these contracted agreements can receive Georgia Film Tax Credits. Production companies involved in contractual agreements must provide documentation as to which party in the agreement can earn the Georgia Film Tax Credit. No document was provided for this application by Spitfire Studios.

*Exhibit R-K*.

18.

Mr. Stancil’s denial explicitly referenced Ga. Comp. R. & Regs. r. 159-1-1-.03(1)(a)(n) and (c) (2010), which do not permit a company to receive film tax certification for “productions performed strictly ‘for hire’, unless the hiring party waives its right to claim the tax credit,” and clarifies that “[i]n the instance of Co-Productions or ‘work for hire’ situations, both companies



must provide an agreement as to which party will earn the tax credits.” *Exhibit R-K.*<sup>9</sup> Spitfire contended that Ms. Brown’s email indicating that Turner was not going to apply for Tax Credit Certification for “Black in America” constituted such an agreement; however, this reliance was misplaced. A production company might decline to apply for Tax Credit Certification for numerous reasons, including that it has determined that it is not eligible. Moreover, Turner never stated that Spitfire acted as either a co-producer or a “work for hire” production company for “Black in America.” *Testimony of Alison Fibben; Testimony of Elmer Stancil; Testimony of Lee Thomas.*

19.

At the hearing, Mr. Stancil noted that Spitfire not only failed to provide an agreement signed by both parties regarding who was entitled to apply for the Tax Credit Certification, as an initial matter, it also failed to provide sufficient documentation to support its assertion that it was the production company for the “Black in America” project. In his view, Spitfire should have submitted a copy of its contract with Turner, which would have served a dual function: first, clarification of Spitfire’s role in the production of the project and, second, proof as to which of

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<sup>9</sup> Productions performed “for hire” are no longer eligible for Tax Credit Certification. Effective January 1, 2013, the Georgia General Assembly amended the Georgia Entertainment Industry Investment Act to specify that:

In the instance of a ‘work for hire’ in which one production company . . . hires another production company . . . to produce a project or contribute elements of a project for pay, the hired company shall be considered a service provider for the hiring company, and the hiring company shall be entitled to the film tax credit.

O.C.G.A. § 48-7-40.26 (b)(10) (2012) (emphasis added); H.B. 1027, 151st Gen. Assembly., Reg. Sess. (Ga. 2012). The Department likewise amended its rules and regulations to reflect the change in the law. Ga. Comp. R. & Regs. r. 159-1-1-.09 (2012) (effective date of January 1, 2013). Thus, the regulations now define “work for hire” as “an arrangement whereby one production company contracts with another production company to engage in qualified production activities pursuant to a production services agreement . . . .” Ga. Comp. R. & Regs. r. 159-1-1-.02(20) (2012). The rules were also amended to specify that “in the instance of a work-for-hire, the work-for-hire company will not be eligible for the Film Tax Credit.” Ga. Comp. R. & Regs. r. 159-1-1-.03(1)(c) (2012). A co-producer may still be eligible upon the submission of an agreement stating which producer will earn the tax credits.

the companies would be claiming the tax credit. In fact, due to disputes between employer production companies and “work for hire” production companies as to who should receive the film tax credit, the Georgia Entertainment Industry Investment Act was amended to give the right to the film tax credit only to the company who will pay for, distribute, and ultimately control the final product. *Testimony of Elmer Stancil; Testimony of Lee Thomas.*

20.

On July 19, 2013, Spitfire asked that the Department reconsider its decision or in the alternative, requested a hearing and transmittal of the record to the Georgia Office of State Administrative Hearings. The Department forwarded Spitfire’s hearing request to the Office of State Administrative Hearings, and an Administrative Law Judge scheduled a hearing. At the hearing, Spitfire asserted in argument that it was a production company and thus should have been eligible for Tax Credit Certification, and that moreover, “Black in America” was a qualifying production under the Georgia Entertainment Industry Investment Act. Spitfire did not tender any evidence nor offer any witness in support of its position.

### **III. CONCLUSIONS OF LAW**

#### **Burden of Proof**

1.

Ga. Comp. R. & Regs. r. 616-1-2-.07 generally places the burden of proof on the agency; however, in this case the undersigned determines that Spitfire bears the burden of proof. *See* Ga. Comp. R. & Regs. 616-1-2-.07(2) (Administrative Law Judge may determine law or justice requires a different placement of burden of proof). The instant proceeding concerns “a tax credit, which provides an even greater benefit to the taxpayer than an exemption from taxation.”

*Ga. Dep't of Revenue v. Ga. Chemistry Council, Inc.*, 270 Ga. App. 615, 618 (2004). Accordingly, “[i]t follows that [the applicant for the tax credit] bears the burden of showing that the legislature intended to allow [the applicant] to claim the [] credit.” *Ga. Dep't of Revenue*, 270 Ga. App. at 618. The standard of proof in this case is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

### **Tax Credit Certification is Required to Obtain Film Tax Credit**

2.

In 2005, the Georgia General Assembly passed the Georgia Entertainment Industry Investment Act. H.B. 539, 148th Gen. Assembly., Reg. Sess. (Ga. 2005); O.C.G.A. § 48-7-40.26. The Act makes available two types of tax credits, each requiring an independent certification application. O.C.G.A. § 48-7-40.26(c); Ga. Comp. R. & Regs. 159-1-1-.01(1) (2010). The first is the Base Film Tax Credit, which amounts to a “tax credit equal to 20 percent of the base investment” for all projects that have been certified by the Department. O.C.G.A. § 48-7-40.26(c)(1). In addition to the Base Film Tax Credit, a company may also earn the Georgia Entertainment Promotion Tax Credit “an additional tax credit equal to 10 percent of such base investment” for promoting Georgia’s film industry in its completed production. O.C.G.A. § 48-7-40.26(c)(2).<sup>10</sup>

3.

The statute authorizes the Department of Economic Development to promulgate rules and regulations in order to determine which projects qualify for certification. O.C.G.A. § 48-7-40.26(i). Productions are certified on a “project by project basis” by the Department of

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<sup>10</sup> Tax Credit Certification for an individual project may affect the ability to obtain the film tax credit for other projects as well, because the in-state expenditures for each project can be aggregated to reach the investment qualification threshold of \$500,000.00. O.C.G.A. § 48-7-40.26(b)(2), (c).

Economic Development. Ga. Comp. R. & Regs. r. 159-1-1-.03(1) (2010). Applicants for Tax Credit Certification “may be asked to provide budget information, funding sources, distribution agreements, production schedules, and personnel information.” *Id.* If a project receives Tax Credit Certification, such certification must be submitted to the state revenue commissioner in order to obtain the tax credit. O.C.G.A. § 48-7-40.26(i).

#### **Who May Claim the Tax Credit**

4.

Only production companies or their affiliates are eligible for the film tax credit at issue in this case. O.C.G.A. § 48-7-40.26(c). A production company is “primarily engaged in qualified production activities which have been approved by the Department of Economic Development.” The Department’s 2010 regulations further required that a production company be “solely and regularly involved in the creation and production of original film, television, or video game content in the State of Georgia.” Ga. Comp. R. & Regs. r. 159-1-1-.02(16) (2010).<sup>11</sup>

5.

Per the Department rules and regulations applicable in the instance case, only one production company per project was eligible to apply for Tax Credit Certification. Ga. Comp. R. & Regs. r. 159-1-1-.03(1), (3) [159-1-1-.03(1), (c) (2010)].<sup>12</sup> “In the instance of Co-Productions or ‘work for hire’ situations, both companies [were required to] provide an agreement as to which party will earn the tax credits.” Ga. Comp. R. & Regs. r. 159-1-1-.03(c) (2010) [159-1-1-.03(1)(a)(14) ] (2010). Productions performed “strictly ‘for hire’” could apply for Tax Credit

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<sup>11</sup> This definition has since been changed to “a company that is primarily engaged in qualified production activities which have been approved by (the Department).” Ga. Comp. R. & Regs. r. 159-1-1-.02(15) (2012).

<sup>12</sup> As detailed in footnote 9, productions performed “for hire” are no longer eligible for Tax Credit Certification. Bracketed citations refer to the Department’s copy of the 2010 rules submitted as *Exhibit M*, which differ slightly from the regulations the Court obtained through Lexis/Nexis.

Certification only if the hiring party waived its rights to the credit. Ga. Comp. R. & Regs. r. 159-1-1-.03(2)(n) [159-1-1-.03(1)(a)(14)] (2010). While “work for hire” production companies were eligible for Tax Credit Certification under the 2010 rules, “work-for-hire service companies, post production houses, catering companies, equipment rental houses, and motion picture laboratories[,] [were] not eligible to receive the tax credit.” Ga. Comp. R. & Regs. 159-1-1-.05(2) (2010) (emphasis added).

### **Appeals of Certification Denials**

6.

The Department’s rules and regulations provide that after it has issued a final order to an applicant for Tax Credit Certification, an applicant may appeal to the Office of State Administrative Hearings. Ga. Comp. R. & Regs. r. 159-1-1-.08(3) [159-1-1-.08] (2010). Spitfire appeals the Department’s denial of Spitfire’s application for Tax Credit Certification for the production “Black in America.” To prevail, Spitfire must demonstrate, as an initial matter, that it is qualified to seek Tax Credit Certification. Accordingly, before the undersigned may even consider whether “Black in America” would qualify for Tax Credit Certification, Spitfire must establish by a preponderance of the evidence that it: (1) produced “Black in America,” (2) co-produced “Black in America” or (3) acted as a “work for hire” production company for “Black in America.”

7.

Notwithstanding an agency’s prior decisions, an “Administrative Law Judge shall make an independent determination on the basis of the competent evidence presented at the hearing.” Ga. Comp. R. & Regs. 616-1-2-.21(1).<sup>13</sup> A review of the evidence presented at the hearing

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<sup>13</sup> Spitfire notes that the Department denied its application on several grounds: first finding that Spitfire was not a “for hire” production company, and then seeming to concede that even if Spitfire was a “for hire” production

demonstrates that Spitfire failed to prove, as an initial matter, that it was eligible to apply for Tax Credit Certification for “Black in America.” After considering the competent evidence presented, the undersigned determines that Petitioner has not met its burden. *See Ga. Dep’t of Revenue v. Ga. Chemistry Council, Inc.*, 270 Ga. App. 615, 618 (2004) (exemption from taxation must be strictly construed and will not be found unless the terms under which it is claimed clearly and distinctly show that such was the intention of the legislature ....”).

#### IV. DECISION

Spitfire has not carried its burden to show that it is eligible for Tax Credit Certification for “Black in America.” Accordingly, the Department’s decision to deny Petitioner’s application for the project “Black in America” is **AFFIRMED**.

SO ORDERED, this 18<sup>th</sup> day of December 2013.



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**RONIT WALKER**  
**Administrative Law Judge**

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company it did not produce all the documentation necessary to obtain Tax Credit Certification. Spitfire argues that the Department’s varying justifications for denial were unfair and arbitrary.