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I N S E N A T E

May 31, 2012

Introduced by Sen. GOLDEN -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the tax law, in relation to Empire state commercial and digital gaming media production tax credit

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 28 of the tax law, as added by section 2 of part V  
2 of chapter 62 of the laws of 2006, paragraph 1 of subdivision (a) as  
3 amended by section 1 and subparagraphs (i) and (iii) of paragraph 2 of  
4 subdivision (a) as amended by section 2 of part I of chapter 59 of the  
5 laws of 2012, paragraph 2 of subdivision (a) as amended by chapter 300  
6 of the laws of 2007 and paragraph 2 of subdivision (b) as amended by  
7 chapter 448 of the laws of 2009, is amended to read as follows:

8 S 28. Empire state commercial AND DIGITAL GAMING MEDIA production  
9 credit. (a) Allowance of credit. (1) A taxpayer, which is a qualified  
10 commercial OR DIGITAL GAMING MEDIA production company, or which is a  
11 sole proprietor of a qualified commercial OR DIGITAL GAMING MEDIA  
12 production company, and which is subject to tax under article nine-A or  
13 twenty-two of this chapter, shall be allowed a credit against such tax,  
14 pursuant to the provisions referenced in subdivision (c) of this  
15 section, to be computed as provided in this section. Provided, however,  
16 to be eligible for such credit, at least seventy-five percent of the  
17 production costs (excluding post production costs) paid or incurred  
18 directly and predominantly in the actual filming or recording of the  
19 qualified commercial OR DIGITAL GAMING MEDIA PRODUCTION must be costs  
20 incurred in New York state. The tax credit allowed pursuant to this  
21 section shall apply to taxable years beginning before January first, two  
22 thousand fifteen.

23 (2) The state has annually seven million dollars in total tax credits  
24 to disburse to all eligible commercial OR DIGITAL GAMING MEDIA  
25 production companies. The seven million dollars in total tax credits  
26 shall be allocated according to subparagraphs (i), (ii) and (iii) of  
27 this paragraph:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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1 (i) The state annually will disburse one million of the total seven  
2 million in tax credits to all eligible production companies and the  
3 amount of the credit shall be the product (or pro rata share of the  
4 product, in the case of a member of a partnership) of twenty percent of  
5 the qualified production costs paid or incurred in the production of a  
6 qualified commercial OR DIGITAL GAMING MEDIA PRODUCTION, provided that  
7 the qualified production costs paid or incurred are attributable to the  
8 use of tangible property or the performance of services within the state  
9 in the production of such qualified commercial OR DIGITAL GAMING MEDIA  
10 PRODUCTION. To be eligible for said credit the total qualified  
11 production costs of a qualified production company must be greater in  
12 the aggregate during the current calendar year than the average of the  
13 three previous years for which the credit was applied. Provided, howev-  
14 er, that until a qualified production company has established a three  
15 year history, the credit will be based on either the previous year or  
16 the average of the two previous years, whichever period is longer for  
17 the qualified production company seeking the credit. If the qualified  
18 production company has never applied for the growth credit, the previous  
19 year's data will be used to create a benchmark. The tax credit shall be  
20 applied only to the amount of the total qualified production costs of  
21 the current calendar year that are greater than the total amount of  
22 production costs of the appropriate measurement period as described in  
23 this subparagraph. The tax credit must be distributed to eligible  
24 production companies on a pro rata basis, provided, however, that no  
25 such qualified production company shall receive more than three hundred  
26 thousand dollars annually for such credit. The credit shall be allowed  
27 for the taxable year in which the production of such qualified commer-  
28 cial OR DIGITAL GAMING MEDIA PRODUCTION is completed.

29 (ii) The state annually will disburse three million of the total seven  
30 million in tax credits to all eligible production companies who film or  
31 record qualified commercials OR HAVE QUALIFIED DIGITAL GAMING MEDIA  
32 PRODUCTION COSTS within the metropolitan commuter transportation  
33 district as defined in section twelve hundred sixty-two of the public  
34 authorities law. The amount of the credit shall be the product (or pro  
35 rata share of the product, in the case of a member of a partnership) of  
36 five percent of the qualified production costs paid or incurred in the  
37 production of a qualified commercial OR DIGITAL GAMING MEDIA, provided  
38 that the qualified production[,] costs paid or incurred are attributable  
39 to the use of tangible property or the performance of services within  
40 the state in the production of such qualified commercial OR DIGITAL  
41 GAMING MEDIA. To be eligible for said credit the total qualified  
42 production costs of a qualified production company must be greater than  
43 five hundred thousand dollars in the aggregate during the calendar year.  
44 Such credit will be applied to qualified production costs exceeding five  
45 hundred thousand dollars in a calendar year.

46 (iii) The state annually will disburse three million of the total  
47 seven million in tax credits to all eligible production companies who  
48 film or record a qualified commercial OR DIGITAL GAMING MEDIA outside of  
49 the metropolitan commuter transportation district as defined in section  
50 twelve hundred sixty-two of the public authorities law; provided, howev-  
51 er, that if, after the state reviews all applications from eligible  
52 production companies who film or record a qualified commercial OR  
53 DIGITAL GAMING MEDIA PRODUCTION outside of the metropolitan commuter  
54 district for a given year, tax credits remain unallocated under this  
55 subparagraph, those credits shall be allotted to the credits set forth  
56 in subparagraph (i) of this paragraph for use consistent with the

1 purposes of such subparagraph. The amount of the credit shall be the  
2 product (or pro rata share of the product, in the case of a member of a  
3 partnership) of five percent of the qualified production costs paid or  
4 incurred in the production of a qualified commercial OR DIGITAL GAMING  
5 MEDIA, provided that the qualified production costs paid or incurred are  
6 attributable to the use of tangible property or the performance of  
7 services within the state in the production of such qualified commercial  
8 OR DIGITAL GAMING MEDIA. To be eligible for said credit the total qual-  
9 ified production costs of a qualified production company must be greater  
10 than two hundred thousand dollars in the aggregate during the calendar  
11 year. Such credit will be applied to qualified production costs exceed-  
12 ing two hundred thousand dollars in a calendar year.

13 (3) No qualified production costs used by a taxpayer either as the  
14 basis for the allowance of the credit provided for under this section or  
15 used in the calculation of the credit provided for under this section  
16 shall be used by such taxpayer to claim any other credit allowed pursu-  
17 ant to this chapter.

18 Notwithstanding any provisions of this section to the contrary, a  
19 corporation or partnership, which otherwise qualifies as a qualified  
20 commercial OR DIGITAL GAMING MEDIA production company, and is similar in  
21 operation and in ownership to a business entity or entities taxable, or  
22 previously taxable, under section one hundred eighty-three, one hundred  
23 eighty-four or one hundred eighty-five of article nine; article nine-A,  
24 article thirty-two or thirty-three of this chapter or which would have  
25 been subject to tax under article twenty-three of this chapter (as such  
26 article was in effect on January first, nineteen hundred eighty) or the  
27 income or losses of which is or was includable under article twenty-two  
28 of this chapter shall not be deemed a new or separate business, and  
29 therefore shall not be eligible for empire state commercial OR DIGITAL  
30 GAMING MEDIA production benefits, if it was not formed for a valid busi-  
31 ness purpose, as such term is defined in clause (D) of subparagraph one  
32 of paragraph (o) of subdivision nine of section two hundred eight of  
33 this chapter and was formed solely to gain empire state commercial OR  
34 DIGITAL GAMING MEDIA production credit benefits.

35 (b) Definitions. As used in this section, the following terms shall  
36 have the following meanings:

37 (1) "Qualified production COMMERCIAL costs" means production costs  
38 only to the extent such costs are attributable to the use of tangible  
39 property or the performance of services within the state directly and  
40 predominantly in the production (including pre-production and post-pro-  
41 duction) of a qualified commercial.

42 (2) "[Production] COMMERCIAL PRODUCTION costs" means any costs for  
43 tangible property used and services performed directly and predominantly  
44 in the production (including pre-production and post-production) of a  
45 qualified commercial. "[Production] COMMERCIAL PRODUCTION costs" shall  
46 not include (i) costs for a story, script or scenario to be used for a  
47 qualified commercial and (ii) wages or salaries or other compensation  
48 for writers, directors, including music directors, producers and  
49 performers (other than background actors with no scripted lines who are  
50 employed by a qualified company and musicians). "[Production] COMMERCIAL  
51 PRODUCTION costs" generally include technical and crew production costs,  
52 such as expenditures for commercial production facilities and/or  
53 location costs, or any part thereof, film, audiotape, videotape or  
54 digital medium, props, makeup, wardrobe, commercial processing, camera,  
55 sound recording, scoring, set construction, lighting, shooting, editing  
56 and meals. For purposes of this section, "post production costs" include

1 the production of original content for a qualified commercial employing  
2 techniques traditionally used in post-production for visual effects,  
3 graphic design, animation, and musical composition. However, where the  
4 commercial consists in its entirety of techniques such as visual  
5 effects, graphic design, or animation, such costs incurred in the  
6 production of the commercial, when occurring in New York, shall be  
7 deemed qualified production costs for the purposes of this section.  
8 Provided further, however, that "post production costs" shall not  
9 include the editing of previously produced content for a qualified  
10 commercial.

11 (3) "Qualified commercial" means an advertisement that is recorded on  
12 film, audiotape, videotape or digital medium in New York for multi-mark-  
13 et distribution by way of radio, television networks, cable, satellite  
14 or motion picture theaters. "Qualified commercial" shall not include (i)  
15 news or current affairs program, interview or talk program, network  
16 promos, i.e., commercials promoting television series or movies, "how-  
17 to" (i.e., instructional) commercial or program, commercial or program  
18 consisting entirely of stock footage, trailers promoting theatrical  
19 films, sporting event or sporting program, game show, award ceremony,  
20 daytime drama (i.e., daytime "soap opera"), or "reality" program, or  
21 (ii) a production for which records are required under section 2257 of  
22 title 18, United States code, to be maintained with respect to any  
23 performer in such production (reporting of books, commercials, etc. with  
24 respect to sexually explicit conduct).

25 (4) "Qualified commercial production company" is a corporation, part-  
26 nership, limited partnership, or other entity or individual which or who  
27 is principally engaged in the production of a qualified commercial and  
28 controls the production of the qualified commercial and is not the  
29 distributor or contracting entity for production of such commercial.

30 (5) "QUALIFIED DIGITAL GAMING MEDIA PRODUCTION COSTS" MEANS DIGITAL  
31 GAMING MEDIA PRODUCTION COSTS ONLY TO THE EXTENT SUCH COSTS ARE ATTRIB-  
32 UTABLE TO THE USE OF PROPERTY OR THE PERFORMANCE OF SERVICES BY ANY  
33 PERSONS WITHIN THE STATE DIRECTLY AND PREDOMINANTLY IN THE CREATION,  
34 PRODUCTION OR MODIFICATION OF DIGITAL GAMING RELATED MEDIA.

35 (6) "DIGITAL GAMING MEDIA PRODUCTION COSTS" MEANS ANY COSTS FOR PROP-  
36 erty used and services performed directly and predominantly in the  
37 creation of digital gaming media projects. Digital gaming media  
38 production costs include but shall not be limited to payments for prop-  
39 erty used and services performed directly and predominantly in the  
40 development (including concept creation), design, production (including  
41 concept creation), design, production (including testing), editing  
42 (including encoding) and compositing (including the integration of  
43 digital files for interaction by end users) of digital gaming media.  
44 Digital gaming media production costs shall not include expenses  
45 incurred for the distribution, marketing, promotion, or advertising  
46 content generated by end-users or other costs not directly and predomi-  
47 nantly related to the creation, production or modification of digital  
48 gaming media.

49 (7) "DIGITAL GAMING MEDIA" MEANS (A) A WEBSITE, THE DIGITAL MEDIA  
50 PRODUCTION COSTS OF WHICH ARE PAID OR INCURRED PREDOMINANTLY IN  
51 CONNECTION WITH: (I) VIDEO SIMULATION, ANIMATION, TEXT, AUDIO, GRAPHICS  
52 OR SIMILAR GAMING RELATED PROPERTY EMBODIED IN DIGITAL FORMAT; AND (II)  
53 INTERACTIVE FEATURES OF DIGITAL GAMING (E.G., LINKS, MESSAGE BOARDS,  
54 COMMUNITIES, OR CONTENT MANIPULATION); (B) VIDEO OR INTERACTIVE GAMES  
55 PRODUCED PRIMARILY FOR DISTRIBUTION OVER THE INTERNET, WIRELESS NETWORK  
56 OR SUCCESSORS THERETO; (C) ANIMATION, SIMULATION OR EMBEDDED GRAPHICS

1 DIGITAL GAMING RELATED SOFTWARE INTENDED FOR COMMERCIAL DISTRIBUTION  
 2 REGARDLESS OF MEDIUM. QUALIFIED DIGITAL GAMING MEDIA DOES NOT INCLUDE A  
 3 WEBSITE, VIDEO, INTERACTIVE GAME OR SOFTWARE THAT IS USED PREDOMINANTLY  
 4 FOR: ELECTRONIC COMMERCE (RETAIL OR WHOLESALE PURPOSES OTHER THAN THE  
 5 SALE OF VIDEO OR INTERACTIVE GAMES), GAMBLING (INCLUDING ACTIVITIES  
 6 REGULATED BY A NEW YORK GAMING AGENCY), EXCLUSIVE LOCAL CONSUMPTION FOR  
 7 ENTITIES NOT ACCESSIBLE BY THE GENERAL PUBLIC INCLUDING INDUSTRIAL OR  
 8 OTHER PRIVATE PURPOSES, AND POLITICAL ADVOCACY PURPOSES. DIGITAL GAMING  
 9 MEDIA SHALL NOT INCLUDE ANY (A) VIDEO GAME OR SIMILAR PRODUCT RECEIVING  
 10 AN "AO" OR "RP" DESIGNATION FROM THE ENTERTAINMENT SOFTWARE RATING  
 11 BOARD; (B) ANY COMPUTER OR VIDEO GAME OR SIMILAR PRODUCT THAT HAS NOT  
 12 BEEN VOLUNTARILY SUBMITTED FOR A RATING DESIGNATION FROM THE ENTER-  
 13 TAINMENT SOFTWARE RATING BOARD; OR, (C) CAN REASONABLY BE DEEMED TO BE  
 14 AN EROGE.

15 (c) Cross-references. For application of the credit provided for in  
 16 this section, see the following provision of this chapter:

17 (1) article 9-A: section 210: subdivision 38.

18 (2) article 22: section 606: subsection (jj).

19 S 2. The subsection heading of subsection (jj) of section 606 of the  
 20 tax law, as added by section 5 of part V of chapter 62 of the laws of  
 21 2006, is amended to read as follows:

22 Empire state commercial AND DIGITAL GAMING MEDIA production credit.

23 S 3. Clause (xxvi) of subparagraph (B) of paragraph 1 of subsection  
 24 (i) of section 606 of the tax law, as amended by section 7 of part C-1  
 25 of chapter 57 of the laws of 2009, is amended to read as follows:

26 (xxvi) Empire state commercial	Amount of credit for qualified
27 AND DIGITAL GAMING MEDIA	
28 production credit under subsection	production costs in production of
29 (jj)	a qualified commercial OR DIGITAL
30	GAMING MEDIA
31	under subdivision thirty-eight of
32	section two hundred ten

33 S 4. This act shall take effect immediately and shall apply to tax  
 34 years beginning on or after January 1, 2012.