S T A T E O F N E W Y O R K

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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:

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

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

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

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

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(i) The state annually will disburse one million of the total seven million in tax credits to all eligible production companies and the amount of the credit shall be the product (or pro rata share of the product, in the case of a member of a partnership) of twenty percent of the qualified production costs paid or incurred in the production of a qualified commercial OR DIGITAL GAMING MEDIA PRODUCTION, provided that the qualified production costs paid or incurred are attributable to the use of tangible property or the performance of services within the state in the production of such qualified commercial OR DIGITAL GAMING MEDIA PRODUCTION. To be eligible for said credit the total qualified production costs of a qualified production company must be greater in the aggregate during the current calendar year than the average of the three previous years for which the credit was applied. Provided, however, that until a qualified production company has established a three year history, the credit will be based on either the previous year or the average of the two previous years, whichever period is longer for the qualified production company seeking the credit. If the qualified production company has never applied for the growth credit, the previous year's data will be used to create a benchmark. The tax credit shall be applied only to the amount of the total qualified production costs of the current calendar year that are greater than the total amount of production costs of the appropriate measurement period as described in this subparagraph. The tax credit must be distributed to eligible production companies on a pro rata basis, provided, however, that no such qualified production company shall receive more than three hundred thousand dollars annually for such credit. The credit shall be allowed for the taxable year in which the production of such qualified commercial OR DIGITAL GAMING MEDIA PRODUCTION is completed.

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

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

purposes of such subparagraph. The amount of the credit shall be the product (or pro rata share of the product, in the case of a member of a partnership) of five percent of the qualified production costs paid or incurred in the production of a qualified commercial OR DIGITAL GAMING MEDIA, provided that the qualified production costs paid or incurred are attributable to the use of tangible property or the performance of services within the state in the production of such qualified commercial OR DIGITAL GAMING MEDIA. To be eligible for said credit the total qualified production costs of a qualified production company must be greater than two hundred thousand dollars in the aggregate during the calendar year. Such credit will be applied to qualified production costs exceeding two hundred thousand dollars in a calendar year.

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

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

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

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

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

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

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

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

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

(6) "DIGITAL GAMING MEDIA PRODUCTION COSTS" MEANS ANY COSTS FOR PROPERTY USED AND SERVICES PERFORMED DIRECTLY AND PREDOMINANTLY IN THE CREATION OF DIGITAL GAMING MEDIA PROJECTS. DIGITAL GAMING MEDIA PRODUCTION COSTS INCLUDE BUT SHALL NOT BE LIMITED TO PAYMENTS FOR PROPERTY USED AND SERVICES PERFORMED DIRECTLY AND PREDOMINANTLY IN THE DEVELOPMENT (INCLUDING CONCEPT CREATION), DESIGN, PRODUCTION (INCLUDING CONCEPT CREATION), DESIGN, PRODUCTION (INCLUDING TESTING), EDITING (INCLUDING ENCODING) AND COMPOSITING (INCLUDING THE INTEGRATION OF DIGITAL FILES FOR INTERACTION BY END USERS) OF DIGITAL GAMING MEDIA. DIGITAL GAMING MEDIA PRODUCTION COSTS SHALL NOT INCLUDE EXPENSES INCURRED FOR THE DISTRIBUTION, MARKETING, PROMOTION, OR ADVERTISING CONTENT GENERATED BY END-USERS OR OTHER COSTS NOT DIRECTLY AND PREDOMINANTLY RELATED TO THE CREATION, PRODUCTION OR MODIFICATION OF DIGITAL GAMING MEDIA.

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

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

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

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

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

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

Empire state commercial AND DIGITAL GAMING MEDIA production credit.

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

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

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