

1 HB250
2 163574-1
3 By Representative Todd
4 RFD: Ways and Means Education
5 First Read: 11-MAR-15

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8 SYNOPSIS: Under existing law, commercial photographers
9 are required to collect and remit state sales
10 taxes.

11 This bill would provide certain state sales
12 tax exemptions to commercial photographers and
13 other photographers.

14 This bill would allow the Alabama Department
15 of Revenue to promulgate rules.

16
17 A BILL
18 TO BE ENTITLED
19 AN ACT

20
21 Relating to taxation; to provide state sales tax
22 exemptions to certain commercial photographers and other
23 photographers; and to allow the Alabama Department of Revenue
24 to promulgate rules.

25 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

1 Section 1. This act shall be known and may be cited
2 as the "Creative Professionals Small Business Tax Protection
3 Act."

4 Section 2. The Legislature makes the following
5 findings:

6 (1) Photographers and photography studios have
7 recently been targeted by the Alabama Department of Revenue,
8 Sales and Use Tax Division, which takes the position that the
9 gross receipts of all photographers engaging in business in
10 Alabama should be the subject of sales tax with limited
11 exclusions.

12 (2) The taxes of gross receipts by the Alabama
13 Department of Revenue is excessively burdensome on commercial
14 photographers, who have traditionally viewed their line of
15 business as a provider of non-taxable photography services as
16 opposed to a retail provider of tangible products.

17 (3) Until the recent flurry of tax audits by the
18 department, commercial photographers had not previously been
19 required by the department to collect and remit sales tax.

20 (4) Most commercial photographers in this state are
21 small businesses that will be negatively impacted if the
22 current position of the department is maintained.

23 (5) The new position of the department that
24 commercial photographers should collect and pay sales tax has
25 substantially no basis in existing case law of this state
26 which has primarily dealt with retail photography, as opposed
27 to commercial photography services. Therefore, we believe that

1 a distinction needs to be made between the sales tax treatment
2 of commercial photography services versus non-commercial
3 photography products, and to clarify the proper application of
4 the existing case law regarding advertising agencies and
5 commercial videographers to equally apply to commercial
6 photographers as well as there should be uniformity in the
7 sales tax treatment of very similar if not identical types of
8 commercial services.

9 (6) Commercial photography is primarily an image
10 production service provided to business entities, including
11 magazine publishers and advertising agencies, for use for
12 commercial purposes.

13 (7) The commercial photography industry, including
14 the business of a commercial advertising production, is
15 virtually identical to the business of commercial video
16 production, which has been held to be a non-taxable service by
17 the Administrative Law Division of the Department of Revenue
18 in Auvid Production International, Inc. v. State of Alabama, S
19 97-475 (Adm. Law Div. O.P.O. 11/14/00) and Bramblett v. State
20 of Alabama, S 05-1067 (O.P.O. 7/25/06).

21 (8) The only difference between commercial
22 photography and commercial video production being the
23 production of still and video images rather than only video
24 images which should be immaterial for sales tax purposes.

25 (9) Commercial photography is part of the creative
26 process found to be nontaxable when performed by advertising

1 agencies, Alabama Administrative Code §810-6-1-.02 and State
2 v. Harrison, 386 So. 2d 460 (Ala. Civ. App. 1980).

3 (10) Commercial photographers are often hired by
4 advertising agencies to provide a part of a larger creative
5 product and the fact that an advertising agency chooses to
6 outsource a portion of its work, which the regulations
7 recognize as a non-taxable service, to a commercial
8 photographer does not transform that non-taxable service into
9 a delivery of a taxable tangible product.

10 (11) This act is intended to give commercial
11 photographers the fair treatment they are entitled to under
12 the laws of this state by providing commercial photographers
13 with the same protections from being required to collect and
14 remit sales tax on non-taxable services that have already been
15 granted to advertising agencies and commercial videographers.

16 (12) Furthermore, this act is intended to clarify
17 the law with respect to the sales tax treatment of
18 non-commercial photographers who are also being targeted for
19 audit by the department, providing statutory certainty in an
20 area that is less than clear in the existing revenue rules and
21 case law.

22 Section 3. For purposes of this act, the following
23 terms shall have the following meanings:

24 (1) ADVERTISING AGENCIES. Advertising agencies which
25 design and implement advertising campaigns for purposes of
26 advertising the goods, services, or ideas of their clients
27 which, as part of that primary function, provide their clients

1 with services such as consultation, consumer research, media
2 planning and placement, public relations, and other marketing
3 activities, and provide tangible personal property such as
4 print advertisements, finished art, and video and audio
5 productions.

6 (2) COMMERCIAL ARTISTS. Artists who:

7 a. Characterize themselves as commercial graphic
8 artists, commercial illustrators, commercial videographers,
9 commercial photographers, or commercial designers, provide
10 services and tangible personal property to their clients for
11 use in the advertising campaigns of their clients, or other
12 commercial uses of their clients; very similar to the services
13 provided by advertising agencies.

14 b. Provide services to their clients that often
15 include creative consultation, such as the creation and
16 development of ideas, concepts, looks, or messages, producing,
17 directing, managing the creative project, writing scripts,
18 casting talent, scouting locations, and image, video
19 processing, retouching, or editing.

20 c. Provide to a client image, artwork, or video for
21 promotion, publicity, marketing, publishing, advertising,
22 corporate communications such as directories, websites, annual
23 reports, brochures, packaging, news reporting, product
24 development, merchandising, commercial display whether in
25 print or in digital form which the client intends to use for
26 commercial use. The types of clients who commission
27 photographs, art, design services, and videos for commercial

1 use may include businesses such as advertising agencies,
2 corporations, publishers, news organizations, nonprofit
3 organizations, governmental agencies, or anyone selling a
4 product or service. Services of commercial artists include,
5 but are not limited to, the creation of preliminary art and
6 finished work product for commercial uses of the client.

7 (3) FINISHED WORK PRODUCT. The final tangible
8 product created as a result of the services provided by a
9 commercial artist or advertising agency includes, but is not
10 limited to, the electronic artwork, illustrations, such as
11 drawings, diagrams, paintings, or images, video, and
12 photographic images.

13 (4) NON-COMMERCIAL ARTISTS. Artists that
14 characterize themselves as portrait painters, fine art
15 painters, sculptors, portrait photographers for personal use,
16 wedding photographers, wedding videographers, and other
17 photographers that create works primarily for non-commercial
18 uses, such as for sale at retail or for the client's own
19 personal non-commercial use. Examples of products for personal
20 uses may include wedding photographs, albums, school
21 photographs, personal portraits, three dimensional sculptures,
22 fine art paintings, or prints for personal use.

23 (5) PRELIMINARY ART. Tangible property which is
24 prepared solely for the purpose of demonstrating an idea or
25 message for acceptance by the client before a contract is
26 entered into, or before approval is given, for preparation of
27 finished work product, provided neither title to, nor

1 permanent possession of, such tangible personal property
2 passes to the client. Examples include roughs, visualizations,
3 layouts, comprehensives, and proofs.

4 (6) SERVICES. Services performed by a commercial
5 artist to convey ideas, concepts, looks, or messages to a
6 client are nontaxable, even if the services may result in a
7 transfer, enhancement, or revision of electronic artwork, hard
8 copies of electronic artwork, copies of manually prepared
9 artwork, or copies of videos.

10 (7) TANGIBLE PRODUCTS. The transfer of preliminary
11 art or finished work product from an advertising agency or
12 commercial artist to a commercial client which is only
13 incidental to the non-taxable services.

14 Section 4. The following and similar fees and
15 commissions incurred or charged by an advertising agency,
16 commercial artist, or non-commercial photographer are not
17 taxable:

18 (1) Media commissions or fees received for placement
19 of advertising whether paid by the medium, by another
20 advertising agency, commercial artist, or a client of the
21 agency or the artist.

22 (2) Consultation and concept development fees
23 related to client discussion, development of ideas, and other
24 services paid by an advertising agency or commercial artist
25 for the transfer of the tangible personal property of the
26 client produced as a result of these services if the transfer
27 is incidental to the providing of the service and is not a

1 sale of that tangible personal property where the advertising
2 agency or commercial artist is the consumer of tangible
3 personal property transferred to the client incidental to the
4 providing of the service.

5 (3) Fees for research or account planning that
6 entail consumer research and the application of that research
7 to the client's business or industry.

8 (4) Fees for quality control supervision that
9 entails the proofing and review of printing and other products
10 provided by outside suppliers.

11 (5) Charges for the formulation and writing of copy.

12 (6) Service fees charged by talent, models, hair
13 stylists, make-up artists, wardrobe stylists, prop stylists,
14 sound recordists, technical assistants, lighting directors,
15 location scouts/managers, tradesmen, editors, etc. and paid
16 for by an advertising agency or commercial artist, whether or
17 not the client is separately invoiced for these fees, as the
18 advertising agency or commercial artist is the consumer of
19 these services.

20 (7) Transfer of tangible materials whether it be via
21 tape, film, optical disc, hard drive, or electronic delivery.

22 (8) Tangible personal property or services used or
23 consumed by an advertising agency or commercial artist in the
24 operation of its business unless the property is sold to a
25 third party.

26 (9) A fixed rate fee charged by a non-commercial
27 photographer for services or labor that is not based on or

1 contingent on the subsequent sale of tangible property is not
2 taxable such as fixed rate fee which includes a non-commercial
3 photographer's fixed charges for attending and taking
4 photographs at an event, such as a wedding, portrait session,
5 etc., when the charges are not contingent upon the subsequent
6 purchase of photographs by the client, and when the fees do
7 not vary depending upon the number of photographs the client
8 may later purchase, even if the photographs are subsequently
9 separately purchased by the client.

10 Section 5. If a non-commercial photographer charges
11 a lump sum to its client which covers fees for services and
12 the sale of tangible products and the fees for services are
13 not separately stated nor are they expressly non-contingent
14 upon the purchase of photographs, then the presumption will be
15 that the entire lump sum paid by the client is taxable, unless
16 the non-commercial photographer can document that the service
17 fees should properly be treated as non-taxable.

18 Section 6. Each advertising agency, commercial
19 artist, and non-commercial photographer shall keep sufficient
20 records to document the basis for the reported measure of tax,
21 including documents to evidence the applicability of this act.

22 Section 7. The department shall promulgate any rules
23 necessary to implement and administer this act.

24 Section 8. This act shall become effective on the
25 first day of the third month following its passage and
26 approval by the Governor, or its otherwise becoming law.