

PUBLICATION

Spotlight on Alabama: Sales Tax Held Not to Apply to Tangible Personal Property

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The issue of whether photographers, and specifically commercial photographers, must collect and remit Alabama sales tax on charges for their services and the tangible property associated with those services, has been a topic of controversy in Alabama in recent years. On Friday, April 29, the Alabama Court of Civil Appeals unanimously affirmed the granting of a summary judgment in favor of Omni Studio, LLC dismissing an assessment of sales tax against the company.

Omni Studio is a full-service commercial advertising photography production studio that provides services to clients that are primarily advertising and marketing firms, although it on some occasions worked for other business clients and rarely for individuals.

As is the case with other commercial photographers in the state, Omni Studio considered itself a service provider, not a retail seller of photographs. Omni Studio therefore did not charge sales tax to its customers or file sales tax returns with the state. The Department of Revenue audited Omni Studio for a six-year period. The usual three-year statute of limitations did not apply because no returns had been filed. The litigation revealed that other commercial photographers have been similarly audited by the Department of Revenue.

At both the trial and appellate levels, the Department of Revenue relied on its regulations and the rulings of its Administrative Law Division (now called the Alabama Tax Tribunal) to argue that because the services culminated in the delivery of photographs, charges for those services were taxable.

Omni Studio's position was that its clients sought not only photographs but the list of services that are involved in producing images for commercial purposes, such as consultation and creative planning, gathering the necessary resources and talent for a production, choosing locations, setting up lighting, processing and editing images. Omni Studio's charges were payable regardless of the number, size or nature of photographs produced and regardless of whether photographs were produced or used at all.

Omni Studio relied on the judicial precedents (one in the context of a public relations company and another in the context of a portrait painter) which held that tangible personal property delivered incident to the provision of services was not subject to sales tax. The Department of Revenue sought to limit the applicability of such a theory to "learned professions" and argued that photography was not such a profession.

The Court of Civil Appeals agreed with Omni Studio, stating that it was not convinced by the Department of Revenue's attempts to distinguish the existing precedent. The decision is a clear win for commercial photographers in the state and possibly other photographers as well. The Department has 14 days in which to ask for review by the Alabama Supreme Court.

Omni Studio, LLC is represented by Baker Donelson attorneys Tom Mahoney and Julie Schiff. If you have any questions about this case or how it could impact your business, please contact Tom Mahoney or any of the attorneys in the Firm's Tax Group.

