

APA-1

Transmittal Sheet For Notice Of Intended Action

Control: 810

Department or Agency: Revenue

Rule Nos: 810-6-1-.119

Rule Title: Photographs, Photostats, Blueprints, Etc.

New; Amended; Repealed; Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety? No

Is there a reasonable relationship between the state's police power and the protection of the public health, safety, or welfare? Yes

Is there another, less restrictive method of regulation available that could adequately protect the public? No

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? No

Is the increase in cost, if any, more harmful to the public than the harm that result from the absence of the proposed rule? N/A

Are all the facets of the rulemaking process designed solely for the purpose of, and so they have, as their primary effect, the protection of the public? Yes

Does the proposed rule have any economic impact? No

If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of Section 41-22-23, Code of Alabama 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been proposed in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama 1975 and that it conforms to all applicable filing requirements of the Administrative Procedure Division of the Legislative Reference Service.

Signature of certifying officer Michael D. Grubbe

Date 06/20/2017

APA-6
10/96

**ECONOMIC IMPACT STATEMENT
FOR APA RULE
(Section 41-22-23(f))**

Control No. 810 Department or Agency REVENUE

Rule No: 810-6-1-.119

Rule Title: Photographs, Photostats, Blueprints, Etc.

 New X Amend Repeal Adopt by Reference

- NO
 YES

This rule has no economic impact.

This rule has an economic impact, as explained below:

1. NEED/EXPECTED BENEFIT OF RULE:
2. COSTS/BENEFITS OF RULE AND WHY RULE IS THE MOST EFFECTIVE, EFFICIENT, AND FEASIBLE MEANS FOR ALLOCATING RESOURCES AND ACHIEVING THE STATED PURPOSE:
3. EFFECT OF THIS RULE ON COMPETITION:
4. EFFECT OF THIS RULE ON COST OF LIVING AND DOING BUSINESS IN THE GEOGRAPHICAL AREA WHERE THE RULE IS TO BE IMPLEMENTED:
5. EFFECT OF THIS RULE ON EMPLOYMENT IN THE GEOGRAPHICAL AREA HERE THE RULE IS TO BE IMPLEMENTED:
6. SOURCE OF REVENUE TO BE USED FOR IMPLEMENTING AND ENFORCING THIS RULE:
7. THE SHORT-TERM/LONG-TERM ECONOMIC IMPACT OF THIS RULE ON AFFECTED PERSONS, INCLUDING ANALYSIS OF PERSONS WHO WILL BEAR THE COSTS AND THOSE WHO WILL BENEFIT FROM THE RULE:
8. UNCERTAINTIES ASSOCIATED WITH THE ESTIMATED BENEFITS AND

BURDENS OF THE RULE, INCLUDING QUALITATIVE/QUANTITATIVE
BENEFITS AND BURDEN COMPARISON:

9. THE EFFECT OF THIS RULE ON THE ENVIRONMENT AND PUBLIC HEALTH:
10. DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE RULE IS NOT IMPLEMENTED:
11. OTHER COMMENTS:

**ALABAMA DEPARTMENT OF REVENUE
Sales and Use Tax**

NOTICE OF INTENDED ACTION

RULE NO. & TITLE

810-6-1-.119 Photographs, Photostats, Blueprints, Etc.

INTENDED ACTION: Amend

SUBSTANCE OF PROPOSED ACTION: The department proposes to amend the above rule in order to update Title, and incorporate changes in the law made by Act 2017-397

TIME, PLACE, MANNER OF PRESENTING VIEWS: A public hearing will be held at **1:30 p.m. on Thursday, August 10, 2017, Room 1203, First Floor**, Gordon Persons Building, located at 50 N Ripley Street, Montgomery, Alabama. Copies of the rule(s) can be obtained at <http://www.revenue.alabama.gov/analysis/rules.cfm>.


All interested parties may present their views in writing to the **Secretary of the Alabama Department of Revenue, Room 4131, Gordon Persons Building, 50 N Ripley Street, Montgomery, Alabama 36132** at any time following publication of the notice up until the conclusion of the hearing. Interested parties may also appear at the hearing to present their views.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE:

Thursday, August 10, 2017

CONTACT PERSON AT AGENCY:

Meagan Barrett
Alabama Department of Revenue
4131 Gordon Persons Building
Montgomery, Alabama 36132
(334) 242-1380



Michael D. Gamble, Secretary
Alabama Department of Revenue

810-6-1-.119 Photographs, **Photostats**, Blueprints, Etc.

(1) The ~~gross proceeds accruing from~~ retail sales of photographs, blueprints and other similar articles are subject to sales or use tax, ~~without any deduction for any part of the cost of production,~~ whether delivered in final printed form or delivered in digital form via telephone lines, over the Internet, by e-mail, or by another alternative form of transmission. The transfer of digital images of these items from a seller to a purchaser for a price constitutes the sale of tangible personal property. The form in which tangible property is delivered by the seller to the purchaser is of no consequence. (Sections 40-23-2(1) and 40-23-61(a)) (Robert Smith FlipFlopFoto v. State of Alabama (Admin. Law Div. Docket No. S. 05-1240, Final Order entered April 30, 2007))

(a) In cases where negatives belonging to the customer are developed, the charge for developing the negatives is not subject to sales or use tax if a separate charge is made to the customer.

(b) In cases where an airplane is chartered for use in making aerial photographs, the charge for use of the airplane is not subject to sales or use tax if a separate charge is made to the customer.

(c) In cases where individuals deliver pictures to photographers or photographic studios for tinting or coloring, the receipts from such tinting or coloring are not subject to tax, since such receipts result from services rendered and do not result from sales of tangible personal property. (Section 40-23-2(1))

~~(2) Any fee for sitting, consultation or any other activity that is done in preparation of the final product, even when separately stated, is a part of the labor or service cost and cannot be deducted from the gross proceeds accruing from retail sales. Therefore, gross proceeds, as referenced in paragraph (1) include, but are not limited to consultation fees, sitting fees, and all other fees when such fees are charged in conjunction with the sale of photographs, blueprints, and other items sold by the retailer as provided in paragraph (1). Any reasonable and customary retainer fee separately stated on the photographer's contract that is both nonrefundable and may not be credited toward any purchase of photographs is not taxable. The separate fee is unrelated to the production of the finished photographs.~~

~~(a) Example 1. Photographer charges \$3,500 for a contract to provide a photographic session. This amount is billed either as a lump sum or broken down on the invoice showing \$3,000 due for consulting, sitting or other fees and \$500 for a disc or access to digital photos. Regardless of whether the pictures are purchased on a disk or accessed digitally, the full amount of \$3,500 is subject to sales or use tax.~~

~~(b) Example 2. Photographer charges \$3,500 for a contract to provide a photographic session. The amount is provided as a lump sum or it is broken down on the invoice showing \$3,000 due for consulting, sitting, or other fees and \$500 for a disc or access to digital photos. The contracting party decides to cancel the photo session and not purchase any photos. There are no sales or use taxes due because there is no sale of tangible personal property.~~

~~(c) Example 3. Photographer charges \$3,500 for a contract for a photographic session. This amount is billed either as a lump sum or broken down on the invoice showing \$3,000 due for consulting, sitting, or other fees and \$500 for a disc or access to digital photos. After the session, the photographer edits the photographs and then mails the disc, album, and/or the printed photographs ordered by the customer to the in-state or out-of-state address provided by the customer. The customer and others can also later order additional photographs from the~~

photographer's online gallery. The photographer also mails those additional photographs to the in-state or out-of-state address provided by the customer.

1. — Prepaid fees constitute a part of taxable gross proceeds because they are for the photographer's labor in planning, shooting, and editing the photographs, which are required and necessary steps in producing the finished, tangible products being sold by the photographer.

2. — The prepaid contract amount is taxable only if the photographer subsequently sells a disc, album, and/or printed photographs to a customer in Alabama. That is, if a customer cancels before the scheduled session date, any prepaid fees collected by the photographer would not be subject to sales tax because no sale of tangible personal property occurred.

3. — The above does not apply, however, to any reasonable and customary retainer fee separately stated on the photographer's contract that is both nonrefundable and may not be credited toward any purchase of photographs. The separate fee is unrelated to the production of the finished photographs.

(d) — Example 4. Photographer books a client one year prior to his/her scheduled photo session. The contract is broken down showing \$3000 for consulting, sitting or other fees, \$250 for a disc of images, and a \$250 print credit. After the session, the client instructs the photographer to mail the disc of images to a location outside of Alabama and to send \$250 worth of prints to a location in Alabama.

1. — The \$250 disc mailed out of state would constitute a nontaxable sale closed outside of Alabama provided it is separately stated on the invoice and the photographer has proof that the disc was placed in interstate commerce. The \$250 worth of prints mailed to a location in Alabama would be taxable in Alabama.

2. — The \$3000 for consulting, sitting or other fees are fully taxable and are considered the photographer's labor in producing the finished photographs. If the consulting, sitting or other fees include a separately stated reasonable and customary retainer fee as described in Example 3, the reasonable and customary retainer fee would not be taxable. The photographer's labor was necessary to produce the items sold in Alabama. Therefore, the entire labor fees would be taxable, even if the photographer also sold additional photographs, in whatever form, outside of Alabama.

3. — In summary, except for any separately stated reasonable and customary retainer fee, the photographer's prepaid fee for taking, editing, and otherwise preparing the discs, albums, or printed photographs for sale is for the photographer's labor associated with those activities, and is a part of taxable gross proceeds. Consequently, in the above example, while the \$250 disc delivered outside of Alabama would be nontaxable, the photographer would owe Alabama sales tax on the \$3,250 balance, less the amount designated as a reasonable and customary retainer, if applicable. If the photographer subsequently sells additional discs, albums, or photographs that were not included in the contract, the proceeds from those sales would be taxable if delivered in Alabama and nontaxable if delivered outside of Alabama. (Jaelyn L. Robinson v. State of Alabama (Admin. Law Div. Docket No. S. 13-807, Opinion and Preliminary Order entered September 8, 2014, Final Order entered October 8, 2014))

(32) The materials which become a physical part of the photographic prints, photostats, blueprints, etc., are purchased tax free at wholesale by the seller of the photographic print, photostat, blueprint, etc. (Sections 40-23-1(a)(9)b and 40-23-60-(4)b

(43) The materials and chemicals used or consumed by the seller of photographic prints, blueprints, etc., but not becoming a component thereof, are purchased at retail by the seller and are subject to the sales or use tax, whichever may apply at the time of such purchase. (Sections 40-23-1(a)(10) and 40-23-60-(5))

(54) **Photographers and others who are in the business of selling at retail photographic prints and other images are entitled to purchase** ~~t~~The mechanical equipment used in the production of photographic negatives, photographic prints, **photostats**, and blueprints including cameras **are taxed** at the reduced machine rate of sales or use tax. (Sections 40-23-2(3) and 40-23-61-(b))

(6 5) Photographic prints, blueprints, or other images sold to an advertising agency for use in the performance of a contract are purchased at retail by the advertising agency and are subject to the sales or use tax, whichever may apply at the time of such purchase. (See Rule 810-6-1-.02, entitled Advertising Agencies.)

(6) The gross proceeds of services provided by photographers, including but not limited to sitting fees and consultation fees, even when provided as part of a transaction ultimately involving the sale of one or more photographs are exempt from sales and use tax, so long as the exempt services are separately stated to the customer on a bill or sale, invoice, or like memorialization of the transaction. For transactions occurring before October 1, 2017, neither the Department of Revenue nor the local tax officials may seek payment for sales or use tax not collected. With regard to such transactions in which sales or use tax was collected and remitted on services provided by photographers, neither the taxpayer nor the entity remitting the tax shall have the right to seek a refund of such tax.

Author: Ginger Buchanan.

Authority: ~~Code of Ala. 1975, §§ Sections~~ 40-2A-7(a)(5), 40-23-1(a)(9)b, 40-23-2(1), 40-23-2(3), 40-23-1(a)(10), 40-23-31, 40-23-60(4)b, 40-23-60(5), 40-23-61(a), 40-23-61(b), and 40-23-83, Code of Alabama 1975.

History: Amended: Filed February 3, 1998, effective March 10, 1998.

Amended: Filed January 11, 2008, effective February 15, 2008.

Amended: Filed November 30, 2016, effective January 4, 2016.