



MULTISTATE INDIRECT TAX

Maryland circuit court strikes down tax on digital advertising services

Tax Alert

Overview

On October 17, 2022, the Anne Arundel County Circuit Court struck down Maryland's Digital Advertising Services Gross Receipts Tax on grounds that the tax is unconstitutional and violates the Internet Tax Freedom Act ("ITFA").

This Tax Alert summarizes the ruling.

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The Maryland Digital Advertising Services Gross Receipts Tax was enacted from a legislative veto override on February 12, 2021. The Maryland Comptroller delayed implementation of the tax to allow time for the issuance of regulations and forms. The tax became effective for taxable years beginning after December 31, 2021. The 0% to 10% graduated tax rate is set based on a taxpayer's global annual gross revenues from all sources (not just digital advertising service revenues). The tax base, on the other hand, is the taxpayer's annual gross revenue from digital advertising services in Maryland.

In accordance with the enacted law, each taxpayer that reasonably expects annual gross revenues derived from digital advertising services in Maryland to exceed \$1,000,000 shall file a declaration of estimated digital advertising gross revenues tax on or before April 15th of that year. A taxpayer required to file a declaration of estimated tax for a taxable year shall complete and file with the Comptroller of the Treasury of Maryland (the "Comptroller") a quarterly estimated tax return on or before June 15th, September 15th, and December 15th of that year. The next quarterly estimated tax return is due on or before December 15th. The Comptroller can assess interest of 10% annually and up to a 25% penalty on unpaid or underestimated tax amounts from the due date to the date of payment if a taxpayer required to pay the tax: (1) fails to pay an installment when due; or (2) estimates tax that is less than 90% of the tax required to be shown on the return and less than 110% of the tax paid for the

prior taxable year.

There is no specific statutory or regulatory provision which provides a statute of limitations for requesting a refund of payment of the digital advertising services tax. However, Maryland does provide a general statute of limitations for tax refunds, which is 3 years from the date of payment.

Upon enactment, Maryland's digital advertising services gross receipts tax faced several potential challenges. On April 15, 2021, Comcast of California/Maryland/ Pennsylvania/Virginia/West Virginia, LLC and other taxpayers used an exception to the general requirement to exhaust administrative remedies and filed a complaint directly in the Anne Arundel County Circuit Court against the Comptroller challenging the constitutionality of the tax. The plaintiffs argued that the tax was unconstitutional as it violates: (1) the United States Supremacy Clause and ITFA, (2) the Commerce Clause of the United States Constitution, and (3) the First Amendment. The plaintiffs asserted that the tax violates ITFA because it is a discriminatory tax targeted at electronic commerce. The plaintiffs further argued that Maryland's tax violates the Commerce Clause, because on its face and as applied it discriminates against interstate commerce. For more information on Maryland's tax and potential challenges after its enactment, please see our previous [Tax Alert](#).

On October 17, 2022, at a motion for summary judgment hearing the court ruled that the tax:

- (1) Is discriminatory against electronic commerce in violation of ITFA and took judicial notice that digital advertising is "similar" to other "traditional" non-digital advertising channels (direct mail, billboards, etc.) which are not taxed in Maryland.
- (2) Violates the Commerce Clause by determining the tax rate based on a taxpayer's total worldwide revenues, not just revenues derived from digital advertising.
- (3) Violates the First and Fourteenth Amendments to the United States Constitution because it singles out the plaintiffs for selective taxation and is not content-neutral. The focus on this point was the "news media entity" exemption.

The above ruling was memorialized in a signed court order that was filed on October 21, 2022.

We will continue to monitor whether the Comptroller plans to appeal this decision.

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