Deloitte Tax LLP
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INDIRECT TAX

Maryland Tax Court holds Digital Advertising Gross Revenues Tax unconstitutional

Tax Alert

Overview

On August 14, 2026, the Maryland Tax Court issued memorandum opinions and orders in three related appeals involving the Maryland Digital Advertising Gross Revenues Tax ("Tax"), Md. Code Ann., Tax-Gen. sections 7.5-101 through 7.5-301 (2021): *Apple Inc. v. Comptroller of Maryland*, No. 23-DA-OO-0456; *Google LLC v. Comptroller of Maryland*, No. 23-DA-OO-0649; and *Peacock TV, LLC v. Comptroller of Maryland*, No. 23-DA-OO-0654. Each case arose on cross-motions for summary judgment from the Comptroller of Maryland's ("Comptroller") denial of a refund of Tax paid for tax year 2022, the first year the Tax was collected. In each case, the court held that the Tax is preempted by the federal Internet Tax Freedom Act ("ITFA"), 47 U.S.C. section 151 note, and violates the dormant Commerce Clause and the Due Process Clause of the Fourteenth Amendment. The court granted the petitioners' motions on all counts in *Apple* and *Google* and in part in *Peacock*, denied the Comptroller's motions on those counts, reversed the Comptroller's decisions, and ordered refunds with interest as applicable under Maryland law. In *Peacock*, the court additionally held that the Tax violates the First Amendment and held for the Comptroller on the petitioner's foreign Commerce Clause claim. See our previously issued Tax Alerts dated February 18, 2021 and June 3, 2021 for details on the initial enactment of the Tax.

This Tax Alert summarizes the three decisions.

Structure of the Tax as described by the court

The court identified three requirements that determine whether the Tax applies:

- Under Tax-Gen. section 7.5-103, the Tax applies to businesses operating in Maryland with at least $100 million in global annual gross revenues, at rates beginning at 2.5 percent and rising to 10 percent for taxpayers with global annual gross revenues exceeding $15 billion.
- Under Tax-Gen. section 7.5-201, the Tax applies to businesses with at least $1 million in annual gross revenues derived from digital advertising services in Maryland.
- Under Tax-Gen. section 7.5-101(e)(2), the Tax applies to digital advertising services in Maryland that are not specifically exempted, with exemptions for digital advertising services on digital interfaces owned or operated by, or operated on behalf of, a broadcast entity or news media entity.

The court noted that Maryland imposes no statewide tax on non-digital advertising services, including billboards, magazines, newspapers, direct mail, other printed media, broadcast radio, and broadcast television, and took official notice that Baltimore City levies a billboard tax on electronic and other outdoor advertising displays.

Digital and non-digital advertising services held “similar” under ITFA

ITFA defines a discriminatory tax to include a tax on electronic commerce that is not generally imposed on transactions involving “similar property, goods, services, or information accomplished through other means.” The court identified “similar,” which ITFA does not define, as the controlling term, found the term ambiguous, and held hearings on the questions of “similar” and related definitional terms.

The court distinguished four ITFA cases relied on by the Comptroller, finding them to be less than persuasive on the ground that none concerned advertising services. The court was persuaded in part by an Illinois ITFA case, cited by petitioners, that involved a use tax imposed on online advertising but not on print or broadcast advertising.

Based on the testimony and other evidence, the court held that the provision of digital advertising services is indistinguishable from the provision of non-digital advertising services, and that the two are “even more aligned than ‘similar.’” The court stated that purpose is the paramount consideration, and that the purpose of digital advertising services is the same as that of non-digital advertising services, which is to make an impression on receivers of the advertising that leads to a sale of goods or other action. The court held that ITFA concerns transactions of electronic commerce rather than the structures, business models, or technical operations behind those transactions. The court rejected the Comptroller’s suggested test under which services differing operationally by one or two characteristics are dissimilar.

Technical Bulletin 59 and Code of Maryland Regulations 03.12.01.B addressed

The Comptroller published Technical Bulletin 59 (“TB59”) the same month as the hearings, introducing “programmatic” and “visual” as key factors in its interpretation of the Tax. The Comptroller incorporated the main elements of TB59 into the Code of Maryland Regulations (“COMAR”) 03.12.01.B on March 2, 2026. The court observed that TB59 and the regulation postdate the refund claims and are technically irrelevant to the appeals, and addressed them because they serve as guidance for state auditors.

The court held that TB59 adds very little to the determination of “similar,” noting that neither “programmatic” nor “visual” appears in ITFA or in the Tax, and held that the Tax violates the “similar” requirement of ITFA notwithstanding the elevation of TB59 to regulation. The court gave little deference to the Comptroller, which was interpreting a state statute in light of federal law, had no longstanding interpretation of a tax enacted in 2021 and first collected in 2022, and offered no testimony on how the state statute fits within ITFA.

Private right of action, preemption, and anti-commandeering arguments rejected

The court held that the absence of a private right of action under ITFA is irrelevant to the appeals because the petitioners sought refunds of tax paid, using ITFA as justification for refund claims rather than filing stand-alone actions to enforce the federal statute.

On preemption, the court held that ITFA language is a “clear and manifest” expression of Congress’ intent that a state not discriminate against internet services. The court applied the three preemption attributes recited in a recent Maryland Supreme Court decision and noted that ITFA contains no saving clause.

On anti-commandeering, the court held that *Murphy v. National Collegiate Athletic Ass'n*, 584 U.S. 453 (2018), is inapposite because, unlike intercollegiate gambling, interstate commerce is subject to Congress' plenary authority and held that ITFA is a valid exercise of that authority.

Tax held not fairly apportioned and discriminatory under the dormant Commerce Clause

Applying the four-prong test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the court held as follows:

- **Substantial nexus.** In *Google*, where the petitioner challenged all four prongs, the court held that the Tax has a substantial nexus with Maryland and that prong 1 is satisfied. The petitioners in *Apple* and *Peacock* did not raise prong 1.
- **Fair apportionment.** The court held that the Tax fails the external consistency test articulated in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), and *Goldberg v. Sweet*, 488 U.S. 252 (1989), because the rate increases with a taxpayer's global revenues, which have no relation to Maryland activity. The court illustrated the point with two taxpayers each having $10 million of Maryland digital advertising service revenue: one with $100 million of global revenues pays 2.5 percent, or $250,000, and one with just over $15 billion of global revenues pays 10 percent, or $1,000,000. In *Apple*, the court distinguished a Washington Supreme Court decision relied on by the Comptroller on the grounds that the Washington tax was an add-on to an existing tax on in-state revenue, was imposed at a fixed rate, and was evaluated only under prong 3.
- **Discrimination.** The court held that unfair apportionment is a form of discrimination against interstate commerce, citing *Armco v. Hardesty*, 467 U.S. 638 (1984), and *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015). Citing *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), the court held that the Tax, while facially neutral, favors in-state businesses because few if any have global revenues meeting the $100 million threshold.
- **Fair relation to state services.** In *Apple* and *Google*, the court held that prong 4 is violated because payors receive no additional benefit for the additional tax attributable to higher global revenues.

The court concluded that tying the tax rate and the $100 million threshold to global revenues, while leaving in-state digital advertising services revenue as the only remaining factor, caused unconstitutional discrimination.

Due Process Clause violation based on discrimination

The court applied the two Due Process requirements stated by a Maryland appellate court: (1) a minimal connection between the interstate activities and the taxing state, and (2) a rational relationship between the income attributed to the state and the intrastate values of the enterprise. The court found that the second requirement is not met, for the same reasons that prong 3 of *Complete Auto* is not met, and that the Tax violates due process because it is discriminatory.

First Amendment and foreign Commerce Clause holdings in *Peacock*

In *Peacock*, the court held that the Tax violates the First Amendment and Article 40 of the Maryland Declaration of Rights, which Maryland courts have held to be *in pari materia* (i.e., on the same subject matter) with the First Amendment. Applying *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), and addressing the Comptroller's reliance on *Leathers v. Medlock*, 499 U.S. 439 (1991), the court held that the broadcast entity and news media entity exemptions have the effect of suppressing speech falling outside those definitions, that the statutory requirement that an entity be engaged "primarily" in the exempted activity invites discrimination on the basis of content, and that the undefined terms “news” and “primarily” are vague. The court stated that the question of severability of the exemption is beyond the scope of its authority and addressed severability only as dictum.

The court reached a different result on petitioner’s foreign Commerce Clause claim. Applying the two inquiries of *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434 (1979), the court held that the Tax does not violate the foreign Commerce Clause, granted the Comptroller's motion on that count, and denied the petitioner's motion.

Refunds ordered and appeal rights

In each case, the court reversed the Comptroller's decision and provided that the refund must be paid with interest as applicable under Maryland law.

Each opinion states that the petitioner exhausted administrative remedies under Maryland law and that its appeal was timely filed. Each order is accompanied by a notice stating that a party may appeal to the circuit court of any county or Baltimore City in which the property or subject of the assessment may be situated, and that a petition for judicial review must be filed within 30 days of the date of the order.

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