

Alert | State & Local Tax (SALT)



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Maryland’s Digital Advertising Gross Revenues Tax Not Dead (Yet)

Supreme Court of Maryland Vacates Maryland Circuit Court’s Order that Ruled the State’s Digital Advertising Gross Revenues Tax Invalid on Procedural Grounds

Background

In October 2022, a Maryland circuit court judge struck down Maryland’s first-in-the-nation Digital Advertising Gross Revenues Tax (“Digital Ad Tax”), denying the Comptroller of Maryland’s motion to dismiss, granting plaintiffs’ motion for summary judgment, and declaring the Digital Ad Tax violated the federal Internet Tax Freedom Act and the U.S. Constitution’s Commerce Clause and First Amendment. See [GT Alert](#). The Comptroller’s Office appealed the circuit court’s judgment, and the Supreme Court of Maryland agreed to hear the case.

The Comptroller’s primary argument on the appeal was that the taxpayers were precluded from bringing a court challenge regarding the constitutionality of the Digital Ad Tax before exhausting administrative remedies.

On May 9, 2023, just four days after oral argument before the circuit court, the Supreme Court of Maryland issued a [Mandate](#), vacating the circuit court’s order granting the taxpayers’ motion for summary judgment, stating that “the Circuit Court for Anne Arundel County lacked jurisdiction over this action because the appellees failed to exhaust their administrative remedies.” The Mandate notes that its rationale will be stated later in an opinion to be filed by the Court.

Impact on Taxpayers

The Court’s ruling could have a significant impact on how tax cases are litigated in Maryland. The following lines from the taxpayers’ initial brief encapsulate the impact:

At the hearing on Defendant’s motion, the Comptroller acknowledged the existence of the constitutional exception, but argued that it applied only to “ministerial” or “mechanical” constitutional violations, such as an improper bill title... He argued it was not available to challenge the legality of a tax on substantive grounds. [] This was so, according to the Comptroller, even if a tax was enacted on transparently unconstitutional grounds—the Circuit Court asked, for example, about a hypothetical tax aimed solely at Native Americans. In response, the Comptroller asserted that the exception would not be available in such circumstances; the only way for a person to challenge such a tax would be to pay it and seek a refund or wait to be assessed—“[a]s difficult as that may be to handle or swallow.”

And with this decision, constitutionally suspect taxes will be allowed to survive while taxpayers and administrators work through a laborious administrative process to challenge them.

Impact on Maryland Digital Advertisers

The Supreme Court’s remand of this case to the Circuit Court for Anne Arundel County with directions to dismiss will require companies whose services meet the broad definition of “digital advertising services” to take steps to determine whether they will be subject to the tax’s various filing requirements.

Immediately, digital advertisers must determine if their 2023 digital advertising service receipts in Maryland will exceed \$1 million; if so, then the businesses must quickly file a return to mitigate penalties.

The Digital Ad Tax may apply to a broad swath of businesses, including companies located outside Maryland. Although the minimum assessable tax base is global annual gross revenues of at least \$100 million, the annual return filing threshold is merely \$1 million in annual gross revenues from digital advertising in Maryland.¹ Digital advertisers who expected their 2023 annual gross revenues derived from digital advertising services in Maryland to exceed \$1 million were required to file a declaration of estimated tax and pay 25% of the estimated tax on or before April 15, 2023.² Additionally, declarations of estimated tax, estimated tax returns, and payments of 25% of the estimated tax are due on or before June 15, 2023, Sept. 15, 2023, and Dec. 15, 2023.³ Title 13 of the Tax General Article mandates that taxpayers that willfully fail to file an annual return or quarterly estimated tax returns be subject to criminal penalties, which may include a misdemeanor conviction plus either monetary fines, imprisonment, or both.⁴

Notwithstanding the constitutional uncertainty surrounding the tax, the Court’s ruling means that no taxpayer may challenge the Digital Ad Tax outside the normal administrative process. Taxpayers will need to either pay the tax and commence the refund claim and administrative appeal process or fail to pay the tax and file an appeal once assessed by the Comptroller’s Office.

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¹ Md. Code, Tax-Gen. §§ 7.5-201(a).

² Md. Code, Tax-Gen. §§ 7.5-201(b)(1); 7.5-301(b)(1).

³ Md. Code, Tax-Gen. §§ 7.5-201(b)(2); 7.5-301(b)(1).

⁴ See Md. Code, Tax-Gen. § 13-1001(G).

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