

Speaker 1 ([00:01](#)):

This podcast episode reflects the opinions of the hosts and guests and not of Greenberg Traurig LLP. This episode is presented for informational purposes only, and it is not intended to be construed or used as general legal advice nor a solicitation of any type.

Nikki Dobay ([00:16](#)):

We're going to pretend that's a rhetorical question, so neither one of us really have to put words in the comptroller's mouth. But it does just, from the taxpayer's perspective, this one is so obvious.

([00:29](#)):

Hello and welcome to GeTtin' SALTy, a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay, shareholder in the Sacramento, California and Portland, Oregon offices. I am very pleased to be joined today once again by a colleague of mine, DeAndré Morrow. De is counsel in the DC office. De, thank you so much for joining me.

Deandre Morrow ([00:52](#)):

Thank you for having me back.

Nikki Dobay ([00:53](#)):

De, seems like we're always talking about Maryland. Is that like your favorite topic?

Deandre Morrow ([00:59](#)):

It is one of them.

Nikki Dobay ([01:01](#)):

Okay. Well, we are back talking about Maryland. It's been a few months since we talked about this. Since then, we wrote an article about this issue and so we are going to be getting back into the Maryland digital advertising tax. If you listen to the last podcast, De and I went through the history and all the litigation that has been ongoing with respect to this tax, kind of give a blow-by-blow of where things were. Unfortunately at that point, it was right after the Maryland Supreme Court had dismissed the state case challenging the constitutionality of that tax.

([01:39](#)):

And De, I think when we left off we said we'd have to wait and see what happened. And it sounds like some things have been happening. So, you're doing some investigating reporting on the ground. What are you seeing there in Maryland?

Deandre Morrow ([01:52](#)):

Yeah. No, absolutely. So I'd say in October, we saw an explosion in terms of just action. Most of that being a plethora of denials of refund claims that we're hearing coming down. What we are hearing, most if not all of those refunds have been denied for one reason or another. And we'll get into the rationale for some of those denials. And we're also hearing about a claim that's already made it to Maryland Tax Court, so that's Apple's appeal. And there's been some interesting sort of procedural things going on there, procedural arguments being made by the comptroller's office. Comptroller's office actually recently submitted a motion to dismiss. And that's being heard before the court, I believe next month.

Nikki Dobay ([02:39](#)):

Okay. All right.

Deandre Morrow ([02:40](#)):

Or this month rather.

Nikki Dobay ([02:41](#)):

All right, so we've had a bunch of refund claims. And I think the article we wrote, we expected this to happen, because we expect that another state level challenge will be teed up. I'm noticing the golf picture right behind you as we're recording, so made me think of the word teed up. But you said there's a couple of reasons why these denials are happening. So, can you catch us up on procedurally what the heck is going on in Maryland with this thing, and if we know the answer to that?

Deandre Morrow ([03:14](#)):

Yeah. So one thing I'll say, pat ourselves on the back for that article because we got a lot of things. We missed on some things, but one of the things that we noted in sort of speculating how this may work from a procedural standpoint, as we were saying, taxpayers file refund claims or if they wouldn't file, pay taxes, they give you assessed, denied. Then they file a claim with the comptroller's office. And we put something in that we said basically the comptroller's office could hold hearings if requested. Or rather we said something like, the process may involve that.

Nikki Dobay ([03:48](#)):

Right.

Deandre Morrow ([03:49](#)):

And that might've seemed peculiar to some people, but what we're seeing sort of is exactly what we were contemplating. And that is how the comptroller's office was going to process refund claims from a procedural standpoint. So take this back a little bit, right? So the comptroller administers, I believe 12 different tax types. Most of those tax types, the regime, the remedial scheme is spelled out under 13-508 of the Maryland's tax code. So, that's the procedure for contesting most taxes. And that procedure says, "Upon receiving an assessment, taxpayer can within 30 days, file a revision. Or they can pay the tax, file a refund claim." And that triggers an informal hearing with the comptroller's office. It's spelled out in that statute, an informal hearing by the comptroller's office followed by a notice of final determination from the comptroller.

Nikki Dobay ([04:46](#)):

And that's what they appeal? That's the trigger?

Deandre Morrow ([04:50](#)):

Typically.

Nikki Dobay ([04:51](#)):

Okay.

Deandre Morrow ([04:51](#)):

The digital ad tax didn't make the cut. It's not one of the taxes enumerated in 13-508.

Nikki Dobay ([04:57](#)):

Okay.

Deandre Morrow ([04:58](#)):

So it has to go through another process, or procedurally get to tax court or whomever, another way. That procedural pathway is carved out under sections 13-901 through 904 of Maryland's tax codes. So, I won't get into the intricacies of that, but at a high level, one of those provisions essentially says, "If claim for refund is filed, stating that the tax was illegally or erroneously collected, the comptroller shall do two things. They'll investigate the claim, they will conduct a hearing." The comptroller's read in, I think, this is speculating again because trying to adjust or figure out how this could happen. But the informal hearings that I mentioned in 508, you go have a hearing before the hearings and appeals division, which is a division within the comptroller's office, that's not happening for digital ad taxes.

Nikki Dobay ([05:48](#)):

Okay.

Deandre Morrow ([05:48](#)):

These appeals are being pushed straight to tax court. I am only speculating here perhaps the comptroller's interpreting 904 to not require them to hold hearings. But that's procedurally one thing that's happening.

([06:00](#)):

Another thing that's happening, and I don't know if this is really a creature of procedure or just a creature of the tax not being as developed as the other taxes, is the comptroller's office is saying that taxpayers are not filing the refund claims in the form required by the comptroller's office because-

Nikki Dobay ([06:19](#)):

I see.

Deandre Morrow ([06:20](#)):

... that 13-9, one of those provisions requires the returns to be filed in a form provided by the comptroller's office. Well, in some instances at the periods in which these refunds were filed, there wasn't a spelled out procedure.

Nikki Dobay ([06:36](#)):

Right. Or forms.

Deandre Morrow ([06:37](#)):

So... Or forms, right.

Nikki Dobay ([06:39](#)):

Right. Okay.

Deandre Morrow ([06:40](#)):

Those are some of the procedural issues that are making this stickier than the typical tax.

Nikki Dobay ([06:45](#)):

So, let's chat about that just a little bit, because I think that's some great insights. Because first we were just really focused on the constitutionality of this tax with the state court case and the initial win and the federal tax case, which is still pending, and we'll kind of chat about. But once the Supreme Court kicked this case out and all this goes back to the comptroller to deal with, I think we were all still hoping there would be a pretty speedy path back to the tax court and up through the Maryland judicial system to determine whether or not this tax was constitutional or not. I think everybody just wants to know the answer to the substantive question. But based on what I will call a procedural quagmire, it seems like it's going to take us some time to get back to a court that's going to be squarely facing that substantive issue. Is that kind of what you're seeing on the ground there?

Deandre Morrow ([07:45](#)):

Yeah, absolutely. And I thought about trying to figure out where things went wrong, where there's a miscommunication. A lot of the issues that we've been hearing at the federal court level and obviously, at the state court procedurally, the thought process I believe, has been that or thought process of the comptroller's office and obviously of the Maryland Supreme Court was that there was a speedy process. And I went back and looked at those cases, like some of the briefs and I'm realizing all of those had 13-508 mentioned in them.

Nikki Dobay ([08:20](#)):

Okay.

Deandre Morrow ([08:21](#)):

I wonder if there was this misconception or just thought like, "Oh yeah, this will go through the regular process." But I think this is showing that there isn't a speedy and efficient process for the digital advertising tax. I mean the motion to dismiss by the comptroller's office to me, is evidence of why the taxpayer at the state level, should have won. And we can get into this, but I think it's going to have some impact on the federal case, I hope.

Nikki Dobay ([08:47](#)):

Yeah. And so is that motion to dismiss, is that squarely based on this, the taxpayer was following the, what I will call the general path that most taxes go through? And now the comptroller's moving to dismiss because this other process wasn't filed. Is that really the crux of the motion to dismiss?

Deandre Morrow ([09:09](#)):

No, not for this one.

Nikki Dobay ([09:11](#)):

Okay.

Deandre Morrow ([09:12](#)):

And that's where things... You said the procedural quagmire.

Nikki Dobay (09:15):

Mm-hmm.

Deandre Morrow (09:15):

All right, so let me take another quagmire and just mix these two together 'cause that's going to make this even more confusing. Right?

Nikki Dobay (09:22):

Perfect.

Deandre Morrow (09:24):

Exactly. So in dissecting the landscape of appellate scenarios in the digital ad cases within Maryland, it appears likely that there exists various buckets of refund claimants. Right?

Nikki Dobay (09:37):

Okay.

Deandre Morrow (09:37):

So, I think there might be three, right? So I think the first one probably encapsulates those that initiated refund claims following the October, 2022 circuit court case. Subsequently, I think the second bucket's going to be comprised of taxpayers who filed refund claims like post submission of their 2022 written returns. Reason being that there's this Supreme Court case. And then lastly, I think the bucket's going to involve those that were assessed.

(10:08):

So, there's two paths to the procedural. So administrative [inaudible 00:10:13]. The first path you pay the tax, you file a refund claim. Second path, you don't pay the tax you get assessed in thereafter, you protest those appeals. So I suspect that these categories encapsulate the pivotal junctures at which a taxpayer would've interjected.

(10:27):

So, to get back to Apple, Apple was in that first bucket. So they filed a refund claim, following the [inaudible 00:10:35] County's court decision saying that the tax violated [inaudible 00:10:40] unconstitutional. They filed in November of 2022, that's before the year-end returns were due, so they filed a refund claim for their estimated taxes. The comptroller's office is essentially saying that they didn't follow the form provided by the comptroller or provide the supportive documentation.

Nikki Dobay (10:58):

Okay.

Deandre Morrow (10:58):

There was no actual form at that point in time. That's what makes this interesting for them.

Nikki Dobay (11:02):

Yeah, it just seems like this is, and again, I think this is one of the main points we were making in our article, was really that at the end of the day, at least for me, I'll speak for myself, I believe that this tax

will be determined to be unconstitutional. And right now, we're just stuck in this really ticky tacky back and forth where... And I know the comptroller has a job to do as well. They're tasked with administering this tax. But it just seems like we're going to be kind of stuck in this quagmire for quite some time before we get the court to rule.

Deandre Morrow ([11:34](#)):

Yeah. And I don't want to be cynical, but I do have a question. Do you think that the comptroller's office is trying to procedurally get taxpayers kicked out to retain as much money as they can before a taxpayer comes through? And they have to know, right?

Nikki Dobay ([11:49](#)):

Right. Yeah.

Deandre Morrow ([11:49](#)):

Am I-

Nikki Dobay ([11:49](#)):

Yeah.

Deandre Morrow ([11:49](#)):

[inaudible 00:11:50].

Nikki Dobay ([11:50](#)):

I'm with you. We're going to pretend that's a rhetorical question, so neither one of us really have to put words in the comptroller's mouth. But it does, just from the taxpayer's perspective, this one is so obvious. And I do tend to agree that some can is being kicked down the road. And I think we also said this in the article, there's going to be so much more... The longer the can gets kicked down the road, the more there is to unwind and to refund. And they're going to be taking more money away from the kids. And it's just really unfortunate. So, we'll have to see how many more podcasts we can get out of this. No, just kidding.

Deandre Morrow ([12:27](#)):

[inaudible 00:12:29].

Nikki Dobay ([12:29](#)):

But I guess, De, the final thing to talk about, and we kind of touched on this in the article, but I don't think we had as much insight at that time, is how much is this, what is going on procedurally right now with the state level, with the state level refunds and denials, how much will that play into the federal case? Because there was a hearing in that case, the oral arguments last month, so we should see a decision sometime early next year. But one of the reasons that the Tax Injunction Act could not apply is because there's no plain, efficient, and speedy remedy at the state level. And so based on what's going on, do you think that the current situation... I think it could really help that federal case.

Deandre Morrow ([13:17](#)):

Yeah, absolutely. As you said, the taxpayers in that case lost in Maryland district court level, so they appealed to the Fourth Circuit. And I agree. I mean I think the motion to dismiss by the comptroller's office, my hope is that it paves the pathway to them proving to the court like, "Hey, this is clearly an inefficient administrative process." So taxpayers are suffering more right now by going through this process. So, I think it could only help them.

Nikki Dobay ([13:48](#)):

Yeah. Well and again, not to harp on the article, but hopefully at some point, we can kind of get through all of these procedural issues and just get a court to really focus on the substance of this. Well D, thank you so much for joining me again. Unfortunately, I know we'll be back talking about this 'cause it seems like it's not going away.

Deandre Morrow ([14:11](#)):

Yeah, I'm finding materials that I wrote three years ago that are still good junk.

Nikki Dobay ([14:17](#)):

All right. Well, we'll find some other stuff to talk about too. But I can't let you go before I ask you a surprise non-tax question.

Deandre Morrow ([14:24](#)):

Uh-oh.

Nikki Dobay ([14:25](#)):

And I've been thinking about this, "What am I going to ask?" So, it just came to me. So we had a holiday 'cause it was Halloween. What kind of Halloween person are you? Are you into it? Does your family all dress up? Do you make sure all the lights are off and hide from the children in the neighborhood? So, where are you at on the Halloween spectrum? So, we don't dress up, Per and I don't dress up, but I dress Rosie up, our dog. And so this year, she's a rat terrier, but we don't know what happened. But a few weeks ago she was bit by a bat on a dark and stormy evening, and she grew bat wings. So for Halloween, she became the bat terrier. And she kind of did terrorize some of the kids in our neighborhood. We were using it as a training opportunity. She did okay, but there were definitely some kids that were afraid of the bat terrier. So, where are you guys? Where's the fam on this? And are you a Halloween person?

Deandre Morrow ([15:26](#)):

So in recent years now, so now I have a three-year-old and a four-month-old, in recent years I have become a holiday person in general, but definitely Halloween. And the viewers can't see this, but you can see that I have a turtleneck on. And the reason I have a turtleneck on is because I bought this turtleneck for... Nothing wrong. I would wear it [inaudible 00:15:49].

Nikki Dobay ([15:48](#)):

I like a turtleneck.

Deandre Morrow ([15:50](#)):

Thank you. But I bought this turtleneck specifically for Halloween.

Nikki Dobay ([15:53](#)):

Okay.

Deandre Morrow ([15:54](#)):

Why? Because my three-year-old daughter loves, loves, loves Despicable Me in the Minions. And we did a trunk or treat last week and she was all into it. She had her Minion costume on and she was all in it, walking around. And she just loved it. She was even doing the Minion walk, which is basically very, very, very tiny steps.

Nikki Dobay ([16:17](#)):

Okay.

Deandre Morrow ([16:17](#)):

I was like, "Please, please go to the next car for this trunk or treat."

Nikki Dobay ([16:20](#)):

Yes.

Deandre Morrow ([16:21](#)):

So Halloween comes around on Tuesday, mommy and daddy want to get in on the fun. So I was supposed to be Gru, hence the turtleneck.

Nikki Dobay ([16:29](#)):

All right.

Deandre Morrow ([16:31](#)):

And she was not having it. She did not want us to put our costumes on. So we couldn't put our costume on, and by the end of the night, she didn't want to put our costume on. And we keep the lights on. So we keep the lights on, we had candy, trick or treaters were coming by, we gave them candy. And it was interesting because when they would come by, she was in her pajamas, she'd come at the door, and she would, "Hi kids, trick or treat." And I'm like, "This could have been you." So yes, very into Halloween and various other holidays. But this year unfortunately, didn't get to participate, so I'm a little bummed. So I was like, "You know what, I'm getting something out of this turtleneck today."

Nikki Dobay ([17:14](#)):

All right. Okay. Well the turtleneck looks good, so-

Deandre Morrow ([17:16](#)):

Thanks.

Nikki Dobay ([17:16](#)):

... keep rocking it. And I think she's learning. Maybe she didn't realize, "Oh, it's only one night a year." Next year she'll be like, "Oh, I got to do this." Well, that sounds awesome. Thank you again, De, for joining me and having this conversation. We will put links to De's and my contact information in the



show notes, as well as a link to the article that we've been referencing. And if you want any other information about the background and history of this tax, please go back and check out the first podcast De and I did on this. And thank you for the listeners for joining. I'll be back with you soon in a few weeks on GeTtin' SALTy.