SALT Alert! 2026-08: Maryland Tax Court finds digital advertising services tax is unconstitutional

The Maryland Tax Court recently issued its determination in the litigation involving three technology industry taxpayers and the Maryland Comptroller regarding the legality of the state Digital Advertising Gross Revenues (DAGR) Tax enacted in 2021.[1] The taxpayers had paid the tax due for tax year 2022 and sought refunds, which the Comptroller had denied. After exhausting their administrative remedies pursuant to Maryland law, the taxpayers filed appeals of the refund denials with the tax court. During the appeals process, both the taxpayers and the Comptroller filed cross motions for summary judgment, and the Comptroller requested a hearing on the issue of whether digital advertising services are “similar” to non-digital advertising services for purposes of the federal Internet Tax Freedom Act (ITFA).[2] In its determination, the court found for the taxpayers in all major regards, holding that the DAGR tax violated ITFA, as well as the dormant Commerce Clause, and the Due Process Clause of the U.S. Constitution.

By way of background, the relevant aspects of the tax include: (a) the tax applies only to businesses operating in Maryland that have at least $100 million in global annual gross revenues and have at least $1 million in in annual gross revenues from digital advertising services in Maryland; (b) tax rates are graduated based on global revenues of the taxpayer and run from 2.5 percent to 10 percent for taxpayers with greater than $15 billion in gross revenues; and (c) state law contains an exemption from the tax for services on digital interfaces owned or operated on behalf of a broadcast entity or news media entity. The court noted in its review of the tax that there is no statewide tax on advertising services that are not digital, such as those involving billboards, magazines, newspapers, printed material, or broadcast media.

While the details of the taxpayers’ contentions varied somewhat, the central argument was that the tax is unconstitutional on three grounds: (a) the DAGR tax

[1] The Tax Court issued a separate opinion for each taxpayer, but the discussion is largely the same in each case, and they are discussed as a group here. One taxpayer did raise two additional arguments regarding the constitutionality of the tax that are not addressed here.
[2] [2] 47 U.S.C. § 151 note (1998).

violates ITFA, which expressly preempts state taxes that discriminate against electronic commerce; (b) the tax violates the dormant Commerce Clause because it violates some or all prongs of *Complete Auto*; and (c) the tax violates the Due Process Clause because it burdens interstate commerce and regulates extraterritorial conduct.

In response, the Comptroller argued: (a) ITFA violates the anti-commandeering proscription inherent in the Tenth Amendment to the U.S. Constitution; (b) ITFA does not confer upon parties a private right of action to enforce it; (c) ITFA does not preempt the DAGR tax because digital advertising services are not similar to other forms of advertising; (d) the tax does not violate the dormant Commerce Clause because it meets all the requirements of *Complete Auto*; and (e) the tax does not violate the Due Process Clause because it is not externally inconsistent and does not tax extraterritorial values.

Internet Tax Freedom Act

The court first addressed the parties' ITFA arguments regarding whether the tax discriminates against electronic commerce. The court focused on the meaning of the word "similar" in the statutory provisions and define a "discriminatory tax" as any tax imposed on electronic commerce that is not generally imposed on transactions involving "similar property, goods, services, or information accomplished through other means." The term "similar" is not defined by ITFA, so the issue facing the court was whether digital advertising services are "similar" to non-digital advertising such as billboards, print newspaper ads, and broadcast television commercials.

The taxpayers cited an Illinois Supreme Court case, *Performance Marketing Ass'n, Inc. v. Hamer*,[3] which the court found relevant. The case involved online advertising distributed in Illinois that contained certain code allowing the tracing of sales by a retailer to the advertising source. Based on that data, the state had imposed use tax on the retailer if sales from sources in the state exceeded a certain level. Illinois did not, however, impose tax on print or broadcast advertising that contained similar codes, and the Illinois Supreme Court held that this violated ITFA. The Comptroller in turn cited four cases, none of which the court found to be persuasive or not on point. In the court's estimation, one case involved the inclusion of a booking fee in the sales price (*Priceline*),[4] and another included a determination that certain similar services were subject to tax (*Labell*).[5] Two other cases cited by the Comptroller were considered to involve an inaccurate comparison of a service to a taxed product (*Gartner*[6] and *ADP*[7]).

In the court's judgment, the taxpayers took a broad interpretation of the term "similar," while the Comptroller took a more granular view of the term. The taxpayers focused on the purpose of advertising, while the Comptroller focused on the differences in the business models and methods of delivery between digital and non-digital advertising. The court noted, however, that in its view of ITFA, "Congress could not have been any clearer that it did not want internet services of

---

3 998 N.E.2d 54 (Ill. 2013).
4 No. 09 C 4438, 2011 WL 4913262 (N.D. Ill. Oct. 14, 2011).
5 147 NE.3d 732 (Ill. Ct. App. 2019).
6 455 P.3d 1179 (Wash. Ct. App. 2020).
7 524 P.3d 278 (Ariz. Ct. App. 2023).

any kind taxed unless other similar services in the broader sense were taxed." The determination of whether two things are similar should be determined by "a plurality of the characteristics," and to the court, "purpose is the paramount consideration." Here, both digital and non-digital advertising are trying to accomplish the same thing – make an impression on the recipient of the advertising in order to lead to a sale or some other action. In that respect, the court viewed digital advertising and non-digital advertising as essentially indistinguishable.

Having found that the DAGR tax violated ITFA, the court next considered whether the taxpayers were prevented from seeking a private remedy due to the lack of enforcement provisions in the statute. The court held that the taxpayers were not trying to enforce ITFA against the state but merely using it as justification for their refund claims, which was the correct procedure.

On the issue of whether the Supremacy Clause of the Constitution applied to preempt Maryland law, the court found that ITFA had a clear and manifest expression of Congress's intent, and that there were three controlling attributes for preemption: (a) a federal statute does not need to provide explicitly that state laws are preempted; (b) preemption may be presumed when the federal legislation is sufficiently comprehensive to leave no room for supplementary state regulation; and (c) in addition to express and implied preemption, a state law is also invalid to the extent it actually conflicts with a federal statute. The court found all these elements were satisfied here.

The Comptroller's anti-commandeering argument was essentially that Congress may not order states to do something over which the Constitution did not give Congress sole authority. The Comptroller cited the case *Murphy v. Nat'l Collegiate Athletic Ass'n*,[8] in which the U.S. Supreme Court struck down a federal statute prohibiting states from authorizing gambling on college sports. The court found that this case was inapplicable here, because Congress has clearly been granted plenary authority to regulate interstate commerce under the Commerce Clause.

Dormant Commerce Clause

To analyze the parties' dormant Commerce Clause arguments, the court focused on the four-pronged test from the *Complete Auto Transit, Inc. v. Brady*[9] case, which will uphold a tax on interstate commerce if: (1) the tax applies to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the state. The taxpayers, as a group, had argued that all four prongs were violated by the DAGR tax. As analyzed by the court, the DAGR tax failed to satisfy three of the four prongs.

As to the nexus prong, the court noted that the tax base of the DAGR tax consists solely of revenues from digital advertising services in Maryland. As such, the tax had a substantial nexus to Maryland.

For the fair apportionment prong, the court focused on whether the tax was externally consistent, i.e., whether a state tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing state, and whether

[8] 584 U.S. 453 (2018).
[9] 430 U.S. 274 (1977).

there was a threat of multiple taxation. Here, the court found that the DAGR tax rate increases based on a taxpayer's global revenues and activities, and these activities may have no connection with Maryland. Similarly, the tax rate increases in direct proportion to a taxpayer's global revenues. The court found that this violates the principles of fair apportionment and creates external inconsistency.[10] Therefore, the second prong of *Complete Auto* was not satisfied.

For the third prong, the court noted that unfair apportionment is de facto discrimination against interstate commerce, citing the Supreme Court decision in *Armco v. Hardesty*.[11] Further, the court found that the tax favored in-state businesses because there appeared to be few, if any, that would have the requisite global revenues to be subject to the tax, and graduating the tax rate based on global revenues had the "practical and intended" effect of applying to non-Maryland companies. Even if the tax was neutral on its face, it therefore discriminated against interstate commerce.

For the fourth prong (a fair relation of the tax to state services), the court found that a taxpayer with large global revenues from out-of-state activities would pay a higher tax than one without large global revenues from out-of-state activities. These global revenues have no relationship to services provided by the state which could benefit the more globally robust taxpayer. Therefore, the fourth prong was not satisfied.

Due Process Clause

The court noted that there are "significant parallels" between the dormant Commerce Clause and the Due Process Clause restrictions, but determining whether the clauses had been violated were two separate and distinct questions. Under U.S. Supreme Court jurisprudence, the Due Process Clause requires (1) a minimal connection between the interstate activities of a taxpayer and the taxing state, and (2) a rational relationship between the income attributed to the state and the intrastate values of the taxpayer's enterprise. In this case the court found that this second requirement had not been met for the same reasons as the third prong of the *Complete Auto* test: the tax violates due process because it discriminates against interstate commerce. Therefore, the court ruled in favor the taxpayers on this issue.

Conclusion and contacts

Having found that the digital advertising services tax violated ITFA, the dormant Commerce Clause, and the Due Process Clause, the court granted summary judgment in favor of the taxpayers. The court ordered the Comptroller to issue a refund of the tax paid by the taxpayers along with interest. The Comptroller has 30 days from the date of the order to appeal the matter to the circuit court of any county.

---

[10] The court provided an example. Company A has $100 million in global revenues and $10 million in Maryland digital ad revenues; it would pay at a 2.5 percent rate or $250,000. Company B also has $10 million in Maryland ad revenues but has global revenues of $15 billion; it would pay at a 10 percent tax rate or $1 million on the same tax base. The court considered this to be unfair apportionment.
[11] 467 U.S. 638 (1984).

For further information or questions on the cases involving Apple, Inc., Peacock TV, LLC, or Google LLC, please contact Jeff Cook or Jeremy Jester.