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Maryland Tax Court Invalidates Digital Advertising Tax: What the Decisions Mean for Digital Service Providers – and Their Clients

by Samantha K. Breslow , Lauren A. Ferrante , David A. Hughes , Kylan S. Memminger

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In a long-running challenge, the Maryland Tax Court ("Tax Court") held that Maryland's Digital Advertising Gross Revenues Tax (the "Digital Advertising Tax" or the "Tax") unlawfully discriminates against digital advertising in violation of the federal Internet Tax Freedom Act ("ITFA"), granting refund relief to Apple[1], Google[2], and Peacock TV[3] (the "Taxpayers"). The Tax Court also held that the Tax violates the Commerce and Due Process Clause of the U.S. Constitution.

The decisions, released on August 14, 2026, represent the most consequential rulings on the merits so far involving Maryland's first-in-the-nation tax on digital advertising revenue.

The Digital Advertising Tax

In 2021, Maryland enacted the Digital Advertising Tax[4], which applies to businesses that have at least $100 million in global annual gross revenue and at least $1 million in annual Maryland revenue from digital advertising services. Its rate ranges from 2.5% to 10%, with the applicable rate determined by the taxpayer's global annual gross revenue.

The statute defines "digital advertising services" to include advertising services on a digital interface, such as banner advertising, search-engine advertising, interstitial advertising, and other comparable advertising services. By contrast, Maryland does not impose a comparable statewide tax on traditional advertising formats, including billboards, magazines, newspapers, direct mail, broadcast radio, and broadcast television. This absence of a tax on traditional advertising set the stage for the Taxpayers' ITFA challenge.

The Tax Court's Central Holding: The Tax Discriminates Against Electronic Commerce

The Tax Court's principal holding was that the Digital Advertising Tax is preempted by ITFA. Section 1105(2)(A) of ITFA prohibits state and local governments from imposing a discriminatory tax on electronic commerce when the tax is not generally imposed on transactions involving *similar* property, goods, services, or information accomplished through other means (emphasis added).

The dispositive question before the Tax Court was whether digital advertising services are "similar" to nondigital (analog) advertising services for ITFA purposes. The Comptroller of Maryland ("Comptroller") contended that digital advertising is a distinct industry or business model because it may involve automation, targeting, real-time transactions, analytics, and other technical features (what the Comptroller generally termed 'programmatic advertising') not necessarily present in traditional advertising. The Taxpayers argued that the relevant similarity lies in the commercial function: both digital and nondigital advertising convey a promotional message intended to influence consumer behavior.

Ultimately, the Tax Court agreed with the Taxpayers, holding that digital and nondigital advertising services are not merely similar but *indistinguishable* in their core purpose of making an impression on an audience that leads to a sale or other desired action. As a result, the Comptroller cannot single out providers of such advertising services merely because they are provided via electronic commerce.

The Tax Court Also Found Commerce Clause and Due Process Violations

The Tax Court separately held that the Tax violates the dormant Commerce Clause. Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a state tax on interstate commerce must, among other things, be fairly apportioned, nondiscriminatory, and fairly related to services provided by the taxing state.

The Tax Court focused on the Tax's measure of global annual gross revenue both as a threshold for taxability and as the basis for the graduated tax rate. In the Tax Court's view, a taxpayer's worldwide revenue does not reasonably reflect the in-state component of the Maryland digital advertising activity being taxed. Thus, a company with the same amount of Maryland digital advertising revenue can owe substantially more tax than another company solely because it has more business activity outside Maryland.

The Tax Court illustrated the issue by employing an example with two companies, each earning $10 million in Maryland digital advertising revenue: a company with $100 million in global revenue would pay $250,000 at the 2.5% rate, while a company with more than $15 billion in global revenue would pay $1 million at the 10% rate.

The Tax Court held that this structure is not externally consistent because it produces greater Maryland tax liability based on non-Maryland activity.

The Tax Court further concluded that the tax unconstitutionally discriminates against interstate commerce and is not fairly related to state-provided services because the higher tax burden attributable to global revenues does not correspond to additional benefits provided by Maryland. For substantially the same reasons, the Tax Court held that the tax fails the Due Process Clause's requirement that the income attributed to Maryland bear a rational relationship to intrastate business.

Previous Challenges to the Tax

The Tax Court's rulings are a culmination of years of litigation over Maryland's Digital Advertising Tax.[5] Immediately after the Tax was enacted, it was challenged in state and federal court, where plaintiffs raised similar federal and constitutional claims as those at issue before the Tax Court in the Apple, Google and Peacock cases. In the previous court challenges, as in the current cases, plaintiffs argued that by targeting Internet-based advertising, the tax violates ITFA by discriminating against electronic commerce and treating it less favorably than non-electronic commerce.

At the state level, a challenge brought by multiple Comcast subsidiaries and Verizon alleged that the Tax violated ITFA and several constitutional provisions. The Maryland Circuit Court ("Circuit Court") agreed with the taxpayers that the Digital Advertising Tax violated ITFA, the Commerce Clause, and the First Amendment.[6] Regarding the ITFA challenge, the judge found that digital advertising is so similar to traditional advertising that taxing digital while not taxing other advertising amounts to discrimination under ITFA. The judge was reported to say during the hearing that "Puppies are puppies and advertising is advertising." However, the Comptroller appealed and the Maryland Supreme Court later ruled that the taxpayers were required to first exhaust administrative remedies, i.e., challenge the Digital Advertising Tax in the Tax Court.[7]

At the federal level, the U.S. District Court for the District of Maryland ("District Court") partially dismissed a challenge to the Digital Advertising Tax on procedural grounds, finding that a challenge to the Tax in federal court was barred by the federal Tax Injunction Act[8] ("TIA").[9] However, the District Court determined that businesses *could* challenge a former provision of the Digital Advertising Tax that prohibited them from directly passing on the cost of the Tax to their customers in federal court. Subsequently, the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") agreed that the TIA barred a federal challenge to the Tax and remanded the case to the District Court to decide whether the passthrough provision was constitutional. Ultimately, the Fourth Circuit held that Maryland's prior restriction on separately stating the Tax as a customer fee, surcharge, or line item was unconstitutional on First Amendment grounds in *Chamber of Commerce of the U.S. v. Lierman*, 151 F.4th 530 (4th Cir. 2025). See our prior post covering the Digital Advertising Tax, other state/local digital services taxes and challenges and potential challenges thereto.

Those earlier cases were important in developing the legal and procedural landscape to challenge the Tax, but they did not produce the same comprehensive merits determination now issued by the Maryland Tax Court in the Apple, Google, and Peacock cases. Indeed, the original Circuit Court judge's ruling on the ITFA and constitutional issues "hit the nail on the head" and was a preview of the Tax Court's ruling.

The prior litigation also underscored a practical feature of state tax challenges: even with the law on their side, taxpayers commonly must exhaust administrative remedies before obtaining a ruling on the merits.

What This Means for ITFA Challenges Moving Forward

The Tax Court's decisions provide taxpayers with a detailed roadmap for challenging not only digital advertising taxes adopted by other states, but any state and local tax that singles out electronic transactions while leaving analogous offline services untaxed. The Tax Court's ITFA analysis is particularly significant because it provides a well-reasoned (and taxpayer-friendly) analysis of ITFA's use of the term "similar." Because the term "similar" is undefined and there are no examples in the law, the Tax Court held hearings on the meaning and applicability of the word "similar." Whereas other state courts[10] have narrowly interpreted the meaning of "similar," often requiring that the goods be the "same" as their nontaxed counterpart, the Tax Court broadly interpreted the meaning of the term:

> "Whether something is similar to something else is determined by a plurality of characteristics that are not necessarily the same by comparison, but that are not so different as to be non-comparable. Advertising services through digital commerce and advertising services through non-digital commerce need not be the same. The ITFA also uses the term 'generally imposed,' meaning that the similarity can be varied by some items that do not fit precisely within the characteristics being compared."[11]

Because electronic services are often far more advanced than their analog counterpart, states have been using these technological differences as a crutch to pass ITFA inspection. But this decision cuts down that defense – a jurisdiction cannot evade ITFA restrictions merely by characterizing an electronic service as technologically sophisticated, programmatic, data-driven, or otherwise distinct from its offline counterpart. The relevant inquiry is not whether the services are the same – at issue is whether the electronic and nonelectronic services are *similar* based on commercial purpose and are alike in substance. The Tax Court clarifies that the question is “Are the transactions similar” not “Are the business models similar?”

In addition to the Tax Court’s well-reasoned analysis of “similar” online and offline transactions, significantly, the Court also rejected the Comptroller’s other ITFA arguments, including that: (1) ITFA violates the anti-commandeering doctrine; (2) ITFA does not provide a private right of action for any person or company trying to enforce it (the plaintiffs were not trying to enforce ITFA but rather relied on it as a basis for a refund claim); and (3) federal law (ITFA) applies here to pre-empt state law (the Digital Advertising Tax).

The ITFA analysis could therefore be leveraged in other states where a tax applies uniquely to electronic transactions, while equivalent offline services remain untaxed. The analysis will depend on the statutory text, the tax base, the relevant offline counterpart, and whether the tax is generally imposed on similar transactions accomplished through non-electronic means. Some examples include:

- **Accounting and Tax Preparation**: Platforms like Intuit’s QuickBooks and TurboTax have replaced many functions of traditional bookkeepers and tax preparers, allowing users to manage finances and file taxes entirely online.
- **Legal Services**: Online legal service providers such as LegalZoom automate document preparation, entity formation, and other tasks previously handled by attorneys or paralegals.
- **Travel Agencies**: Digital platforms like Expedia and Booking.com allow users to plan and book travel without the need for traditional travel agents.
- **Telehealth and Medical Scheduling**: Services like Teladoc provide remote consultations, prescription management, and scheduling, replacing in-person interactions with software-driven service delivery.

In each of these examples, the core service remains unchanged, but the mode of delivery is now internet-based and often automated. Under ITFA, states may not single out these business (often SaaS-based) models for unfavorable tax treatment without running afoul of the ITFA’s prohibition on discriminatory taxation.

In addition, while not binding in other states, the Tax Court’s ruling should be persuasive and a “precursor” to other similar litigation in state courts challenging Washington’s and Utah’s taxes targeting digital advertising, in addition to Chicago’s social media tax (discussed in detail in our prior post). Further, Illinois’ new “Targeted Advertising Services Tax” and “Social Media Platform Fee” remain susceptible to numerous legal challenges, including the federal and constitutional bases affirmed by the Tax Court. Please see our prior coverage of the new problematic Illinois taxes here.

For additional information and advice about the litigation discussed here or any digital services taxes or otherwise, please feel free to reach out to the blog post's authors or your Kilpatrick attorney contact.

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[1] *Apple Inc. v. Comptroller*; 23-DA-OO-0456.

[2] *Google LLC v. Comptroller*; 23-DA-OO-0649.

[3] *Peacock TV LLC v. Comptroller*; 23-DA-OO-0654.

[4] Md. Code Ann., Tax-General §§ 7.5-101 through 7.5-301.

[5] Predictions that ITFA would protect taxpayers from the Digital Advertising Tax are years in the making: "Internet Tax Freedom Act: Protector From the Tax Man?" *Tax Notes State*, May 11, 2020, p. 785.

[6] *Comcast of California/Maryland/Pennsylvania/Virginia/West Virginia, LLC v. Comptroller of the Treasury of Maryland*, No. C-02-CV-21-000509, (Md.Cir.Ct. Oct. 21, 2022).

[7] *Comptroller of Maryland v. Comcast of California*, 297 A.3d 1211 (2023).

[8] 28 U.S.C. Section 1341.

[9] *Chamber of Commerce of the United States of America v. Franchot* (No. 21-cv-410) (Mar. 4, 2022).

[10] In *Labell v. City of Chicago*, the Illinois Court created a higher burden than is required by ITFA, requiring that the streaming services at issue be the "same" as its nontaxed counterpart. 2019 IL App. (1st) 181379, P15, 59 ("Had we agreed with plaintiffs and come to the conclusion that streaming services were the same as automatic amusement devices and live cultural performances, a discussion of the potential discrimination against electronic commerce under section 1105(2)(A)(ii) would be warranted. We, however, came to the opposite conclusion. This requirement is absent from the ITFA."); *see also*, ADP*, LLC v. Arizona Dep't of Revenue*, 524 P.3d 278 (Ariz. Ct. App. 2023) (holding hat payroll software sold over the internet not similar enough to untaxed payroll services); *see also* (*Gartner, Inc. v. Dep't of Revenue*, 455 P.3d 1179 (Wash. Ct. App.) (2020) (finding that searchable research content online for a fee was not similar to research via human interaction).

[11] *Google LLC v. Comptroller*; 23-DA-OO-0649. There is similar language focusing on the "plurality of characteristics that are not necessarily the same by comparison" *in Apple Inc. v. Comptroller*; 23-DA-OO-0456 and *Peacock TV LLC v. Comptroller*; 23-DA-OO-0654.