

## Blog Post

# Maryland's High Court Hands the State a Big Win in its Digital Ad Tax Dispute, More Challenges to Follow

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Last fall, when a Maryland County Circuit Court held that the [Maryland Digital Ad Tax violated the dormant commerce clause, the supremacy clause, the Internet Tax Freedom Act, and the First Amendment of the U.S. Constitution](#), most of the tax world anticipated that the Maryland Comptroller would promptly appeal the ruling, which it did. The State argued that the Circuit Court's decision must be reversed because the plaintiffs had not properly exhausted their administrative resources prior to bringing the lawsuit, as required under state law.

On May 9, 2023, the Maryland Supreme Court, in a *per curiam* opinion, handed the State of Maryland a major victory, only days after hearing oral arguments. The Maryland Supreme Court held that the Circuit Court did not have jurisdiction in the first place because the plaintiffs did not exhaust their administrative remedies, and vacated the lower court's October 2022 ruling. In a somewhat unusual move, the Court rendered its decision in summary form and indicated that an opinion explaining its reasoning would be forthcoming, so there will be more to unpack in the future. But in the short term, what does this procedural decision mean for the Digital Ad Tax and SALT law more broadly?

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## Requirement to Exhaust Administrative Remedies

The most important takeaway from this ruling is the Maryland Supreme Court's reliance upon the state's "anti-injunction" laws, and its declaration that the requirement to exhaust administrative remedies is paramount and cannot be disregarded. Maryland's anti-injunction statute mirrors similar laws in effect in most states, and prevents a court from issuing "an injunction, writ of mandamus, or other similar action against the State or any officer or employee of the state that enjoins or prevents the assessment or collection of any tax."

In this case, the Comptroller argued, and the Maryland Supreme Court appeared to agree, there is no constitutional exception to the state's anti-injunction act and its requirement that the taxpayer exhaust administrative remedies before bringing an action. It will be instructive to read the court's opinion when it is released, but the impact is that even if tax legislation was clearly unconstitutional, a taxpayer may not have grounds to immediately challenge it, at least not before it has impacted a large number of taxpayers. Such a ruling may serve to empower other states to take more risks in drafting new tax legislation.

Generally, these laws are intended to protect the state's right to assess and collect taxes in an efficient manner. However, this result has the practical effect to *deprive* taxpayers of the right to contest a tax until there is an assessment or the taxpayer has paid and sued to collect a refund of such tax. The problem, of course, is that it can take years for either an assessment or the right to sue for a refund to arise, and, in the meantime, taxpayers may be compelled to comply even with a law that is unconstitutional on its face.

## What's Next for the Digital Ad Tax?

With this decision in hand, there is no question that Maryland will continue to aggressively pursue its

Digital Ad Tax. Advertisers who may be subject to the tax should move quickly to review their filing obligations, to avoid potential penalties for noncompliance.

It is likely that the merits of the Digital Ad Tax will continue to be litigated in the next several months and possibly years, either through appeals of an assessment, or by a taxpayer paying the tax and suing for a refund. Thus, it will be some time before we get an answer on the constitutionality of the tax.

Depending on the breadth and scope of the Maryland Supreme Court's opinion, other states that are closely watching the fate of the Maryland Digital Ad Tax may also be emboldened by how well the anti-injunction act held up in the face of this challenge. To date, at least five states have introduced or considered identical measures. They are: Connecticut, Massachusetts, Montana, New York, and Texas. More imminently, the day after the Maryland Supreme Court issued its ruling, the Maryland Comptroller publicly applauded the decision and called on technology and communications companies to come into compliance. While this first-of-its-kind tax has Constitutional flaws, which will continue to be challenged, the state wants to collect its money now and sort out the details later.

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