

Blog Post

Updated: Maryland's Latest Attempt to Fix its Digital Ad Tax May Lead to More Litigation

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Shortly after the Maryland passed the country's first "Digital Advertising Gross Revenues Tax", H.B. 732, the Maryland Senate went to work attempting to fix a few known glitches in the law. Senate Bill 787, which passed the Maryland General Assembly on April 12, 2021, is now headed to the Governor's desk for signature. If the Governor does not act within 30 days (from April 12th), the bill will automatically become law.

The bill contains a provision intended to prevent large online companies from directly passing along the cost of the digital advertising tax. The bill seeks to prevent this by prohibiting companies from adding a separate fee, surcharge or line item to cover the tax.

However, as [previously discussed](#), this measure may not have much of a practical impact on the ability of large companies to pass the burden on to customers indirectly through pricing, thwarting the state's goal of preventing smaller customers from bearing the burden of this tax.

Further, on top of the constitutionality and legality issues currently being litigated with respect to the new law, this pass-through provision raises

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additional constitutional concerns under the First Amendment and the Dormant Commerce Clause. Under similar circumstances, the Sixth Circuit previously held that a provision prohibiting providers from identifying a tax on the customer's bill violated the First Amendment of the U.S. Constitution. *See BellSouth Telecommunications Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008). The Court in that case invalidated on constitutional grounds a Kentucky tax provision that prohibited telecommunication providers from identifying a tax on bills to customers. The Court held that prohibiting a taxpayer from separately identifying a tax on its bill violated the free speech clause of the First Amendment, even if the provision arose on account of the state's substantial interest in avoiding customer confusion over who was legally responsible for the tax. Thus, it is questionable whether the state may limit the ability of a company to separately state the tax on its invoice, and it likely is another aspect of this law that will end up in the courts.

Three other provisions contained in the bill are helpful to taxpayers. For instance, the bill would delay the effective date of the digital advertising tax from January 1, 2021 (retroactive) to January 1, 2022, which would give the Comptroller time to provide much needed clarity on some of the ambiguous language in the new law. The Maryland Comptroller promptly issued Bulletin 21-2, confirming that in accordance with this bill, the first quarterly estimated payment for the Maryland Digital Advertising Gross Revenues Tax will be due April 15, 2022, based on revenues from the first quarter of 2022.

The bill also exempts news media companies (i.e., companies engaged "primarily in the business of newsgathering, reporting or publishing articles about news, current events, culture or other matters of public interest").

Finally, the bill limits the scope of H.B. 932, which provided for sales and use tax on digital media by exempting certain digital services such as online education and expanding the exemption for custom software.

Despite its flaws, the bill does offer some improvements over H.B. 732, and given that the legislative session is now over, the Governor may decide to allow the bill to become law rather than exercising his right to veto the bill, as he did with the prior bill. Ultimately, the bill does not go far enough to fix the many known issues in the new law, but the delayed effective date alone is welcome news to taxpayers seeking to clarify their compliance obligations.

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