

Maryland Digital Advertising Tax Survives In Recent Supreme Court Decision

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On May 9, 2023, the Maryland Supreme Court issued an order that revived the state's digital advertising tax, which was previously found to be unconstitutional by a Maryland circuit court. The Supreme Court's decision did not address the constitutionality of the tax; rather, it vacated the lower court's decision for lack of jurisdiction because the taxpayers challenging the tax had failed to exhaust their administrative remedies.

Over Governor Hogan's veto, Maryland's legislature enacted the Digital Advertising Gross Revenues Tax, Title 7.5 of the Tax-General Article, ("DAGRT") in 2021. It immediately faced challenges, and in November 2022, the circuit court struck down the tax finding that, among other things, DAGRT was unconstitutional and violated the Internet Tax Freedom Act – a federal law prohibiting the imposition of discriminatory state and local taxes on electronic commerce.

The Maryland Comptroller appealed the circuit court decision arguing that taxpayers failed to exercise their administrative remedies, which would have required the action to be filed with the Maryland tax court. While the Supreme Court agreed with the Comptroller on the jurisdictional issue, it did not address whether DAGRT is constitutional. Taxpayers will now need to bring their challenges before the tax court. In the meantime, Maryland will continue with its first-in-the-nation tax on digital advertising.

Currently, DAGRT applies to businesses with global annual gross revenues of at least \$100 million, of which at least \$1 million is derived from digital advertising (e.g., software, websites, or applications, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and similar advertising) in Maryland. The tax rate varies from 2.5% to 10% based on the business's global annual gross revenues.

Maryland has reportedly already received over \$106 million from companies subject to the tax. While Maryland's DAGRT may yet be found unconstitutional, the allure of a new revenue source derived from large online advertising companies has attracted the interests of a number of states. D.C., New York, and Washington are among those considering similar digital ad tax proposals. Maryland's recent success may encourage other states to enact similar taxes.

If you have any questions or would like further information, contact James Vandermark (vandermarkj@whiteandwilliams.com, 646.837.5791) or Jonah Levinson (levinsonj@whiteandwilliams.com, 215.864.7194), or another member of the Tax and Estates Group.

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