

Digital Advertising Gross Revenue Tax Comprehensively Struck Down by Maryland Tax Court – with Potential Impact Elsewhere

Tax Talks on September 1, 2026

Introduction

On August 14, 2026, the Maryland Tax Court struck down the state’s Digital Advertising Gross Revenues Tax (the “Tax”). In *Apple Inc. v. Comptroller*, *Google LLC v. Comptroller* and *Peacock TV, LLC v. Comptroller*, the court held that the Tax violated the federal Internet Taxation Freedom Act (the “ITFA”), as well as the Commerce Clause, Due Process Clause, and First Amendment of the Constitution. The ITFA and the dormant Commerce Clause conclusions seem to be the most notable, with potentially wide-ranging applications to similar digital taxes that may be enacted by other states. Although it is likely that Maryland will appeal these decisions, the court’s opinions do set out an analysis that will likely be relied upon by opponents of state-level digital taxes in other situations.

The Tax was enacted in 2021 and applies to businesses with at least one million dollars in annual gross revenues derived from digital advertising services in Maryland. Additionally, certain digital advertising services, such as those owned and operated by a broadcast or news media entity, are expressly exempt from the Tax. The Tax imposes a 2.5% rate, which can rise to up to 10% depending on the gross revenue of the taxpayer.

Analysis

ITFA

Digital Advertising - What is “Similar”?

A tax violates the ITFA if it is imposed on electronic commerce but not on “transactions involving *similar* property, goods, services, or information accomplished through other means” (emphasis added). At issue was the fact that the Tax imposed a special tax on digital advertising, but not any other type of advertising. The taxpayers and the Maryland tax authority fought over whether digital advertising should be considered “similar” to print, television, billboard, radio, and other advertisements because they all have the same basic purpose (to “carry a message designed to get the public to do something”^[1]), or whether digital advertising was a new industry with a distinct business model and thus should not be considered “similar” to the other, more traditional, types of advertising.

The Maryland Tax Court concluded that the term “similar” was ambiguous and held hearings with expert witnesses from all parties to analyze whether digital advertising is similar to other, non-digital advertising. The court ultimately applied what it described as a “common-sense approach” in defining digital and non-digital advertising services, and ruled that the purpose of the activities in question is the “paramount consideration”^[2] for determining whether activities are “similar” to each other. As such, the court concluded that “in the advertising industry, academia, and in Maryland households, the provision of digital advertising services is indistinguishable from the provision of non-digital advertising services”^[3] for purposes of the ITFA and the Tax, and hence the Tax was pre-empted by the ITFA.

Supremacy Clause and Anti-Commandeering

In addition to arguing that the Tax does not violate the ITFA, the Maryland tax authority also argued that the ITFA itself was invalid. First, the Maryland tax authority argued that a court should not find a state law pre-empted under a federal statute and the Supremacy Clause unless the pre-emption was part of the “clear and manifest purpose of Congress.”^[4] The court disposed of this argument quickly, noting that the ITFA is, in fact, a “clear and manifest” representation of Congressional intent to pre-empt discriminatory state taxes.

Second, and more interesting, the Maryland tax authority argued that the ITFA is unconstitutional on anti-commandeering grounds because Congress did not have constitutional authority to restrict states from taxing electronic commerce. Generally, while Congress may directly pass laws to regulate activities even within states (as long as the exercise of power is otherwise granted to Congress), and Congress may even pre-empt state laws in many circumstances, Congress “may not commandeer the States’ legislative processes by directly compelling them to enact and enforce a federal regulatory program, but must exercise legislative authority directly upon individuals.”^[5] The Maryland tax authority relied principally on *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453 (2018), which invalidated a federal law that prohibited states from amending or altering their current restrictions on college sports betting in certain respects. The Maryland Tax Court distinguished *Murphy* on the grounds that Congress did not have plenary authority to regulate intercollegiate gambling, while Congress did have plenary authority to regulate interstate commerce.

Constitutional Arguments

Dormant Commerce Clause

The taxpayers argued that the Tax violates the dormant Commerce Clause of the U.S. Constitution, which restricts states’ ability to pass legislation that burdens interstate commerce. The taxpayers relied on the four-prong test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), all prongs of which must be met for a state law to overcome a dormant Commerce Clause challenge.^[6] The four prongs are as follows:

- The tax is applied to an activity with a substantial nexus with the taxing state;
- The tax is fairly apportioned;
- The tax does not discriminate against interstate commerce;
- The tax is fairly related to the services provided by the state.

The court found that the Tax met the first prong of *Complete Auto*, as a state taxing authority needs only show “more than a mere scintilla” of a connection with the taxing state to have a substantial nexus.

However, the court found that the Tax violated each of the other three prongs of *Complete Auto*. With respect to fair apportionment under prong two, a tax must have “external consistency” to be constitutional—which can be violated if a “State’s tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.”^[7] The court found that the graduated rate schedule of the Tax based on global revenue flunked the requirement of “external consistency” as the Tax could be calculated substantially based on activity conducted outside of Maryland—as the court put it, a “taxpayer’s global revenue has nothing to do with its Maryland activity,” and thus “the Tax graduated rate schedule does not reasonably reflect the in-state component of the digital advertising activity being taxed.”^[8]

The court also found that the Tax was discriminatory against interstate commerce in violation of prong three. First, the court acknowledged that a tax that is unfairly apportioned is *de facto* discriminatory, so its finding that prong two of the *Complete Auto* test was failed was sufficient to find a further violation of prong three. Further, while the court agreed with the Maryland tax authority that the Tax was neutral on its face as it applied equally to in-state and out-of-state taxpayers, it reasoned that the Tax was discriminatory because it had an effect of taxing far more out-of-state taxpayers than in-state taxpayers.

Finally, the court found that the Tax violated prong four (the fair relation test), noting that Maryland did not have any businesses which met the thresholds for the application of the Tax, and that in reality the Tax was only imposed on out-of-state businesses.

Given the violations of the *Complete Auto* test, the court found that the Tax violated the dormant Commerce Clause.

Due Process Clause

The court briefly analyzed the taxpayers’ one-sentence Due Process Clause claim. For a state tax to comply with the Due Process Clause, Maryland case law states that there must be “a rational relationship between the income attributed to the State and the intrastate values of the enterprise.” *ConAgra Foods RDM, Inc. v. Comptroller of the Treasury*, 241 Md. App. 547, 565 (2019). The court found that its reasoning under prong three of the *Complete Auto* test is sufficient to show that there is no “rational relationship” between the income attributable to Maryland and the global values of the affected taxpayers, and hence that the Tax violated the Due Process Clause.

First Amendment

Peacock TV, LLC also brought a First Amendment challenge to the Tax, arguing that the Tax's exceptions (for digital advertising services on digital interfaces "owned or operated on behalf of a broadcast entity or news media entity") constitute content-based distinctions and that the Tax generally operates to suppress speech. In a relatively short section of the opinion, the court found that the Tax did indeed violate the First Amendment by inviting official scrutiny of the content of publications:^[9] The court also concluded that the words "news" and "primarily" in the statute were vague, which is "usually fatal" in a First Amendment analysis.^[10]

Conclusion

These cases are significant because they represent one of the first published opinions addressing the myriad issues that face digital goods and services taxes. The Maryland Tax Court has presented a taxpayer-friendly approach to the various questions that arise under these taxes. Challengers now have a clear authority to cite when taking positions or raising arguments against similar taxes that could be imposed by other states.

The court does spend most of its time on the ITFA question and the dormant Commerce Clause question—quite reasonably, as these are the primary sources of federal law that potentially protect digital commerce from state taxation. The ITFA analysis is straightforward and the strongest ground for the taxpayers to challenge the Tax (and provides a major obstacle to other forms of digital taxes), and the Maryland Tax Court's general approach and interpretation of the ITFA will likely be convincing to other courts. While the Maryland Tax Court's analysis of the anti-commandeering claim by the Maryland tax authority is perfunctory, a claim that the ITFA violates the anti-commandeering principle is implausible and there are many arguments that could be spelled out in more detail to defend the ITFA against any such claim.

Although the dormant Commerce Clause analysis is less straightforward than the ITFA analysis, the court's conclusions will be welcome to challengers of other state taxes (not just digital taxes), as the court sets forth a broadly taxpayer-friendly analysis of the *Complete Auto* prongs. The ancillary conclusions regarding the Due Process Clause and the First Amendment could also be useful to other challengers of other taxes.

Needless to say, the Maryland Tax Court is not the last word on the Tax, or on digital taxes generally. However, it does set out the arguments in a clear fashion, could provide a useful guide for challengers to digital taxes, or state legislatures considering their own digital taxes.

[\[1\]](#) *Peacock TV, LLC*, at 8.

[\[2\]](#) *Peacock TV, LLC*, at 22.

[\[3\]](#) *Id* at 21.

[\[4\]](#) *Id* at 25.

[\[5\]](#) *New York v. United States*, 505 U.S. 144, 145 (1992). *See also Printz v. United States*, 521 U.S. 898 (1997); *Murphy v. Nat’l Collegiate Athletic Ass’n*, 584 U.S. 453 (2018).

[\[6\]](#) Each taxpayer focused on different prongs of the *Complete Auto* Test. Google LLC argued that the Tax failed all four prongs. Apple, Inc. argued that the Tax failed prongs two, three, and four, and Peacock TV, LLC argued that the Tax failed prongs two and three.

[\[7\]](#) *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

[\[8\]](#) *Peacock TV, LLC*, at 28.

[\[9\]](#) The court found that this feature violated the principles set forth in *Arkansas Writers’ Project, Inc v. Ragland*, 481 U.S. 221 (1987).

[\[10\]](#) *Peacock TV, LLC*, at 34.

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