

Larry's Tax Law

## Maryland Takes a Beat on Its New Digital Advertising Tax

By Larry Brant and Peter Evalds on 4.15.21 | Posted in Legislation, State and Local Tax, Tax Laws

Last week, we reported on [Maryland's new gross receipts tax](#) on revenues derived from digital advertising services (the "Tax"), the first of its kind in the nation. Affected taxpayers and tax practitioners alike can breathe a sigh of relief—the Tax will not apply to tax years beginning before 2022. Additionally, the broadcast news industry secured a significant victory by obtaining an exclusion from the Tax.

### Background

As we previously discussed, the Tax is imposed on annual gross revenues derived from "digital advertising services" in Maryland. "Digital advertising services" is defined broadly to include advertisement services on digital interfaces, including banner ads, search engine ads, interstitial ads and other "comparable" advertising services. As enacted, the Tax applied to the revenues from digital advertising services in Maryland of any taxpayer with global annual gross revenues from any source of at least \$100 million.

The Tax was originally passed in 2020, but was vetoed by Maryland Governor Larry Hogan after the end of the legislature's 2020 legislative session. After laying dormant for the better part of a year, the legislature overrode the Governor's veto earlier this year. As enacted, the Tax applied to tax years beginning after 2020. As we noted in our prior blog post, many issues, such as the promulgation of rules regarding apportionment methodology, still need to be addressed. The Tax is already the subject of at least one court challenge. That lawsuit is ongoing.

### Senate Bill 787

Maryland Senate Bill 787 ("SB 787") was passed by the Maryland House of Delegates on April 9, 2021, and by the Maryland Senate on April 12, 2021. Governor Hogan is expected to neither sign nor veto SB 787. In that event, SB 787 will become law on or about May 12, 2021.

SB 787 amends the Tax in at least three significant ways:

1. SB 787 creates a reprieve from the Tax for certain revenues. Specifically, the legislation exempts from the Tax revenues that are derived from services on digital interfaces that are owned or operated by or on behalf of a "broadcast entity" or a "news media entity." For this

purpose, a “broadcast entity” is defined as an entity “primarily engaged” in operating a broadcast television or radio station; and a “news media entity” is defined as an entity “engaged primarily” in the business of gathering news, reporting, or publishing articles or commentary regarding “news, current events, culture, or other matters of public interest.” Entities that primarily aggregate or republish third-party content are expressly excluded from the definition (and thus are subject to the Tax).

2. SB 787 prohibits taxpayers from directly passing on the cost of the Tax to customers by means of separate fees, surcharges or other line-item charges. Of course, it does not prohibit taxpayers from simply increasing the cost of goods or services to withstand the tax cost.
3. SB 787 suspends the effective date of the new tax for one year. It provides that the Tax becomes effective for taxable years beginning in 2022 and later.

The broadcast and news industries secured an important exclusion from the Tax. At least for those taxpayers, there will be one less tax to worry about.

The changed effective date for the Tax under SB 787 will undoubtedly result in numerous sighs of relief by affected taxpayers and practitioners. It will also make administration of the Tax a bit more palatable by giving the Maryland Comptroller time to issue regulations and guidance on matters such as apportionment (as directed under the original legislation). It should also give taxpayers time to allow the litigation challenging the Tax to take its course.

We will continue to provide updates as the evolution of the Tax develops.

**Tags:** annual gross revenues, apportionment, broadcast, broadcast companies, digital advertising, digital advertising services, global annual revenues, gross receipts tax, Maryland, Maryland House Bill 732, Maryland Senate Bill 787 (SB 787)