

Maryland Proposed Digital Ad Tax Amendments SB 787, HB1200

Customer Pass-Through Prohibition-Legal Concerns

Summary of bill: SB787 and HB 1200, recently filed in the Maryland General Assembly by Senate President Bill Ferguson and House Majority Leader Eric Luedtke, would, among other things, prevent taxpayers subject to the digital advertising gross receipts tax from passing the economic incidence of the tax to customers in the form of a “separate fee, surcharge, or line-item.” While the text of the bill prohibits passing the tax along using certain direct methods, news reports suggest the authors intend to shield Maryland purchasers of digital advertising services from the economic effects of the bill, suggesting they might broaden it through committee amendments. The bill is set for a hearing in the Senate Budget and Taxation Committee on February 17, 2021 at 1:00. If the Governor’s veto of the underlying digital advertising tax is overridden, and the bills were to pass, they would become effective July 1, 2021. As discussed below, the provision prohibiting passing the cost of the tax through to customers, either through an increase in prices to Maryland customers or through separate statements on invoices, would be unconstitutional under the Commerce and No Bill of Attainder Clauses and the First Amendment to the U.S. Constitution.

- **Discriminates Against Interstate Commerce in Violation of the Commerce Clause:** The Commerce Clause of the U.S. Constitution prohibits state laws that discriminate against interstate commerce. A state law discriminates against interstate commerce if it favors in-state interests at the expense of out of state interests. The purpose and effect of the proposed antipass-through provision would prevent an increase in the price of digital advertising to Maryland advertiser attributable to an increase in costs which the State itself created. The State thus seeks to exact tax revenues from New York sales of plaintiffs' products, but to shield its citizens from the economic impact of the tax. The practical effect of the prohibition would be the shifting the direct burden of the digital advertising tax from the taxpayer’s Maryland customers to their out-of-State customers. It thus favors in-state customers and discriminates against out-of-state customers in violation of the Commerce Clause of the U.S. Constitution.
- **Prohibited by the Bill of Attainder Clause:** A constitutionally proscribed bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. A state law is a bill of attainder if it serves no nonpunitive legislative purposes. Where no legitimate legislative purpose appears, the statute will be considered punitive. Here, the purpose of the proposed prohibition on passing the burden of tax onto Maryland customers, conduct that otherwise would be lawful, clearly is to make the taxpayer and its shareholders suffer the burden of the tax. There is no discernable non-punitive purpose that would justify such a cost-pass-through prohibition making it a legislative punishment prohibited by Bill of Attainder Clause.
- **Violates the First Amendment:** The First Amendment to the U.S. Constitution generally prohibits laws “abridging the freedom of speech.” The cost-pass-through prohibition provisions of the bills would prohibit taxpayers from including on invoices given to their customers, either a statement that the price of digital advertising services includes the new Maryland tax or from including a line-item on the invoice detailing the tax. These provisions thus would statutorily prohibit those subject to the tax from speaking to their customers about the tax in printed invoices. Such a prohibition on speaking cannot withstand scrutiny under the First Amendment to the U.S. Constitution.