Informational Hearing on
Sustaining Journalism in California: Tax and Tax Credit Options

Panel on Advertising or Data Barter Taxes:
Possibilities, Pitfalls, and Lessons Learned

Senate Revenue and Tax Committee

March 13, 2024
Testimony of Darien Shanske

My name is Darien Shanske and I am a Martin Luther King Jr. Professor of Law at UC Davis. I have written extensively on the policy and legal issues relating to digital barter taxes.[1] I am honored to have the chance to testify to this committee.

California – like most jurisdictions around the world - has opted to tax consumption. Sound tax policy requires that all consumption be subject to the same tax. Thus, if I buy a book of maps, I pay sales tax and if I exchange my data for Google Maps I should pay sales tax. It cannot be that one evades taxes through bartering or this would create a perverse incentive for taxpayers to distort their economic behavior. Of course, taxing a barter poses administrative challenges and so no doubt many barters are not taxed.

The business model of certain online platforms does not involve a small amount of bartering. Not taxing these barters creates a large gap. (I should note here that California should tax digital downloads as well.)

In the field of taxation, it is very common to use reasonable proxies and a quite reasonable – and administrable – proxy for the value of the barters currently avoiding tax is the gross receipts generated by ads sold by the very same platforms.[2] The logic is the following: If the gross receipts generated from all the ads did not roughly pay for all the "free" services, then why would the platforms offer those services? (In case it is helpful, I have included an illustration slide I made as an attachment.)

This justification for a digital advertising tax does not originate with me or my co-author or with law professors or even with any one economist. Two leading tax economists made the same point in 2021 in the leading peer-reviewed academic tax journal. An IMF Report noted the conceptual point in 2020.[3] In 2018, the OECD, in a highly influential report, identifies the role of barter as an important challenge raised by the digital economy.[4] More recently, a leading international tax scholar called this the "fundamental barter transaction."[5] Indeed, this analytic point is understood by at least some participants in the industry.[6]

Note that there are other complementary reasons to impose a digital barter tax that I am happy to discuss.

Before leaving policy for administrability and law, I want to address one common objection. It is sometimes countered that the extraordinary profits of these online platforms is actually taxed under the corporate income tax. There are two main responses to this. First, the corporate income tax has *not* been successful at taxing these corporate profits, primarily because they have been shifted abroad.[7] And so this is not a serious objection unless the contention is that California should shift to Worldwide Combined Reporting or adopt other countermeasures such as conforming to the Corporate Alternative Minimum Tax (both of which would be great ideas!).[8]

The other reason this objection should be rejected is that, as just explained, a digital barter tax is important to plug a hole in the sales tax and that would be true regardless of what happens with the corporate income tax. We tax consumption *and* then the profits – if any - earned on the consumption all the time.

A note on implementation. Twelve countries[9] and one state currently have digital taxes roughly like the one proposed here. The UK is apparently the only jurisdiction to have publicly reported on its experience. This experience has been positive, with implementation easier than expected[10] and revenues higher than expected.[11]

No doubt a digital barter tax would be subject to legal challenge, as Maryland's first in the nation digital ad tax has been. I am happy to discuss any and all of the legal challenges and have addressed them at some length, but don't think that is the best use of my remaining time.[12] I will instead end with my assessment.

In general, though I can clearly offer no guarantees, most of the arguments made against Maryland's tax are weak. The strongest argument against the tax involves the Internet Tax Freedom Act, the ITFA. This law, first passed in 1998 on a temporary basis and made permanent in 2016 forbids "discriminatory taxes on electronic commerce."[13] And so the argument is that a tax on the receipts from digital ads is discriminatory because there is not a similar tax on non-digital ads.

The primary response to this argument relies on the policy argument that I have just made, namely that this would not be a tax on ads but a tax on untaxed consumption using ad revenue as a proxy. Or, put another way, a discrimination requires that two similar items are treated differently. Since digital ads are part of these complex barters involving user data and information, they are not really similar to so-called traditional ads.

I think these arguments are strong, though it is true that a lower court judge in Maryland rejected versions of them in a decision since vacated. A perhaps better view of where appellate judges are likely to come out is from the attached piece by a

prominent tax commentator and contributing editor at *Tax Notes* (a leading publication), Robert Goulder. Goulder thinks it a close call.[14]

I would add two other considerations that suggest to me it is not even that close. First, courts should interpret the scope of ITFA preemption narrowly, which means that if the case is close then the state should win. Indeed, the ITFA is a textbook example for why this presumption is appropriate. Here is Congress granting a special favor, with no policy merits, to narrow – and powerful – special interests and, here is the kicker, it costs Congress nothing because it is giving away *the states'* tax base and not its own! The ITFA is the law of course and, unless it is unconstitutional (and there is a colorable argument that it is not), then the industry should get the benefit of this legislation, but there is no reason to give it any more.

Second, judges are people too. Thus, even though judges should focus on substance and not labels, there is no reason not to make obscure matters clearer for busy, generalist judges. And so please see the example of a proposed digital barter tax from Tennessee. The proposal's findings explain what the tax is designed to do.

To be sure, the near certainty of legal challenge should influence how revenues raised by this tax would be budgeted. It might also make sense to fast-track possible legal challenges. This would only be prudent but I don't think prudence should give way to abdication. The sales tax is vitally important for this state. Shying away from a straightforward way to plug a big hole because of the threat of litigation is yet another way for the powerful to arrogate advantages to themselves beyond even what the law has granted them.

NOTES

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[1] I co-wrote a long article about the legal and policy issues here: Kim, Young Ran
[2] California's corporate income tax uses sales as a proxy for business activity. Ca RTC 25136. The federal income tax assumes that half of a business meal is actually personal and hence not deductible. IRC Sec. 274(n)(1).
[3] Aqib Aslam & Alpa Shah, Tec(h)tonic Shifts: Taxing the "Digital Economy" 19-36 (IMF Working Paper No. 2020/076, 2020), https://www.imf.org/en/Publications/WP/Issues/2020/05/29/Tec-h-tonic-Shifts-Taxing-the-Digital-Economy-49363 at *15: "In principle, each advertisement viewed by a particular user has an associated value, determined by auction according to the willingness to pay by online retailers, which would presumably correlate closely with the relative value of the initial data provided by that user to the business."
[4] OECD (2018), Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264293083-en at Sec. 54. In 2013, an influential French report also highlighted the import of this business model and proposed an interim special digital tax. See https://nebula.wsimg.com/f722d8a16e3e827b1030e7608c1ff84e?AccessKeyId=44C040F42B9648A5BD88&disposition=0&alloworigin=1 at Sec. 1.2.4.
In 2018, Germany explored the question of whether these barters were subject to VAT; Italy is exploring the question now. Whether these transactions are subject to VAT will turn on intricacies of VAT law, but the key to note is the extent to which the basic conceptual issue is broadly understood. See William Hoke, Italy Investigates Meta's VAT Liability Based on Barter Theory, 109 TAX NOTES INT'L 1172 (FEB. 27, 2023).
[5] Yariv Brauner, Taxation of Information and the Data Revolution (March 1, 2023). https://ssrn.com/abstract=4400680 at * 12.
[6] Toby Bargar, Changes to Streaming Media Monetization Could Affect State Taxes, Bloomberg Tax (Oct. 13, 2022): "If free and reduced-cost streaming does take a bite out of retail receipts—and by extension, tax collections—state and local legislators may already have a model solution in front of them: tax the ads themselves. In February 2021, Maryland enacted a first-of-its-kind "digital ads tax" targeting the revenue of technology platforms that generate a substantial amount of receipts from advertising in the state."
[7] Daniel Shaviro, Mobile Intellectual Property and the Shift in International Tax Policy from Determining the Source of Income to Taxing Location-Specific Rents: Part One, 2020 Sing. J. Legal Stud. 681. 681-82 (2020): "In recent decades, a number of fantastically successful, mainly American, multinational entities ("MNEs")-led and epitomised by the "Four Horsemen", Apple, Amazon, Facebook and Google (also known as "FAANG" or "GAFAM" if one changes the names a bit)-have risen to global economic hyper-prominence. While their market capitalisations and profits are high, reflecting that they earn substantial rents or quasi-rents, their aggregate global taxes are generally quite low, reflecting their ability to create stateless income." Sometimes, industry representatives choose to argue that there is no longer a significant problem relating to income stripping, citing some respected academics to

that effect. It goes without saying that this is debate worth having, but at the end of the day there is no reason states, and nation states (like all the nations involved in Pillars 1 and 2) should not follow the majority view that income shifting is a big problem. Thomas Torslov, Ludvig Wier, and Gabriel Zucman, The Missing Profits of Nations, 90 Rev. Econ. Stud. 1499 (2023). See also https://itep.org/corporate-tax-avoidance-trump-tax-law/.

[8] See Shanske, Darien, White Paper on Eliminating the Water's Edge Election and Moving to Mandatory Worldwide Combined Reporting (August 2, 2018), https://ssrn.com/abstract=3225310; Shanske, Darien and Gamage, David, Why States Should Conform to the New Corporate AMT (February 13, 2023). 107 Tax Notes State 601, https://ssrn.com/abstract=4394117

[9] Digital Services Taxes, https://www.taxobservatory.eu/www-site/uploads/2023/06/EUTO_Digital-Service-Taxes_June2023.pdf.

[10] Digital Service Taxes at 13: "The implementation was smooth and costs were quite low: His Majesty's Revenue & Customs' (HMRC) implemented the DST for £6.3 million (€7.25 million).15 The HMRC considered the implementation easier than expected as no DST tax avoidance was observed (their hypothesis is that the reputation risk outweighs the potential gains)."

[11] https://publications.parliament.uk/pa/cm5803/cmselect/cmpubacc/732/report.html#:~:text=HMRC%20collected%20%C2%A3358%20million,3%20billion%20by%202024%E2%80%9325: "HMRC collected £358 million for the year 2020–21 (30% more than forecast due to the unpredictable impact of the COVID-19 pandemic), with 90% coming from five business groups. Digital Services Tax is forecast to raise around £3 billion by 2024–25."

[12] See the sources cited in note 1 for much more on the legal arguments.

[13] Internet Tax Freedom Act § 1101(a)(2), 47 U.S.C. § 151 (2018).

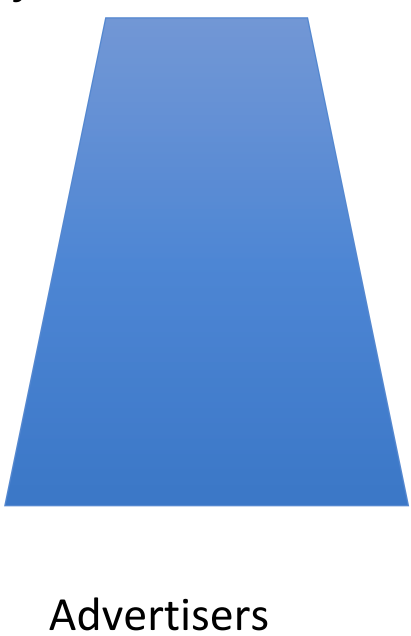
[14] Robert Goulder, *Let's Get Salty: The World Is Watching Maryland v. Comcast* , Tax Notes International, Volume 110, May 22, 2023: "Given these realities, is it accurate to say Maryland's tax is discriminatory? It's a close call. The circuit court found an ITFA violation; I'm not sure an appellate court would reach the same conclusion."

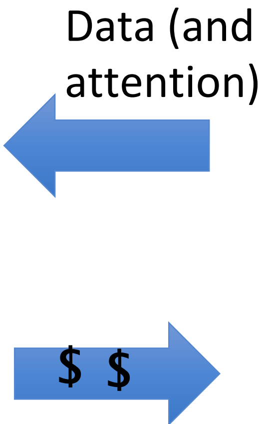
The Congressional Research Service has summarized the limited cases relating to discrimination under the ITFA as follows: "As more state and local governments pass laws to tax digital goods and services, courts have had to address novel issues concerning ITFA preemption. Often, these cases turn on whether an analogous tax involving a comparable nondigital good or service exists, and if so, whether the good or service is taxed in the same manner. If a court finds an analogous tax exists, then it typically holds that the ITFA does not preempt the state or local government's tax on electronic commerce." https://crsreports.congress.gov/product/pdf/IF/IF11947#:~:text=Following%20the%20initial%20moratorium%2C%20a,Trade%20Enforcement%20Act%20of%202015.

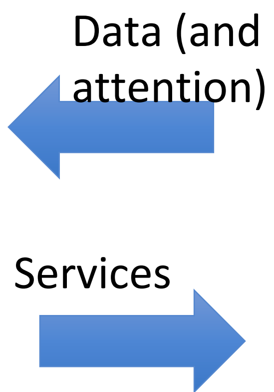
Reason #1 for States DSTs: Fill out the consumption tax

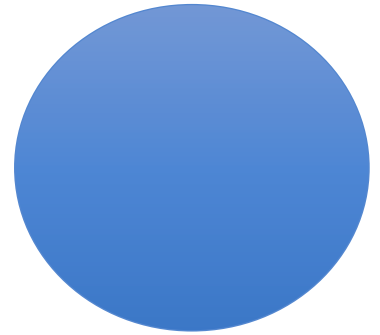
s treating the cash flow advertisers as a proxy for of the untaxed services.

The products and services that user/ consumers receive generally represent fina consumption that should be part of the sal tax base, but there is no cash flow.









Advertisers

Digital Platform – e.g., Google

Users/Consumers

If the consumer just bought a physical map, sales tax would be due.

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Let's Get Salty: The World Is Watching *Maryland v. Comcast*

by Robert Goulder

Robert Goulder

This publication rarely dwells on state and local taxation developments, but there are reasons why people around the world are paying attention to the state of Maryland. A pending lawsuit, *Comcast*, represents a front line in the tussle over taxing rights in the digital economy.[1]

A few years ago, the Maryland General Assembly enacted a tax provision that wasn't too different from some of the digital services taxes proposed by foreign governments. The measure (H.B. 732) had been described as the American cousin to France's "Google" tax. It's a gross receipts tax on digital advertising services that are uniquely targeted to Maryland residents based on data obtained from digital transactions with Maryland residents.

The rates range from 2.5 to 10 percent and apply to a taxpayer's global revenues from relevant digital advertising services. Note how the revenues can accrue anywhere in the world — outside Maryland or even outside the United States. It only matters that those revenues were derived from digital advertising services targeting Maryland residents. That's a novel tax base. Don't think of it in terms of local sales activity in the traditional sense, think of it as global sales activity made possible through local data.

Sales thresholds apply to narrow the scope of affected taxpayers. An in-scope taxpayer must have $100 million of global annual gross revenue and $1 million of local annual gross revenue. Again, that's local in the sense of being derived from the targeting of Maryland residents. The advertiser could be located in Timbuktu for all we care.

The stated purpose of Maryland's new tax is to fund local educational projects. It's easy to rally behind public education, but why fund it in this peculiar manner — as opposed to a more conventional revenue source like the property tax? The cynical answer is that voters detest the property tax and, thus far, they don't seem to mind DSTs.

Maryland lawmakers enacted a companion tax (H.B. 932) that applies to digital downloads and streaming services.[2] The latter bill is not the focus of the *Comcast* litigation and is not discussed in this article, other than to clarify how Maryland now claims two DSTs.[3] Ostensibly, both measures aim to plug the gaps in Maryland's statewide consumption tax system.[4] That is to say, they're conceptually detached from Maryland's income tax regime.

That's not something that proponents of foreign DSTs are likely to say. As the rest of the world sees it, DSTs are decidedly about backstopping the corporate income tax, which is seen as porous regarding profits derived from the global tech sector. I've yet to meet a European who insists the objective of their DSTs is to shore up VAT.

It should follow that parallels between Maryland's DSTs and foreign DSTs shouldn't be taken too literally because the taxes apparently serve different purposes. Today, I'm ignoring that

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[1] *Comptroller of Maryland v. Comcast of California*, No. C-02-CV-21-000509.

[2] Maryland H.B. 932, The 21st Century Economy Fairness Act.

[3] For the sake of uniformity and consistency, this article uses the term "DST" to describe H.B. 732. Other sources refer to it as a digital advertising tax, or DAT, perhaps to distinguish it from the companion tax provision, H.B. 932. I regard both measures as DSTs.

[4] By way of illustration, before enactment of Maryland's two DSTs, the sale of a hard-copy book would trigger Maryland's retail sales tax, whereas the purchase of an e-book would not. Similarly, the purchase of a traditional subscription list for direct marketing purposes would trigger a sales tax, whereas the purchase of the digital equivalent would not. H.B. 732 is intended to level the playing field for the latter scenario and H.B. 932 for the former.

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advice. The purpose of this week's column is to indulge in the comparisons.

No Veto Strong Enough

At the time of its enactment in March 2020, H.B. 732 stood out for several reasons. Then-Maryland Gov. Larry Hogan had threatened to veto it. Hogan, a Republican moderate, insisted the tax was the wrong way to raise revenues. No other U.S. state had enacted such a measure, and there were doubts about its legality. A coalition of 200-plus businesses opposed it. Why bother to enact a state tax that federal courts are possibly going to shoot down? It passed anyway.

True to his word, Hogan vetoed the bill in May 2020. Lawmakers voted to override the veto in February 2021. A similar fate awaited the companion measure. Overturning a gubernatorial veto in Maryland requires a supermajority (three-fifths) of each chamber. Supporters of the tax attained their supermajorities despite the frequent criticism of a popular governor.

The opposition campaign took to the airwaves and editorial columns to warn Maryland consumers that affected digital service providers would surely pass the burden of these new taxes on to them in the form of higher prices. That's a take I generally agree with, but it failed to sway lawmakers. The override cleared the House of Delegates (88 to 48) and the Maryland Senate (29 to 17). The outcome tells us these elected officials were darn serious about taxing digital services. They weren't even considering alternate funding mechanisms.

Tucked away in the backstory of these Maryland bills is polling data that confirms voters are less sensitive to DSTs. That kind of thing gets noticed. At least nine other states are considering similar DSTs.[5] If you're a politician, the optimal form of taxation is the one that won't cost you your seat.

The latest development in *Comcast* occurred May 9, when the Maryland Supreme Court concluded that the taxpayers failed to extinguish their administrative remedies. Their case was not ripe for adjudication before the courts. Formally, the matter has been remanded to the Anne Arundel County Circuit Court in Maryland with instructions to proceed accordingly. The practical result is that all the juicy legal issues are back on the table — at least for now.

The order is a procedural ruling, not dispositive as to any substantive arguments. It does not prejudice the taxpayers' ability to relitigate the issues arising from the Internet Tax Freedom Act or the commerce clause. Nor does it prejudice the state's ability to fend off those arguments. On that point, a recent amicus curia brief filed by some tax professors provides illuminating explanations as to why Maryland's DST might be viable after all.[6]

ITFA and the Commerce Clause

From the start, there were doubts about the law's compliance with the ITFA. A lot of legal scholars regard the ITFA as badly outdated, and they are not wrong. The likes of Amazon, Netflix, Facebook, and Google are no longer vulnerable start-ups being run out of someone's garage. They are not the minnows of a fledgling commercial space that merits preferential tax treatment from Congress.

The practical effect of the ITFA is to punish brick-and-mortar businesses, making them the only outfits in town that aren't beneficiaries of overt favoritism by the state. The ITFA is the antithesis of neutrality.

Once you enter the courthouse, however, these criticisms are beside the point. We can't ignore the ITFA simply because critics don't like it. States like Maryland, however, are correct to argue that the shield provided by the ITFA is not so all-encompassing as some would have it.

What does the ITFA actually prohibit? It bars two things. First, a tax on internet access. That's not what's occurring here. Second, it bars discriminatory taxes on electronic commerce. What's a discriminatory tax for these purposes? The statute tells us that's a tax on e-commerce that's not generally imposed on transactions

[5] Beyond Maryland, DSTs have been debated in Arkansas, Connecticut, Indiana, Massachusetts, Montana, New York, Texas, Washington, and West Virginia.

[6] *See* Brief of Amici Curiae Tax Law Professors in *Comptroller of Maryland v. Comcast* (The Maryland Digital Advertising Case), Indiana University, Maurer School of Law, Legal Studies Research Paper Series, No. 501 (2023). The tax law professors are Reuven S. Avi-Yonah, David Gamage, Orly Mazur, Young Ran (Christine) Kim, and Darien Shanske.

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involving similar property, goods, services or information achieved through other means. In short, a discriminatory measure for ITFA purposes is one that taxes the digital version of a thing while letting the analog version off the hook.

The hallmark of discrimination is that fundamentally similar things are treated differently. The twist here is that there is no analog version of digital advertising services. Sure, there is plenty of non-digital advertising — it's all around us. The magazines on your coffee table are probably half advertisements. But consider how different print ads are from what occurs in the digital space.

The futility of non-digital advertisement is that it knows nothing about the audience. The print ad in a magazine is trying to pitch you a particular brand of cat food, but you don't own a cat. Maybe you hate cats. Good luck making that sale. Conventional advertising is shooting in the dark.

Digital ads overcome those obstacles by being uniquely tailored to the digital user. It does so by manipulating the user's own digital data. Let's say that you spent 5 minutes on a website where pregnancy tests were being discussed. Within minutes, your email inbox is receiving coupons for a particular brand of diapers and baby formula. There's no analog equivalent for that type of advertising, which is so focused, so tailored, and so individualized.

Given these realities, is it accurate to say Maryland's tax is discriminatory? It's a close call. The circuit court found an ITFA violation; I'm not sure an appellate court would reach the same conclusion.

There were separate doubts about the law's compliance with constitutional requirements. Nobody thinks the framers of the commerce clause were thinking about digital services in the 1780s, but they knew plenty about the propensity of states to enact tax or trade laws that favor residents to the detriment of nonresidents. On the whole, it's a good thing the Constitution imposes limits on one state's ability to fiscally torment another. Again, how far the restrictions extend is debatable.

The problem for Maryland is that its advertising DST relies on an extraterritorial measure (global revenue) to determine the applicable tax rate. The appellees contend that discriminates against out-of-state businesses — and is precisely the kind of tax the commerce clause was meant to prevent. I'm not so sure. Recall how the structure of the tax is about the usage of digital data pertaining to Maryland residents, regardless of where the advertiser is located. That's consistent with how modern digital business models operate.

The real question is what's the value of the digital data of Maryland residents? It's flat wrong to think you can accurately gauge the value of that data by looking only at Maryland-based advertisers. Again, the location of the advertiser is utterly irrelevant. The only fair means of approximating the data's fair market value is to look at the full population of businesses who might commercially exploit it, and that can only be measured by looking at global revenue.

The tax appears extraterritorial if you fixate on the location of the advertiser or the geographic source of the revenue; it ceases to be extraterritorial if you look to the source of the data. Data, in case you haven't heard, is king these days. The circuit court found a commerce clause violation. An appellant court might find the circuit court was looking in the wrong place.

Your American Cousin

Before this episode, most people assumed DSTs were the plaything of foreign technocrats. We knew, for instance, that many countries were upset with being unable to adequately tax the profits of digital service providers via the conventional income tax. The reasons were fleshed out a decade ago in the OECD's base erosion and profit-shifting project action 1. That fragment of BEPS remains unfinished business. The rise of foreign DSTs is a response to those frustrations.

Here's what I'd like to know: Do the same motivations explain the domestic interest in DSTs? Is Maryland's fling with DSTs an attempt to extract tax dollars from out-of-state businesses that lack a meaningful presence (no investment and no job creation) in Maryland? I'm sure that's how it looks to the nation's digital service providers. No doubt, that's how it looks to Comcast and the other plaintiffs.

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But let's remember why Maryland enacted this tax. It sought a level playing field regarding its consumption tax base. It doesn't seem to be chasing an elusive subset of capital income that it can't otherwise snare. If it were, a gross receipts tax would be a crude way to go about it.

The nature of the tax isn't about taxing profits, at all. It's about who is exploiting digital data that carries a local source. In that sense, Maryland's DST is closer in spirit to a severance tax, with homegrown data as the resource being harvested.

The business world has figured out there's tremendous value in big data; the tax world is playing catch-up. Maryland would say it has crafted a revenue tool that's well suited to 21st-century business models. Maryland is the first actor among U.S. states, but it is not alone in its ambitions. DSTs have been debated in places as diverse as tax-loving Massachusetts and tax-loathing Texas. Something must explain why these governmental bodies are contemplating such a novel tax.

The analogy to natural resources is compelling. If data holds value, and we know it does, shouldn't we expect a price on its exploitation? DSTs are that price. Don't be surprised if half the country has comparable DSTs in a few years, depending on how the *Comcast* litigation plays out. Such a result could be troubling for the federal government as it tries to push back against foreign DSTs. How would it look when Treasury Department officials castigate foreign DSTs as unfair and discriminatory, when the United States is doing the same thing domestically? Yes, that would be awkward. No, that's not Maryland's problem. ■

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education shall allocate to each LEA an amount sufficient for the LEA to serve all eligible children, as defined in § 49-6-104, in the LEA's pre-kindergarten program.

(b) It is the legislative intent that funds in the universal pre-K fund, established in § 67-4-1307, must be made available for appropriation and expenditure in accordance with this section.

(c) An eligible child, as defined in § 49-6-104, shall not be required to pay tuition or fees to enroll in, or attend, a pre-kindergarten program established by an LEA. This section does not prohibit an LEA from charging fees for child care provided outside the instructional day of the LEA's pre-kindergarten program.

SECTION 7. Tennessee Code Annotated, Section 49-6-108, is amended by deleting subdivision (1) and by deleting subdivisions (5) and (6) and substituting instead the following:

(5) Review existing regulations and standards, and recommend needed changes, to promote a consistent assessment and monitoring process for providers of pre-kindergarten programs established under §§ 49-6-103 — 49-6-110; and

(6) Provide an annual report to the governor and the general assembly on the status of pre-kindergarten programs, which must include, at a minimum, the number, location, and types of providers of pre-kindergarten classrooms and the number of children served. The annual report must be posted on the department of education, office of early learning's website to provide public access to the report.

SECTION 8. Tennessee Code Annotated, Title 67, Chapter 4, is amended by adding the following as a new part:

67-4-1301. Findings and intent.

The general assembly finds and declares the following:

(1) The largest internet corporations use their monopolistic control of essential online platforms to extract economic rents from their users in the form

of personal data. This personal data is highly valuable and acquired at a steep discount, as demonstrated by the massive profit these corporations make selling this information to digital advertisers. For the purposes of stability and equity in the tax base, such economic rents are a favorable target for taxation;

(2) Tennessee sales and use tax statutes provide that specified digital products are taxed at the state rate of seven percent (7%) and a standard local tax rate of two and one-half percent (2.5%), instead of the local tax rate in effect in a county or municipality. However, many digital transactions are hard to bring into the digital sales tax base because instead of paying a monetary fee, customers sometimes barter their personal information for access to digital platforms. This personal information is in turn sold for use in targeted advertisements on digital platforms. To tax this consumption, leading tax economists have suggested using the receipts earned from digital data transactions as a proxy for the value of the barter;

(3) As has been noted by many, including the Organisation for Economic Co-operation and Development (OECD), the value of the consumption provided by digital platforms is typically greater as the size of its network is greater. As such, the general assembly finds that the consumption value provided by networks of a small size is negligible, especially when compared to the compliance burden that would be imposed on smaller digital platforms; and

(4) Digital advertising is not substantially similar to traditional print or broadcast advertising, as traditional advertising neither relies on the extraction of valuable personal information from users, nor does it serve as a proxy for currently untaxed consumption.

67-4-1302. Part definitions.

As used in this part, unless the context otherwise requires:

(1) "Annual gross revenues" means income or revenue from all sources, before any expenses or taxes, computed according to generally accepted accounting principles;

(2) "Assessable base" means the annual gross revenues derived from data transactions from digital advertising services in this state;

(3) "Commissioner" means the commissioner of revenue;

(4) "Department" means the department of revenue;

(5) "Digital advertising services":

(A) Means data transactions from advertising services on a digital interface; and

(B) Includes advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services that use personal information about the people to whom the ads are being served;

(6) "Digital interface" means any type of software, including a website, part of a website, or application that a user is able to access;

(7) "Person":

(A) Means an individual, firm, partnership, association, corporation, limited liability company, trust, or other legal or business entity;

(B) Includes a receiver, executor, trustee, guardian, or other representative appointed by order of any court; and

(C) Does not include a governmental entity or a unit or instrumentality of a government entity; and

(8) "User" means an individual or other person who accesses a digital interface with a device.

67-4-1303. Tax imposed.

(a) A data transaction privilege tax is imposed on a person's annual gross revenues that are derived from data transactions from digital advertising services in this state.

(b)

(1) The portion of a person's annual gross revenues derived from data transactions from digital advertising services in this state must be determined using an apportionment factor.

(2) The apportionment factor is a fraction, the numerator of which is the person's annual gross revenues derived from data transactions from digital advertising services in this state and the denominator of which is the person's annual gross revenues derived from data transactions from digital advertising services in the United States.

(3) The department shall promulgate rules that specify how to determine the state from which revenues from data transactions from digital advertising services are derived.

67-4-1304. Tax rate.

The data transaction privilege tax imposed pursuant to § 67-4-1303 is levied at the rate of nine and one-half percent (9.5%) of the assessable base and applies only to persons with an assessable base of fifty million dollars ($50,000,000) or more.

67-4-1305. Returns.

(a) Each person that, in a calendar year, has an assessable base of at least fifty million dollars ($50,000,000) shall complete and file with the department a return on or before April 15 of the following year.

(b)

(1) A person that reasonably expects that the person's assessable base will be fifty million dollars ($50,000,000) or more shall complete and file with the department a declaration of estimated tax, on or before April 15 of that year.

(2) A person required under subdivision (b)(1) to file a declaration of estimated tax for a taxable year shall complete and file with the department a quarterly estimated tax return on or before June 15, September 15, and December 15 of that year.

(c) A person required to file a return under this section shall file with the return an attachment that provides any information that the department requires to determine annual gross revenues derived from data transactions from digital advertising services in this state.

(d) A person required to file a return under this section shall maintain records of data transactions from digital advertising services provided in this state and the basis for the calculation of the data transaction privilege tax owed for a minimum of five (5) years.

(e) The chief executive officer, proprietor, owner, or highest-ranking manager shall sign annual and quarterly returns to certify the accuracy of the information contained therein under penalty of perjury.

67-4-1306. Tax payment.

(a) Except as provided in subsection (b), a person who is required to file a return under this part shall pay the data transaction privilege tax with the return that covers the period for which the tax is due.

(b) A person required to file estimated data transaction privilege tax returns under § 67-4-1305(b) shall pay:

(1) At least twenty-five percent (25%) of the estimated data transaction privilege tax shown on the declaration or amended declaration for the taxable year:

(A) With the declaration or amended declaration that covers the year; and

(B) With each quarterly return for that year; and

(2) Any unpaid digital transaction privilege tax for the year shown on the person's return that covers that year with the return.

67-4-1307. Allocation of tax revenue – Universal pre-K fund.

(a) All revenue from the data transaction privilege tax collected under this part, including penalties and interest, must be deposited in a special account in the state treasury to be known as the universal pre-K fund. The fund shall be administered by the department of education and used exclusively to fund, establish, and maintain a universal pre-kindergarten program in each public and public charter elementary school in this state in accordance with §§ 49-6-104 and 49-6-107. Moneys in the fund may be invested by the state treasurer in accordance with § 9-4-603. Notwithstanding another law to the contrary, interest accruing on investments and deposits of the universal pre-K fund must be credited to the fund, shall not revert to the general fund, and must be carried forward into the subsequent fiscal year. Any balance remaining unexpended at the end of a fiscal year in the fund shall not revert to the general fund but must be carried forward into the subsequent fiscal year.

(b) Notwithstanding subsection (a), two percent (2%) of the revenue from the data transaction privilege tax collected under this part, including penalties and interest,

must be paid into the state treasury and earmarked and allocated to the department of revenue for the administration and enforcement of this part.

(c) For purposes of this section, "universal pre-kindergarten" means a program established pursuant to § 49-6-104, and includes a program established under § 49-6-104 that is intended to provide high-quality education before attending kindergarten and has a purpose to:

(1) Increase access to voluntary high-quality pre-kindergarten programs;

(2) Provide developmentally appropriate activities for children in this state;

(3) Expand early childhood community capacity;

(4) Support linguistically and culturally appropriate curricula; and

(5) Focus on school readiness.

67-4-1308. Violations and penalties.

(a) If the total amount of the digital transaction privilege tax due for the year is less than three hundred dollars ($300), then it is a Class E felony for:

(1) A person subject to this part to knowingly:

(A) Fail to file a return;

(B) Violate § 67-4-1305 or § 67-4-1306;

(C) Fail to keep books and records as required by this part;

(D) File a fraudulent return; or

(E) Violate a rule promulgated by the department for the administration and enforcement of this part;

(2) An officer or agent of a corporation or manager, member, or agent of a limited liability company subject to this part to knowingly sign a fraudulent return filed on behalf of such corporation or limited liability company; or

(3) An accountant or other agent to knowingly enter false information on the return of any taxpayer.

(b) If the total amount of the digital transaction privilege tax due for the year is three hundred dollars ($300) or more, then it is a Class D felony for:

(1) A person subject to this part to knowingly:

(A) Fail to file a return;

(B) Violate § 67-4-1305 or § 67-4-1306;

(C) Fail to keep books and records as required by this part;

(D) File a fraudulent return; or

(E) Violate a rule promulgated by the department for the administration and enforcement of this part;

(2) An officer or agent of a corporation or manager, member, or agent of a limited liability company subject to this part to knowingly sign a fraudulent return filed on behalf of such corporation or limited liability company; or

(3) An accountant or other agent to knowingly enter false information on the return of any taxpayer.

(c) A prosecution for an act in violation of this section must commence within three (3) years of the commission of the act.

67-4-1309. Rulemaking.

The commissioner shall promulgate rules and forms necessary to implement this part. Rules must be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

SECTION 9. For purposes of rulemaking, this act takes effect upon becoming a law, the public welfare requiring it. Sections 1 through 7 of this act take effect upon becoming a law, the

public welfare requiring it, and apply to the 2025-2026 school year and each school year thereafter. Section 8 of this act takes effect January 1, 2025, the public welfare requiring it.