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SALT Trends

in Taxing the Digital Economy

This article looks at recent initiatives designed to tax certain digital activities, such as streaming services, third-party delivery platforms, and digital advertising and, conversely, the potential challenges to such initiatives.

JENNIFER W. KARPCHUK AND ILYA A. LIPIN

As e-commerce booms, services shift more to virtual formats, and products are increasingly delivered by various digital means. One of the major state and local tax trends in recent years has been attempts to tax the evolving digital economy. Growing budget shortfalls resulting from the coronavirus pandemic will incentivize states to raise revenue through enforcement, liberal interpretation of current provisions, broadening the base and imposing new taxes on digital goods and services. Although states may seek to tax this potential new revenue stream, they may be subject to legal challenges. This article looks at recent initiatives designed to tax certain digital activities, such as streaming services, third-party delivery platforms, and digital advertising and, conversely, the potential challenges to such initiatives.

The Internet Tax Freedom Act and the Digital Economy

During 1998, the internet was in its infancy and today's internet giants were just emerging – Google was founded in September 1998; Amazon had just gone public in 1997 and by 1998 had opened its second distribution facility; and Netflix was founded in 1997, but its streaming services would not be created for another 10 years. Despite the novelty of the internet, the Internet Tax Freedom Act ("ITFA") was signed into law in 1998. Both the Clinton administration and the U.S. Congress shared concerns about the possibility that state and local tax governments would seek to target electronic commerce and internet access as areas for taxation and that such taxation could stifle the development of internet commerce. These concerns led to the adoption of the ITFA.

The ITFA originally was a moratorium on taxation. The law was extended several times until 2016 when it became permanent and was renamed the Permanent Internet Tax Freedom Act ("PITFA"). When PITFA was passed as part of the Trade Facilitation and Trade Enforcement Act of 2015, the commissioner of the Federal Communications Commission commended the bill, stating: "This is a great day for American consumers. The U.S. Senate passed the Permanent Internet Tax Freedom Act with a strong bipartisan vote. This confirms a national consensus that state and local taxes on Internet access should be taken off the table once and for all . . . I hope the bill is enacted soon — Americans need and want the certainty that the digital world will be spared the taxman."

PITFA provides for two key protections: (1) it places a prohibition on the taxation of internet access; and (2) it prohibits a state, or a political subdivision of a state, from imposing multiple or discriminatory taxes on electronic commerce. "Electronic commerce" is defined as "any transaction conducted over the Internet comprising the sale of property, goods, [or] services." Thus, the same tax rate must apply to items, regardless of whether they are purchased over the internet or through traditional commerce, such as at a brick-and-mortar store. For example, PITFA likely would be violated if a state taxed the sale of digital books but exempted the sale of physical books.

As the digital economy continued to expand, states sought creative ways to target perceived lost revenue from digital sources. In a 2013 case, *Performance Marketing Association v. Hamer*,[1] the Illinois Supreme Court was called upon to examine the applicability of PITFA to online "direct marketing." The online direct marketing at issue was marketing or advertising by which a person or organization that published or displayed an advertisement (referred to as an "affiliate") was paid by the retailer when a sale was completed (commonly referred to as "click through nexus"). Illinois had a law that required out-of-state internet retailers using Illinois online marketers to collect use tax on sales to Illinois residents. In invalidating the law based on ITFA, the court reasoned that the Illinois law imposed use tax collection obligations on out-of-state retailers that used online marketing without imposing similar obligations on retailers utilizing print or broadcast marketing.

In considering potential challenges to taxing the digital economy, the PITFA should be front and center in taxpayers' minds and, as the digital economy continues to evolve, more challenges involving this issue are likely.

Netflix and Tax: Streaming Services

A recent trend in the digital arena has been the taxation of streaming services. For instance, during 2015, Chicago amended its law to impose its 9 percent amusement tax on streaming services. In *Labell v. City of Chicago*,[2] several taxpayers challenged the constitutionality of Chicago's amusement tax as it relates to internet based-streaming services, such as Netflix and Hulu. The taxpayers advanced two main arguments: (1) the ordinance requires customers of streaming services to pay the amusement tax, even though the ordinance fully exempts users of automatic amusement devices (juke boxes, pinball machines, video machines) from taxation; and (2) the ordinance fully or partially exempts live theatrical, musical, and cultural performances at theaters and other venues from the amusement tax but taxes streaming services that provide access to similar or identical theatrical, musical, or cultural performances over the internet.

In reaching its decision that the Chicago ordinance does not violate the PITFA, the Illinois Appellate Court distinguished the holding in *Performance Marketing*, concluding that, unlike performance marketing services, which are identical regardless of whether they are performed via the internet or over-the-air broadcasting, streaming services are not the same as automatic amusement devices or live cultural performances. In support of its conclusion, the court noted that whereas streaming services are primarily used privately in the home or on devices owned and maintained by the patron, automatic amusement devices are used publicly, outside the home and are owned and maintained by businesses. The court also held that in-person live cultural performances can be distinguished from performances delivered through streaming services because live performances encourage patrons to visit public spaces where they can view the live cultural performance but also frequent other Chicago businesses such as restaurants, bars, and hotels.

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Some issues arise out of the court's decision. First, a tax is discriminatory under the PITFA if it applies to electronic commerce but is not imposed on similar goods or services delivered through other means. The court in *Labell* creates a higher burden that requires the streaming service to be the "same" as its nontaxed counterpart—a requirement that is absent from the PITFA and far more stringent. Second, it is not difficult to envisage identical streaming services that could be disproportionately taxed. For example, if a Chicago theater holds a live performance of Broadway's Hamilton, the Chicago amusement tax will not apply, but if the same content is available to users via Disney+, the tax will apply. The content being transferred is identical, but following the court's analysis, the activities are not the "same" for purposes of the PITFA because one performance is attended in person and will deliver value to local businesses and the other will not. To require that entertainment viewed electronically be exactly the same as entertainment performed live – including having the same impact on the community – ignores the inherent differences when a service is delivered electronically, and it belies the spirit of the PITFA. This issue is more acute now since, due to the public health crisis caused by COVID-19, the number of streaming options has increased exponentially.

However, taxpayers will have another bite at the "apple" in Chicago. Apple and Spotify both had cases that were stayed pending the outcome in *Labell.* With the benefit of seeing the outcome of *Labell*, the taxpayers in the Apple litigation may be able to develop a better argument and succeed in a PITFA challenge. Apple is challenging the application of Chicago's amusement tax to its music streaming services on several grounds, including the PITFA. The taxpayers challenge in *Labell* related to television, movies, and music. Apple may be able to achieve a different result than in *Labell* by focusing solely on music. There is no exact live equivalent to television and movies, whereas with music the same content is delivered regardless of whether it is performed live or streamed—the only difference is the means of delivery. This seems to fit squarely within the protections of the PITFA. Time will tell whether Apple can succeed on the heels of Netflix's PITFA loss.

Third-Party Delivery Services

Using apps and online platforms, consumers can order and have meals delivered from their favorite participating restaurants to their doorsteps. While the ordering of food via an app may seem like a straightforward transaction, the associated nonuniform state and local tax rules may be an unwelcome surprise for the parties responsible for collecting and remitting the tax on food, as well as associated delivery and processing fees (which sometimes can amount to 25%-30% of the transaction). Post-Wayfair nexus considerations, tax rate differences due to sales across state and local jurisdictional lines, intra- and interstate sourcing rules, local food and beverage taxes, and special district taxes create additional complexity that needs to be addressed.[3]

For instance, in Pennsylvania, the Department of Revenue announced that per their administrative policy, the third-party delivery service is responsible for collecting sales tax on the entire purchase, including the order, service fee, and delivery fee.[4] Similarly, in recently published administrative guidance, Nebraska stated that multivendor marketplace platforms (MMPs) "are responsible for collecting and remitting sales tax on the entire sales price of any prepared food sold through its platform. This includes delivery charges, mandatory gratuities, and any service charges or fees passed on to the customer." The guidance defines an MMP as the intermediary between the buyer and seller that communicates the offer and acceptance between the buyer and seller and collects payment from the purchaser and transmits payment to the seller.[5]

Conversely, in *Crimson 2 Go, LLC v. Ala. Dept. Rev.*, Alabama Tax Trib., Dkt. No. S. 16-118, 07/07/2016, the Alabama Tax Tribunal voided the Department of Revenue's audit assessment claiming that the third-party delivery provider was buying food from the restaurants and reselling it to its customers. The Tribunal held that "the customers ordered the food from the restaurants, albeit through the Taxpayer's website, and the restaurants ultimately received the gross receipts from the food sales, less a negotiated marketing/service fee retained by the Taxpayer for facilitating the sales and deliveries." With respect to delivery fees, the Tribunal found that if the third-party delivery provider was a "de facto agent for the restaurants," the restaurants would be responsible for collecting sales tax on such charges. If the provider was not an agent, the delivery fee would be considered a nontaxable service.[6]

In Private Letter Ruling 17-001 (Nov. 17, 2016), the Utah State Tax Commission determined that a third-party delivery service merely acts "as a middle man between the customer and restaurant and does not make sales of tangible personal property" because it does not take title of the food at any point during the transaction, and thus is not responsible for the collection of sales tax. In this ruling, a company maintained and operated a website where individuals can order food from participating restaurants. The restaurants provide a menu with pricing; the customer selects items and "checks out" when the order is completed. The company's terms and conditions stated that "the restaurant is the seller of the food and responsible for its preparation and quality" and that the company "is only providing order processing services for a fee." The invoice displayed the following information: company's name, restaurant's name, prices for the items ordered, sales tax on the total food amount, delivery charge (if applicable), and tip (if applicable).[7]

Given the novelty and popularity of the service offering, any perception that revenue from third-party food delivery services is "escaping" taxation, even if due to uncertainty or the absence of provisions imposing tax, may raise a red flag in the eyes of lawmakers. For instance, in New York, a legislator sent a letter to the State Department of Taxation and Finance, urging the Department "to conduct an immediate audit of the state sales taxes paid by online food delivery companies" suggesting that "food delivery companies were failing to uniformly collect sales tax on their delivery and service fees – amounting to what could be tens of millions of dollars in unpaid taxes to New York State annually."[8] State regulators are aware that the major food delivery providers do not charge the same amount of sales tax on identical transactions.[9] The fact that food delivery services is one of the businesses that has thrived during the coronavirus pandemic increases the chances of an audit in the next several years. To prepare for potential audits, third-party delivery providers should understand and meticulously document the scope of their business operations in each jurisdiction. Based on the issues discussed above, it is important to identify the following to determine whether tax may apply to the sale and who is responsible for remitting the tax to the state:

1. Which party is making the sale to the customer;
2. Whether the third-party vendor is a marketplace facilitator based on the state's rules;
3. How the transaction (food, beverages, service fees, etc.) is presented on the invoice and which party reports the transaction to the taxing jurisdiction; and
4. Which items and services are subject to tax and at what rate.

Personal shopper and delivery businesses that transport products from grocery stores, department stores, and pharmacies also are expected to face scrutiny due to similarities in their business models.

The Newest Trend: Digital Advertising Taxes

A number of states and localities, including Maryland, New York, and the District of Columbia, have recently considered dig-

ital advertising taxes. Most of the digital advertising taxes that have been contemplated in other states raise PITFA concerns because most states do not tax traditional advertising services. Therefore, a state that taxes only digital advertising services likely would violate the PITFA. However, digital advertising taxes could give rise to unique legal challenges apart from PITFA.

The First Amendment

The first of these legal challenges is the First Amendment to the United States Constitution. Although taxation is not a typical First Amendment issue, concerns over taxation are what gave birth to the principles protected by the First Amendment. During the 1700s, there were persistent efforts by the British government to prevent or abridge the free expression of any opinion that was perceived to criticize the British Crown. In 1712, Parliament imposed a tax on all newspapers and advertisements with the intent of suppressing the publication of comments and criticisms against the Crown. Historians have argued that the American Revolution began in 1765 when the British government sent stamps for newspaper duties to the American colonies in an attempt to curtail the circulation of newspapers. These taxes were commonly referred to as "taxes on knowledge." In 1785, four years before Congress proposed the First Amendment, the Massachusetts legislature imposed a stamp tax on all newspapers and magazines. An advertisement tax followed in 1786. However, both taxes were met with such hostility that they were repealed within a few years.

With the history of the First Amendment in mind, there may be arguments that a tax on digital advertising services violates the First Amendment. In *Leathers v. Medlock*[10], the United States Supreme Court examined an Arkansas Gross Receipts Act, which imposed a 4 percent tax on receipts from the sale of services, including cable television, but exempted receipts for newspaper and subscription magazine sales. The act was challenged based on the First Amendment right to freedom of expression (as well as the 14th Amendment right to equal protection). The court concluded that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas. Notably, the dissent in *Leathers* strongly disagreed with the majority's opinion. Justice Marshall proclaimed: "Because I believe the majority has unwisely cut back on the principles that inform our selective taxation precedents, and because I believe that the First Amendment prohibits the State from singling out a particular information medium for heavier tax burdens than are borne by like-situated media, I dissent."

Despite the disagreement between the justices, *Leathers* stands for the proposition that it is permissible under the First Amendment for a state legislature to enact a taxation scheme that exempts certain members of the media from a generally applicable sales tax. However, a tax discriminates between speakers and potentially violates the First Amendment if it: (1) singles out the press; (2) targets a small group of speakers; or (3) makes distinctions on the basis of content. If a differential tax scheme has such an effect, the state must show a compelling justification for its action. With respect to the digital advertising taxes proposed by states and the District of Colombia, taking Maryland as an example[11], taxpayers could argue that the digital advertising tax proposed earlier this year singles out commercial speech (digital advertising) for the tax. Taxpayers also could challenge the tax by asserting that it targets a small group of companies since under the proposed taxing scheme, only companies with at least $1 million in Maryland-sourced digital advertising and $100 million in global annual revenues would be liable for the tax.

Depending on the state, taxpayers challenging a digital advertising tax may find further protection in the State's constitution, which may contain a broader provision than that embodied in the First Amendment. For instance, in *Magazine Publishers of Am. v. Pa. Dep't of Rev.*,[12] the taxpayers appealed an amendment to the tax code that repealed the sales and use tax exclusion for magazines, while continuing to exempt newspapers. While the majority of the court did not side with the taxpayers, the dissent focused on the Pennsylvania Constitution and the broader protections for freedom of the press and speech than the First Amendment. Article 1, 7 of the Pennsylvania Constitution provides in relevant part that: "The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." As explained by the dissent:

> This Court, recognized that Article 1, 7 of the Pennsylvania Constitution provides protection for freedom of speech broader than the federal constitutional guarantee. We must always be wary of the government's control of the expression of ideas and the power to tax is one such control. A tax on magazines that discourages one form of expression, magazines, in favor of another, newspapers, clearly operates to restrain the use of the printing press to examine the proceedings of government. This is in direct violation of the first sentence of Article 1, 7 of the Pennsylvania Constitution, which states that 'no law shall ever be made to restrain the right thereof.' The tax restrains the crucial function of the press as government watchdog and limits the free communication of thoughts and opinions in print.

The dissent's point emphasizes that taxpayers challenging a digital advertising tax should review protections in States' constitutions to determine whether they may contain a broader provision than that embodied in the First Amendment.

The Dormant Commerce Clause

Another possible challenge to digital advertising taxes is a claim that they violate the Commerce Clause of the United States Constitution. The Commerce Clause grants Congress the Power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Underlying the Commerce Clause is the framers' "conviction that in order to succeed the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[13] While the Constitution does not expressly limit the power of the states to regulate commerce, the Supreme Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute."[14] This impli-

cation is known as the dormant Commerce Clause. "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce."[15] The seminal United States Supreme Court decision addressing the applicability of the Commerce Clause to state or local taxation is *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), which established a four-prong test to determine whether a state or local tax imposes an unconstitutional burden on interstate commerce. This test requires that: (1) a taxpayer have a substantial nexus with the taxing jurisdiction; (2) the tax may not discriminate against interstate commerce; (3) the tax must be fairly apportioned; and (4) there must be a reasonable relationship between the tax imposed on the taxpayer and the services provided by the taxing jurisdiction. Failure to meet any prong renders the tax unconstitutional.

Digital advertising taxes present a particularly robust dormant Commerce Clause challenge. For example, assume a seller of digital advertising contracts with a customer to place advertisements on the internet. Thereafter, the customer's advertisements can be viewed on any device throughout the country. State A implements a digital advertising tax. Apart from its customer's advertisement being viewed from a device within State A, the digital advertiser has no other connection with State A. While the digital advertiser's customer might certainly derive economic value from its advertisement being viewed in State A, the digital advertiser does not derive any such direct benefit. Arguably, the digital advertiser lacks a substantial nexus with State A. Further, there is likely a lack of a rational relationship between the digital advertising tax imposed on the digital advertiser and the services (or lack thereof) provided by State A.

The Foreign Commerce Clause

In addition to the requirements that must be met under the dormant Commerce Clause, the often forgotten foreign Commerce Clause has two additional requirements that must be met: (1) a state should not create a substantial risk of *international* multiple taxation; and (2) states should not interfere with the federal government's need for uniformity and should not "prevent the federal government for speaking with one voice when regulating commercial relations with foreign governments." Some additional context is useful for purposes of this discussion. In 2018, the European Commission released two proposals regarding the taxation of multinational corporations that provide digital services. The first proposal was a permanent solution targeting comprehensive corporate income tax reform. The second was an interim solution, which took the form of an EU-wide 3 percent digital services tax that would apply to: (1) revenues derived from the sale of online advertising; (2) receipts or income from digital intermediary activities such as the operation of online marketplaces; and (3) the sale of data collected from online users. The Commission's proposal failed to garner the requisite unanimous consent of all EU members states, thereby defeating a single EU-wide digital services tax. Nevertheless, the proposal prompted some member states to consider or adopt their own digital services taxes. To date, Austria, France, Italy, and the United Kingdom (the latter, no longer part of the EU) have formally adopted a digital services tax; the Czech Republic and Spain are considering the implementation of such a tax. Additionally, outside the EU, other countries have recently considered or adopted a digital services tax. For instance, Turkey has a digital services tax, India has introduced a variation of the tax, and Brazil is still considering the adoption of such a tax.

Digital services taxes typically are designed to address a perception that the existing rules for multinational taxation do not fairly tax large multinational corporations that provide digital services, because the income allocation rules do not accurately reflect the importance of the users of the services. Thus, the digital service taxes seek to ensure that all taxpayers pay their fair share. The taxes are aimed at a small number of large digital companies. To be subject to a digital services tax, a company, viewed at a group level, generally must meet a double threshold: a worldwide revenue threshold (for example, €750 million in Austria, France, Italy, and Turkey) and a domestic taxable sales threshold (for example, €25 million in France or €5.5 million in Italy). Turning back to the United States, the U.S. Trade Representative has been investigating European digital services taxes. Specifically, during 2019, the U.S. Trade Representative investigated France's newly enacted digital services tax and concluded that it was discriminatory. As a result, the U.S. Trade Representative proposed imposing tariffs of up to 100% on $2.4 billion worth of French imports, such as makeup and wine. Tensions deescalated in January 2020 after the United States agreed to defer the tariffs while France agreed to postpone collection of its digital service tax until the end of 2020 as the countries tried to negotiate a potential multilateral alternative at the Organization for Economic Cooperation and Development ("OECD"). Hopes for an amicable resolution disintegrated on June 12, 2020 when the U.S. Treasury Secretary sent a letter to the finance ministers stating that OECD discussions regarding a global approach to taxing the digital economy had reached

1 998 N.E.2d 54 (Ill. 2013).

2 2019 Ill. App. (1st) 181379.

3 The Tax Foundation Fiscal Fact No. 538 Jan. 2017 - Punching the Meal Ticket: Local Option Meals Taxes in the States, https://taxfoundation.org/punching-meal-ticket-local-option-meals-taxes-states/

4 Pennsylvania Department of Revenue, Third Party Delivery Businesses, https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Pages/Third-Party-Sales-Deliveries.aspx#:~:text=Pennsylvania%20law%20requires%20third%2Dparty,as%20delivery%20and%20service%20fees.

5 Nebraska Department of Revenue, Information Guide, Prepared Food and Beverage Delivery Service, January 2020, https://revenue.nebraska.gov/sites/revenue.nebraska.gov/files/doc/info/6-535.pdf.

6 It is important to note that, in this opinion, the Tribunal stated that "[t]his case again confirms that the seemingly simple sales tax is sometimes one of the most theoretically difficult taxes to correctly apply and administer."

7 A similar conclusion was reached by the Arkansas Department of Finance and Administration in Sales Tax and Restaurant Delivery Service, Opinion No. 20180926 (March 26, 2019).

8 Letter to the New York State Department of Taxation, Brad Hoylman, New York State Senator, 27th District, January 3, 2020.

9 Noah Lichtenstein, "The Hidden Cost of Food Delivery," March 16, 2020. https://techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery/

10 499 U.S. 439 (1991).

11 H.B. 732, which would have imposed a digital advertising tax in Maryland, was ultimately vetoed by Governor Larry Hogan during May of 2020.

12 654 A.2d 519 (Pa. 1995).

13 *Hughes v. Oklahoma*, 41 U.S. 322325-26 (1979).

14 *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330338 (2007).

15 *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 17871794 (2015).

16 *Miller Bros. Co.*, 347 U.S. 340344-45 (1954).

a stalemate and that the United States would not accept even interim changes affecting U.S. technology companies. The letter repeated previous threats to retaliate if countries implement their own digital services taxes.

As the above discussion illustrates, the United States has been overt in opposing digital services taxes. If states choose to enact such taxes, those actions undoubtedly would undermine federal foreign policy and prevent the federal government from "speaking with one voice" in international affairs, resulting in a strong potential foreign Commerce Clause violation.

The Due Process Clause

Another potential challenge to digital advertising taxes is the Due Process Clause of the U.S. Constitution. The Due Process Clause provides that no person shall be "deprived of life, liberty, or property without due process of law." The central question is "whether the state has given anything for which it can ask return." The Due Process Clause has been applied to the taxation of interstate business in primarily two situations. First, like the Commerce Clause, the Due Process Clause requires sufficient nexus: "[D]ue process requires some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax."[16] Thus, the Due Process Clause has been invoked to forbid the imposition of tax upon a taxpayer whose connections with a state are inconsequential. Second, even assuming there is a minimum connection with a state, the Due Process Clause further requires that the measure of the tax fairly reflect the taxpayer's activities in the state. Similar to the Commerce Clause analysis, there are legitimate questions regarding whether or not a digital advertising tax would pass muster under the Due Process Clause. It is questionable whether a sufficient minimum connection exists for a digital advertiser whose only connection with a state is the fact that its customer's advertisement is viewed on a device in the state. Further, even assuming such remote activities do create the requisite minimum connection, there would be a subsequent question of whether or not the proposed tax base accurately reflects the digital advertiser's limited activities within the state.

Equal Protection and Uniformity

The United States Constitution's Equal Protection and Uniformity Clauses in states' constitutions offer similar protections and arguments. The Equal Protection Clause, which applies to all 50 states, requires that classifications rest on real and not feigned differences and that the distinction has some relevance to the purpose for which the classification is made and that the different treatment is not so disparate that it is wholly arbitrary. All but two states have some form of a uniformity provision, which generally require taxes to be uniform. For instance, Pennsylvania's Uniformity Clause provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general rules." There is an argument under the Equal Protection Clause that there is a lack of a rational basis for enacting a punitive tax on advertising provided via digital means and similarly, there is an argument under uniformity clause provisions that there is a lack of uniformity in taxing only digital advertising.

Conclusion

Streaming services, third-party delivery platforms, and digital advertising are three high value industries that are (or may be) the targets of state and local taxation. As deficits resulting from the impact of the coronavirus are tallied, state and local jurisdictions will be exploring means to seal holes in their budgets through increased enforcement of existing laws and enactment of laws taxing novel revenue streams, such as digital advertising. This article has explored various arguments that potentially could be used by practitioners and tax advisers to challenge some of these taxing initiatives. ■