SB 787

Department of Legislative Services

Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 787 (Senator Ferguson)
Budget and Taxation Ways and Means

Digital Advertising Gross Revenues, Income, Sales and Use, and Tobacco Taxes - Alterations and Implementation

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This emergency bill (1) exempts a broadcast entity and news media entity from the digital advertising gross revenues tax enacted by Chapter 37 of 2021; (2) prohibits a person from directly passing on the cost of the digital advertising gross revenues tax to a customer through a separate fee, surcharge, or line-item; (3) alters certain dates and intent language related to the tobacco tax increases enacted by Chapter 37; (4) generally clarifies the implementation of Chapter 38 of 2021 which imposes the State sales and use tax on specified digital products; and (5) creates a subtraction modification against the State income tax for certain utility arrearage amounts forgiven in tax year 2021. The bill specifies that (1) the income tax provision applies to taxable years beginning after December 31, 2019, and (2) the digital advertising gross revenues tax applies to taxable years beginning after December 31, 2021.

Fiscal Summary

State Effect: Special fund revenues may decrease beginning in FY 2022 as a result of the digital advertising gross revenues tax and sales and use tax exemptions for digital products and codes proposed by the bill and a delayed effective date. General fund revenues may decrease in FY 2021 to the extent subtraction modifications are claimed against the income tax. State expenditures are not affected.

Local Effect: Local income tax revenues may decrease in FY 2021 due to subtraction modifications claimed against the income tax.

Small Business Effect: None.

Analysis

Bill Summary:

Digital Advertising Gross Revenues Tax

The bill exempts a broadcast entity and news media entity from the digital advertising gross revenues tax by establishing that digital advertising services do not include advertisement services on digital interfaces owned or operated by or operated on behalf of a broadcast entity or news media entity.

A broadcast entity is an entity that is primarily engaged in the business of operating a broadcast television or radio station. A news media entity is an entity engaged primarily in the business of newsgathering, reporting, or publishing articles or commentary about news, current events, culture, or other matters of public interest. A news media entity does not include an entity that is primarily an aggregator or republisher of third-party content.

The bill also prohibits a person who derives gross revenues from digital advertising services in the State from directly passing on the cost of the tax imposed to a customer who purchases the digital advertising services by means of a separate fee, surcharge, or line-item.

Digital Products and Codes

The bill specifies which existing sales and use tax exemptions and other provisions of law governing the sales and use tax apply to digital products and codes. In addition, the definitions of digital product and digital code are altered. Certain types of digital instruction, seminars, discussions, and professional services are excluded from the definition of digital product. A digital code is defined to include a number, symbol, alphanumeric sequence, barcode, or similar code.

Tobacco Tax

As part of the increase in certain tobacco taxes, Chapter 37 imposes a one-time floor tax on cigarettes and other tobacco products (OTP) in fiscal 2021. The bill specifies that the floor tax applies to products used, possessed, or held in the State on or after March 14, 2021, and that the Comptroller must remit the revenue attributable to the tax by June 13, 2021. Chapter 37 required the Comptroller to report by December 31, 2020, to the Senate Budget and Taxation Committee and the House Ways and Means Committee the change in consumption of cigarettes, other tobacco products, and electronic smoking devices (ESD) in the State over the immediately preceding 12 months. The bill delays this requirement by one year.

Chapter 37 stated that it is the intent of the General Assembly that the Comptroller distribute, as necessary, fiscal 2021 tobacco taxes generated by the bill, including the sales tax imposed on ESD, to the Rainy Day Fund and to the expenditure accounts of the appropriate units of State government to fund costs associated with COVID-19. The bill eliminates this intent language.

Forgiven Utility Arrearages Subtraction Modification

A taxpayer can claim a subtraction modification for the amount of utility arrearages forgiven in tax year 2021, if the forgiveness of the utility arrearages was pursuant to grants provided to utilities under Chapter 39 of 2021.

Current Law: During the 2020 session, the General Assembly passed House 732 and House Bill 932. The Governor vetoed each bill, but the General Assembly overrode the vetoes during the 2021 session, and the bills became Chapter 37 and Chapter 38 of 2021, respectively.

Digital Advertising Gross Revenues Tax

Chapter 37 imposes a tax on the gross revenues of specified digital advertising. Chapter 37 also (1) increases various taxes imposed on cigarettes, ESD, and OTP and (2) requires the Governor to include at least $18.25 million in annual funding for the Tobacco Use Prevention and Cessation Program beginning in fiscal 2022.

Chapter 37 imposes a tax on the annual gross revenues of a person derived from digital advertising services in the State. Chapter 37 provides for the filing of the tax returns and making tax payments.

The part of the annual gross revenues of a person derived from digital advertising services in the State are to be determined using an apportionment fraction based on the annual gross revenues of a person derived from digital advertising services in the State and the annual gross revenues of a person derived from digital advertising services in the United States. The Comptroller is required to adopt regulations that determine the state from which revenues from digital advertising services are derived.

The digital advertising gross revenues tax is imposed at the following rates:

- 2.5% of the assessable base for a person with global annual gross revenues of $100.0 million through $1.0 billion;
- 5% of the assessable base for a person with global annual gross revenues of $1.0 billion through $5.0 billion;

- 7.5% of the assessable base for a person with global annual gross revenues of $5.0 billion through $15.0 billion; and
- 10% of the assessable base for a person with global annual gross revenues exceeding $15.0 billion.

Revenues from the digital advertising gross revenues tax are distributed to the Blueprint for Maryland’s Future Fund, after the Comptroller’s costs to administer the tax are deducted.

Digital Products and Codes

Chapter 38 imposes the sales and use tax on specified digital products and codes and requires the sales and use tax revenue from each sale to be distributed to the Blueprint for Maryland’s Future Fund.

A digital product is defined as a product that is obtained electronically by the buyer or delivered by means other than tangible storage media through the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

A digital product includes:

- a work that results from the fixation of a series of sounds that are transferred electronically, including prerecorded or live music or performances, readings of books or other written materials, and speeches and audio greeting cards sent by email;
- a digitized sound file, such as a ring tone, that is downloaded onto a device and may be used to alert the user of the device with respect to a communication;
- a series of related images that, when shown in succession, impart an impression of motion, together with any accompanying sounds, that are transferred electronically, including motion pictures, musical videos, news and entertainment programs, live events, video greeting cards sent by email, and video or electronic games;
- a book, generally known as an “e-book,” that is transferred electronically; and
- a newspaper, magazine, periodical, chat room discussion, weblog, or other similar product that is transferred electronically.

A digital code is defined as a code that may be obtained by any means, including in a tangible form, such as a card or through email, and provides a buyer with a right to obtain one or more digital products. A digital code does not include a gift certificate or gift card with a monetary value that may be redeemable for an item other than a digital product.

An end user is any person other than a person who receives by contract a digital product transferred electronically for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product, in whole or in part, to another person.

The bill requires that the retail sale of a digital code or digital product must be presumed to be made in the state in which the customer's tax address is located.

A customer tax address, as it relates to a sale of a digital product, will vary according to the nature of the sale, as well as information that is available to a vendor at the time of sale of a digital product. Customer tax address may be (1) the address of the business location, for a digital product that is received by a buyer at the business location of the vendor; (2) the primary use location of the digital product; (3) the location where the digital product is received by the buyer, or donee of the buyer; (4) the location indicated by the address for the buyer according to specified business records; (5) the location indicated by an address for the buyer obtained during the sale, as specified; or (6) other locations determined by the vendor, provided that the location is consistently used by the vendor for all sales to which an item applies, as specified.

Primary use location is the street address that is representative of where the buyer's use of a digital product will primarily occur, as determined by (1) the residential street address or a business address of the actual end user of the digital product, as specified or (2) the location of the buyer's employees or equipment that makes use of the digital product if the buyer is not an individual. A primary use location does not include the location of a person who uses a digital product as the purchaser of a separate good or service from the buyer.

Subscription, as it relates to a digital product, is an arrangement with a vendor that grants a buyer the right to obtain digital products from within one or more product categories having the same tax treatment, in a fixed quantity or for a fixed period of time, or both.

Tobacco Taxes

Chapter 37 increases the tobacco tax rate from $2.00 to $3.75 per pack of cigarettes and increases the OTP tax rate for all products other than cigars and pipe tobacco from 30% to 53% of the wholesale price. Chapter 37 also increases the sales and use tax rate imposed ESD. These devices are commonly known as e-cigarettes or vaping products.

Forgiven Utility Arrearages Subtraction Modification

Under the federal income tax, if a person owes a debt to someone else and the debt is canceled or forgiven for less than its full amount, the amount of the canceled indebtedness may be required to be reported as income under certain circumstances. The State generally conforms to the federal tax treatment of canceled debts, foreclosures, repossessions, and abandonments. The amount of income that must be realized or excluded for State income tax purposes in these circumstances is determined under the federal income tax.

On February 15, 2021, the Governor signed Senate Bill 496 (Chapter 39), the Recovery for the Economy, Livelihoods, Industries, Entrepreneurs, and Families (RELIEF) Act, emergency legislation designed to provide income tax relief to certain taxpayers, economic impact payments of up to $500 to certain taxpayers, and other forms of more immediate assistance to businesses and employers impacted by the COVID-19 pandemic. As part of this assistance, the Act authorized the Public Service Commission to distribute grants to utility companies to assist households with utility arrearages.

State Revenues:

Digital Advertising Gross Revenues Tax

The fiscal and policy note for Chapter 37 estimated that annual revenues for the Blueprint for Maryland's Future Fund from the digital advertising gross revenues tax may increase by as much as $250 million under one set of assumptions. The exemption proposed by the bill may reduce the overall revenue impact of the digital advertising tax provisions of Chapter 37; however, the amount of the revenue decrease cannot be reliably estimated due to a lack of data regarding the amount of digital advertising revenues generated by broadcast and news media entities.

Digital Products and Codes

The fiscal and policy note for Chapter 38 estimated that annual revenues for the Blueprint for Maryland's Future Fund from the sales and use tax on digital products and codes may increase by as much as $83.1 million in fiscal 2021 and by $118.6 million in fiscal 2025 under one set of assumptions. The clarifications and exemptions proposed by the bill may reduce the overall revenue impact of the sales and use tax provisions of Chapter 38; however, the amount of the revenue decrease cannot be reliably estimated due to a lack of data regarding the amount of digital products and codes that may be purchased in the State.

Forgiven Utility Arrearages Subtraction Modification

A taxpayer can claim a subtraction modification for the amount of utility arrearages forgiven in tax year 2021, if the forgiveness of the utility arrearages was pursuant to grants provided to utilities under Chapter 39 of 2021. As a result, general fund revenues may decrease in fiscal 2021 due to subtraction modifications claimed against the State income tax. Revenue losses will occur only to the extent the grants provided to utility companies under the RELIEF Act trigger federal cancellation of debt income provisions and require taxpayers to report as income the amount of forgiven utility arrearage.

The tobacco tax provisions of the bill do not materially impact State revenues.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 1200 (Delegate Luedtke) - Ways and Means.

Information Source(s): Comptroller's Office; Department of Legislative Services

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