



MULTISTATE TAX COMMISSION

MEMORANDUM

To: Digital Products Work Group Members & the Public
From: MTC Staff
Subject: Executive Summary: Internet Tax Freedom Act Panel and Presentation
Date: November 14, 2023

Introduction

On November 14, 2023, the Uniformity Committee hosted a panel discussion on the Internet Tax Freedom Act (ITFA) as part of the committee's project concerning the taxation of digital products. The purpose of the panel was to provide a baseline of knowledge about this federal law that preempts state tax authority relating to, but is not specifically targeted at, digital products, in preparation for further study of the topic by the project work group.

The panel featured Professor Andrew Appleby, Associate Professor of Law at Stetson University College of Law, Joseph Bishop-Henchman, Executive Vice President of the National Taxpayer's Union Foundation, Mark Nebergall, President of the Software Finance & Tax Executives Council, and Jonathan White, Counsel for the Multistate Tax Commission (MTC). The panel was moderated by Nancy Prosser, General Counsel for the MTC.

Available on the MTC's webpage dedicated to this project are the [slides that accompany the panel discussion](#), an unedited [transcript](#) of the discussion, and an [audio file of the discussion](#). Polling questions were embedded in the slides to solicit input from the audience which are mentioned during the discussion. Comments and questions from the audience also occurred during the discussion.

This summary was prepared by MTC staff to highlight key aspects of the discussion. It has been reviewed and approved by the presenters.

The Big Picture

The panel began with the primary concepts covered by the Internet Tax Freedom Act (ITFA): prohibition of taxes on Internet access and discriminatory taxes on electronic commerce. There are no federal regulations interpreting ITFA, so there is no authoritative source of guidance on the meaning or application of ITFA outside of state and federal court decisions. The panel then moved to a deeper discussion of ITFA.



Key Language and Terms

The panel first discussed ITFA's key terms and their definitions. ITFA has several key terms, each of which is defined in the statute. The key terms and paraphrased definitions include:

- (a) internet access – a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet and includes services incidental to providing an Internet connection such as a home page, electronic mail, and instant messaging, video clips, and personal electronic storage capacity;
- (b) multiple taxes – any tax imposed by one State or political subdivision on essentially the same electronic commerce as another state imposes tax on without a credit for taxes paid in other jurisdictions;
- (c) discriminatory taxes – any tax imposed on electronic commerce that is either not imposed on, imposed at a different rate on, or imposed with different collection obligations than, transactions involving similar property, goods, services, or information accomplished through other means; and
- (d) electronic commerce – any transaction conducted over the Internet or through Internet access, and includes Internet access.

The panel also mentioned an important but undefined concept: that to trigger the prohibition against discriminatory taxes, the tax imposition must be based on the Internet's involvement. It is not enough that an item or transaction is merely digital. The panel also discussed the role that a broader general tax can play in simplifying or neutralizing ITFA. For example, the panelists agreed that the broader a state's sales tax base is, the less likely there will be a successful challenge under the discrimination provision. This is because the broader the tax, the more likely a similar, but offline, tax imposition will be found.

Key Cases

The panelists discussed ITFA's limited litigation history, noting this is possibly due to states not pushing the limits of targeting Internet commerce. However, panelists noted that the introduction of tax regimes like the Maryland digital advertising tax may presage an increase in similar taxes and ITFA litigation. Key among the existing cases are:

- (a) *Performance Marketing Ass'n v. Hamer*, 998 N.E.2d 54 (Ill. 2013).
- (b) *Labell v. City of Chicago*, 147 N.E.3d 732 (Ill. App. Ct. 2019).
- (c) *Gartner, Inc. v. Dep't of Revenue*, 455 P.3d 1179 (Wash. Ct. App. 2020); and
- (d) *Comptroller of Maryland v. Comcast*, No. SCM-REG-0032-2022 (Md. Cir. Ct. Oct. 20, 2022), *rev'd on procedural grounds*, No. C-02-CV-21-000509 (July 12, 2023).

The panelists discussed the *Labell* and *Performance Marketing* cases specifically, noting the difference in result and potential reasons why.

In discussing the cases more generally, the panelists discussed the burden of proof and differing theories regarding the anti-discrimination provision. For example, some panelists believe that taxation of a truly "net-native" item is automatically discriminatory, as a similar, but offline, item does not exist and therefore cannot be taxed. Others believe that an analysis of what



is similar and whether the tax in question is imposed on that similar item must be done in any event.

Secondary Sources and Administrative Resources

Several helpful secondary sources and various state administrative resources were also highlighted and include:

- (a) [Matthew G. McLaughlin, *The Internet Tax Freedom Act: The Congress Takes a Byte Out of the Net*, 48 Cath. U.L. Rev. 209 \(1999\);](#)
- (b) [Walter Hellerstein and Andrew Appleby, *The Internet Tax Freedom Act at 25*, 107 State Tax Notes 7 \(2023\);](#)
- (c) [Ohio Department of Revenue, ST 2020-01: Internet Tax Freedom Act Summary – June 2020.](#)
- (d) [Illinois Department of Revenue, General Information Letter No. ST 15-0034-GIL \(June 18, 2015\);](#) and
- (e) [Virginia Department of Taxation, Ruling of the Tax Commissioner, Pub. Doc. No. 16-195 \(Oct. 13, 2016\).](#)

In discussing secondary sources, the panel discussed the role of state guidance and litigation in developing ITFA's details and what deference may be due to state guidance on ITFA.