IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Alcatel-Lucent USA Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 803 F.R. 2017
	:	Argued: September 17, 2020
Commonwealth of Pennsylvania,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK FILED: September 13, 2021

Alcatel-Lucent USA, Inc. (Taxpayer) petitions for review of the order of the Board of Finance and Revenue (F&R) sustaining a decision of the Commonwealth of Pennsylvania's (Commonwealth) Department of Revenue's (Department) Board of Appeals (BOA) that denied Taxpayer's Petition for Refund of corporate net income tax paid in the amount of $2,047,875 for the tax year ending December 31, 2014 (2014 Tax Year). At issue is the application of the percentage cap for "net loss carryover" (NLC) deductions contained in Section 401(3)4.(c)(1)(A)(V) of the Tax Reform Code of 1971 (Tax Code),[1] for the 2014

[1] Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §7401(3)4.(c)(1)(A)(V). This section provides:

(c) (1) The net loss deduction shall be the lesser of:

(Continued....)

Tax Year following the Supreme Court's decision in *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth*, 171 A.3d 682 (Pa. 2017), *cert. denied*, 138 S.Ct. 2635 (2018).[2] Taxpayer challenges the Department's policy that subjected only large corporate taxpayers to the percentage cap and excluded application to small corporate taxpayers for the tax years beginning prior to January 1, 2017.[3] Upon review, we affirm.

I. Background

Taxpayer is a Delaware corporation that provides IP networking, ultra-broadband access, cloud technology, communications equipment, and related services to its customers. Taxpayer carried into the 2014 Tax Year net losses, as defined under Section 401(3)4.(b) of the Tax Code, 72 P.S. §7401(3)4.(b), apportioned to Pennsylvania in the amount of $791,244,978, which had accumulated since the tax year ending September 30, 2000. For the 2014 Tax Year, Taxpayer's taxable income apportioned to Pennsylvania before accounting for any net loss deduction was $27,332,333. At the time, the NLC deduction was the greater of 25% of income apportioned to Pennsylvania or $4,000,000. 72 P.S.

> (A) . . . (V) For taxable years beginning after December 31, 2013, the greater of twenty-five per cent of taxable income as determined under subclause 1 *or, if applicable, subclause 2 or four million dollars ($4,000,000)* . . . .

72 P.S. §7401(3)4.(c)(1)(A)(V) (emphasis added).

[2] In *Nextel*, the Supreme Court severed the unconstitutional flat-dollar cap from the NLC provision, while preserving the percentage cap. *Nextel*, 171 A.3d at 705.

[3] For tax years between 2007 and 2017, the NLC deduction included both a flat-dollar cap *and* a percentage cap. *See* 72 P.S. §7401(3)4.(c)(1)(A)(II)-(VI). In response to *Nextel*, the General Assembly eliminated the flat-dollar cap for taxable years beginning after December 31, 2017. *See* 72 P.S. §7401(3)4.(c)(1)(A)(VII)-(VIII).

§7401(3)4.(c)(1)(A)(V). Taxpayer took a net loss deduction of $6,833,083, which was the greater amount. After accounting for the NLC deduction, Taxpayer reported taxable income apportioned to Pennsylvania of $20,499,250, which resulted in a corporate net income tax liability of $2,047,875, which Taxpayer paid in full. The Department accepted Taxpayer's tax report as filed and did not issue an assessment. Stipulation of Facts (S.F.) Nos. 2-12.

Notably, for the 2014 Tax Year, 13,566 corporations carried net losses, which exceeded taxable income. Of them, 347 had Pennsylvania taxable income in excess of the $4,000,000 net loss cap, and thus were unable to deduct their net losses to reduce their Pennsylvania taxable income to $0. Those corporations paid corporate net income tax. The remaining taxpayers (13,219) had Pennsylvania taxable income that did not exceed the $4,000,000 net loss cap, and thus were able to deduct their net losses without limitation and thereby reduce their Pennsylvania taxable income to $0. They paid no corporate net income tax in 2014. S.F. Nos. 16-17.

Prior to the Supreme Court's *Nextel* decision, Taxpayer filed a Petition for Refund with the BOA seeking a refund of the Pennsylvania corporate net income tax in the amount of $2,047,875 paid for the 2014 Tax Year. Taxpayer raised general issues regarding the calculation of the corporate net income tax as well as a constitutional challenge that the NLC deduction limitation violated the Uniformity Clause of the Pennsylvania Constitution (Pa. Const. art. VIII, §1) by creating variable effective tax rates, *i.e.*, Taxpayer paid tax while similarly situated taxpayers did not. Taxpayer requested an unlimited NLC deduction and corresponding tax refund. The BOA denied the refund request and declined to address the constitutional issues. Taxpayer timely appealed to F&R, raising the same issues.

F&R denied Taxpayer's request for relief because the limit on NLC deductions for the 2014 Tax Year was set at the greater of $4,000,000 or 25% of taxable income or the amount of net loss up to the amount of taxable income reported according to the Tax Code. *See* 72 P.S. §7401(3)4.(c)(1)(A)(V). Taxpayer correctly used a 25% net loss deduction in its tax calculation. The Tax Code does not authorize a greater net loss deduction.

As for Taxpayer's challenge to the validity and/or constitutionality of the NLC deduction, as applied, F&R stated that, as an administrative tribunal, it can only apply the current state of Pennsylvania law and cannot pass upon the validity or constitutionality of that law. *See Parsowith v. Department of Revenue*, 723 A.2d 659, 662 (Pa. 1999) (F&R is not a competent tribunal to pass upon a challenge of a statute's validity or constitutionality); *Philadelphia Life Insurance Co. v. Commonwealth*, 190 A.2d 111, 116 (Pa. 1963) (same). Thus, on August 23, 2017, F&R denied Taxpayer's request for relief. Taxpayer's petition for review to this Court followed.

Shortly thereafter, on October 18, 2017, the Supreme Court decided *Nextel*,[4] in which it severed the unconstitutional flat-dollar cap, while preserving the percentage cap, from the NLC provision at issue. *Nextel*, 171 A.3d at 705.

Following the *Nextel* decision, the Department issued Corporation Tax Bulletins, which accurately reflect the Department's past and ongoing policy practice to not reassess corporations that utilized the flat-dollar deduction until *after* January 1, 2017. S.F. No. 22. Thus, the Department implemented *Nextel*

[4] The parties filed briefs addressing the impact of the Supreme Court's decision in *Nextel* and supplemental briefs addressing the impact of this Court's decision in *General Motors Corporation v. Commonwealth*, 222 A.3d 454 (Pa. Cmwlth. 2019), *appeal pending* (Pa., No. 12 MAP 2020).

prospectively by removing the flat-dollar deduction beginning in 2017 and thereafter. *Id.*

II. Issues

In this appeal,[5] Taxpayer argues that the Department violated the Uniformity Clause of the Pennsylvania Constitution by applying the statutory percentage cap on net loss deductions to large corporations but refusing to apply the same percentage cap to small corporations. Alternatively, Taxpayer contends that the Due Process and Equal Protection Clauses of the United States Constitution and the Remedies Clause of the Pennsylvania Constitution (U.S. Const. amend. XIV, §1; Pa. Const. art. 1, §11) entitle Taxpayer and other similarly situated corporations to a remedy.

III. Discussion

A. Uniformity Clause

Taxpayer argues that the Department violated the Uniformity Clause by applying the 2014 NLC deduction provision as written, rather than by retroactively applying *Nextel* and recalculating the tax liabilities of all taxpayers that had utilized the $4,000,000 cap in accordance with the remaining percentage cap. *See General Motors Corporation v. Commonwealth*, 222 A.3d 454 (Pa. Cmwlth. 2019), *appeal pending* (Pa., No. 12 MAP 2020) (applying *Nextel* retroactively to the tax year ending December 31, 2001). Taxpayer contends that the Department cannot systematically refuse to apply a statute to some taxpayers, while applying the same

[5] This Court's review in this matter is "*de novo* in nature, with no record being certified by [F&R]." Pa. R.A.P. 1571; *Andrews v. Commonwealth*, 196 A.3d 1090, 1096 (Pa. Cmwlth. 2018). "Although the Court hears these cases under its appellate jurisdiction, the Court functions essentially as a trial court." *Andrews*, 196 A.3d at 1096 (citation omitted). Our decision is based on either a record created before this Court or, as in this case, stipulated facts. *Graham Packaging Co., LP v. Commonwealth*, 882 A.2d 1076, 1077 (Pa. Cmwlth. 2005).

statute to other taxpayers. *See Commonwealth v. Molycorp*, 392 A.2d 321 (Pa. 1978). According to Taxpayer, "[t]he only suitable remedy" to cure the Department's "discriminatory application" of the percentage cap statute is to treat Taxpayer the same as small corporations by allowing a full deduction of net losses without regard to the percentage cap. *Nextel*, 171 A.3d at 705. This will put Taxpayer in the same position as the small corporations that the Department's discriminatory policy favored.

We begin our analysis with a review of the *Nextel* decision. In *Nextel*, the Pennsylvania Supreme Court held that the 2007 NLC deduction provision, which permitted taxpayers to choose an NLC deduction the greater of 12.5% of taxable income or $3,000,000, violated the Uniformity Clause of the Pennsylvania Constitution (Pa. Const. art. VIII, §1). To cure the constitutional defect, the *Nextel* Court severed the flat-dollar cap from the 2007 NLC deduction provision, but left in place the percentage cap. The *Nextel* Court refused to grant the taxpayer the remedy it sought – an unlimited NLC deduction and corresponding tax refund – because the taxpayer calculated its 2007 tax liability using the percentage cap, which the Court left intact. Moreover, the *Nextel* Court rejected the taxpayer's argument that, pursuant to *Molycorp*, it was entitled to a full refund of the taxes it paid under the 2007 NLC deduction provision. The Court reasoned that *Molycorp* involved the discriminatory application of a valid taxing statute, and, therefore, the "only suitable remedy for such discrimination was to make whole the taxpayer who was overcharged through a refund of the overpaid taxes." *Nextel*, 171 A.3d at 705. In contrast, the taxpayer in *Nextel* challenged the structure of the 2007 NLC deduction provision, and based on the Court's severance of the offending provision of that

statute, "there was no overpayment of corporate income taxes by [the taxpayer], as it owe[d] exactly what the . . . Department previously assessed." *Id.*

In the wake of *Nextel*, the Department issued Corporation Tax Bulletins announcing that it would not apply *Nextel* to taxable years beginning *prior to* January 1, 2017. S.F. No. 22, Exhibits F and G. The Bulletins stated that the Department would "determine the corporate net income tax liability of taxpayers for taxable years beginning *after* December 31, 2006, through December 31, 2016, by allowing taxpayers the greater of the flat-dollar cap or the percentage cap as authorized by the statute prior to the issuance of the decision in *Nextel*." S.F., Exhibit G.

Taxpayer argues that the Department violated the Uniformity Clause by failing to retroactively apply *Nextel* and recalculate the tax liabilities of all taxpayers that had utilized the $4,000,000 cap in accordance with the remaining percentage cap. Taxpayer contends that *Molycorp* is controlling because, just as in *Molycorp*, here the Department applied the 2014 NLC deduction provision in a discriminatory manner because it "could have applied the percentage cap [provision] to small corporations, as the 2014 tax year was still open for assessments when the [] Supreme Court severed the [2007 flat-dollar provision] in *Nextel*." Taxpayer's Brief at 17. This is to be contrasted with *Nextel*, "where the 2007 tax year at issue was closed for assessment and no action could have been taken by the Department." *Id.* at 20. Taxpayer's contention that the Department could have, and should have, applied the percentage cap to small corporations is premised on the Department having a duty to retroactively apply *Nextel* to the 2014 NLC deduction provision. In other words, a finding that the 2014 NLC deduction provision violates the Uniformity Clause, and thus must be remedied, may be made *only if Nextel*, which

was decided in 2017, *applies retroactively*. Therefore, the next step in our analysis is whether *Nextel* applies retroactively.

In determining whether a decision applies retroactively, we are guided by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (plurality). *Oz Gas, Ltd. v. Warren Area School District*, 938 A.2d 274, 283 (Pa. 2007) (recognizing *Chevron*'s continued viability in Pennsylvania jurisprudence). In *Chevron*, the United States Supreme Court fashioned a three-part test for retroactivity. 404 U.S. at 106-07. "Those three factors examine: (1) whether the decision establishes a new principle of law; (2) whether retroactive application of the decision will further the operation of the decision; *and* (3) the relevant equities." *General Motors*, 222 A.3d at 471 (citing *Chevron*, 404 U.S. at 106-07) (emphasis added). "[W]hether a judicial decision should apply retroactively is a matter of judicial discretion to be decided on a case-by-case basis." *Passarello v. Grumbine*, 87 A.3d 285, 307 (Pa. 2014).

To illustrate, in *Oz Gas*, Pennsylvania taxpayers had "for nearly 100 years . . . paid *ad valorem* taxes on oil and gas interests" in reliance on past precedent, which held that oil and gas was taxable as real estate. *Oz Gas*, 938 A.2d at 278. However, new precedent – *Independent Oil and Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County*, 814 A.2d 180 (Pa. 2002) (*IOGA*) – precluded counties from collecting taxes on oil and gas reserves that remain in the ground. With regard to whether *IOGA* should apply retroactively to past taxes, our Supreme Court in *Oz Gas* determined that *IOGA* represented a departure from decades of taxation of oil and gas interests, upon which the taxing authorities had relied. *Oz Gas*, 938 A.2d at 283. "The decision in *IOGA* established a new principle of law in that, prior to the decision, these sorts of taxes were deemed collectible pursuant to statute and precedent." *Id.* The Supreme Court determined

that the other two *Chevron* factors also supported a prospective-only holding. *Id.* "Applying *IOGA* retroactively would not forward the operation of the decision because the decision speaks for itself and clearly establishes that the taxes are uncollectible going forward. And, finally, the equities weigh heavily in favor of prospective-only application." *Id.* The Court explained that requiring a refunding of the taxes would cause substantial financial hardship to the communities involved and the taxpayers would receive substantial relief from a prospective-only application of the decision. *Id.*

In *American Trucking Associations, Inc. v. McNulty*, 596 A.2d 784, 787 (Pa. 1991), a trucking association challenged Pennsylvania's axle tax and marker fees, which were assessed against common carriers. Ultimately, the United States Supreme Court found that such taxes and fees, when charged to carriers engaged in interstate commerce, violated the Commerce Clause of the United States Constitution (U.S. Const. art. VIII, §1). *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 297-98 (1987). In *McNulty*, the Pennsylvania Supreme Court was charged with determining whether *Scheiner* entitled the trucking association to a refund of taxes previously paid. While the *McNulty* matter was pending on remand, the United States Supreme Court determined that *Scheiner* applied prospectively only. *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 182 (1990) (plurality opinion). Applying the *Chevron* test, the United States Supreme Court determined that: (1) the decision in *Scheiner* clearly established a new principle of law by declaring the highway taxes unconstitutional pursuant to the Commerce Clause; (2) retroactive application of the *Scheiner* decision would not forward the operation of the decision; and (3) the relevant equities dictated prospective application because the legislature did not believe the taxes to be

unconstitutional, the taxing authorities collected taxes that the authorities reasonably believed were valid, and refunding the taxes could deplete the state treasury. *Id.* at 179-82. Later, in *McNulty*, the Pennsylvania Supreme Court embraced the logic employed in *Smith* and similarly determined that the *Scheiner* decision applied prospectively only. *McNulty*, 596 A.2d at 787. The Pennsylvania Supreme Court explained: "Under a ruling that [a decision] is to be applied prospectively, it is as though the taxes collected prior to the date of the decision were not unconstitutional." *Id.* "[T]he holding of unconstitutionality applies from the date of decision, and not before." *Id.* In other words, "the effect of holding [a decision] to be prospective only is to establish that the tax declared unconstitutional therein had not been unconstitutional until the Court so ruled." *Id.*

More recently, in *General Motors*,[6] this Court addressed whether *Nextel* itself should apply retroactively or prospectively under the *Chevron* test. *General Motors*, 222 A.3d at 471-73. We determined that *Nextel* met all three of the *Chevron* factors within the context of that appeal. *Id.* "[W]ith regard to the first prong, in *Nextel*, the Pennsylvania Supreme Court made it clear that, in finding that the net loss cap violated uniformity, it merely needed to apply existing case law to which it had 'steadfastly adhered' to for "over a century." *Id.* at 472 (quoting *Nextel*, 171

[6] We note that *General Motors* is factually distinguishable from this case. The NLC deduction at issue in *General Motors* contained only the flat-dollar deduction, not the percentage cap. The flat-dollar deduction created a non-uniform classification based solely on whether the taxpayer's income exceeded the $2,000,000. Taxpayers whose income exceeded $2,000,000 paid the corporate net income tax, while taxpayers whose income did not exceed $2,000,000 did not pay the tax in violation of the Uniformity Clause. To remedy this constitutional infirmity, we severed the $2,000,000 flat-dollar deduction from the NLC provision of the Tax Code. With the removal of the statutory cap, the taxpayer was entitled to a refund. Such is not the case here because Taxpayer paid tax under the percentage cap upheld as constitutional. Nevertheless, *General Motors* is instructive with regard to whether *Nextel* should apply retroactively or prospectively.

A.3d at 696-97). The *Nextel* Court "cited years of precedent for the principle that it has 'consistently viewed as unconstitutional tax laws which . . . wholly exempt some of those taxpayers from paying tax.'" *General Motors*, 222 A.3d at 472 (quoting *Nextel*, 171 A.3d at 697); *see, e.g.*, *Saulsbury v. Bethlehem Steel Co.*, 196 A.2d 664 (Pa. 1964) (holding that the Uniformity Clause proscribes the unequal treatment of certain individuals based upon their income); *Kelley v. Kalodner*, 181 A. 598 (Pa. 1935) (holding that a graduated-rate income tax violated the Uniformity Clause); *In re: Cope's Estate*, 43 A. 79 (Pa. 1899) (holding that a flat $5,000 property exemption applicable to all estates for purposes of the Pennsylvania Inheritance Tax violated the Uniformity Clause as it resulted in the unjust, arbitrary, and illegal classification of similarly situated taxpayers based solely on a difference in the amount of property in the estate). We reasoned that, unlike in *Oz Gas* and *McNulty*, the *Nextel* Court did not overrule prior precedent. *General Motors*, 222 A.3d at 472. Consequently, we determined that the Supreme Court in *Nextel* did not apply a new principle of law, but rather applied the longstanding principle that tax uniformity prohibits classification based on quantity of income. *Id.* In addition, we determined that the other two *Chevron* factors supported a retroactive application. *Id.* Under the second prong, a retroactive application furthered the *Nextel* decision by severing the offending flat-dollar deduction and "[e]qualizing the tax positions" of the favored and disfavored taxpayers. *Id.* With regard to the third prong, the Commonwealth failed to meet its burden of showing the inequities involved in issuing a refund to the taxpayer. *Id.* at 472-73.

Applying the foregoing here, we similarly conclude that *Nextel* meets the first prong for the same reasons stated in *General Motors*. *General Motors*, 222 A.3d at 472. However, under the second prong, a retroactive application would not

forward the operation of the *Nextel* decision in this case. In *Nextel*, the Supreme Court eliminated the flat-dollar deduction but upheld the percentage cap, which Taxpayer in this case correctly applied. Here, Taxpayer is attempting to avoid application of the percentage cap altogether in order to equalize the tax positions between the two classes and reduce its tax liability to $0. Such a position does not further the *Nextel* decision, which upheld the percentage cap.

With regard to the third prong, the weighing of equities is intended to evaluate whether retroactive application would produce "substantial inequitable results." *Chevron*, 404 U.S. at 107. The United States Supreme Court has recognized that this prong considers the impact on all parties. *Smith*, 496 U.S. at 183. The Pennsylvania Supreme Court has characterized this prong as the most significant of all three prongs. *McNulty*, 596 A.2d at 790. The inequity of retroactively applying *Nextel* in this case is more of a concern for unsuspecting taxpayers that legally claimed the dollar-based deduction and would now owe more taxes. The dollar cap was constitutional until the 2017 Tax Year, the year that *Nextel* was decided. The taxpayers that took the percentage-based NLC deduction were unaffected. However, taxpayers that took the dollar-based NLC deduction would actually owe more taxes if now forced to take the lesser, percentage-based deduction. Retroactively assessing thousands of taxpayers that justifiably relied upon the legality of the flat-dollar deduction prior to the *Nextel* decision would produce a substantially inequitable result. This is sufficient justification for applying the *Nextel* decision prospectively in order to avoid "injustice or hardship."

Upon review, *Chevron* does not support a retroactive application of *Nextel* in this case. We, therefore, apply *Nextel* prospectively. Because Taxpayer calculated its tax liability for the 2014 Tax Year using the 2014 NLC deduction

provision, which was not unconstitutional and was valid, in *toto*, until 2017, Taxpayer paid the correct amount of tax and is, therefore, not entitled to a refund.

B. Due Process, Equal Protection and Remedies Clauses

Alternatively, Taxpayer claims it is entitled to relief pursuant to the Due Process and Equal Protection Clauses of the United States Constitution and the Remedies Clause of the Pennsylvania Constitution. Taxpayer and other large corporations paid tax in the 2014 Tax Year, while thousands of similarly situated small corporations paid no tax. Taxpayer argues that, under *Nextel*, this unequal treatment violates the Uniformity Clause. The Department's policy to allow small corporations to utilize the flat-dollar deduction until the 2017 Tax Year leaves intact the non-uniform tax positions of the two classes: Taxpayer and other large corporations that paid tax while small corporations paid none for the 2014 Tax Year. According to Taxpayer, Due Process, Equal Protection, and the Remedies Clauses require "meaningful backward-looking relief" so that the actual relative position of Taxpayer (and the other disfavored taxpayers) is "equivalent to the position actually occupied by the favored taxpayers." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18, 42 (1990). Since the statute of limitations for assessing small corporations is now closed, the only way to place Taxpayer in an equal position as the small corporations is to allow Taxpayer to deduct its net losses without regard to the constitutional percentage cap.

1. Due Process

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. In *McKesson*,

the United States Supreme Court examined the requirements of due process in a tax discrimination case. There, the state court properly struck down a liquor tax as unconstitutional because it discriminated against interstate commerce by giving preference for liquor made from state-grown crops. Despite declaring the law unconstitutional, the state court refused to provide a refund or any other form of post-payment relief. *McKesson*, 496 U.S. at 22.

On appeal, the United States Supreme Court reversed the state court's failure to provide meaningful relief for the payment of an unlawful tax. *McKesson*, 496 U.S. at 52. The Supreme Court held that "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31 (footnote omitted). Due process is satisfied only if the "position" that the taxpayer occupies at the end of the day is "equivalen[t] to the position actually occupied by the [taxpayer's] favored competitors." *Id.* at 42. It is insufficient to merely "place [a taxpayer] in the same tax position that [the taxpayer] would have been placed by . . . a hypothetical" reformation of a discriminatory statute. *Id.* at 41.

As our Supreme Court explained in *Annenberg v. Commonwealth*, 757 A.2d 338 (Pa. 2000), the Court in *McKesson*

> did not bind the state's hands in choosing what type of backward looking remedy it would employ. Rather, the Court held that [the] State could cure the invalidity by: (1) refunding the difference between the tax paid and the tax that would have been assessed had the taxpayer been granted the unlawful exemption; (2) assessing and collecting back taxes, to the extent consistent with other constitutional restrictions, from those who benefited from the unlawful exemption during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme; or (3) applying a combination of a partial refund and a partial retroactive

> assessment, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce.

Id. at 349-50 (footnote omitted).

Here, unlike in *General Motors*, Taxpayer correctly paid the tax due under the percentage cap, which was upheld as constitutional in *Nextel*. Taxpayer was not denied property. Consequently, Taxpayer is not entitled to a refund based on an unlawful deduction. Although the small corporations benefited from the NLC's flat-dollar deduction, which was declared unconstitutional, as discussed above, a retroactive reassessment of their tax liability is foreclosed under *Chevron* and *Smith* as well as the statute of limitations. Under the circumstances presented here, applying *Nextel* prospectively by subjecting all corporations to the percentage cap after 2017 does not violate due process.

2. Equal Protection

Next, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state may "deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, §1. "The Equal Protection Clause applies only to taxation which in fact bears unequally on persons or property of the same class." *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336, 343 (1989) (citation and internal quotation omitted). "The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Id.* at 345.

A state law that does not target a protected class is subject to rational basis review. *Armour v. City of Indianapolis, Indiana*, 566 U.S. 673, 680 (2012). This means that "if there is a rational relationship between the disparity of treatment

and some legitimate governmental purpose," the statute meets the constitutional standard. *Id.* In creating classifications and distinctions in tax statutes, "[l]egislatures have especially broad latitude." *Id.* (citation omitted); *accord Allegheny Pittsburgh Coal*, 488 U.S. at 344. "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Id.*

Although the rational basis standard is relatively lax, when a tax classification violates a state's own law, it cannot meet the standard. *See Allegheny Pittsburgh Coal*, 488 U.S. at 345. For example, in *Allegheny Pittsburgh Coal*, the United States Supreme Court examined a local taxing scheme, which valued some properties based on recent purchase prices. The Supreme Court determined that the tax scheme violated West Virginia's constitution, which provided that all property shall be taxed in proportion to its value. The relative undervaluation of comparable properties in the county denied the taxpayers of equal protection of the law. *Id.* at 346. As for remedy, the Court ruled that "[a] taxpayer in this situation may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised." *Id.* "The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Id.*

In *General Motors*, we considered and rejected a similar equal protection argument. 222 A.3d at 469. "[A]s in *Allegheny Pittsburgh Coal*, the Pennsylvania Constitution requires uniform state taxation. Pa. Const. art. VIII, §1. In *Nextel*, the Pennsylvania Supreme Court determined that the flat-dollar threshold created a non-uniform classification in violation of the Pennsylvania Constitution.

Equal protection requires the Commonwealth to remove the discrimination." *General Motors*, 222 A.3d at 469. The Supreme Court removed the discrimination by severing the flat-dollar limitation. *Nextel*. Prospective application of *Nextel* does not violate equal protection.

3. Remedies Clause

Finally, the Remedies Clause of the Pennsylvania Constitution provides: "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law." Pa. Const. art. 1, §11. Our Supreme Court has said: "[T]he right to sue the Commonwealth for the recovery of money or taxes alleged to have been erroneously paid to it exists only by the grace of the Legislature." *Land Holding Corp. v. Board of Finance and Revenue*, 130 A.2d 700, 703 (Pa. 1957). "Where a State through its Legislature consents to be sued, the modes, terms and conditions of the statute conferring such privilege and authorizing refunds must be strictly construed and followed." *Id.*

In *General Motors*, we considered a similar Remedies Clause argument and held that where a taxpayer exercises its rights by seeking relief in open courts, the Remedies Clause is satisfied. *See General Motors*, 222 A.3d at 469-70.

Here, Taxpayer is exercising its right to pursue a tax refund consistent with the rights granted to it by the General Assembly. The "due course of law" includes the statutorily prescribed administrative review before F&R and the judicial appeal process. *General Motors*, 222 A.3d at 470. The Court is "open" to Taxpayer and is considering Taxpayer's claims. In this regard, Taxpayer's rights under the

Remedies Clause are being met. *See General Motors*, 222 A.3d at 470. The Remedies Clause does not otherwise entitle Taxpayer to the relief it seeks.[7]

IV. Conclusion

In sum, because application of the *Nextel* decision is prospective only in this case, Taxpayer correctly paid corporate net income taxes in the amount of $2,047,875 for the 2014 Tax Year by using the 2014 NLC deduction provision and is not entitled to a refund. In addition, Taxpayer is not entitled to a refund pursuant to the Due Process, Equal Protection, and Remedies Clauses.

Accordingly, we affirm.

MICHAEL H. WOJCIK, Judge

Judge Crompton did not participate in the decision of this case.

[7] Taxpayer concedes that this Court's decision in *General Motors* is dispositive on its Equal Protection and Remedies Clause claims, but it reserves its right to appeal these issues. *See* Petitioner's Supplemental Brief at 7-8 n.28.

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	:	
Commonwealth of Pennsylvania,	:	
	:	
Respondent	:	

O R D E R

AND NOW, this 13th day of September, 2021, the order of the Commonwealth of Pennsylvania, Board of Finance and Revenue dated August 23, 2017, is AFFIRMED. Unless exceptions are filed within thirty (30) days pursuant to Pa. R.A.P. 1571(i), this Order shall become final.

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MICHAEL H. WOJCIK, Judge