[J-9-2021][M.O. – Baer, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

GENERAL MOTORS CORPORATION,	:	No. 12 MAP 2020
	:	
Appellee	:	Appeal from the Order of
	:	Commonwealth Court dated 1/30/20 at
	:	No. 869 FR 2012 granting the waiver
	:	of briefing and argument on exceptions
v.	:	and entering judgment of the 11/21/19
	:	order that reversed and remanded the
	:	decision of the PA Board of Finance
	:	and Revenue at No. 1202690 dated
COMMONWEALTH OF PENNSYLVANIA,	:	11/6/12 and exited 11/9/12
	:	
	:	ARGUED: March 10, 2021
Appellant		

DISSENTING OPINION

JUSTICE SAYLOR **DECIDED: December 22, 2021**

I respectfully dissent, since I agree with the Commonwealth's position that *Nextel Communications of the Mid-Atlantic, Inc. v. Department of Revenue*, 642 Pa. 729, 171 A.3d 682 (2017), made a "fundamental break from precedent that litigants may have relied upon." Brief for Appellant at 22 (quoting *Passarello v. Grumbine*, 624 Pa. 564, 602, 87 A.3d 285, 308 (2014)). In the first instance, in *Dana Holding Corp. v. WCAB (Smuck)*, ___ Pa. ___, 232 A.3d 629 (2020), this Court recognized that the overturning of a presumptively valid statute "raise[s] the same concerns about reliance and vested rights

that have animated the application of balancing tests to determine whether the effect of new rules should be limited to prospective application." *Id.* at ___, 232 A.3d at 640.[1]

If this were not sufficient, *Nextel* explicitly disavowed the previous ruling in *Commonwealth v. Warner Brothers Theatres, Inc.*, 345 Pa. 270, 27 A.2d 62 (1942), that a taxation scheme incorporating a cap on capital-loss deductions "does not violate the Uniformity provision of the Constitution," because "[w]here the base is the same and the rate unvarying, there is no lack of uniformity." *Id.* at 274, 27 A.2d at 64. As the Commonwealth highlights, the decisions referenced by the majority as ostensibly reflecting the Court's "steadfast[] adhere[nce]" to the opposite proposition involved different questions of disparate tax rates. Majority Opinion, *slip op.* at 25-28.[2]

However, "[w]hether, in calculating the tax base, a deduction dollar cap violates uniformity *was* the issue in *Commonwealth v. Warner Bros*." Brief for Appellant at 21 (emphasis in original). In terms of the reliance interest in maintaining a statutory cap on net-loss deductions, the Commonwealth can find very little comfort in the fact that *Warner Brothers*' material and straightforward proclamation was expressed in relatively brief terms, *see* Majority Opinion, *slip op.* at 29 (relying on the fact that *Warner Brothers* "provided minimal discussion of the Uniformity Clause issue" to remove the decision from the calculus of determining whether *Nextel* reflects a new rule). *Cf. American Trucking Associations, Inc. v. McNulty*, 528 Pa. 212, 219, 596 A.2d 784, 787 (1991) ("Undeniably,

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[1] Although the Court in *Dana Holding* tended toward the modern federal approach of favoring retroactive application of judicial rulings invalidating statutes to similarly-situated litigants, we expressly recognized that tax-refund cases are treated differently. *See id.* at ___, 232 A.3d at 642, 647.

[2] *See* Brief for Appellant at 21 ("[O]f course the Court was able to 'ancho[r] its decision [to invalidate a state taxation statute] in precedent[,] . . . [b]ut surely that cannot be dispositive. Few decisions are so novel that there is no precedent to which they may be moored." (quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 127-28, 113 S. Ct. 2510, 2534 (1993) (O'Connor, J., dissenting))).

the General Assembly was justified in relying on the *Aero Mayflower* line of cases in considering the statutes enacted here to be constitutional.").

As such, I would implement the balancing assessment that is ordinarily applied in determining retroactive application of a new rule in the discrete setting of tax-refund cases, as manifested in *Oz Gas, Ltd. v. Warren Area Sch. Dist*., 595 Pa. 128, 938 A.2d 274 (2007). There, this Court ultimately pronounced the general rule that "a decision of this Court invalidating a tax statute takes effect as of the date of the decision and is not to be applied retroactively." *Id.* at 146, 938 A.2d at 285; *accord McNulty*, 528 Pa. at 225, 596 A.2d at 791.

Finally, based on my conclusion that *Nextel* reflects a new rule (and that the judicial overturning of a presumptively valid statute in the absence of on-point, clearly-settled law is sufficient to implicate a retroactivity assessment in any event), I respectfully differ with the majority's conclusion that due process requires a refund. *See generally* Brief for Appellant at 13-14 (distinguishing *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco of Florida*, 496 U.S. 18, 110 S. Ct. 2238 (1990), on the basis that the circumstances before the Supreme Court involved a state's clear violation of settled law, and, for this reason, the state was obligated to provide relief consistent with that law).[3]

[3] I also note that the majority's present due process analysis, if applied in *Nextel*, would seem to require a different result in that matter. While the analysis in *Nextel* was centered on legislative intent relative to severance, *see Nextel*, 642 Pa. at 764-68, 171 A.3d at 703-05, this Court generally presumes that the Legislature did not intend an unconstitutional result. *See* 1 Pa.C.S. §1922(3).