[J-9-2021] [MO: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 January
	:	30, 2020 at No. 869 FR 2012
v.	:	granting the waiver of briefing and
	:	argument on exceptions and
	:	entering judgment of the November
COMMONWEALTH OF PENNSYLVANIA,	:	21, 2019 order that Reversed and
	:	Remanded the Decision of the PA
Appellant	:	Board of Finance & Revenue at No.
	:	1202690 dated November 6, 2012
	:	and exited November 9, 2012.
	:	
	:	ARGUED: March 10, 2021

DISSENTING OPINION

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

I respectfully dissent, as I do not believe that our decision in *Nextel Communications of Mid-Atlantic, Inc. v. Commonwealth*, 171 A.3d 682 (Pa. 2017), applies retroactively.

It is well-established 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."[1] And with good reason; retroactive application of a decision striking down a tax statute "subjects the taxing entities to the potentially devastating repercussion of having to refund taxes paid,

[1] *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274, 285 (Pa. 2007); *see also Mount Airy # 1, LLC v. Pa. Dept. of Revenue*, 154 A.3d 268, 280 n.11 (Pa. 2016) ("[T]axes collected pursuant to an unconstitutional statute, prior to the date of invalidation, are not generally refundable.").

budgeted and spent by the entities for the benefit of all, including those who challenged the tax."[2]

While *Chevron*[3] (the general test governing retroactivity) controls in other circumstances, we have applied the *Oz Gas* rule of non-retroactivity in tax cases without discussing the *Chevron* factors at all.[4] As our jurisprudence has evolved, the *Oz Gas* rule has displaced the *Chevron* factors in the tax arena. The Commonwealth Court majority chose nonetheless to reject a prospective-only approach, opining that failure to refund GM "would have a chilling effect on taxpayers that wish to make [constitutional] challenges" to tax statutes.[5] Notably, however, we have rejected this very argument many times, including in *Nextel*.[6] I can discern no reason why this case should be any different.

Despite the *Oz Gas* rule of non-retroactivity, a taxpayer who wants to challenge the constitutionality of a tax statute still has an incentive to do so. First, getting a tax statute struck down as unconstitutional generally will benefit the taxpayer moving forward. (Admittedly, that is not the case here because the statute at issue applies only to the 2001 tax year.) Second, taxpayers can seek a declaratory judgment and/or injunctive relief *before* paying the tax. Third, there is at least one exception to the rule that decisions striking down tax statutes apply only prospectively. In *Sands Bethworks Gaming, LLC v. Pennsylvania Department of Revenue*, 207 A.3d 315 (Pa. 2019), we held that the Gaming

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2 *Oz Gas*, 938 A.2d at 285.

3 *See Chevron Oil Company v. Huson*, 404 U.S. 97 (1971).

4 *See Mount Airy*, 154 A.3d at 280 n.11.

5 *General Motors Corp. v. Commonwealth*, 222 A.3d 454, 468 (Pa. Cmwlth. 2019).

6 *Oz Gas*, 938 A.2d at 284 ("[T]here is always an incentive, in the avoidance of liability for payment of taxes or fees in the future, to challenge the validity of a statute."); *Nextel*, 171 A.3d at 705 ("[W]e reject Nextel's argument that failure to reward its challenge with a refund will somehow chill the bringing of future such actions to contest the constitutionality of taxing statutes.").

Act's "Casino Marketing and Capital Development" ("CMCD") tax scheme violated the Uniformity Clause. Nevertheless, we ordered the Department of Revenue to refund the proceeds of that unconstitutional tax. Writing for the Court, then-Chief Justice Saylor explained that:

> Ordinarily, a ruling invalidating a tax statute is not applied retroactively so as to require the government to refund all taxes paid under the statute, as doing so "subjects the taxing entities to the potentially devastating repercussion of having to refund taxes paid, budgeted *and spent*[.]" *Oz Gas*, 938 A.2d at 285 (emphasis added); *see also Mount Airy #1*, 154 A.3d at 280 n.11 (noting money damages are ordinarily unavailable as a remedy for a constitutional violation). That concern does not apply here because the funds have not been spent, but have been held in abeyance in the CMDC Account during the pendency of this matter. . . . This suggests that the appropriate remedy is for the Commonwealth to refund such monies to those who paid them – and indeed, that is the remedy favored by all parties to this litigation.

Id. at 325.

In other words, there's some flexibility in the *Oz Gas* rule of non-retroactivity, at least in situations where the tax proceeds have been segregated and not yet been budgeted or spent. But that's obviously not the case with GM's 2001 corporate net income tax dollars, which surely are long gone from the state treasury.

In sum, the *Chevron* test does not control here. "[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." *Oz Gas, Ltd*., 938 A.2d at 285. Thus, General Motors is not entitled to the benefit of *Nextel*. Because the Majority concludes otherwise, I respectfully dissent.