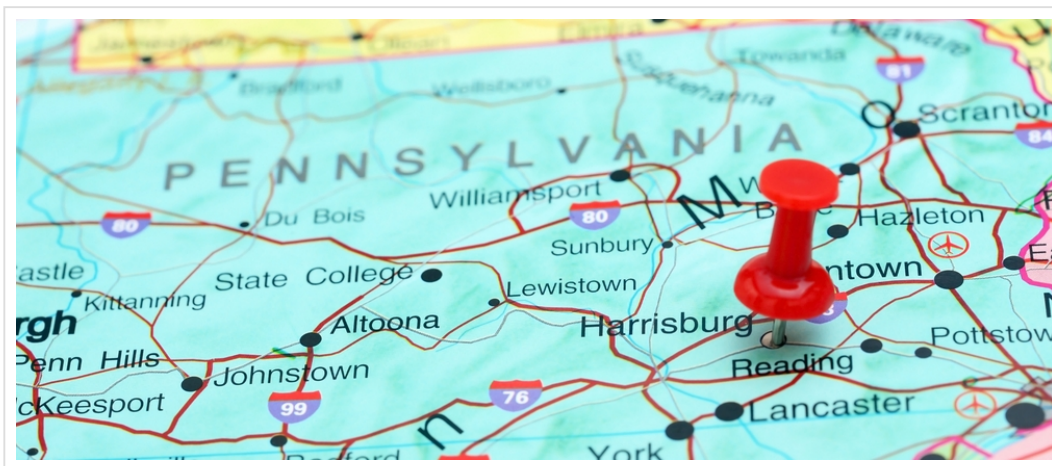


# WIN SOME, LOSE SOME: THE PENNSYLVANIA SUPREME COURT ON UNIFORMITY

Posted on **October 23, 2017** by **Jim Malone**



The

Pennsylvania Supreme Court sustained Nextel's challenge to the statutory cap on the net loss carryforward deduction, but the company went home empty-handed. *Nextel Communs. of the Mid-Atlantic, Inc. v. Commonwealth*, No. 6 EAP 2016, 2017 Pa. LEXIS 2456 (Pa. Oct. 18, 2017), *rev'g*, 129 A.3d 1 (Pa. Commw. 2015).

To recap, in November of 2015, Nextel won a major victory in Commonwealth Court, as its challenge to the structure of the net loss carryover deduction as a violation of the uniformity clause was sustained. Nextel argued that the statute, which limited the deduction to the greater of a percentage of taxable income or a flat dollar amount, allowed certain corporations to escape tax altogether, thereby violating the uniformity clause of the Pennsylvania Constitution. 129 A.3d at 4-5. The court agreed. *Id.* at 9-10. While a majority of the Commonwealth Court concluded that all caps on the net loss carryover deduction should be struck and awarded Nextel a refund, two judges dissented on the remedy, arguing that the problematic dollar cap should be severed, leaving the percentage cap in place. *Id.* at 14-16 (Pellegrini, J. dissenting).

The Supreme Court agreed with the Commonwealth Court that the dollar cap on the deduction violated the uniformity clause. At the outset, the court rejected the Commonwealth's argument that corporate income taxes are treated differently for uniformity purposes, along with an alternative argument that only rate differences matter. 2017 Pa. LEXIS 2456 at \*15-\*20. After a thorough review of the history of the uniformity clause and the case law under it, the court held that the hard dollar limitation on the deduction improperly created two classes of taxpayers: Those who were exempt from taxation, and those who were not. *Id.* at \*35.

On the remedy, however, Nextel did not fare as well. The court concluded that the hard dollar cap on the deduction should be severed, but the percentage limitation left in place. *Id.* at \*50. The court's conclusion rested on an analysis of legislative intent. It weighed three options:

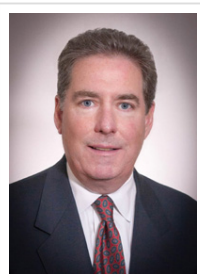
- Severing the dollar limit on the deduction;
- Severing the dollar limit and the percentage limit; or
- Striking down the entire statute and eliminating the deduction altogether.

*Id.* at \*46. The court then concluded that severing the dollar limit best fulfilled the intent of the legislature because it kept the deduction in place while also imposing limits on its scope. *Id.* at \*49-\*50.

As a matter of analyzing legislative intent, the majority's position is hard to fault. The problem is that it leaves in place a situation in which many taxpayers improperly escaped tax altogether under the illegal provision, and Nextel wound up paying taxes. Normally, it would be appropriate to award retrospective relief to Nextel. *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 31, 38-41 (1990); *see also Annenberg v. Commonwealth*, 562 Pa. 581, 757 A.2d 338, 349-51 (2000). While *McKesson* and *Annenberg* were commerce clause cases, that should not make a difference: The commerce clause limits the power of a state to legislate, and the uniformity clause does so as well.

While the outcome seems anomalous, it is not unprecedented: The Pennsylvania Supreme Court has previously applied decisions invalidating a tax prospectively. *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 595 Pa. 128, 938 A.2d 274, 284-85 (2007).

For all of the posts related to the *Nextel* case, [click here](#).



By: [Jim Malone](#)

Jim Malone is a tax attorney in Philadelphia. A Principal at Post & Schell, he focuses his practice on federal, state and local tax controversies. [Learn more about Post & Schell's Tax Controversy Practice >>](#)

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