[J-9-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

GENERAL MOTORS CORPORATION,	:	No. 12 MAP 2020
	:	
Appellee	:	Appeal from the Order of Commonwealth Court dated January 30, 2020 at No. 869 FR 2012 granting the waiver of briefing and argument on exceptions and entering judgment of the November 21, 2019 order that Reversed and Remanded the Decision of the PA Board of Finance & Revenue at No. 1202690 dated November 6, 2012 and exited November 9, 2012.
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
Appellant	:	
	:	ARGUED: March 10, 2021

<u>OPINION</u>

CHIEF JUSTICE BAER **DECIDED: December 22, 2021**

Pennsylvania's Tax Reform Code of 1971 ("Tax Code"), as amended, permits corporate taxpayers to deduct losses suffered in prior years from the current year's taxable income to reduce their tax liability. The General Assembly in the years since 1991 has placed various caps on the so-called "net loss carryover," ("NLC") that a corporate taxpayer can deduct each year. In recent years, corporate taxpayers have challenged the caps as creating unequal tax burdens on classes of taxpayers based upon the quantity of their income in violation of the Uniformity Clause of the Pennsylvania Constitution, Article VIII, Section 1.[1]

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[1] The Uniformity Clause instructs, "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." PA. CONST. art. VIII, § 1.

In *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth, Department of Revenue*, 171 A.3d 682 (Pa. 2017), this Court held that the NLC deduction applicable to corporate income tax for the tax year ending December 31, 2007 ("2007 Tax Year"), discussed *infra,* violated the Uniformity Clause. In the case at bar, we apply *Nextel* and consider General Motors Corporation's ("GM's") constitutional challenges to the NLC provisions applicable to corporate income tax in the tax year ending December 31, 2001 ("2001 Tax Year").

As explained below, we agree with the Commonwealth Court that *Nextel* applies retroactively to the case before us; however, we reverse the Commonwealth Court to the extent it remedied the violation of the Uniformity Clause by severing the $2 million NLC deduction cap, which would result in an unlimited NLC deduction; for the reasons set forth below, we instead sever the NLC deduction provision in its entirety, which will result in no NLC deduction for the 2001 Tax Year. We, nevertheless, affirm the Commonwealth Court's order to the extent it directs the Department to recalculate GM's corporate income tax without capping the NLC deduction and issue a refund for the 2001 Tax Year, which we conclude is required to remedy the due process violation of GM's rights pursuant to *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18 (1990).

I. Factual Background

GM is a Delaware corporation engaged in the sale of motor vehicles in Pennsylvania and subject to Pennsylvania's corporate income tax.[2] In the case at bar, GM is contesting the calculation of its 2001 Tax Year corporate income tax, after filing a report of change in its federal taxable income in March 2010. GM asserted that it had $9,394,999.00 in taxable income apportioned to Pennsylvania for 2001 and

[2] General Motors, apparently as a result of bankruptcy proceedings, is "also known as Motors Liquidation Company through any successors in interest." Stipulation of Facts, dated December 14, 2018, at 2; *see also* Department's Brief at 5 n.1.

$202,276,343.00 in available net losses that had accumulated since 1995 and could be applied to the 2001 Tax Year. Under the applicable provisions of the Tax Code, 72 P.S. § 7401(3)4.(c)(1)(A)(I), GM could deduct net losses only up to a $2 million cap, resulting in $7,394,999.00 of taxable income.[3] After applying the 9.99 percent corporate tax rate to its taxable income, GM computed and paid $738,760.00 in 2001 Tax Year corporate income taxes. *See* 72 P.S. § 7402(b) (setting the "annual rate of tax on corporate net income" at 9.99 percent). Had it not been subject to the $2 million statutory NLC deduction cap, it could have deducted losses equal to its income and thereby reduced its corporate income tax liability to zero.

In February 2012, GM timely filed a petition for refund with the Department of Revenue's ("Department") Board of Appeals. It claimed, *inter alia*, that the cap on the NLC resulted in a "progressive effective tax rate" which violated the Uniformity Clause. It explained that "a taxpayer conducting business on a larger scale in Pennsylvania pays a higher effective tax rate than a similarly situated taxpayer conducting business on a smaller scale." Petition for Refund (attached rider). GM contended that the $2 million

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[3] The yearly calculation of the net loss deduction is defined by Section 7401(3)4.(c)(1)(A), in relevant part, as follows:

> (c)(1) The net loss deduction shall be the lesser of:
>
> (A)(I) For taxable years beginning before January 1, 2007, two million dollars ($2,000,000);
>
> (II) For taxable years beginning after December 31, 2006, the greater of twelve and one-half per cent of taxable income as determined under subclause 1 or, if applicable, subclause 2 or three million dollars ($3,000,000) . . . or
>
> (B) The amount of the net loss or losses which may be carried over to the taxable year or taxable income . . . .

72 P.S. § 7401.

cap violates the Uniformity Clause by imposing a 9.99 percent tax on corporate defendants with greater income while smaller corporations with less than $2 million in taxable income can utilize an unlimited NLC deduction, and potentially reduce their tax liabilities to zero, as would have occurred if GM had been able to utilize all its available NLC.

The Board of Appeals denied relief to GM because it does not have authority to declare statutory provisions unconstitutional. GM appealed to the Board of Finance and Review on June 26, 2012, which sustained the decision of the Board of Appeals, observing that it also did not have authority to adjudicate the constitutionality of the statute. GM then filed a Petition for Review in Commonwealth Court in December 2012, reasserting its arguments challenging the constitutionality of the flat $2 million cap on the NLC deduction. The Commonwealth Court initially held this case pending completion of the litigation in *Nextel*, which raised similar challenges to the subparagraph of Section 7401(3)4.(c)(1)(A) relevant to the 2007 Tax Year. As the instant case involves the application of this Court's recent decision in *Nextel*, we turn first to that case.

II. *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth, Department of Revenue*, 171 A.3d 682 (Pa. 2017)

Nextel Communications of the Mid-Atlantic, Inc. ("Nextel") challenged the subparagraph of Section 7401, set forth *supra* at note 3, applicable to the 2007 Tax Year. Unlike the 2001 Tax Year provisions applicable to GM, which included only a flat $2 million cap, the 2007 Tax Year provisions challenged by Nextel limited the potential NLC deduction to the "greater of twelve and one-half per cent of taxable income . . . or three million dollars." 72 P.S. § 7401(3)4.(c)(1)(A)(II). Under this statute, the majority (98.8 percent) of corporations, specifically those with $3 million or less in taxable income, could "reduce their tax liability to zero in the 2007 Tax Year, if they had prior net operating losses of $3 million or more." *Nextel*, 171 A.3d at 686-87. In contrast, the few corporations (1.2

percent) with income in excess of $3 million could not reduce their tax liability to zero even if their carryover losses exceeded their income for the 2007 Tax Year because the NLC deduction was capped at the greater of $3 million or 12.5 percent of their taxable income. *Id.* at 687. Nextel asserted that the 2007 Tax Year NLC deduction cap provision violated Pennsylvania's Uniformity Clause in that it imposed "tax classifications between corporations based on the quantity of their property," in violation of our prior caselaw invalidating "dollar-value thresholds for exemptions and deductions." *Id.* at 693, 692.

In addressing Nextel's argument, this Court provided a thorough and erudite history of the Uniformity Clause, which we reference but do not reproduce here. *Id.* at 694-698. It emphasized that the "paramount tenant" of the Uniformity Clause is that the "burden should be borne equally by all those who are obligated to pay a tax." *Id.* at 697. Where a classification is made between groups of taxpayers, "the standard to be used in determining whether the law violates the Uniformity Clause is whether the classification is based upon some legitimate distinction between the classes that provides a non-arbitrary, reasonable, and just basis for the disparate treatment." *Id.* at 696 (internal quotation marks and citation omitted). Critical to our ultimate holding in *Nextel*, we opined that "classifications based solely upon the quantity or value of the property being taxed are arbitrary and unreasonable, and hence, forbidden." *Id.* at 696.

In support of this statement, the opinion identified *In re Cope's Estate*, 43 A. 79 (Pa. 1899) in which this Court deemed unconstitutional a provision that exempted all estates valued at $5,000 or less from inheritance tax. Similarly, we highlighted *Kelley v. Kalodner*, 181 A. 598 (Pa. 1935), in which this Court found the Uniformity Clause violated by a statute that, *inter alia,* provided a flat deduction from taxable income, specifically $1,000 for single taxpayers, $1,500 for married taxpayers, and $400 for each dependent under eighteen. *Nextel*, 171 A.3d at 697. Likewise, the Court cited to our prior rejection in *Saulsbury v. Bethlehem Steel Co*., 196 A.2d 664 (Pa. 1964), of a $10 occupational privilege tax imposed solely on taxpayers earning in excess of $600. *Nextel*, 171 A.3d at 697-98.

We additionally looked to *Amidon v. Kane*, 279 A.2d 53, 60 (Pa. 1971), where this Court found a Uniformity Clause violation despite the utilization of a flat 3.5 percent tax rate. In that case, the personal income tax was calculated by applying the flat tax rate to the taxpayer's net personal income as reported on their federal tax return. The Court in *Amidon* deemed this unconstitutional due to the personal exemptions used to calculate each taxpayer's federal taxable income, which resulted in a lack of uniformity, similar to the overt exemptions in *Kelley* and *Saulsbury*.

In addition to relying upon long-standing caselaw, we also looked to our then recent decision in *Mount Airy # 1, LLC v. Pennsylvania Department of Revenue*, 154 A.3d 268 (Pa. 2016), addressing a challenge to municipal taxation of casinos outside of Philadelphia. In relevant part, the statute at issue in *Mount Airy* "resulted in casinos with less than $500 million in gross revenues paying a flat amount of $10 million, while casinos with gross revenues in excess of $500 million . . . were required to pay more than $10 million." *Nextel, 171 A.3d at 699*. In finding this provision in *Mount Airy* unconstitutional, we reaffirmed "the central tenet of our Court's Uniformity Clause jurisprudence: a taxing statute which classifies similarly situated taxpayers solely on the basis of their income, and thereby places differing tax burdens on each class as a result, is forbidden." *Id.* at 700.

Applying this caselaw to the NLC deduction cap, this Court in *Nextel* concluded that the 2007 Tax Year provision was unconstitutional as a result of the $3 million flat cap on deductions. While recognizing that the NLC provision utilized a deduction cap rather than the taxation exemption thresholds reviewed in *Cope's Estate*, *Kelley*, and *Saulsbury*, we explained that the NLC provision violated the Uniformity Clause because it "operates in a manner that creates the very same type of exemption from taxation solely on the basis of income." *Nextel*, 171 A.3d at 698. As explained above, one class of corporate taxpayer could employ the NLC deduction to reduce their tax liability to zero where another could not. "Because the NLC has created disparate tax obligations between these two classes of similarly situated taxpayers based solely on the value of the property involved – i.e., the amount of each class member's taxable income – it is . . . an arbitrary and unreasonable classification which is prohibited by the Uniformity Clause." *Id.* at 699.

In so holding, this Court distinguished our prior decisions in *Turco Paint and Varnish Co. v. Kolodner*, 184 A. 37 (Pa. 1936), and *Commonwealth v. Warner Brothers*, 27 A.2d 62 (Pa. 1942), upon which the Department had relied. We highlighted that *Turco Paint* did not involve unconstitutional differentiations based upon the quantity of a taxpayer's income, but instead involved a challenge to the calculation of income. As described in more detail below, the tax provision challenged in *Turco Paint* imposed corporate income tax based upon a corporation's federal net income. For corporations doing business in different states, the statute provided a method of apportioning the business attributable to Pennsylvania based upon the consideration of three factors: "the corporation's gross receipts from Pennsylvania, its Pennsylvania payroll, and the physical property it owned in Pennsylvania." *Nextel*, 171 A.3d at 700 (citing T*urco Paint*, 184 A. at 41). We observed that this statutory calculation resulted in "some variance in the amount of a corporation's net income subject to taxation, due to the degree to which a corporation derived its income from Pennsylvania," but held that it was not unconstitutional because the variance resulted from the corporation's activities in Pennsylvania and "was not the product of purposeful legislative differentiation among groups of corporate taxpayers." *Id.* at 700.

Next, this Court in *Nextel* distinguished the decision in *Warner Brothers*. We observed that *Warner Brothers* focused primarily on the claim that "the General Assembly unlawfully delegated its power to impose income taxes to the federal government by using the federal income tax code's definition of a corporation's taxable income" and "cursorily dismissed" the Uniformity Clause issue raised by the challenger. *Id.* at 701. Thus, the Court in *Nextel* opined that neither *Turco Paint* nor *Warner Brothers* altered the conclusion that that statutory cap on the NLC deductions as applied to Nextel violated the Uniformity Clause because it classified taxpayers based upon the quantity of their income.

In so doing, we additionally rejected the Department's reliance on language in *Amidon* suggesting a distinction between the Uniformity Clause analysis of personal income tax, as applied in *Cope's Estate* and *Kelley*, and corporate income tax, as in *Turco Paint* and *Warner Brothers*. We clarified that "[w]hile our Court has recognized critical differences between corporate and personal tax codes, this recognition should not be interpreted as an endorsement of a wholly separate uniformity analysis for corporate and personal taxes. The Uniformity Clause, and our caselaw interpreting it, is equally applicable to both types of taxes." *Id.* at 700-701

Having concluded that the 2007 Tax Year NLC provision as applied to Nextel violated the Uniformity Clause based upon the long-standing caselaw in *Cope's Estate, Kelley*, *Saulsbury*, *Amidon*, and the more recent decision in *Mount Airy*, the Court in *Nextel* next considered the remedy, engaging in a severability analysis. We recognized that there were "three available options: (1) sever the flat $3 million deduction from the remainder of the NLC; (2) sever both the $3 million and 12.5% deduction caps and allow corporations to claim an unlimited net loss . . . ; or (3) strike down the entire NLC and, thus, disallow any net loss carryover." *Id.* at 703. To determine the appropriate remedy, the Court considered the legislative history of the NLC deduction.

We traced the history of the net lost carryover deduction, recounting that it was first introduced in 1980 as an unlimited deduction to encourage investment by companies engaged in high technology, farming, and construction, presumably industries with high starting costs that would benefit from deducting early losses from later profits. Faced with the need to raise revenue following a recession, the General Assembly eliminated the NLC deductions from 1991-1994. The General Assembly reinstated the NLC deduction in 1994 but imposed a flat dollar figure cap. In the intervening years, it has maintained the NLC deduction with a cap, which has increased over time, and added the percentage cap deduction provision beginning in Tax Year 2007.

From this history, the Court in *Nextel* discerned that "the overall structure of the NLC reflects the legislature's intent to balance the twin policy objectives of encouraging investment (by allowing corporations to deduct some of the losses they sustain when making such investments against their future revenues), and ensuring that the Commonwealth's financial health is maintained (through the capping of the amount of this deduction)." *Id.* at 704. Given these dual goals, the Court determined that severing the flat $3 million cap would best effectuate the legislative intent as it would promote private investment by providing the NLC deduction, but protect the public fisc by imposing the 12.5 percent cap on all corporations, which critically satisfied the "central tenet" of the Uniformity Clause which is "that the tax burden be borne equally by the class of taxpayers subject to paying it." *Id.* at 704-05.

In so doing, the Court rejected Nextel's proposal of striking the cap entirely as it would be contrary to the legislative decision rejecting unlimited NLC deductions and imposing caps in all years since 1994. Importantly, we opined, "To remove all caps, and allow unlimited net loss deductions would be clearly contrary to the wishes of the General Assembly." *Id.* at 705. We nevertheless also rejected the Department's proposal to eliminate the NLC deduction, which would have required Nextel to pay additional taxes, finding that option inconsistent with the legislative intent to encourage business investment. Instead, by striking only the $3 million flat cap, the Court concluded that Nextel was not entitled to a refund as it had paid taxes calculated utilizing the retained 12.5 percent NLC deduction cap. In a footnote, this Court acknowledged that the

Department "indicated that it is not seeking the right to make additional assessments against any other taxpayer beyond the period of the statute of limitations, and our decision today does not confer such a right upon it." *Id.* at 705 n.27 (internal citation omitted).[4]

III. Proceedings in Commonwealth Court following *Nextel*

In the wake of this Court's 2017 decision in *Nextel*, GM and the Department entered into a joint stipulation of facts in December 2018.[5] In addition to stipulating to the relevant financial data relating to GM's taxable income set forth above, GM and the Department stated that 15,395 corporations had net losses in excess of taxable income for the 2001 Tax Year. Only 134 corporations of these 15,395 corporations had taxable income in excess of the $2 million cap, which subjected them to income tax liability while the other corporations reduced their corporate income tax liability to zero. The parties additionally agreed that the "statutory time period for the Department of Revenue to disallow a net loss deduction and issue an assessment for the [2001] Tax Year has expired." Stipulation of Facts at 5.

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[4] In rejecting Nextel's request for a refund, this Court found inapplicable cases relied upon by Nextel involving the "discriminatory application of an otherwise valid taxing statute," where "the only suitable remedy for such discrimination was to make whole the taxpayer who was overcharged through a refund of the overpaid taxes." *Id.* at 705 (distinguishing *Commonwealth v. Molycorp*, 392 A.2d 321 (Pa. 1978); *Iowa–Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); and *Tredyffrin–Easttown School District v. Valley Forge Music Fair, Inc.*, 627 A.2d 814 (Pa. Cmwlth. 1993)) (emphasis removed). The Court contrasted the situation in *Nextel*, which did not involve a discriminatory application of a constitutional statute as in the cited cases, but instead involved an unconstitutional tax provision, which when severed, resulted in Nextel having paid its taxes in conformity with the retained, constitutional 12.5% NLC deduction cap. We observe that Nextel did not present this Court with a robust due process argument based upon *McKesson*, 496 U.S. 18, as does GM in the case at bar as discussed *infra.*

[5] Initially, the Commonwealth Court stayed GM's litigation pending the parallel appeal of *RB Alden Corp. v. Commonwealth*, 169 A.3d 727 (Pa. Cmwlth. 2017), which raised similar issues. Subsequently, the court issued decisions in both cases on November 21, 2019, but only published the decision in regard to GM's appeal. This Court placed the appeal in *RB Alden* on hold pending the decision in this instant case, 10 and 13 MAP 2020.

After hearing argument in September 2019, the Commonwealth Court issued its opinion, *General Motors Corporation v. Commonwealth*, 222 A.3d 454 (Pa. Cmwlth. 2019) ("*GM").* The court recognized that the parties agreed that the $2 million NLC deduction cap applicable to the 2001 Tax Year violated the Uniformity Clause, assuming that this Court's decision in *Nextel* applied retroactively to GM's 2001 tax return. *Id.* at 458.

Rather than first considering the retroactivity of *Nextel*, the court initially engaged in a severability analysis. It observed that, unlike the 2007 Tax Year NLC deduction provisions applicable in *Nextel*, the 2001 Tax Year provisions did not include a percentage-based deduction cap, which this Court in *Nextel* had embraced as a remedy to meet the dual objectives of encouraging business investment and protecting the public fisc. Instead, the court recognized that the 2001 Tax Year provisions offered two options for severance: "(1) sever the flat $2,000,000 deduction from the remainder of the NLC and allow corporations to claim an unlimited net loss; or (2) strike down the entire NLC and, thus, disallow any [NLC]." *Id.* at 462. Neither of these options, the court noted, met both legislative goals identified in *Nextel.* The court then discerned the legislature's dominate policy goal to be the promotion of business development, observing that the NLC deduction provision had existed from 1980-1991 without a cap. Accordingly, the court concluded that the $2 million deduction cap should be severed. *Id.* at 463-64.

The court next turned to GM's argument in support of a refund of the taxes it paid as a result of the $2 million NLC deduction cap. GM argued that this refund was required to equalize the treatment of "favored taxpayers" who had been permitted to deduct NLC up to their total income and "disfavored taxpayers" like GM whose NLC deduction was capped at $2 million. In considering this claim, the Commonwealth Court summarized the United States Supreme Court's decision in *McKesson*, 496 U.S. 18, discussed in detail *infra*. The Commonwealth Court recounted the High Court's instruction in

McKesson, that "[i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *GM*, 222 A.3d at 466 (quoting *McKesson*, 496 U.S. at 31).

The court concluded that the case at bar fell within *McKesson*'s parameters as Pennsylvania's Tax Code required taxpayers to pay the tax prior to challenging it or be subject to penalties. *Id.* at 468 (citing 72 P.S. § 10003.7). It additionally rejected the Department's claim that *McKesson* should be limited to cases applying federal rather than Pennsylvania law, citing numerous cases where Pennsylvania courts have applied *McKesson* "whatever the root of the constitutional infirmity may be." *Id.* at 467-68.

The court then reasoned that, under *McKesson*, the only meaningful relief for the disparity between the taxpayers favored by the $2 million NLC deduction cap and those disfavored, such as GM, was to strike the $2 million cap and to refund the taxes GM paid as a result of the unconstitutional cap. In so doing, it recognized that the disparity could not be addressed by assessing the previously favored taxpayers because the statute of limitations had passed.

Finally, the Commonwealth Court addressed the Department's contention that this Court's decision in *Nextel* should not be applied retroactively because it invalidated a tax statute and established new law. In support, the Department relied upon *Oz Gas, Ltd. v. Warren Area School District*, 938 A.2d 274, 278 (Pa. 2007) and *American Trucking Associations, Inc. v. McNulty*, 596 A.2d 784, 787 (Pa. 1991), for the proposition that decisions invalidating tax statutes take effect as of the date of the decision and should not be applied retroactively. The Department argued that *Nextel* established new law because, prior to this Court's decision, corporate income tax statutes had been deemed compliant with the Uniformity Clause when the statute imposed the same statutory rate (such as the 9.99 percent corporate tax rate) on all taxpayers. GM countered, arguing that *Nextel* does not constitute new law but rather merely applied the long-standing precedent invalidating the use of dollar thresholds in tax provisions, such as the $2 million NLC deduction cap in this case. *GM*, 222 A.3d at 470.

In approaching this issue, the Commonwealth Court first stated the three-factor test for retroactive application of caselaw articulated by the United States Supreme Court in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971) (plurality) ("Chevron"), and applied in *Oz Gas* and *McNulty*, which requires courts to engage in the following analysis:

> (1) determine whether the decision established "a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed[;]"
>
> (2) "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation[;]"
>
> (3) weigh "the inequity imposed by retroactive application" and to consider "avoiding the injustice or hardship by a holding of nonretroactivity."

Chevron, 404 U.S. at 106–07 (internal alterations, quotation marks, and citations removed); *see also GM*, 222 A.3d at 471.

Applying the first prong, the Commonwealth Court agreed with GM that *Nextel* "did not apply a new principle of law, but rather applied the long-standing principle that tax uniformity prohibits classification based on quantity of income." *GM*, 222 A.3d at 472 (citing *Cope's Estate, Kelley,* and *Saulsbury*). The court next opined that the decision in *Nextel* would be furthered by applying it retroactively to require severance of the 2001 Tax Year NLC deduction cap as applicable to GM because severance would equalize the tax positions of the favored and disfavored taxpayers, resulting in GM being able to reduce its taxable liability to zero as did the favored taxpayers. Finally, in regard to the third factor, the court opined that the Department had failed to carry its burden to demonstrate that it would be subjected to significant financial exposure in the form of refunds sought by other taxpayers similarly-situated to GM such that "the Commonwealth's financial health [would] be impaired." *Id.* at 473. Thus, the court held that the *Chevron* test favored retroactive application of *Nextel*. Accordingly, the court remanded to the Board to "recalculate GM's corporate net income tax without capping the amount that it can take on its NLC and issue a refund for the 2001 Tax Year." *Id.*

Now-President Judge Brobson authored a concurring and dissenting opinion, in which he agreed with the panel's conclusion that the 2001 Tax Year NLC deduction cap of $2 million violated the Uniformity Clause. He dissented, however, from the court's severance analysis and remedy, which he viewed as contrary to this Court's decision in *Nextel*.

In regard to the severance analysis, the dissent read *Nextel* as holding that "the intent of the General Assembly since reintroducing the NLC deduction has been to allow the deduction but with limits," in contrast to the panel majority's reading of legislative intent as championing business investment. *Id.* at 476 (Brobson, J, dissenting). In terms of remedy, the dissent observed that this Court in *Nextel* overturned the Commonwealth Court's decision providing a refund to *Nextel*. The dissent observed that this Court instead addressed the statutory flaw through severance without providing affirmative relief to remedy the inequality between Nextel and the favored taxpayers. While acknowledging that he would have preferred the Commonwealth Court's remedy, the dissent felt constrained by this Court's holdings in *Nextel* under which the court "cannot sever the $2 million cap from the NLC deduction provision and allow GM to take an unlimited NLC deduction for the 2001 Tax Year." *Id.* Instead, the dissent viewed *Nextel* as requiring severance of the NLC deduction in its entirety, which results in GM having underpaid rather than overpaid its taxes.

The Department subsequently appealed the decision to this Court. As the parties have stipulated to the facts below, the questions before this Court are issues of law over which our standard of review is *de novo*. *Nextel*, 171 A.3d at 689 n.9. The Department challenges the Commonwealth Court's retroactive application of *Nextel* and its decision to remedy the resulting unconstitutionality by severing the NLC deduction cap rather than eliminating the entire NLC deduction. We address these issues in turn and also consider GM's argument that if we sever the entire NLC deduction, we should nevertheless affirm the Commonwealth Court's order remanding for a refund based upon the conclusion that due process under *McKesson* requires that GM be placed in a position equal to the previously favored taxpayers.

IV. Retroactive Application of *Nextel*

A. Parties' Arguments

The Department asks this Court to reverse the Commonwealth Court and hold that our decision in *Nextel* applies prospectively only. Indeed, the Department maintains that this Court determined that the decision in *Nextel* "concerning uniformity was to be applied prospectively," noting that Nextel itself did not obtain relief. Department's ("Dept.") Brief at 12 (citing *Nextel*, 171 A.3d at 705). The Department emphasizes footnote 27 of *Nextel*, indicating that the Commonwealth would not seek to recoup additional taxes from the favored taxpayers. The Department contends that this footnote "made clear that, because of the decision's prospective application, the tax position of all taxpayers was unchanged as a result of *Nextel*." Dept. Reply Brief at 5.

In support, the Department quotes *Oz Gas*, 938 A.2d at 285, as holding 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." Dept. Brief at 13. Thus, if the decision invalidating a tax applies prospectively only, the Department argues that the taxes collected prior to the date of the opinion are not unlawful and thus not subject to refund.

Finally, the Department applies the three-factor *Chevron* test, disputing each of the Commonwealth Court's holdings. In regard to the first *Chevron* factor, questioning whether the decision establishes a new principle of law, the Department asserts that *Nextel* satisfied this factor because it diverged from this Court's prior precedent which had "consistently held that the Uniformity Clause was satisfied in the corporate net income tax context where the same statutory tax rate was applied to the same tax base." Dept. Brief at 20 (citing *Turco Paint*, 184 A. 37; *Warner Bros.*, 27 A.2d 62; and *Commonwealth v. Westinghouse Electric Corp.*, 386 A.2d 491 (Pa. 1978)). In this case, the Department argues that the same corporate tax rate of 9.99 percent was applied uniformly to all taxpayers.

It rejects the suggestion that *Nextel* merely involved application of *Cope's Estate*, which it views as distinguishable. It maintains that the *Cope's Estate* line of cases addressed tax statutes where "there was variability in the tax rates applied," reading *Cope's Estate* as taxing estates valued at $5,000 or less at 0 percent and those in excess of $5,000 at 2 percent. Dept. Reply Brief at 9.

In contrast, the Department argues that *Warner Brothers* provides a closer analogy to *Nextel*. It emphasized that the calculation approved in *Warner Brothers* included a $2,000 cap on the deduction of capital losses. *Warner Brothers*, 27 A.2d at 62. It argues that "[d]ollar limitations that were imposed in calculating the tax base had not been held to violate uniformity until the *Nextel* decision." Dept. Brief at 20. In a footnote, the Department acknowledges that this Court, subsequent to *Warner Brothers*, found a Uniformity Clause violation when dollar thresholds for deductions were applied to calculate personal taxable income. Dept. Rely Brief at 10 n.2 (discussing *Amidon*, 279 A.2d 53). The Department argues, however, that *Amidon* should not control this corporate taxation case, citing language in *Amidon* distinguishing between personal and corporate taxation. The Department, thus, contends that the first factor of *Chevron* is satisfied because the decision in *Nextel* altered this Court's prior precedent allowing the use of dollar thresholds for deductions in calculating corporate taxation under *Warner Brothers*.

Briefly turning to the second *Chevron* factor, addressing whether retroactive application would forward the principles established in the decision, the Department contends that providing retroactive relief to GM would not promote the operation of *Nextel,* which instead should be applied prospectively from the date of its decision, as in *Oz Gas.* It emphasizes that the uniformity violation flagged by *Nextel* has been corrected and addressed through statutory changes as of 2017. [6]

Developing its reasoning relating to the third factor contemplating the equities of retroactive application of the new decision, the Department asserts that a review of the equities favors prospective relief. The Department recounts that this Court in *Oz Gas* cited to "the potentially devastating repercussion of having to refund taxes paid, budgeted and spent" by taxing entities. Dept. Brief at 24 (quoting *Oz Gas*, 938 A.2d at 285). Indeed, it asserts that the Commonwealth's "financial exposure, solely with respect to tax years in which the net loss carryover contained only a flat-dollar limitation, is approximately $37 million." Dept. Reply Brief at 2.[7]

GM retorts that courts generally apply judicial decisions retroactively to pending cases and that prospective application "is appropriate only if there has been a change in law." GM Brief at 12 (citing *Gibson v. Commonwealth*, 415 A.2d 80, 84 (Pa. 1980) ("judicial decisions have had retrospective operation for near a thousand years")). It

[6] The General Assembly amended the NLC deduction provision to include only a percentage cap of 35% for the 2018 tax year and 40% for the tax years beginning after December 31, 2018, which is applicable to all corporations regardless of income. 72 P.S. § 7401(3)4.(c)(1)(A)(VII), (VIII).

[7] It argues that the financial strain on the Commonwealth could exceed $500 million if the NLC deduction cap was severed. Dept. Brief at 24.

disputes the Department's claim that this Court in *Oz Gas* and *McNulty* mandated that decisions invalidating tax statutes should apply prospectively. GM counters that the Court in *Oz Gas* and *McNulty* did not institute a blanket rule, but instead engaged in a case-by-case analysis under the three-factor *Chevron* test, including the first factor which, as stated, considers whether the decision to be applied established a new principle of law.

As detailed *infra*, GM emphasizes that both *Oz Gas* and *McNulty* involved the application of decisions establishing new principles of law and overturning long-established precedent. GM maintains that *Nextel* did not alter the law but "steadfastly adhered" to case law dating back to *Cope's Estate* in 1899. GM Brief at 17 (quoting *Nextel*, 171 A.3d at 696). It counters the Department's reliance on *Warner Brothers*, observing that the decision primarily involved a delegation clause contest. It further emphasizes the more recent decisions of this Court rejecting the use of flat-dollar thresholds, discussed *infra*.

GM next addresses the second *Chevron* factor questioning whether retroactive application would further the purpose of the new principle established by the decision. It contends that "if a principle of law has always been the law, it is a truism that applying that principle 'furthers the purpose' of the principle." GM Brief at 19. Here, it contends that the principle established by *Nextel* is to "ensure that all tax laws produce equality in the assignment of the tax burden within a particular class." *Id.* at 19-20 (quoting *Nextel*, 171 A.3d at 696). It argues that this principle is furthered by mandating that GM receive the same tax treatment as taxpayers favored under the 2001 Tax Code's NLC deduction provisions.

GM contends that the third *Chevron* factor is intended to address "whether it would be inequitable to retroactively impose an abrupt law change (the new principle) on a litigant who has relied on the old principle." GM Brief at 21. Given that it views *Nextel* as consistent with this Court's Uniformity Clause jurisprudence, it argues that there is no inequity in applying the long-standing precedent underlying *Nextel*. GM additionally disputes as unsupported the Department's specific claims regarding the potential refunds that could result from the retroactive application of Nextel. More broadly, GM observes that invalidation of tax statutes will often involve refunds in the millions of dollars. It proffers that "[i]f a $37 million fiscal cost is sufficient for the state to avoid retroactive application of a state tax decision, then the state will almost always avoid refunds in tax cases." *Id.* at 24.

GM refutes the Department's claims that this Court in *Nextel* applied its decision prospectively. According to GM, the denial of a refund in *Nextel* resulted not from a prospective-only application, but instead from a retroactive application. It explained that, under the 2007 statute, as severed by the 2017 decision, Nextel could not obtain a refund because it had paid the tax due utilizing the retained 12.5% NLC deduction cap. Additionally, GM highlights footnote 27 of this Court's opinion, which it views as applying the decision retroactively to impose the 12.5% cap on all corporations but acknowledging that the statute of limitations prevented the Department from seeking payment of additional taxes from the previously favored taxpayers.

B. Analysis

As noted, the question before this Court is not whether the $2 million NLC deduction cap applicable to the 2001 Tax Year would constitute a Uniformity Clause violation under *Nextel*. Indeed, all agree that the 2001 flat cap provision is unconstitutional for the same reasons that this Court invalidated the $3 million NLC cap applicable to the 2007 Tax Year in *Nextel*. The question instead is whether this Court's 2017 decision in *Nextel* should apply retroactively to GM's 2001 Tax Return.

We initially respectfully reject the Department's contention that this Court already determined that the *Nextel* decision should apply purely prospectively based upon our refusal to grant a refund to Nextel or countenance additional assessments to taxpayers favored by the 2007 NLC provision. Notably, this Court did not engage in a retroactivity analysis in *Nextel*. Moreover, the decision in fact applied the holding to the parties before the Court. Specifically, this Court remedied the non-uniformity of the 2007 NLC deduction provision by eliminating the $3 million cap, leaving the 12.5 percent cap, under which Nextel originally calculated and paid its taxes, coincidentally resulting in no refund due. While application of the remedied 2007 NLC deduction provision would have resulted in higher taxes for the previously-favored corporations, the Department recognized that the statute of limitations barred re-assessment of those corporations. Thus, the absence of any re-assessment was not the result of a determination of non-retroactivity by this Court but rather a simple acknowledgement of the statute of limitations.

While not addressed by the parties, this Court recently provided an extensive explication of the federal and state jurisprudence governing retroactivity determinations. *Dana Holding Corp. v. Workers' Comp. Appeal Bd.*, 232 A.3d 629 (Pa. 2020). After setting forth this history, we ultimately held that "the general rule in Pennsylvania will be that, at least where prior judicial precedent isn't overruled, a holding of this Court that a statute is unconstitutional will generally be applied to cases pending on direct appeal in which the constitutional challenge has been raised and preserved." *Id.* at 648-49. Despite this general rule, we expressly acknowledged the "possibility of equitable balancing in extraordinary cases." *Id*. Moreover, this Court highlighted that while the general rule in Pennsylvania favors retroactive application, some subject areas may require "additional latitude to implement a ruling prospectively," and further observed the special considerations relevant to "public financing or tax refunds," citing to this Court's decision in *Oz Gas. Id.* at 647. Bearing in mind these considerations, we turn to our decisions in *Oz Gas* and *McNulty*, which applied the three-factor *Chevron* balancing test to situations, like the case at bar, where a challenged tax would have been invalidated if a prior precedent applied retroactively.

In *McNulty*, this Court addressed on remand the retroactive application of *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), which had declared certain fees and taxes imposed by Pennsylvania on interstate truckers to be unconstitutional in violation of the federal Commerce Clause. Importantly for our review in the case at bar, all acknowledged that *Scheiner* "established a new principle of law by overruling clear past precedent." *McNulty*, 596 A.2d at 788.

While *McNulty* was pending before this Court, a plurality of the United States Supreme Court utilized the three-part test of *Chevron* to conclude that *Scheiner* should not apply retroactively in a case involving a similar Arkansas tax in *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990).[8] This Court recognized that the import of the *Smith* holding was that "the tax declared unconstitutional [in *Scheiner*] had not been

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[8] As summarized by this Court in *McNulty*, the High Court in *Smith* applied *Chevron* to *Scheiner* as follows:

> 1) *Scheiner* obviously established a new principle of law by overruling clear past precedent;
>
> 2) the purpose of the Commerce Clause, creating an area of trade free from interference by the states, does not require retroactive application, while prospective application would accommodate the states' legitimate interest in taxing interstate commerce in a manner consistent with existing precedent; and
>
> 3) the equities fall in favor of not applying *Scheiner* retroactively, to avoid the hardship and potentially disruptive consequences of unsettling actions taken by state legislatures, courts, and tax collection authorities in reliance on established precedents, whose overruling could not be foreseen.

McNulty, 596 A.2d at 788.

unconstitutional until the Court so ruled," such that any taxes collected prior to that date were permissible. *McNulty*, 596 A.2d at 789.

This Court in *McNulty*, however, had to address whether *Scheiner* should be "given purely prospective application, that is, whether it is limited entirely to future cases, denying the benefit even to the parties in this case, in which the principle was first announced."[9] *Id.* at 789. In considering the purely prospective application, this Court again applied the three-factor *Chevron* test, emphasizing the third factor addressing the equities of applying the case's holding to the successful party then before the Court. *Id.* at 790. In so doing, the Court concluded that the equities favored purely prospective application given that the Commonwealth had collected and spent the taxes "for their designated purpose, improvement of the Pennsylvania road system," further noting that the trucking company had received a benefit from the improved roads "that could not be recouped by the Commonwealth." *Id.* Accordingly, this Court denied the taxpayers' petition for refund for taxes paid prior to the invalidation in *Scheiner*.[10]

In *Oz Gas*, this Court considered whether a refund should be granted for taxes imposed from 1999-2000 on "oil and gas reserves that remained in the ground," when the taxes were later invalidated by this Court in 2002 as contrary to the General County Assessment Law in *Independent Oil and Gas Association v. Board of Assessment Appeals of Fayette County, 814 A.2d 180 (Pa. 2002) ("IOGA")*. *Oz Gas*, 938 A.2d at 276. Recognizing that the Court in *McNulty* did not deem *Scheiner* retroactive despite the

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[9] *Scheiner* was recaptioned on remand to *McNulty* due to a change in the Secretary of the Department of Revenue.

[10] As is relevant to the third issue addressed in this opinion, Justice Papadakos dissented to the denial of refunds in *McNulty*, opining that the majority ignored the "recent U.S. Supreme Court decision in *McKesson*." *McNulty*, 596 A.2d at 792 (Papadakos, J., dissenting). The dissent favored granting the challengers a meaningful remedy based upon the due process analysis announced in *McKesson*. The majority in *McNulty* did not address *McKesson.*

constitutional infirmity, this Court opined, "If a finding that the same tax was unconstitutional, meaning that the tax was never validly collected, would be subject to prospective-only application, it would defy logic to hold that *IOGA*'s holding, based in statutory interpretation, must apply retroactively." *Id.* at 283.

The Court, additionally, engaged in its own *Chevron* analysis. *Id.* As to the first factor, we opined that IOGA established a new principle of law. Moreover, we observed that "the decision, as a practical matter, unsettled expectations and a long-standing governmental reliance interest" regarding the validity of the specific oil and gas taxes. *Id*. As to the second *Chevron* factor, we opined that "[a]pplying 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." *Id.* The Court, applying the third factor, concluded that the equities favored prospective application based upon the substantial financial hardships that would be imposed upon local taxing authorities that had "collected and made use of the taxes at issue with the good faith belief that they were legally entitled to them." *Id.* Accordingly, the Court concluded that, under the *Chevron* test, *IOGA* should be applied prospectively and denied refunds to the taxpayers in *Oz Gas.*[11] In so doing, we relied upon *McNulty* in opining 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 285.

In applying *Oz Gas* and *McNulty* to the case at bar, we initially emphasize that both decisions were grounded upon the three-part *Chevron* test. Importantly, the first *Chevron* factor in both cases counseled in favor of prospective application because the decision in

[11] Although the Court in *Oz Gas* recounted that the taxpayer raised the potential application of *McKesson*, 496 U.S. at 31 (holding that the due process clause obligates states to "provide meaningful backward-looking relief to rectify any unconstitutional deprivation" resulting from a tax statute), we did not engage in an analysis of that issue. *Oz Gas*, 938 A.2d at 281.

question established a new principle of law. Indeed, the establishment of a new principle of law also affects a court's consideration of the third factor relating to the equities of applying a decision retroactively, given that both taxpayers and taxing entities have relied upon the existing precedent.

As evidenced by the case at bar, this analysis, however, is substantially altered if the decision to be applied does not involve a new principle of law. Indeed, turning back to the High Court's phrasing of the test in *Chevron*, we observe that the first factor is stated in the imperative: "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106 (internal citations omitted). As applied to the case at bar, we conclude that this first factor controls because *Nextel* did not establish a new principle of law but instead "steadfastly adhered" to a century of case law interpreting the Uniformity Clause to invalidate tax "classifications based solely upon the quantity or value of the property being taxed." *Nextel*, 171 A.3d at 696. A review of the relevant precedent dispels the suggestion that *Nextel* constituted new law.

In 1899, this Court in *Cope's Estate* opined on the fundamental principles of tax law, observing that "[e]quality in the imposition of the [tax] burden is of the very essence of the right, and, though absolute equality and absolute justice may not be attainable, the adoption of some rule tending to that end is indispensable." *In re Cope's Estate*, 43 A. at 81 (internal quotation marks omitted). Turning to the Uniformity Clause itself, we observed that the clause "is as broad and comprehensive as it could possibly have been made" emphasizing that "all taxes" includes "property tax, inheritance tax, succession tax, and all other kids of tax . . . ." *Id.* at 81. As directly relevant to the instant case, we further explained that while the legislature had authority to classify subjects of taxation "justly and fairly," a classification "based solely on a difference in the quantity of precisely the same kind of property[] is necessarily unjust, arbitrary, and illegal." *Id*. We expounded, "The money value of any given kind of property . . . can never be made a legal basis of subdivision or classification for the purpose of imposing unequal burdens on either of such classes, or wholly exempting either of them from any burden." *Id.* at 82.

Applying these principles to the tax challenged in *Cope's Estate,* we concluded that the estate tax was invalid because it imposed two percent tax on all estates, but exempted from taxation the first $5,000 of every estate. Observing that 90-95 percent of estates were valued at less than $5,000, the Court observed the effect of this statute was "to wholly exempt from taxation the personal property of a very large percentage of decedents' estates, and impose increased and unequal burdens on the residue of the same class of property." *Id*.at 81, 82. The similarity in effect of the tax provision in *Cope's Estate* and the $2 million deduction cap in the case at bar is clear: a minority of taxpayers are subjected to a tax while the majority is spared, due solely to a flat dollar threshold.

Three decades later, this Court in quick succession addressed challenges to a personal income tax in *Kelley*, 181 A. 598 (Pa. 1935), and the corporate income tax in *Turco Paint*, 184 A. 37 (Pa. 1936) and *Warner Brothers*, 27 A.2d at 63 (Pa. 1942). In *Kelley,* this Court considered the constitutionality of a statute imposing a personal income tax. The statute included "a deduction for living expenses in the amount of $1,000 in the case of a single person, and $1,500 for the head of a family or a married person" in addition to $400 "for each dependent under eighteen years of age." *Id.* at 599. Relying upon *Cope's Estate*, this Court in *Kelley* held that the deductions resulted in tax exemptions for those earning less than $1,000 or $1,500. While acknowledging the beneficial purpose of these exemptions, the Court nevertheless found the exemptions unconstitutional in violation of the Uniformity Clause. The Court in *Kelley* also invalidated an overt graduated tax with tax rates varying from 2 percent for those with incomes not exceeding $5,000 to 8 percent for incomes in excess of $100,000.

In *Turco Paint*, the Court considered the constitutionality of the Corporate Net Income Tax Act of 1935, which *inter alia* imposed a tax on foreign and domestic corporations for the privilege of doing business in the Commonwealth. In relevant part, the statute imposed a 6 percent tax on a corporation's net income attributable to the business conducted in Pennsylvania, utilizing the income as reported on the corporation's federal return. While the tax was a straightforward calculation for entities that conducted all their business in Pennsylvania, the calculation proved more complex for corporations conducting business in multiple states. For those corporations, the total income attributable to Pennsylvania (and thus subject to the 6 percent tax) was derived through a formula taking into account total tangible assets, total payroll, or total gross receipts.[12] *Turco Paint*, 184 A. at 40 (setting forth statutory language and details of the taxation formula).

The corporate taxpayer in *Turco Paint* argued that the 1935 tax violated, *inter alia*, the Uniformity Clause. In addition to challenging the three-factor apportionment method as non-uniform, the taxpayer also claimed that "the act imposes a graded income tax, and that the graduation of the tax follows from the process by which net income is determined." *Id.* The Court rejected this challenge without reciting the taxpayer's specific claims, opining merely that the plaintiff had "not pointed to a single provision of the act which would demonstrate a legislative intent to impose a graded income tax." *Id*. Instead, it observed that the 6 percent tax applied equally to all corporations and utilized the same tax base consisting of the "net-income attributable to this state." *Id.* [13]

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[12] The details of this calculation are not relevant to the issues now before the Court.

[13] As discussed *infra,* Justices of this Court subsequently viewed the *Turco Paint* issue relating to the "process by which net income is determined" as a challenge to the statute's use of federal net income as the base of Pennsylvania's corporate income tax. These Justices observed that federal corporate net income was calculated using various exemptions and deductions. *Amidon*, 279 A.2d at 68 (Pomeroy, J. concurring); 70

Turning to the challenge to the three-factor apportionment of Pennsylvania-related income, the Court in *Turco Paint* contrasted the arguments raised in that case with the issue presented in *Kelley*. Unlike *Kelley*, which involved the utilization of "different rates . . . on varying amounts or quantities of the same tax base," *Turco Paint* involved the application of the same rate applied to the same subject matter. *Id.* We additionally opined that a tax is not rendered unconstitutionally graduated "simply because of the fact that one association, owning more of the particular taxable subject-matter than another, pays, on this account, a greater sum total of tax." *Id.* The Court suggested the non-uniformity in the form of graded taxes generally arises through the application of different tax rates to different quantities of the same tax base. *Id.*

In *Warner Brothers*, this Court addressed a challenge to the corporate income tax which it phrased as "an excise tax for the privilege of doing business in the Commonwealth, based upon net income as returned to and ascertained by the Federal Government."[14] *Warner Brothers*, 27 A.2d at 63. As noted in *Nextel*, this Court in *Warner Brothers* primarily addressed the issue presented in terms of an improper delegation of legislative authority. It viewed the issue as contesting a provision allowing a deduction for capital losses, where the power to vary the dollar amount of the deduction rested with the federal government rather than the General Assembly. *Id.* In rejecting the claim, this Court opined that the "the Act does not delegate the power to tax to the Federal Tribunal,

(Eagan, J, dissenting); *see also Saulsbury*, 196 A.2d at 668 (Cohen, J., dissenting). It is unclear whether any of the deductions (or more importantly, whether any of the challenges raised in *Turco Paint*) involved deductions utilizing dollar limitations, similar to the exemptions that the Court had rejected two months earlier in *Kelley.*

[14] While some decisions have framed the corporate tax as an "excise tax" rather than an income tax, this Court has more recently found this distinction to be "merely semantical" and instead concluded that the "the true nature of the tax is a direct tax on corporate net income." *Nextel*, 171 A.3d at 690 n.11.

it only takes the net income fixed by it, as the base for the excise privilege tax levied by the Commonwealth." *Id.*

We observed in *Nextel* that the decision in *Warner Brothers* provided minimal discussion of the Uniformity Clause issue. Indeed, the entirety of the Court's analysis consists of the following three sentences:

> The Act before us does not violate the Uniformity provisions of the Constitution. It by its terms applies to all corporations with which the Commonwealth has power constitutionally to deal by making their net income subject to the tax. *Turco Paint*, [184 A. 37]; *Com. v. Columbia Gas & Elec. Corp.*, [8 A.2d 404 (Pa. 1939)]. Where the base is the same and the rate unvarying, there is no lack of uniformity.

Warner Bros., 27 A.2d at 64. This discussion does not acknowledge, let alone distinguish, the more developed Uniformity Clause jurisprudence invalidating dollar-thresholds as set forth in *Cope's Estate* and *Kelley.*

Moreover, this Court continued to utilize the principles set forth in *Cope's Estate* and *Kelley* through the 1960s and 1970s in the decisions of *Saulsbury*, 196 A.2d 664 (Pa. 1964), and *Amidon*, 279 A.2d 53 (Pa. 1971). In *Saulsbury*, we struck a $10 occupational privilege tax because it applied only to those taxpayers with gross earnings in excess of $600. Citing *Kelley*, we reiterated that "a statute levying an income tax from which certain individuals were exempted because their incomes did not exceed stated amounts was void, in that it was lacking in uniformity and violated the constitutional rule." *Saulsbury,* 196 A.2d at 666. We additionally rejected an attempt to cabin *Kelley*'s holding to apply only to property taxes and not to excise taxes, reiterating that the language of the Uniformity Clause applying to "all taxes" is as "broad and comprehensive as it could possibly be." *Id.* (citing *inter alia* to *Kelley* and *Cope's Estate*).

In *Amidon*, the Court invalidated the General Assembly's enactment of a personal income tax statute which imposed a 3.5 percent tax on taxpayers' federal taxable income.

The challengers in that case argued that the various exemptions and deductions included in the calculation of the federal taxable income rendered the tax non-uniform, as some taxpayers could take advantage of deductions and exemptions not available to others. The Court opined that the inclusion of "federal personal exemptions for the taxpayer and his qualified dependents" in the calculation of taxable income constituted "the same elements of nonuniformity as were condemned in both *Kelley* and *Saulsbury*." *Amidon*, 279 A.2d at 60

The opinion in *Amidon* rejected the Commonwealth's attempt in that case to rely upon *Turco Paints* and *Warner Brothers*, which, as noted, approved the use of federal corporate net income in the calculation of Pennsylvania's corporate income tax. The majority, with somewhat minimal analysis, deemed these cases inapposite based upon a distinction between corporate and individual taxation, observing that the corporations are "profit maximizing" "artificial legal entities" in contrast to individuals. *Id.* at 63.

Justice Pomeroy in concurrence, however, questioned the majority's blanket distinction between corporate and personal uniformity clause jurisprudence. He emphasized the Court's prior statements observing that the Uniformity Clause applied broadly to "all taxes." He instead offered a more nuanced distinction between the analysis of the uniformity of the personal income tax deemed unconstitutional in *Amidon* and the corporate income tax found constitutional in *Turco Paint*, despite both taxes being based upon the federally reported income. He observed "that there is no parallel in the federal income tax on corporations" to the exemptions included in the federal personal tax, specifically citing the "personal exemption of $625" for each taxpayer and dependent. *Id.* at 68 (Pomeroy, J., concurring). The concurrence agreed with the majority in equating these exemptions with the dollar-figure exemptions declared non-uniform in *Kelley* and *Saulsbury.*[15]

More recently, this Court reiterated the holdings of *Cope's Estate* and its progeny in *Mount Airy*, 154 A.3d 268. In *Mount Airy*, the Court, in relevant part, reviewed a uniformity challenge to a tax imposed on casinos outside of Philadelphia which varied depending on whether the casino had gross terminal revenue ("GTR") in excess of $500 million.[16] In finding this provision unconstitutional, this Court cited the decisions discussed above in observing the enduring, "basic principle that '[t]he money value of any given kind of property . . . can never be made a legal basis of subdivision or classification

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[15] In contrast, Justice Eagen, in dissent in *Amidon*, would have found the use of the federal personal income calculation constitutional despite the use of deductions and exemptions, because he viewed *Turco Paint* and *Warner Brothers* as controlling on that issue. He recounted that the corporate tax calculations that were deemed permissible in *Turco Paint* included deductions for business expenses, charitable contributions, net operating loss carryovers, and payments to pension and profit sharing plans. *Id.* at 69 (Eagen, J., dissenting). This description, however, does not indicate whether any of these corporate deductions and exemptions involved dollar limitations as contrasted with the $625 personal tax exemption highlighted by Justice Pomeroy's concurrence.

[16] Specifically, this Court described the details of the tax as follows:

> A casino located outside of Philadelphia County must pay both (a) an annual county local share assessment of 2% of its GTR and (b) a municipal local share assessment of either 2% of its GTR or a lump sum of $10 million, whichever is greater. Therefore, a non-Philadelphia casino with GTR at or below $500 million will always pay a $10 million municipal local share assessment, and a non-Philadelphia casino with GTR above $500 million will always pay more than $10 million.

Id. at 271. This Court's holding in *Mount Airy* focused upon the fact that the provision requiring payment of "the greater of $10 million or 2% of GTR" was the "functional equivalent of a second tax bracket with a marginal rate of 2% for casinos with GTR greater than $500 million." *Id.* at 276.

for the purpose of imposing unequal burdens on [similarly situated] classes.'" *Id.* at 275 (quoting *Cope's Estate*, 43 A. at 82).

Having reviewed this jurisprudence, we reject the Department's argument that *Nextel* adopted a new principle of law for purposes of the first *Chevron* factor. The Department cites *Turco Paints* for the proposition that prior to *Nextel* this Court had not found a Uniformity Clause violation "in the corporate tax context where the same statutory tax rate was applied to the same tax base." Dept. Brief at 20. *Turco Paints* certainly supports the very general proposition that application of the same tax rate to the same tax base does not violate the Uniformity Clause.

Critically, however, it is not clear whether the Court in *Turco Paint* considered the constitutionality of exemptions and deductions utilizing flat dollar thresholds, the likes of which have been consistently rejected by this Court in *Cope's Estate*, *Kelley, Saulsbury*, and now *Nextel.* Moreover, nothing in *Turco Paints* indicates that the Court would not have employed a different Uniformity Clause analysis for the use of quantity-based exemptions and deductions in the corporate taxation context than what it employed months earlier in regard to personal taxes in *Kelley* As we clarified in *Nextel*, "[w]hile our Court has recognized critical differences between corporate and personal tax codes, this recognition should not be interpreted as an endorsement of a wholly separate uniformity analysis for corporate and personal taxes. The Uniformity Clause, and our caselaw interpreting it, is equally applicable to both types of taxes." *Nextel*, 171 A.3d at 700-701.

Having rejected the Department's contention that *Nextel* constituted a break in precedent, our application of the three-factor *Chevron* test, as utilized in *McNulty* and *Oz Gas*, is straightforward. Specifically, the first factor of the *Chevron* test requires that the decision "establish a new principle of law" in order for it to apply "nonretroactively." *Chevron*, 404 U.S. at 105; *McNulty*, 596 A.2d at 788. *Nextel* does not satisfy this first factor.

As explained above, rather than establishing a new principle of law, *Nextel* faithfully applied this Court's jurisprudence developed consistently in *Cope's Estate*, *Kelley*, *Saulsbury*, *Amidon*, and *Mount Airy* holding that the Uniformity Clause is violated where a difference in taxation is "based solely on a difference in quantity of precisely the same kind of property." *Nextel*, 171 A.3d at 699 (quoting *Cope's Estate*, 43 A. at 81). We observed that the Court has "consistently viewed as unconstitutional" statutes which exempt entire classes of taxpayers from the payment of taxes based solely upon whether their income or property value falls below the statutorily designated exemption value, as it required the non-exempted taxpayers to bear the full tax burden. *Id.* at 697. We have repeatedly deemed these quantity-based distinctions in tax burden to be "necessarily unjust, arbitrary and illegal." *Id.* at 699. *Nextel* merely applied this century of jurisprudence to the NLC deduction provision. Absent the establishment of a new principle of law, *Nextel* does not necessitate prospective application under the *Chevron* test.[17]

V. Severability

There is no dispute that if *Nextel* applies retroactively, then the $2 million cap included in the 2001 NLC deduction provision violates the Uniformity Clause for the same reasons that the 2007 $3 million NLC deduction cap was deemed unconstitutional in *Nextel*. The question then becomes whether and how the unconstitutionality can be remedied where the 2001 NLC deduction provision does not contain the fallback option of the uniform 12.5 percent cap, which was present in the 2007 NLC deduction provision. As this Court opined in *Nextel*, the retention of the 12.5 percent cap continued to effectuate the "twin policy objectives" of encouraging business investment through the provision of an NLC deduction while also ensuring the Commonwealth's fiscal health by

[17] As we find the first factor to control this analysis, we do not speak to the second and third *Chevron* factors.

capping the deduction. *Nextel*, 171 A.3d at 704. In regard to the 2001 NLC deduction provision, the only available options are the severance of the $2 million cap, resulting in unlimited NLC deductions, or elimination of the entire NLC deduction, resulting no NLC deductions.

The parties recognize that the General Assembly has explicitly instructed that "provisions of every statute shall be severable" if a court finds a provision invalid. 1 Pa.C.S § 1925.[18] Specifically, Section 1925 provides guidance, directing that provisions should be severed if the remaining valid provisions of the statue are not so "essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one." Additionally, courts should be mindful of whether "the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.* Essentially, we consider what the General Assembly "would have done had it known that the exemption was

[18] In full, Section 1925 entitled "Constitutional construction of statutes," provides as follows:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. § 1925.

unconstitutional." *PPG Industries, Inc. v. Commonwealth*, 790 A.2d 261, 269 (Pa. 2001) (internal citation and alteration removed).

The Department maintains that the Commonwealth Court erred in remedying the unconstitutionality by severing the $2 million NLC deduction cap rather than severing the NLC deduction in its entirety. In support, the Commonwealth reiterates the history of the NLC deduction, highlighting that the General Assembly has not enacted the NLC without a cap since 1991. It offers Judge Brobson's dissent as providing a proper analysis, emphasizing this Court's rejection in *Nextel* of an unlimited NLC deduction as "clearly contrary to the wishes of the General Assembly." Dept. Brief at 30 (quoting *Nextel*, 171 A.3d at 704-05); *GM*, 222 A.3d at 476 (Brobson, J., dissenting). The Department, like Judge Brobson, finds the General Assembly's over-arching goal to be the protection of the fiscal health of the Commonwealth. Accordingly, it maintains that the General Assembly would have preferred to strike the entire NLC deduction provision rather than impose an unlimited NLC deduction through the elimination of the $2 million cap.

GM in contrast advocates for the elimination of the $2 million NLC deduction cap. It agrees with the Commonwealth Court's determination that the General Assembly would have championed the goal of encouraging business investment in the Commonwealth if forced to choose between the dual goals of the protecting the public fisc and promoting business development. It emphasizes that at the time of enactment most of our sister states allowed corporations to deduct net losses and that to eliminate Pennsylvania's deduction entirely would render the Commonwealth comparatively less competitive. GM Brief at 30 (citing legislative history as indicating that thirty-nine states permitted "operating loss carryforwards").

Additionally, it argues that severance of the cap is consistent with Section 1925 of the Statutory Construction Act. GM observes that the NLC deduction provision is not rendered incomplete or incapable of execution if the cap is eliminated, given that the

General Assembly enacted it without a cap for the eleven years prior to 1991. GM further highlights that severance is favored by the Tax Code, which it views as "express[ing] a legislative intent to sever the smallest possible bit of text from a tax statute necessary to achieve a constitutional result." GM Brief at 31-32 (citing 72 P.S. § 10002 ("It is hereby declared as the legislative intent that this code would have been adopted had such unconstitutional word, phrase, clause, sentence, section or provision thereof not been included therein.")).

In considering the severance options available in the case at bar, we continue to recognize the General Assembly's twin policy goals of promoting business development through the provision of NLC deductions while also imposing caps on the deductions to protect the fiscal health of the Commonwealth. Moreover, we acknowledge that we found both options currently available to be contrary to the intent of the General Assembly in *Nextel*, 171 A.3d at 705. Upon careful consideration, however, we conclude that severance of the NLC provision in its entirety is more consistent with the General Assembly's intent, as evidenced by the history of NLC deduction provision. Specifically, as we noted in *Nextel*, the legislature initially enacted the NLC deduction without a cap in 1980, eliminated the NLC deduction in its entirety from 1991-1994 to address budgetary concerns, and then reinstated it in 1994, but only in capped format. *Id.* at 704-705. We agree with Judge Brobson in dissent below that "the intent of the General Assembly since reintroducing the NLC deduction has been to allow the deduction but with limits." *GM*, 222 A.3d at 476 (Brobson, J, dissenting).

Moreover, we find elimination of the NLC deduction provision permissible under Section 1925 of the Rules of Statutory Construction. Given that the legislature previously enacted the corporate income tax without including the NLC deduction, it is clear that the tax is not dependent upon the NLC deduction provsion. Accordingly, we respectfully reverse the Commonwealth Court's severance of the $2 million deduction cap and instead strike the NLC deduction for the 2001 Tax Year in its entirely.

VI. Due Process - *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18 (1990)

The Department additionally disputes the Commonwealth Court's reliance upon the United States Supreme Court's decision in *McKesson* as requiring "meaningful backward-looking relief" in the form of refunding the taxes paid by GM to equalize the positions of the corporations subject to the $2 million NLC deduction cap and those favored corporations permitted unlimited NLC deductions. Prior to addressing the parties' arguments, we review the High Court's decision.[19]

The United States Supreme Court in *McKesson* faced a similar situation to that currently before this Court involving a taxpayer seeking a refund for taxes deemed unconstitutional. Specifically, the parties before the High Court in *McKesson* acknowledged that, under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), a Florida tax provision violated the Commerce Clause by imposing a lower tax burden on sales of alcoholic beverages manufactured from specified agricultural products commonly grown in Florida than the tax applied to alcoholic beverages that did not utilize Florida products. The taxpayer, like GM, sought a refund of the "amount of the excess taxes it had paid as a result of its disfavored treatment." *McKesson*, 496 U.S. at 24-25.

In addressing the taxpayers' petition, the High Court explained that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause," which could include both pre- and postdeprivation remedies. *Id.* at 36. The High Court expounded upon the necessity of states employing postdeprivation refund

[19] As discussed *supra* at 10 n.4, this Court in *Nextel* was not presented with a robust due process argument based upon *McKesson*.

procedures to provide taxpayers with "a fair opportunity to challenge the accuracy and legal validity of their tax obligation" and a "clear and certain remedy for any erroneous or unlawful tax collection." *Id.* at 39 (internal citation and quotation marks omitted). It explained,

> [I]f a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

Id. at 22.[20] Stated differently, the Court required states "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation" if taxpayers are "relegate[d] to a postpayment refund action." *Id.* at 31. Notably, none of these statements setting forth the due process requirements of a postdeprivation remedy restricts the holding to Commerce Clause violations but instead speaks broadly in terms of "erroneous or unlawful tax collection" and "unconstitutional deprivation[s]." *Id.* at 31, 39.

The High Court next considered available and sufficient postdeprivation remedies. It observed that in cases where a taxing body does not have authority to tax or where it imposes the tax on an entity with absolute immunity, then the tax must be refunded as there is no other option to cure the violation. *Id.* at 39. However, for violations of the Commerce Clause resulting in the tax code favoring one group of taxpayers over another, the state has flexibility in designing a remedy. The Court recognized the state could utilize the following three options: (1) refund "the difference between the tax [the taxpayer] paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received[,]" (2) "assess and collect back taxes from petitioner's

[20] The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme[;]" and (3) "a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors, 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 40-41. The Court emphasized that a state is "free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements." *Id.* at 51-52.

In so doing, the Court rejected Florida's "contrived and self-serving" suggestion that the remedy should be gauged by the tax structure the state would have imposed had it known of the constitutional flaw in the current system; in essence, the state sought application of the "hypothetical" tax structure that would have been imposed if the state had employed a predeprivation review. *Id.* at 42. Specifically, Florida proposed that it would have cured the Commerce Clause violation by imposing the higher tax rate on all distributors, rather than only to McKesson and other distributors of out-of-state beverages. Thus, Florida asserted that McKesson paid what would have been the hypothetical proper tax and that any refund would result in a "windfall" to McKesson.

The Justices found that Florida's proposed use of the hypothetical tax structure failed to remedy the constitutional deprivation which involved the imposition of a "relative disadvantage" on one category of taxpayer. *Id.* It noted that the Commerce Clause violation resulted from the comparative economic advantage enjoyed by distributors of Florida-related beverages over the distributors of other beverages. Thus, the remedy must address the discriminatory effect that resulted from the imposition of the taxes on McKesson and its competitors. *Id*. at 43.

In addressing the potential disruption to a state's financial planning that could result from refunds, the High Court observed that states could reduce their exposure by imposing procedural requirements such as limiting refunds to those taxpayers who pay their tax under protest, instituting an installment-based refund procedure, imposing shortened statute of limitations periods, or devising accounting structures such as escrow accounts for payment of contested taxes. It recognized that "the State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." *Id.* at 45.

The Department primarily distinguishes *McKesson* from the case at bar by asserting that *McKesson* resulted from the application of settled law, whereas it argues that *Nextel* altered settled law. The Department also argues that *"McKesson* is not applicable here because this present appeal does not involve a state statute that has been held to violate established federal law," as was the case in *McKesson*. Dept. Brief at 15. The Department explains that the United States and Pennsylvania Supreme Courts have both recognized that "the Federal Constitution is silent on the subject of whether a state court may decline to give its decision retroactive effect." Dept. Reply Brief at 18 (citing *inter alia Smith*, 496 U.S. 167; *August v. Stasak*, 424 A.2d 1328, 330 (Pa. 1981)). Thus, it argues that *McKesson* does not require the "retroactive equalization of tax positions" in the case at bar because it reads *Nextel* as announcing a new principle of law under Pennsylvania's Uniformity Clause that should be applied prospectively. Dept. Reply Brief at 18.

In response, GM maintains that due process, as set forth by the High Court in *McKesson,* requires the Department to provide GM with "meaningful backward-looking relief" to cure the inequality it suffered in comparison to the corporate taxpayers that were not subject to the 2001 NLC deduction cap. GM Brief at 6. It reasons that "if the deduction is stricken from the statute, GM will have 'actually' paid tax, while over 15,000 similarly situated taxpayers 'actually' did not." GM Brief at 37. As a direct comparison to

McKesson, GM reasons that "*McKesson* means that if this Court were to strike the whole net loss deduction (like the Florida court struck the entire tax preference in *McKesson*), this Court must still equalize the actual tax positions of corporate taxpayers for 2001." GM Brief at 36.

To equalize the actual tax positions, GM asserts that *McKesson* requires either that the favored taxpayers should be assessed additional taxes or GM should be refunded the taxes it paid. Observing that the statute of limitations has run on the Department's ability to seek additional funds from the corporations not subject to the NLC deduction cap, it proffers the only available option to remedy the inequality is to provide GM with a refund based upon the application of the unlimited NLC deduction cap.

GM also rejects the Department's prior argument that *McKesson* is limited to rights established by the federal constitution, such as the Commerce Clause. It explains that *McKesson* addresses the protection of due process rights with respect to property, such as money paid as taxes, and does not depend on the underlying constitutional protection of the property, whether it be the Commerce Clause or the Uniformity Clause. Indeed, GM highlights that this Court in *Automobile Trade Association v. Philadelphia*, 596 A.2d 794 (Pa. 1991), "recognized that the state-law right to uniform taxation is a right protected by the Due Process Clause under *McKesson."* GM Brief at 42. It additionally observes that other states have applied *McKesson* to "taxpayer rights established under state law." *Id.* at 43 (citing, *inter alia*, *Aileen H. Char Life Interest v. Maricopa County*, 93 P.3d 486 (Ariz. 2004) (applying *McKesson* to enforce rights secured by Arizona's Uniformity Clause)). [21]

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[21] GM is supported in regard to its *McKesson* argument by *Amici Curiae* Professor Alice L. Stewart and the University of Pittsburgh School of Law Low-Income Taxpayer Clinic. In addition to supporting GM's analysis of *McKesson*, *Amici* proffers that low-income taxpayers are particularly in need of retroactive application of tax challenges as they do

GM recognizes that the reasoning of *McKesson* was based in part upon the Florida taxpayer's inability to contest the tax prior to payment. It acknowledges that Pennsylvania's Tax Code provides for a prepayment challenge seeking a tax reassessment. GM Brief at 38-39 (citing 72 P.S. § 9702(a)). GM argues, however, that its "voluntary" payment of the tax and utilization of the refund procedure of 72 P.S. § 10003.1(a) does not render *McKesson* inapplicable based upon the United States Supreme Court decision in *Reich v. Collins*, 513 U.S. 106 (1994), which applied *McKesson* despite the existence of a predeprivation remedy.[22]

In *Reich*, the High Court opined that the taxpayer "was entitled to pursue what appeared to be a 'clear and certain' postdeprivation remedy, regardless of the State's predeprivation remedies." *Reich*, 513 U.S. at 113. The Court in *Reich* additionally acknowledged states' preference for taxpayers to "pay first, litigate later," which is encouraged by the configuration of taxing provisions, which presumably include the imposition of penalties and interest on the failure to pay taxes timely.[23] The Supreme Court reasoned that "it would seem especially unfair to penalize taxpayers who may have ignored the possibility of pursuing predeprivation remedies out of respect for" a state's preference for postdeprivation remedies. *Id.* at 112. As Pennsylvania's Tax Code provides a "clear and certain" postdeprivation remedy in the form of a refund procedure, we agree that taxpayers should not be penalized for pursuing that avenue of relief.

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not have the resources to challenge statutory provisions on their own and instead rely upon the retroactive application of the precedent.

[22] The Department has not contested the applicability of *McKesson* based upon the availability of a predeprivation remedy under the Pennsylvania Tax Code.

[23] The Commonwealth Court in the case at bar opined that *McKesson* applied because the Pennsylvania Tax Code "penalizes taxpayers for failing to remit taxes in a timely fashion." *GM*, 222 A.3d at 468.

As set forth above, this Court has acknowledged the High Court's decision in *McKesson* in several cases, but only rarely engaged in an analysis of the case. *See e.g. Oz Gas*, 938 A.2d at 281 (acknowledging but not addressing a litigant's assertion of due process rights under *McKesson*); *McNulty*, 596 A.2d at 792 (Papadakos, J, dissenting and arguing that the majority should have considered and granted relief pursuant to the then-recent decision in *McKesson*).[24] In *Automobile Trade Association*, this Court acknowledged *McKesson*'s potential relevance in regard to the Uniformity Clause challenge, but did not apply it in that case, instead remanding for the necessary preliminary analysis of the constitutionality of the challenged provision as well as for consideration of whether any resulting decision should apply retroactively.[25] *Automobile*

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[24] Additionally, in *Annenberg v. Commonwealth*, 757 A.2d 338, 350 (Pa. 2000), this Court applied *McKesson* and remanded for the determination of appropriate remedy; however, that case involved a federal Commerce Clause violation clearly controlled by *McKesson*.

[25] In so doing, this Court in *Automobile Trade Association* additionally opined regarding the distinction between the United Supreme Court's denial of relief to the taxpayer in *Smith* and the grant of relief in *McKesson*, observing that the decisions issued on the same day:

> It is apparent in reading the unanimous opinion in *McKesson* together with the plurality opinion in *Smith* that the distinguishing factor in *Smith* was the determination that *Scheiner* was to be given prospective effect. The result of the prospectivity decision was that the tax had not been unlawful when collected. There being no illegal collection to be remedied, the rule of *McKesson* did not apply.

Automobile Trade Association, 596 A.2d at 796. Given our determination in the case at bar that *Nextel* applies retroactively, *Automobile Trade Association* counsels in favor of the potential availability of a remedy under *McKesson* to address the unconstitutionality of the NLC deduction provision. As a historical observation, this Court's decision in *Automobile Trade Association*, addressing *McKesson*, issued the same day as our decision in *McNulty*, denying the taxpayer a refund following the determination that *Scheiner* should not apply retroactively.

Trade Association, 596 A.2d at 797. Accordingly, it does not appear that this Court has applied *McKesson* outside of a Commerce Clause case.

Upon review, we conclude that the underlying due process concerns relating to the denial of postdeprivation remedies apply equally to Uniformity Clause violations as they do to the Commerce Clause violation presented in *McKesson*. As the High Court explained, "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *McKesson*, 496 U.S. at 36. We conclude that the effect on the taxpayer of an unlawful extraction of a tax is the same whether the infirmity is based in the Commerce Clause or the Uniformity Clause because both function to impose on one group of taxpayers an economic disadvantage compared to another group of taxpayers. Thus, as explained by this Court in regard to a Commerce Clause violation, the Due Process Clause of the Fourteenth Amendment requires the state to "fashion a backwards looking remedy whereby those who had paid the tax were put in the same position as those taxpayers who had been favored by the unlawful exemption." *Annenberg v. Commonwealth*, 757 A.2d 338, 349 (Pa. 2000).

As applied to the case at bar, while we conclude that the statutory flaw is remedied through the severance of the NLC deduction provision in its entirety, we recognize that under *McKesson* that severance does not remedy the discriminatory impact of the Uniformity Clause violation on GM. As with the Commerce Clause violation in *McKesson*, GM remains disadvantaged as compared to the corporate taxpayers that previously utilized the unlimited NLC deduction under the 2001 Tax Code and are not subject to additional assessment by the Commonwealth because of the applicable statute of limitations. Instead, the due process clause requires the Commonwealth to equalize GM's position with the favored taxpayers who were not subject to the $2 million NLC deduction cap by refunding the tax GM paid as a result of the imposition of the NLC deduction cap. Accordingly, we affirm the order of the Commonwealth Court to the extent it remanded to the Finance and Review Board to recalculate GM's corporate net income tax without capping its NLC deduction and to issue a refund based upon that recalculation.

VII. Conclusion

As set forth above, we affirm the Commonwealth Court to the extent it deemed *Nextel* to apply retroactively to control the case at bar. We reverse the Commonwealth Court to the extent it remedied the violation of the Uniformity Clause by severing the $2 million NLC deduction cap; we instead conclude that the proper remedy is to sever the NLC deduction provision in its entirety for the 2001 Tax Year. Finally, we affirm the Commonwealth Court's order to the extent it remands to the Finance and Review Board to recalculate GM's corporate net income tax without capping its NLC deduction and to issue a refund based upon that recalculation, which we conclude is required to remedy the due process violation of GM's rights pursuant to *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18 (1990).

Justices Todd, Donohue, Dougherty and Mundy join the opinion.

Justice Saylor files a dissenting opinion.

Justice Wecht files dissenting opinion.