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Pennsylvania: Refund Ordered in NOL Cap Case

Recently, the Pennsylvania Commonwealth Court issued the latest decision addressing the state's unconstitutional flat dollar NOL cap, which was struck down in the 2017 *Nextel* decision. In light of the Pennsylvania Supreme Court's conclusion in a different case *(General Motors II)* that the *Nextel* decision applied retroactively, the Commonwealth Court revised its original panel decision and held in an en banc decision that the only remedy available to equalize the tax positions between favored and non-favored taxpayers was to issue the taxpayer a refund. Although the taxpayer calculated its tax liability for the tax year applying the valid percentage cap, the court noted that the taxpayer was disadvantaged when compared to small corporate taxpayers that utilized the flat dollar NOL cap and paid no taxes. To equalize the actual tax positions and provide "meaningful backward-looking relief" as required to remedy the due process violation, *McKesson Corp.* requires that either the favored taxpayers be assessed additional taxes or the unfavored taxpayer be refunded the taxes it paid. Because the statute of limitations precluded Pennsylvania from assessing the favored taxpayers, the Commonwealth Court concluded that the only remedy available to cure the Uniformity Clause violation was to issue the taxpayer a refund of the taxes paid after it applied the percentage cap. It is not yet known whether the decision will be appealed. Please contact Mark Achord with questions on *Alcatel-Lucent USA Inc. v. Commonwealth of Pennsylvania*.

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