

## Pennsylvania Supreme Court Declares \$3,000,000 Net Loss Carryover Deduction Unconstitutional

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On October 18, 2017 the Pennsylvania Supreme handed down its decision in *Nextel Communications of the Mid Atlantic v. Commonwealth of Pennsylvania* No. 6 EAP 2016.

The tax provision at issue gave taxpayers with a net operating loss carry forward deduction of the higher of 12.5% of the current year's taxable income or \$3,000,000 whichever was higher. The lower court (Commonwealth Court) had ruled that the \$3,000,000 limitation was unconstitutional and that the deduction should be unlimited. The Pennsylvania Supreme Court ruled that the \$3,000,000 provision was unconstitutional and the only deduction available was 12.5% of the taxpayer's taxable income for the year.

The court's ruling means that taxpayers who had relied on the \$3,000,000 provision now find that their losses are limited to 12.5% of their taxable income for the year. Most taxpayers have used the \$3,000,000 deduction rather than the deduction based on 12.5% of taxable income. This means that most taxpayers have claimed a net operating loss deduction in excess of what this decision allows.

It is possible that the Department of Revenue could seek to adjust returns for open years and any matters on appeal to take back the disallowed portion of the deduction. Taxpayers with open appeals may need to consider withdrawing those appeals to avoid clawback of the deduction taken regarding their returns. The Department of Revenue has indicated that it will wait until all appeal possibilities have run their course before determining their course of action.

On November 1, 2017, the taxpayer filed a petition with the Pennsylvania Supreme Court requesting reargument. If that is denied, an appeal to the U.S. Supreme Court is a possibility.

For additional information, contact Chuck Potter.