



# This Week in State Tax (TWIST)

January 12, 2026



## Pennsylvania: The beat goes on; taxpayer denied relief from NOL cap

In a recent ruling, the Pennsylvania Commonwealth Court rejected a taxpayer's argument that past state Supreme Court rulings concerning the unconstitutionality of caps on the utilization of Net Loss Carryovers (NLCs) must be applied on a case-by-case basis to determine whether a retroactive remedy is appropriate. The ruling comes after a lengthy series of state court decisions holding that Pennsylvania's flat cap on the use of NLCs is unconstitutional under the state Uniformity Clause.

Recall, at various times, Pennsylvania has implemented either a flat cap on the amount of NLCs that may be applied on a return, or a cap equal to the greater of a flat amount or a percentage of taxable income. In recent years, the Pennsylvania Supreme Court has invalidated both models as violating the Uniformity Clause of the state constitution. In *Nextel*, the state high court invalidated the flat-cap portion of the then-existing law; this invalidation did not advantage the taxpayer, and there was no discussion of remedy for requiring use of the unconstitutional method. In *General Motors* the taxpayer had actually paid additional tax because of an unconstitutional NLC limitation; the state Supreme Court determined that the only appropriate remedy was to permit a refund for the taxes paid by the taxpayer on unused NLCs. In *Alcatel*, the Supreme Court repudiated its *General Motors* opinion, citing (among other factors) the potentially devastating impact of potential refunds on the state fisc; it concluded that the *Nextel* line of cases should only be applied prospectively. [For a complete write-up on *Alcatel* and more background on the *Nextel* line of cases see our [TWIST of November 25, 2024](#).]

In the current case, the taxpayer (under the laws in existence at for the tax years at issue) reported their NLC as 100 percent of its taxable income, resulting in no tax liability for that year. On audit, the Department of Revenue applied the percentage-of-income NLC cap and assessed additional tax. At the taxpayer's request, the Board of Appeals continued the taxpayer's appeal until the conclusion of the then-pending *Nextel* case; as a result, the taxpayer had not yet paid the disputed tax at the time *Nextel* was decided. Here, the parties agree that the NLC cap in existence during the year at issue was unconstitutional under *Nextel*; however, the state argued that, under *Alcatel*, the taxpayer was not entitled to any relief for the non-uniform treatment. The taxpayer countered that the *Alcatel* decision applies only to refunds and does not permit the state to affirmatively collect unconstitutional taxes. In upholding the assessment, the state Supreme Court held that *Alcatel* "definitively decided the issue of retroactivity across the board, and it therefore controls regardless of the procedural posture of a taxpayer's appeal." In other words, the court is not required to reexamine the *Chevron* factors as applied to each taxpayer that may bring a uniformity challenge. Moreover, as *Nextel* applies only prospectively, the NLC deduction provision was constitutional until that case was decided in 2017. Thus, in the court's view, the Department's assessment was valid as it was issued prior to the 2017 decision. Please contact [Lawrence Joseph](#) with questions on [Dow Chem. Co. v. Commonwealth of Pa.](#)

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