

**pennsylvania**

DEPARTMENT OF REVENUE

Board of Appeals

PO BOX 281021

Harrisburg PA 17128-1021

**BOARD OF APPEALS
PETITION FORM****FOR INTERNAL USE ONLY**

GENERAL INSTRUCTIONS: Please type or print neatly in blue or black ink. Attach a copy of the notice being appealed. Mail this petition to the address above. Petitions filed via the U.S. Postal Service are considered filed as of the postmark date. The department does not recognize meter dates. Petitions filed by any other method are considered filed on the date received by the department.

TAX INFORMATION:

Sales Tax Employer Withholding Tax Corporation Tax Personal Income Tax Other _____

Account ID Number _____ Federal Employer Identification Number _____

Tax Period: Begin _____ End _____

Is this a petition for refund? Yes No If yes, Cash Credit Total Refund Requested \$ _____

If petition is in regard to sales tax, please list amount(s) below:

PA Tax Refund \$ _____ Philadelphia Tax Refund \$ _____ Allegheny County Tax Refund \$ _____

Has any portion of this request been included in another petition for refund or requested in a current or prior audit?

Yes No If yes, please provide relevant docket number _____ and/or assessment number _____.

Is this a petition for reassessment of tax, penalty and/or interest? Yes No

Notice Number _____ Notice Mailing Date _____ Assessment Amount \$ _____

PETITIONER INFORMATION:

Corporation Individual Partnership (Attach a list of partners and addresses.) Other _____

Estate Date of Death _____ (Date of Death required for estates & personal income tax fiduciary appeals.)

Business Name _____

Trade Name _____

Individual Last Name _____ First Name _____ MI _____

Social Security Number _____ **PRIVACY NOTIFICATION:** The department is authorized under federal law, 42 U.S.C. § 405 (c), to use your Social Security number in administering state tax law. The department uses your Social Security number to establish your identity and to process your appeal.

Street Address _____ City _____ State _____

Country _____ ZIP Code +4 _____ Web site _____

Telephone _____ Fax _____ E-mail Address _____

Contact Person _____ Contact Phone Number _____

REPRESENTATIVE INFORMATION:

Representation by an attorney, CPA or other person is not required. However, if so represented, complete this area.

Business Name _____

Individual Last Name _____ First Name _____ MI _____

Street Address _____ City _____ State _____

Country _____ ZIP Code +4 _____ Web site _____

Telephone _____ Fax _____ E-mail Address _____

Contact Person _____ Contact Phone Number _____

SCHEDULING REQUEST:

Hearing requested.

No hearing requested. Please decide on basis of the petition and record.

This case to be held pending action of court on the same issue(s).

Case Number _____ Court Citation Number _____

FOR INTERNAL USE ONLY

DOCKET # _____

EXAMINER _____

PETITION DUE _____

**Rider Attached to
Petition for Refund of Corporate Net Income Tax**

Pennsylvania allows taxpayers with net losses to carry over those losses and deduct them in subsequent taxable years. Petitioner's operations generated significant losses, resulting in a net loss carryover available in _____.

Under 72 P.S. § 7401(3)4.(c)(2)(B)(IV), however, the net loss deduction was capped at the greater of \$3,000,000 or 20% of Petitioner's taxable income. Based on this limitation, Petitioner deducted less than its available net loss carryover.

Petitioner is entitled to recompute its net loss deduction without regard to the cap under 72 P.S. § 7401(3)4.(c)(2)(B)(IV). The Uniformity Clause of the Pennsylvania Constitution requires a tax to be applied with "uniformity upon similar kinds of businesses or property with substantial equality of the tax burden on all members of the class." *Fidelity Bank, N.A. v. Commonwealth*, 645 A.2d 452, 458 (Pa. Cmwlth. 1994). The net loss cap violates the Uniformity Clause because it results in Petitioner being subjected to tax at a higher effective rate than other similarly situated taxpayers.

A tax "which is imposed at different rates upon the same kind of property, solely on the basis of the quantity involved, offends the uniformity clause." *Kelley v. Kalodner*, 181 A. 598, 602 (Pa. 1935). A tax can contain illegal rate differences even if the nominal rate is constant. *See Amidon v. Kane*, 279 A.2d 53, 66 (Pa. 1971). Accordingly, in *Amidon*, the court looked beyond the 3.5% nominal flat rate on personal income and analyzed the effective rate. The court noted that the statute provided different deductions to similarly situated taxpayers and, as a result, the effective tax rate on the same dollar of income ranged from 1.77% to 3.01%. The court concluded that this variation was non-uniform and thus unconstitutional.

In *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth*, Docket No. 98 F.R. 2012 (11/23/15), the Commonwealth Court held that the net loss cap violates the Uniformity Clause, and granted Nextel the right to deduct its net losses without regard to the cap, resulting in a refund to Nextel. The Court noted that Nextel was allowed to deduct only \$5.6 million of NOLs in computing its 2007 taxable income (12.5% of its \$45 million of taxable income prior to the NOL deduction), despite having NOLs well in excess of \$45 million. At the same time, other similarly situated taxpayers with income below \$3 million were able to reduce their taxable income to zero.

Petitioner is in the same position as Nextel: because of the net loss deduction cap, Petitioner paid tax, even though a similarly situated taxpayer who conducted business on a smaller scale would not pay tax. Allowing a taxpayer to offset a greater percentage of its taxable income, merely because it conducted business on a smaller scale than Petitioner, violates the Uniformity Clause because it results in different effective tax rates. *See Kelley*, 181 A. at 602; *Amidon* 279 A.2d at 66. Accordingly, Petitioner is entitled to compute its net loss deduction without regard to the statutory cap.