

## CLASS ACTION STAYED

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The Pennsylvania Superior Court (which rarely addresses tax issues) held that a trial court correctly ruled that a purported class action for the refund of Sales and Use Tax must be decided in the first instance by the Department of Revenue. However, the court held that the trial court incorrectly dismissed the class action for lack of subject matter jurisdiction; instead it should have stayed the action until the Department of Revenue acted on the refund claim. *Stoloff v. Neiman Marcus Group, Inc.*, No. 2674 EDA 2009 (Pa. Super. May 23, 2011). The taxpayer purchased a dress and was charged Pennsylvania Sales Tax. Clothing is excluded from Sale and Use Tax, with the exception of certain items of clothing containing fur or other ornamentation. 72 P.S. §7204 (26). The taxpayer brought an action against the vendor in common pleas court, requesting a refund and damages and claiming class status. The court had little trouble concluding that the claim for refund must first be brought to the Department of Revenue and ruled that it was irrelevant whether the collected taxes were still held by the vendor or had been turned over to the Commonwealth, citing 72 P.S. §§7252, 7253. In either case, the claimed refunds were Commonwealth property. However, the court held that the refund claims are within the exclusive jurisdiction of the Department of Revenue whether or not class status is claimed, citing *Lillian v. Commonwealth*, 354 A.2d 250 (Pa. 1974). Other cases have held that each taxpayer must proceed independently; a class action may not be brought for refund claims. *E.g., Iraelit v. Montgomery County*, 703 A.2d 722 (Pa. Commw. 1997) (as to Personal Property Tax).

The court held that the requirement that a taxpayer proceed first before the Department of Revenue is an issue of primary jurisdiction, not an issue of subject matter jurisdiction. Both the administrative agency and the court play roles in a claim for refund, but the first step must be a refund claim with the administrative agency. Thereafter, a court can dispose of any remaining issues. Therefore, the class action should be stayed in the trial court until the Department of Revenue acts.