

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

RITE AID HDQTRS, CORP.,	:	April Term 2020
	:	
Plaintiff,	:	
	:	
v.	:	No. 1092
	:	
BRINES REFRIGERATION HEATING &	:	
COOLING, INC.,	:	COMMERCE PROGRAM
	:	
Defendant.	:	Control Number 20090944
	:	
	:	992 EDA 2021

OPINION

This opinion is submitted relative to defendant Brines Refrigeration Heating & Cooling, Inc.'s ("Defendant") appeal of this court's order dated December 23, 2020 and docketed December 24, 2020 denying its request to stay proceedings.¹ For the reasons set forth below, this court's order dated December 23, 2020 and docketed December 24, 2020 should be affirmed.

Plaintiff Rite Aid Hdqtrs, Corp. ("Plaintiff") is a pharmacy chain with stores located throughout the United States including Pennsylvania.² Defendant is a commercial mechanical contractor that performs HVAC, lighting, refrigeration and other general services.³ From 2004 to 2019, plaintiff contracted with defendant to perform various maintenance and related services

¹ Included within the motion to stay proceedings was a request for a protective order to limit discovery. The motion to certify the December 23, 2020 order for appeal is solely limited to the motion to stay proceedings and therefore this opinion will only address the request to stay proceedings portion of the order.

² The facts set forth herein are derived from the verified complaint filed with the court and the declaration of Corey Stough, Senior Manager of Transaction Taxes at Rite Aid, attached to plaintiff's response to defendant's motion to stay as proceedings Exhibit "A".

³ Plaintiff's complaint at ¶ 13.



at its various locations in more than 20 states, including Pennsylvania.⁴ During this time period, various contracts were executed by the parties which set forth the contractual relationship and obligations between the plaintiff and defendant. Specifically, the 2010 Master Service Agreement and the 2016 Master Service Agreement, in particular, required that defendant's invoices identify "state sales tax" when applicable.⁵ Additionally, the 2013 HVAC Agreement also included a "Retail Facilities Invoice Procedure" which required that "All Invoices MUST list separately the overhead and profit rate and applicable sales or other tax, if any. Vendor shall be responsible for all collected taxes associated with paid invoices."⁶ Furthermore, the 2010 MSA, the 2016 MSA, the 2013 HVAC Agreement, Lighting Agreement and the 2018 HVAC Agreement also contain indemnification provisions and assurances that defendant was in compliance with all current federal, state and local laws and regulations.⁷

Since 2010, defendant issued to plaintiff more than 150,000 invoices which include a line item charge for either "tax", "sales tax" and/or the name of the taxing jurisdiction.⁸ At all times relevant hereto, plaintiff paid defendant's invoices, including the line item charge for "tax", "sales tax" and/or that contained the name of the taxing authority.⁹

In January 2019, the PA Department of Revenue ("Department") sent plaintiff the results of a sales tax audit of plaintiff's subsidiary Thrift Drug, Inc. covering an audit period of May 1,

⁴ Plaintiff's complaint ¶¶ 1, 18.

⁵ Id. ¶ 21

⁶ Id. at ¶ 22

⁷ Id. at ¶¶ 23, 24, and 25.

⁸ Id. at ¶¶ 2, 26

⁹ Id. ¶¶ 3-4, 27-34

2015 to February 8, 2018.¹⁰ As a result of the audit, the Department assessed additional tax amounts in approximately 177 invoices that plaintiff received from defendant during the relevant audit period for which the Department determined that plaintiff had not paid any PA sales or use tax for the taxable service identified in defendant's invoices.¹¹

Also, in 2019, the Department began a separate sales audit of Rite Aid, Inc. Plaintiff retained Keystone Tax Associate's, a sales and use tax consulting firm, to help in reviewing the sales and use tax Rite Aid paid to the Commonwealth of PA and related issues. In November 2019, representatives from Keystone and Rite Aid met with the Department state tax auditors to discuss the preliminary assessment of use tax on Rite Aid of PA for the invoices issued by Brines that included a "tax" line item.¹² State auditors informed Rite Aid that the Department was unable to locate any record of defendant being registered with or licensed by the Department to collect and remit PA sales tax. The State Auditors also informed plaintiff that the Department did not have records of defendant remitting any sales tax to the department. The Department also informed plaintiff that they did not recognize the "tax" listed on the invoices issued by defendant and paid by plaintiff because unless defendant was remitting the tax to the department using a different name, the tax listed on the invoice had not been remitted and was not a PA sales tax.¹³

On January 23, 2020, during a call between representatives of plaintiff and defendant, defendant provided plaintiff with the following information: 1) defendant had not paid sales tax

¹⁰ Declaration of C. Stough ¶ 6; Plaintiff's complaint ¶ 35.

¹¹ Id. at ¶ 7; Plaintiff's complaint ¶ 35.

¹² Declaration of C. Stough ¶¶ 10, 12.

¹³ Id. ¶¶ 12, 13.

for work performed in Pennsylvania to the Department or the tax authorities in other states and
2) the itemized “tax” listed on defendant’s invoice was not actually a tax but some other charge
by defendant. Defendant did not explain what it claimed the line item stating “tax” represented.

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The Department in connection with a closed audit, assessed plaintiff use tax, interest and
fines for the work performed by defendant.¹⁵ In connection with an open audit, the Department
has informed plaintiff that it will be assessed additional use tax for work performed by defendant
even though plaintiff paid the “tax” to defendant for the work.¹⁶

On April 22, 2020, plaintiff instituted this lawsuit against defendant alleging claims for
breach of contractual agreements, fraud, unjust enrichment and negligent misrepresentation
associated with defendant’s representations that it remitted the monies collected for “tax” on its
invoices when it did not. Additionally, plaintiff seeks a declaration that defendant is
contractually required to indemnify plaintiff for any additional tax liability and for any expenses,
including attorney fees resulting for defendant’s alleged fraudulent and improper failure to remit
sales tax.

On September 2, 2020, defendant filed a motion to stay proceedings on plaintiff’s
complaint or in the alternative for a protective order to limit discovery.¹⁷ Plaintiff filed a

¹⁴ Plaintiff’s complaint ¶ 40.

¹⁵ Id. at ¶ 51.

¹⁶ Id. at ¶ 52.

¹⁷ In addition to the motion to stay, the defendant has filed one set of preliminary objections and
two sets of amended preliminary objections. Plaintiff has filed responses to the preliminary objections
and also filed preliminary objections to preliminary objections. Plaintiff has filed preliminary objections
to defendant’s answer with new matter and counterclaim and to defendant’s amended answer with new
matter and counterclaim. Plaintiff has also filed a motion for attorney fees.

response to the motion. On December 23, 2020, this court denied defendant's motion to stay proceedings or limit discovery. This order was docketed on December 24, 2020. On January 19, 2021, plaintiff filed a motion with this court to amend this court's order dated December 23, 2020 to include the statement that the motion involved a controlling question of law to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter. On May 21, 2021, the Pennsylvania Superior Court granted defendant's permission to appeal.

DISCUSSION

Defendant argues this matter is subject to the doctrine of primary jurisdiction and should be stayed so that the administrative proceedings with the Department may be exhausted. In general, the doctrine of primary jurisdiction holds that where an agency has been established to handle a particular class of claims, the court should refrain from exercising its jurisdiction until the agency has made a determination. Hence, although the court may have subject matter jurisdiction, the court defers its jurisdiction until an agency ruling has been made. Thus, the doctrine of primary jurisdiction applies where the administrative agency cannot provide a means of complete redress to the complaining party and yet the dispute involves issues that are clearly better resolved in the first instance by the administrative agency charged with regulating the subject matter of the dispute.¹⁸ The doctrine "... requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme."¹⁹

¹⁸*Stoloff v. Neiman Marcus Group, Inc.*, 24 A.3d 366, 371 (Pa.Super.,2011) citing *Elkin v. Bell Telephone Co. of Pennsylvania*, 491 Pa. 123, 420 A.2d 371 (1980).

¹⁹ *Id.*

Therefore, where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar, the proper procedure is for the court to refer the matter to the appropriate agency. Also weighing in the consideration should be the need for uniformity and consistency in agency policy and the legislative intent. Where, on the other hand, the matter is not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility.²⁰ The doctrine of primary jurisdiction must be used sparingly and under the appropriate circumstances.²¹

In order to determine if the doctrine of primary jurisdiction applies, the allegations in plaintiff's complaint, not the form of the pleading or the causes of action asserted, are evaluated to determine whether the doctrine of primary jurisdiction applies.²² After examining the complaint allegations here it is clear that the doctrine of primary jurisdiction does not apply. Plaintiff brings this action against defendant for breach of contract and fraud arising from defendant's alleged improper collection of a "tax" and its alleged false representations that the "tax" collected would be remitted to the proper authorities. There is no allegation or reasonable inference that can be drawn from the complaint that defendant is holding the "tax" in trust for the Department or that the "tax" was a sales tax. In fact, it is alleged that defendant is not licensed or registered with the Department and therefore could not remit the required sales tax charges.²³

²⁰ *Stoloff v. Neiman Marcus Group, Inc.*, 24 A.3d 366, 375-77 (Pa. Super. 2011).

²¹ *Erie Exchange ex rel. Sullivan v. Pennsylvania Ins. Dept.*, 133 A.3d 102 (2016).

²² *Id.*

²³ Plaintiff's complaint ¶ 35,

This action was instituted by plaintiff to recoup the allegedly unauthorized line item charge that defendant imposed upon plaintiff.²⁴ Plaintiff is not asking for the Department to assess sales or use tax on plaintiff or defendant. The assessment has already been made by the Department since the “tax” charged on the invoice is not recognized as a sales tax by the Department.²⁵ Plaintiff is not asking for a refund, seeking an interpretation of any tax regulations nor challenging any tax assessment from the Department. Plaintiff is seeking recourse against defendant for its allegedly improper actions independent of the Department’s role and on matters which are properly within the expertise of this court. Since the expertise of the Department is not implicated, the doctrine of primary jurisdiction does not apply.

Defendant relies upon *Stoloff v. Neiman Marcus Group, Inc.*²⁶ to argue that the doctrine of primary jurisdiction applies to this matter. However, *Stoloff* is distinguishable from the case hand. In *Stoloff*, the plaintiff purchased a dress over the telephone from a Neiman Marcus catalog. Neiman Marcus added sales tax of six percent to the cost of the dress. *Stoloff* commenced a class action lawsuit against Neiman Marcus alleging breach of contract, unjust enrichment, violation of the consumer protection law, and conversion. *Stoloff* sought equitable relief as well. Neiman Marcus preliminarily objected and asserted the court lacked subject matter

²⁴ Defendant makes various statements regarding what the line item “tax” represents. Defendant stated that the “tax” listed on the invoice issued to Rite Aid “was not Pennsylvania sales tax paid by plaintiff to defendant” but rather was the reimbursement of the sales tax paid by defendant to defendant’s own vendors and then passed onto plaintiff as a cost of the goods sold to plaintiff. (Defendant’s response to motion for attorney fees).

²⁵ Plaintiff’s complaint ¶¶ 51-52.

²⁶ 24 A.3d 366 (Pa. Super. 2011).

jurisdiction because Stoloff failed to exhaust her administrative remedies with the Department of Revenue. The court sustained the preliminary objections and dismissed the class action.²⁷

Stoloff appealed to the Pennsylvania Superior Court which held that primary jurisdiction over a tax-refund claim belongs with the Department of Revenue and extended the holding not only to taxpayers seeking a sales tax refund from the Department of Revenue but also to taxpayers seeking a refund of taxes being held in trust for the Department.²⁸ Here, unlike *Stoloff*, plaintiff is not seeking a tax refund from the Department of Revenue or from an entity holding the tax in trust for the Department. Plaintiff is seeking a refund from defendant for charging plaintiff a “tax” disguised as a sales tax. The Department of Revenue’s expertise is not required in this action and the doctrine of primary jurisdiction does not apply.

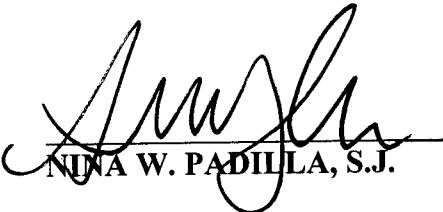
CONCLUSION

Based on the foregoing, this court’s order denying defendant’s motion to stay proceedings dated December 23, 2020 and docketed December 24, 2020 should be affirmed.

Respectfully Submitted,

BY THE COURT,

Date: 7/28/2021


NINA W. PADILLA, S.J.

²⁷ Id at. 372.

²⁸ *Stoloff v. Neiman Marcus Group, Inc.* at. 372.