

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GOOD-WILL MECHANICAL CORP.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 825952  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period June 1, 2006 through November 30, 2011. :

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Petitioner, Good-Will Mechanical Corp., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2006 through November 30, 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (David Gannon, Esq., of counsel), brought a motion dated April 1, 2014 seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Richard S. Chiu, CPA, did not respond to the Division of Taxation's motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

***FINDINGS OF FACT***

1. Petitioner, Good-Will Mechanical Corp., filed a Request for Conciliation Conference (Request) with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The Request was filed in protest of a Notice of Determination dated April 1, 2013, bearing assessment number L-039184609-3 and asserting interest due for the period June 1, 2009 through November 30, 2011 in the amount of \$34,252.40, plus penalty in the amount of \$23,858.32. The envelope in which the Request was filed bears a United States Postal Service (USPS) postmark dated September 26, 2013 and is date stamped as received by BCMS on September 30, 2013.

2. On October 18, 2013, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice number L-039184609, the Order determined that petitioner's protest was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on April 1, 2013, but the request was not mailed until September 26, 2013, or in excess of 90 days, the request is late filed.

3. Petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition is dated as signed by petitioner on October 31, 2013, and the envelope in which the petition was mailed bears a USPS postmark dated November 1, 2013. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on November 4, 2013. There is no dispute that the petition was filed within 90 days after the October 18, 2013 issuance of the Order and constitutes a timely challenge thereto.

4. In support of its motion and to prove mailing of the Notice of Determination under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated

April 1, 2014, of David Gannon, Esq.; (ii) an affidavit, dated February 7, 2014,<sup>1</sup> of Daniel A. Maney, manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iii) an affidavit, dated February 7, 2013,<sup>2</sup> of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 1, 2013; and (v) a copy of petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the period December 1, 2012 through February 28, 2013, the last return filed by petitioner before the Notice of Determination dated April 1, 2013, reporting the same Brooklyn, New York, address for petitioner as that listed on said notice.

5. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR, using the year, the numeric ordinal day of the year and military time of day. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR. In the present case, "4/1/13" is handwritten in the upper right corner of the first and last page of the CMR. It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS)

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<sup>1</sup> The jurat of the Maney affidavit contains the typed month and year of "January, 2013" that have been crossed out, and the month and year of "February, 2014" has been handwritten in their place.

<sup>2</sup> The jurat of the Peltier affidavit contains the typed month and year of "January, 2013." The month has been crossed out and "February" has been handwritten in its place, however, the year has not been changed.

and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

6. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address."

7. The CMR relevant to the Notice of Determination under protest consists of 27 pages and lists 293 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 27, which contains 7 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated April 1, 2013 to each page of the CMR and also wrote his or her initials on the last page thereof.

8. Page 12 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1525 9710 and assessment number L-039184609, was to be mailed to petitioner at the Brooklyn, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

9. Page 4 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1525 8782 and assessment number L-039184609, was to be mailed to petitioner's representative, Richard S. Chiu, CPA, at the New York, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and the representative's name and address as noted.

10. The affidavit of Bruce Peltier describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." The mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature or initials on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 27 and affixed a postmark dated April 1, 2013 to each page of the CMR. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS employee complied with this request by handwriting and circling the number "293" on the last page next to the heading "Total Pieces Received at Post Office."

11. According to the Peltier affidavit, a copy of the subject Notice of Determination was mailed to petitioner and petitioner's representative on April 1, 2013, as claimed.

12. The facts set forth above in Findings of Fact 5 through 11 were, as noted, established through the affidavits of Daniel A. Maney and Bruce Peltier, as well as the documentary evidence presented by the Division. Mr. Maney's affidavit avers that he is and was fully familiar with the Division's present and past office procedures concerning the generation and processing of notices for shipment to the Division's Mail Processing Center. Mr. Peltier's affidavit avers that he has been a supervisor in the Division's mail room since 1999 and that he is currently a principal mail and supply supervisor and is fully familiar with the operations and procedures of the mailing of notices.

### ***CONCLUSIONS OF LAW***

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was timely filed (*see* Finding of Fact 3), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This determination shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

B. A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9[b][1]).

C. Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212.

"The proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] *citing Zuckerman*).

D. Petitioner did not respond to the Division’s motion. Accordingly, it is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Maney and Peltier affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v. Baiden*, at 544; *Whelan v. GTE Sylvania*).

E. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to

petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

G. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner’s last known address on April 1, 2013. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well



as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).<sup>3</sup> Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's sales tax return for the period December 1, 2012 through February 28, 2013, which satisfies the "last known address" requirement. The evidence further establishes that a copy of the notice was properly sent to petitioner's representative. It is thus concluded that the Division properly mailed the notice on April 1, 2013 and the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law § 170[3-a][a]; § 1138[a][1]).

H. Petitioner's Request for Conciliation Conference was filed on September 26, 2013. This date falls after the 90-day period of limitations for the filing of such a request. Consequently, the Request was untimely (*see* Tax Law § 1138[a][1]; § 170[3-a][b]) and the same was properly dismissed by the October 18, 2013 Order issued by BCMS. Petitioner has offered no claim or evidence to meet its burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

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<sup>3</sup> As noted in Finding of Fact 2, the Peltier affidavit appears to have a clerical error in the jurat. Specifically, while the month of the jurat was changed from January to February, as it was in the Maney affidavit, the year of 2013 was not changed, although in the Maney affidavit the year was changed from 2013 to 2014. Clearly, the date of February 7, 2013 is incorrect as it predates the date of the notice discussed in the affidavit (April 1, 2013). It is determined that such clerical error in the jurat does not affect the contents of the affidavit (*Matter of Esther Parking Corp.*, Tax Appeals Tribunal, December 18, 1997; *Matter of Fifth Ave. & 37<sup>th</sup> St. Corp.*, 261 AD 550, 26 NYS2d 219 [1941], *affd* 286 NY 628 [1941]).

I. The Division's motion for summary determination is hereby granted, the October 18, 2013 Order dismissing petitioner's Request is sustained and the petition is denied.

DATED: Albany, New York  
July 10, 2014

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE