

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
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| of | : | |
| | : | |
| ALL FOUNDATION SYSTEMS | : | |
| & REPAIRS, LLC | : | ORDER |
| | : | DTA NO. 850536 |
| 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 March 1, 2016 through February | : | |
| 28, 2018. | : | |
| _____ | : | |

Petitioner, All Foundation Systems & Repairs, LLC, 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 March 1, 2016 through February 28, 2018.

On July 10, 2025, petitioner, appearing by Sales Tax Defense LLC (Jennifer Koo, Esq., of counsel), filed a motion seeking summary determination in the above-captioned matter pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.¹ The Division of Taxation, appearing by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), was granted an extension of time within which to file its response to September 22, 2025, which date commenced the 90-day period for the issuance of this order.

Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following order.

¹ Petitioner originally filed its motion on June 24, 2025 and, subsequently, a corrected version was filed on July 10, 2025.

ISSUE

Whether petitioner has established that no material and triable issues of fact exist such that summary determination may be granted in its favor.

FINDINGS OF FACT

1. The Division of Taxation (Division) conducted a sales and use tax audit of petitioner, All Foundation Systems & Repairs, LLC, for the period March 1, 2016 through February 28, 2018.

2. As a result of the audit, the Division issued to petitioner a notice of determination, bearing assessment identification number L-054711560 (notice), dated November 19, 2021, asserting additional sales and use tax due in the amount of \$486,128.96, plus penalty and interest, for the period of March 1, 2016 through February 28, 2018.

3. Petitioner protested the notice by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). BCMS issued a conciliation order, dated March 17, 2023, bearing CMS number 000334382, sustaining the notice in full.

4. On April 28, 2023, petitioner protested the conciliation order by filing a petition with the Division of Tax Appeals.

5. On July 10, 2025, petitioner filed a notice of motion for summary determination with supporting documents, including: (i) an affidavit of Leopoldo Pensa, president of petitioner, sworn to on June 20, 2025, but notarized on June 18, 2025; and (ii) a memorandum of law in support of the motion, by Jennifer Koo, Esq., dated June 20, 2025.

6. In his affidavit, Mr. Pensa asserts the following:

(i) the sales and use tax assessment issued against petitioner should be cancelled in its entirety;

(ii) petitioner installs helical pile systems that provide structural support to basements and foundations of residential homes and commercial buildings;

(iii) it was determined during the Division's audit that petitioner's sales qualify as capital improvements;

(iv) petitioner provided the Division with copies of its sales contracts with customers for the audit test period of September 1, 2017 through November 30, 2017;

(v) in the majority of cases, the installation of helical pile systems are required to be inspected and approved by a licensed engineer;

(vi) petitioner uses a professional engineering company to provide engineering services;

(vii) petitioner provided the Division with copies of certain invoices for the purchase of these engineering services for the test period of September 1, 2017 through November 30, 2017;

(viii) petitioner subcontracts out the installation of helical pile systems to Premium Technical Services Corporation (Premium);

(ix) petitioner provided the Division with copies of the relevant purchase invoices from Premium;

(x) Premium provides both the materials and installation of materials;

(xi) Premium furnishes both the labor and materials at the same time for each job; and

(xii) Premium charges petitioner for both the materials and labor on the same invoice.

7. Mr. Pensa's affidavit did not expressly refer to any attachments or exhibits in support for the assertions made therein.

8. Attached to Ms. Koo's memorandum of law, and specifically referred to therein, are what appear to be: (i) copies of several invoices; (ii) a copy of a document titled, "HELICAL PILE INSTALLATION LOG"; (iii) copies of certain payroll information; (iv) copies of additional invoices; (v) copies of a document titled, "SUBCONTRACTOR AGREEMENT;" (vi) copies of certain design plan blueprints; and (vii) copies of additional invoices. Petitioner did not file an affirmation or affidavit supporting the authenticity or accuracy of any of the attachments or exhibits filed with its motion or Ms. Koo's memorandum of law.

9. On September 19, 2025, the Division filed a response to petitioner's motion. The Division's response consisted of a memorandum of law in opposition to petitioner's motion for summary determination and what appears to be: (i) a copy of the Division's audit report; (ii) copies of the notice with the notice of taxpayer rights; (iii) a copy of the BCMS conciliation order; (iv) a copy of the petition; (v) a copy of the answer; and (vi) a copy of petitioner's motion in this matter.

10. The Division did not file any affirmation or affidavit supporting the authenticity or accuracy of any of the attachments or exhibits filed with its response to petitioner's motion or Ms. Lyon's memorandum of law.

11. In its memorandum of law, petitioner argues that: (i) engineering services are not subject to sales or use tax and (ii) subcontractor services are not subject to sales or use tax. Petitioner also argues that, in its books and records, it misclassified certain engineering services into an equipment rental account and, therefore, such are not subject to sales and use tax. Petitioner asserts that it does not perform any helical pile installation work and, thus, such charges are not subject to sales and use tax.

12. In its memorandum of law, the Division argues that petitioner did not provide records to support the assertion that engineering services were misclassified as rental equipment charges in its books and records, and that petitioner failed to support its assertion that the Division erroneously concluded that petitioner purchased materials as a subcontractor and installed them. The Division cites to the alleged audit report for its assertions and points out inconsistencies in Mr. Pensa's affidavit (i.e., his assertions that petitioner itself installs helical pile systems and that petitioner hires a subcontractor to install the helical pile systems).

CONCLUSIONS OF LAW

A. 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]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Laws and Rules § 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]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Id.*, citing *Matter of Redemption Church of Christ of Apostolic Faith v Williams*, 84 AD2d 648, 649 [3d Dept 1981]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]; *see*

Daliendo v Johnson, 147 AD2d 312, 317 [2d Dept 1989]). 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 a material issue of fact is “arguable” (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). “If material facts are in dispute or if different inferences may reasonably be drawn from facts themselves undisputed, a motion for summary judgment must be denied” (*Supan v Michelfeld*, 97 AD2d 755, 756 [2d Dept 1983], citing *Moskowitz v Garlock*, 23 AD2d at 943-944; *Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]).

C. In reviewing the evidence submitted by petitioner, the facts must be viewed in the light most favorable to the nonmoving party (*see Matter of Hulteen*, Tax Appeals Tribunal, September 29, 2022, citing *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 US 574, 587 [1986]). The sole affidavit provided by petitioner includes no supporting attachments or evidence for any of the assertions made therein. Much of petitioner’s arguments are based upon assertions made in Ms. Koo’s memorandum of law and based upon documents referenced and attached to that memorandum of law, not the Pensa affidavit. Petitioner did not file an affirmation or affidavit supporting the authenticity or accuracy of any of the attachments or exhibits filed with Ms. Koo’s memorandum of law. Such purported evidence is of very limited value (*see Matter of Carlson*, Tax Appeals Tribunal, April 29, 2021, *confirmed* 214 AD3d 1133 [3d Dept 2023]). Furthermore, the Pensa affidavit itself creates uncertainty as to the facts with conflicting assertions that petitioner both installs the helical pile systems and subcontracts out the installation of the helical pile systems (*see* finding of fact 6 [ii] and [viii]). On the arguments raised in petitioner’s motion, summary determination must be denied because it failed to resolve

all factual disputes and, thus, failed to make a prima facie showing of entitlement to judgment as a matter of law.

D. The motion of All Foundation Systems & Repairs, LLC, for summary determination is denied, and the hearing will proceed as scheduled.

DATED: Albany, New York
November 13, 2025

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE