STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VERMA DEEPAK	:	DETERMINATION DTA NO. 823623
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, 1988 through August 31, 1991.	:	

Petitioner, Verma Deepak, 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, 1988 through August 31, 1991.

The Division of Taxation by Daniel Smirlock, Esq. (David Gannon, Esq., of counsel), brought a motion filed October 28, 2010 seeking dismissal of the petition or, in the alternative, summary determination in the above referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). The Division of Taxation submitted the affidavit of David Gannon, Esq., dated October 27, 2010, together with attached exhibits in support of the motion. Petitioner, appearing by S. Buxbaum & Co., Sales Tax Consulting LLC (Stewart Buxbaum, CPA), responded to the motion by submitting a letter in opposition thereto, together with the November 10, 2010 affidavit of Verma Deepak. Petitioner's response to the motion was filed on November 15, 2010, and such date commenced the 90-day period for issuance of this determination. After due consideration of the affidavits, attached exhibits, and all pleadings and

proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the substantive issues raised in the petition.

FINDINGS OF FACT

1. On May 7, 2010 petitioner, Verma Deepak, filed a petition with the Division of Tax Appeals challenging an assessment of sales and use taxes under Assessment ID No. L-009893202-8 for the period June 1, 1988 through August 31 1991. The petition lists the amount of tax determined as $732,501.45, plus penalty and interest, and alleges the following:

> The taxpayer never received a copy of the Notice of Determination at his last known address, certified mail, as required by law. On January 28, 2010 a FOIL [Freedom of Information Law] request was made for a copy of the Notice of Determination. On April 16, 2010 a microfich [*sic*] copy of the Notice of Determination was received from the Records Access Office. Accordingly, the Notice of Determination should be cancelled.
>
> In addition, the taxpayer never received a Conciliation Order.

The petition bears a check mark in the box that precedes the preprinted statement "[a] conciliation conference was not requested." The petition also raises the substantive arguments that petitioner did not commit fraud, that the Division of Taxation (Division) did not meet its burden of proving fraud and, consequently, that the statute of limitations on assessment has expired with respect to petitioner.

2. In response to the FOIL request referenced above, the Division furnished a microfiche copy of the Notice of Determination and the pertinent pages from the certified mailing log associated with such notice. The copy of the notice reflects the same dollar amount of tax

assessed as is listed above ($732,501.45), is dated as issued on December 9, 1994, further specifies the period covered by the assessment as spanning June 1, 1988 through August 31, 1991, and indicates that petitioner was assessed as an officer or person responsible for taxes determined to be due from Verma Jewelers, Inc. The copy of the notice and the page of the certified mailing log that lists the notice pertaining to petitioner (identified by its assessment number) both reflect the same address for petitioner. The Division concedes, however, that the mailing log lacks an indication confirming the total number of pieces of mail listed on the mailing log that were actually received into the custody of the United States Postal Service (USPS) for mailing on December 9, 1994.

3. The Division alleges (notwithstanding the check-marked box to the contrary on the petition) that a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) was requested by petitioner, was held on October 5, 1995, and resulted in a reduction of the amount of tax assessed by the notice from $732,501.45 to $361,837.79. The Division asserts that a conciliation order sustaining the notice as so reduced was issued to petitioner on November 3, 1995. In turn, the Division's motion herein seeks dismissal of the petition or summary determination on the basis that the petition was not filed with the Division of Tax Appeals, as required by statute, within 90 days after the date on which the conciliation order was issued.

4. Petitioner's letter in opposition requests denial of the motion and seeks a hearing on the merits of the petition. Petitioner's position is that the Division has not established proper mailing, and hence proper notice to the taxpayer, of either the Notice of Determination or the conciliation order. In this regard petitioner alleges, via his affidavit, that he never received a copy of the Notice of Determination and never received a copy of the conciliation order.

Although unstated, it appears petitioner would argue, consistent with his request for a hearing on the merits, that this alleged failure to give proper notice, specifically with respect to the conciliation order, resulted in a tolling of the 90-day period within which a petition for a hearing before the Division of Tax Appeals must be filed.

5. As described more fully hereinafter, and notwithstanding the check-marked box on the petition, which states that a conciliation conference was not requested, it appears that such a conference was in fact requested and occurred. Hence, evidence concerning the fact and date of issuance of the subject conciliation order is relevant and will be set forth hereinafter.

6. The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, started when the BCMS word processing unit prepared and forwarded the conciliation orders, together with the accompanying Certified Mailing Record (CMR) predated in its upper right portion with the intended date of mailing, to the particular conciliation conferee for signature. The conciliation conferee, in turn, would sign and forward the order and cover letter to the BCMS clerk assigned to process conciliation orders.

7. The BCMS clerk's regular duties included verifying the names and addresses of taxpayers and their representatives, per BCMS records, with the information listed on the CMR. A certified control number was assigned to each conciliation order listed on the CMR, and the BCMS clerk's duties included affixing a sequential certified control number sticker to the mailing envelope for each listed taxpayer or representative. The clerk would then record the certified control number from each envelope next to the appropriate name on the CMR under the heading "Certified No." In this instance, certified control number Z122303608 was assigned to the conciliation order to be mailed to petitioner, Verma Deepak, and certified control number

Z122303609 was assigned to the conciliation order to be mailed to petitioner's then-representative, John Serpico, Esq., and such numbers are duly recorded on the CMR.

8. The conciliation orders and accompanying CMR would then be picked up in BCMS by an employee of the Division's Mail Processing Center (Center) and deposited in the "Outgoing Certified Mail" basket in the Center. A member of the staff, in turn, would place the conciliation orders in envelopes, weigh and seal the same and affix postage and fee amounts on the envelopes. A mail processing clerk would then count the envelopes and verify the names and certified control numbers against the information contained on the CMR. In turn, a member of the Center staff would deliver the sealed, stamped envelopes to a branch of the USPS in Albany, New York for mailing.

9. The CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Center, each CMR would be picked up at the post office by a staff member of the Center on the following day after its initial delivery and then delivered back to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

10. Each page of a CMR is a separate and individual CMR for the conciliation orders listed on that page. The CMR pertaining to the conciliation orders to be mailed on November 3, 1995 is a 3-page document, listing 14 items of certified mail on each of the first 2 pages thereof and 13 items of certified mail on the third page thereof. Each such listed item includes a certified control number, with such numbers running consecutively, as well as the names and addresses of the addressees, and postage and fee amounts. The conciliation orders to be mailed to petitioner, Verma Deepak, and to his then-representative, John Serpico, Esq., are listed on page two of the three-page CMR.

11. Each page of the CMR contains spaces to record the "Total Number of Pieces Listed by Sender," (i.e., BCMS) and, correspondingly, "Total Number of Pieces Received at Post Office." There is also a space on each such CMR page for the receiving USPS employee to initial so as to indicate receipt of the listed pieces of mail into the custody of the USPS for mailing. In this instance, the postal employee wrote, in the space to indicate "Total Number of Pieces Received at Post Office," the number "14" on each of the first two pages of the CMR and "13" on the third page of the CMR, which numbers correspond to the numbers written on each of such pages in the space to indicate "Total Number of Pieces Listed by Sender." The postal employee also initialed each of the three pages of the CMR in the appropriate space to confirm receipt of the listed items, and affixed the postmark of the Colonie Center branch office of the USPS, dated November 3, 1995, to each of the three pages of the CMR, all in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR in order to indicate the number of pieces of mail actually received at the post office.

12. The facts set forth above in Findings of Fact "6" through "11" were established through the affidavits of Robert Farrelly and Bruce Peltier. Mr. Farrelly was employed as the Assistant Supervisor of Tax Conferences for BCMS, his duties included supervising the preparation and mailing of conciliation orders, and he is fully familiar with the procedures involved therewith. Mr. Peltier was employed as a Principal Mail and Supply Clerk in the Registry Unit of the Division's Mail Processing Center, his duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS, and he is fully familiar with such procedures.

13. The record on this motion includes a printed copy of the conciliation order, bearing CMS No. 146219, allegedly mailed by certified mail to petitioner, Verma Deepak, on November 3, 1995. This conciliation order is captioned as pertaining to the Matter of the [conciliation conference] Request of Verma Deepak, and identifies Notice Number L-009893202 pertaining to Tax Law Articles 28 and 29 (i.e., sales and use taxes) for the period spanning June 1, 1988 through August 31, 1991. As printed, the placement of petitioner's name is aligned to the right of, as opposed to centered in, the caption box section of the order. The order recites the name of the conciliation conferee, states that a conciliation conference was conducted at 55 Hanson Place, 7th Floor, Brooklyn, New York, on October 5, 1995, at which the requester (i.e., petitioner, Verma Deepak) appeared by his then-representative, John Serpico, Esq., and indicates that the statutory notice was recomputed (reduced) to $361,837.79, plus penalty and interest. The conciliation order is dated November 3, 1995.

14. The above-described conciliation order does not bear the signature of the conciliation conferee. In his affidavit, Mr. Farrelly attests that "[a] copy of the signed Conciliation Order is not available because BCMS utilizes a records retention and disposal process whereby, as relevant here, paper case files are destroyed approximately six years after the expiration of the appeal period."

15. A computer printout from the Case Inquiry BCMS Tracking System for CMS No. 146219 reflects information that corresponds in all respects with that set forth hereinabove, including the information set forth on the printed copy of the conciliation order. In particular, this BCMS computer printout record reflects the conference date (October 5, 1995), the conciliation order date (November 3, 1995), the initial amount of tax assessed ($732,501.45) and the reduced amount of tax remaining assessed and in dispute as the result of the conference

adjustment ($361,837.79). This record reflects the same address for petitioner as appears on the CMR pertaining to the conciliation order, on the Notice of Determination, on the Division's December 9, 1994 mailing log with respect thereto, and on petitioner's personal income tax returns for the years 1993 and 1994.[1]

16. Petitioner responded to the subject motion by noting, as conceded by the Division, that the CMR pertaining to the Notice of Determination is deficient for its lack of information confirming the number of pieces of mail received by the USPS from the Division on the alleged December 9, 1994 date of mailing of the notice (***see*** Finding of Fact 2). Petitioner thus points out that the Division may not rely upon the presumption of receipt that attaches to a properly mailed statutory notice and commences the 90-day period within which a challenge against a statutory notice may be made by filing either a petition for a hearing with the Division of Tax Appeals or request for a BCMS conference.

17. Concerning the conciliation order, petitioner points out that the printed copy of the conciliation order provided by the Division is not a signed copy (i.e., does not bear the conciliation conferee's signature). Petitioner also notes the misaligned position of petitioner's name in the caption box of the printed copy of the conciliation order (***see*** Finding of Fact 13). Petitioner further notes that the Division has specified the "approximate" six-year time period after which BCMS paper records are destroyed, as opposed to the exact time period after which paper records are destroyed (***see*** Finding of Fact 14). Petitioner asserts that the lack of a signed copy of the order and the misalignment of the caption box show that the printed version of the

[1] A different address is listed for petitioner on his personal income tax return for the year 1995. However, this return was not due to be filed until April 15, 1996, which is after the date on which the conciliation order was allegedly mailed to petitioner, as described. There is no evidence in the record to show that petitioner changed his address prior to November 3, 1995 and notified the Division of any such change.

conciliation order provided herein is not a "true" copy of the order, and impacts petitioner's ability to obtain a hearing before the Division of Tax Appeals.

18. Finally, petitioner alleges that the number written on the CMR in confirmation of the number of pieces of mail listed by sender is "unclear" and may be either "14" or "19," and that the initials of the USPS receiving employee are also "unclear" in comparison to each other. On these allegations, petitioner maintains that the motion should be denied and a hearing on the substantive merits raised in the petition should be granted.

CONCLUSIONS OF LAW

A. A taxpayer may challenge an assessment of sales and use taxes by either a) filing a request for a conciliation conference with BCMS or, b) bypassing the BCMS conciliation conference option and filing a petition for a hearing with the Division of Tax Appeals. Under either of such options there is a 90-day statutory time limit, measured from the issuance of the statutory notice assessing the tax, for filing a request for a BCMS conference or a petition for a hearing (Tax Law § 1138[a]; § 170[3-1][e]). If a taxpayer chooses the first option of filing a request for a conciliation conference, and a conciliation order sustaining all or part of an assessment is issued as a result of the conference, the taxpayer may continue his challenge by filing a petition for a hearing with the Division of Tax Appeals. As before, there is a 90-day statutory time limit, measured from the issuance of the conciliation order, for filing a petition for a hearing with the Division of Tax Appeals (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Regardless of which of the foregoing options is chosen, the Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond such 90-day statutory time limit (***see Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989; ***Matter of DeWeese***, Tax Appeals Tribunal, June 20, 2002).

B. When a notice of determination is properly mailed by the Division, it is the mailing date of the notice which triggers the 90-day period within which a taxpayer must, in the first instance, file either a request for a conciliation conference or a petition for a hearing. Likewise, when a conciliation order is properly mailed, it is the mailing date of the order which triggers the 90-day period within which a taxpayer must file a petition for a hearing. Where, as here, the timeliness of a petition is at issue, the Division bears the burden of proving proper mailing of the relevant statutory document (initially the notice of determination or, thereafter, the conciliation order) giving rise to the right to a hearing (***see Matter of Ruggerite, Inc. v. State Tax Commission***, 97 AD2d 634, 468 NYS2d 945 [1983], ***affd*** 64 NY2d 688, 485 NYS2d 517 [1984]).

C. Establishing proper mailing of the relevant statutory document creates a presumption that the document so mailed was delivered in the normal course of the mail (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991), and it is the date of such proper mailing from which the 90-day statutory challenge period is measured. However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests, as noted, with the Division (***Matter of Novar TV & Air Conditioning Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard mailing procedure used by the Division provided by one with knowledge of the relevant procedure; and second, there must be proof that the standard procedure was followed in the particular instance (***see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.***). A statutory notice or a conciliation order is mailed when it is delivered to the custody of the USPS (***see Matter of Air Flex Custom Furniture,*** Tax Appeals Tribunal, November 25, 1992).

When a statutory notice or conciliation order is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, petitioner in turn bears the burden of proving that a timely protest was filed in response thereto (***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990).

D. Where the Division is unable to prove proper mailing of a statutory notice of determination or of a conciliation order, it may not rely upon the consequent presumption of delivery that attaches thereto. Instead, the 90-day response period within which a taxpayer may challenge an assessment is tolled and does not begin to run until such time as the taxpayer receives actual notice of the assessment (the notice of determination) or, if a BCMS conference was requested, of the conciliation order (***Matter of Hyatt Equities, LLC***, Tax Appeals Tribunal, May 22, 2008; ***Matter of Riehm v. Tax Appeals Tribunal***, 179 AD2d 970, 228 NYS2d 228 [1992], ***lv denied*** 79 NY2d 759, 584 NYS2d 447 [1992], ***rearg denied*** 80 NY2d 893, 587 NYS2d 910 [1992]; ***Matter of Combemale***, Tax Appeals Tribunal, March 31, 1994).

E. With respect to the mailing of the Notice of Determination, the Division has conceded that it cannot establish proper mailing (***see*** Finding of Fact 2). As a result, the Division is not entitled to rely upon the presumption of receipt, and thus the 90-day period within which petitioner was required to file either a petition for a hearing or a request for a BCMS conciliation conference was tolled and did not commence to run until receipt of actual notice of the assessment by petitioner. Thus, the first issue presented concerns petitioner's receipt of actual notice of the assessment, and thereafter whether and how petitioner challenged the same upon receipt of such actual notice.

F. Petitioner has denied receiving the Notice of Determination. Petitioner has also (by the check-marked box on the petition) denied requesting a BCMS conference. Finally, petitioner has

denied receipt of a conciliation order. In stark contrast, however, and notwithstanding the checked box on the petition prior to the preprinted phrase indicating that "[a] conciliation conference was not requested," the evidence provided by the Division clearly bears out the conclusion that petitioner did in fact challenge the assessment by requesting a BCMS conciliation conference. Specifically, the Division provided evidence to show that petitioner received a conciliation conference with respect to the Notice of Deficiency, that the result of the conference was a significant reduction to the amount of tax assessed by the notice, and that BCMS issued a conciliation order bearing out such reduction. The Division's evidence details the specific place and date of the conciliation conference, and the subsequent preparation and issuance by certified mail of the resulting conciliation order. All of this evidence clearly presupposes and bears out the Division's issuance and petitioner's receipt of actual notice of the assessment, as well as the conclusion that petitioner filed a request for a BCMS conference in response thereto (***Matter of Matson***, Tax Appeals Tribunal, March 10, 1988; ***Matter of Riehm v. Tax Appeals Tribunal***). This evidence also supports the conclusion that the check mark appearing in the box on the petition indicating that a conference was not requested was placed there in error. In this regard, it is noteworthy that the preprinted phrase on the petition form states that a conciliation conference was not *requested*. In his response to this motion, and in the face of the foregoing evidence bearing out the conduct and result of the conference, petitioner has made no claim that a BCMS conference did not occur. Instead, petitioner has simply denied *receiving* a conciliation order. In sum the evidence establishes that petitioner requested a conference in response to his receipt of notice of the assessment, that a conference was held, and that a conciliation order was in turn issued. Any other determination requires the untenable conclusion that all of the evidence

showing that petitioner requested and received a conciliation conference, and that a conciliation order was issued thereafter, was entirely fabricated or concocted by the Division.

G. The Division, for its part, has made no claim that petitioner's request for a conference was not timely filed (i.e., within 90 days after receipt of actual notice of the assessment). Instead, the Division moves for summary determination and dismissal of the petition upon the claim that the petition was untimely because it was not filed within 90 days after issuance of the conciliation order. Thus, resolution of this matter turns on the question of the Division's issuance of the conciliation order, and petitioner's receipt of and response to such order.

H. In contrast to the Division's inability to establish proper mailing of the Notice of Determination and its consequent inability to rely upon the presumption of receipt thereof, as acknowledged above, the Division has met its burden of establishing proper mailing of the conciliation order. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address by certified or registered mail, and to likewise mail a copy of the order to petitioner's then-representative, by certified or registered mail (***see Matter of Wilson***, Tax Appeals Tribunal, July 13, 1989).[2] As indicated by the CMR and the affidavits of Mr. Peltier and Mr. Farrelly, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner at his last known address by certified mail, specifically on November 3, 1995, the date appearing on the CMR. The affidavits describe the various stages of producing and mailing orders, and attest to the

[2] While the Tax Law does not specifically mandate the service of notice on a taxpayer's representative, case law has clearly established that the 90-day period for filing a petition or a request for conference is tolled if the taxpayer's representative is not served with a copy of the statutory notice or a copy of the conciliation order, as relevant (***Matter of Hyatt Equities, LLC***, Tax Appeals Tribunal, May 22, 2008). As described here, the evidence establishes that the conciliation order was properly mailed to both petitioner and petitioner's then-representative.

authenticity and accuracy of the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the conciliation order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, and the CMR bears a USPS date stamp coinciding with the claimed date of mailing (i.e., November 3, 1995). There were 14 certified mail control numbers listed on the CMR dated November 3, 1995, specifically on the second page thereof, which sets forth the mailing information pertaining to the conciliation order issued to petitioner and to petitioner's then representative. In turn, "14" is listed as the number of items being mailed, and such number is written as the number of items received by the USPS, with such receipt and the date thereof (November 3, 1995) confirmed by the affixation of the USPS postmark and the USPS employee's initials, as described, and as is consistent with the manner in which such confirmation information appears on the other two CMR pages, as described.

I. Petitioner has offered no explanation or support for his argument that the lack of a signed copy of the conciliation order has some bearing on this matter. This is especially true in light of the Division's explanation of its paper records retention and disposal process, such that the same necessitates the provision of a printed copy of the order from records maintained by the Division in electronic (computer) storage.[3] In the same manner, the physical placement of petitioner's name to the right of the caption box on such printed copy of the order is clearly the result of printer misalignment and is of no apparent consequence, in light of the totality of the

[3] Petitioner's assertion that the copy of the order provided herein is not a "true" copy (i.e., a photocopy) of the signed paper order physically issued to petitioner begs the question, given that the Division has acknowledged its paper records destruction policy (***see*** Finding of Fact 14), and thus could not in any event have provided a copy of the paper order issued to petitioner.

evidence provided, on the question of proper mailing of the order. Furthermore, petitioner's allegation that the numeral "14" and the USPS employee's initials are "unclear" is simply unfounded. Review of such numerals and initials reveals no apparent lack of clarity or significant distinction in the manner in which such numerals or such initials are written in comparison to each other. In sum, the Division has established proper mailing of the conciliation order, as claimed, on November 3, 1995 (***see Matter of Auto Parts Center***, Tax Appeals Tribunal, February 9, 1995). Petitioner's mere denial of receipt of both the Notice of Determination and, subsequently, the conciliation order, in light of the evidence establishing proper mailing of the order by the Division, is unavailing..

J. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

K. Petitioner offered no arguments or evidence to counter the Division's motion regarding the issue of the timeliness of petitioner's protest, and petitioner is therefore deemed to have conceded that no question of fact requiring a hearing on such issue exists (***see Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; ***John Costello Assoc. v. Standard Metals***, 99 AD2d 227, 472 NYS2d 325 [1984], ***lv dismissed*** 62 NY2d 942 [1984]). Specifically, since petitioner presented no evidence to contest the facts alleged in the Farrelly and Peltier affidavits, those facts may, as a consequence, be deemed admitted (***see Kuehne & Nagel v. Baiden***, at 544, 369 NYS2d at 671; ***Whelan v. GTE Sylvania***, 182 AD2d 446, 582 NYS2d 170, 173 [1992]). Upon all of the proof presented, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

L. The Division has established that it properly mailed the conciliation order in question to petitioner and to his then-representative on November 3, 1995, and is thus entitled to the presumption of receipt that follows such proper mailings. In turn, in order to be considered timely, any protest against the order had to have been filed within 90 days thereafter. The petition in this matter was not filed until it was mailed on May 7, 2010, and was therefore clearly late with respect to the conciliation order. Since a protest was not timely filed (i.e., within 90 days after issuance of the order as required by statute), there is no jurisdiction to proceed with this matter (Tax Law § 170 [3-a][e]; 20 NYCRR 4000.5[c][4]).

M. The Division of Taxation's motion for Summary Determination is granted and the petition of Verma Deepak is hereby dismissed.[4]

DATED: Troy, New York
February 10, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[4] Petitioner is not entirely without recourse. That is, he may pay the disputed amount of tax and file a claim for refund of such payment. If petitioner's claim for refund is disallowed, he may then file a request for a conciliation conference or a petition with the Division of Tax Appeals to contest such disallowance. (***See Matter of Rosen***, Tax Appeals Tribunal, July 19, 1990.)