STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

**ROBERT KLEIN,
OFFICER OF PARKLINE CORP.**

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 September 1, 1981 through May 31, 1986.

In the Matter of the Petition

of

ROBERT KLEIN

for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Period January 1, 1989 through April 7, 1989 and the Year 1990.

In the Matter of the Petition

of

ROBERT KLEIN

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 November 30, 1989.

DECISION
DTA Nos. 810209, 811722 and 811723

Petitioner Robert Klein, officer of Parkline Corp., 1112 Park Avenue, Apt. 5C, New York, New York 10128, filed an exception to the determination of the Administrative Law Judge issued on February 6, 1995. Petitioner appeared by Baker & McKenzie, Esqs. (Michael I. Saltzman, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief which was received on July 31, 1995, and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUES

I. Whether petitioner met his burden to prove by clear and convincing evidence that the methodology of the sales and use tax audit was erroneous or that the amount of additional sales and use tax assessed to petitioner for the period September 1, 1981 through May 31, 1986 was incorrect.

II. Whether the statute of limitations expired prior to the issuance of the notices of determination to petitioner assessing additional sales and use tax for the period September 1, 1981 through May 31, 1986.

III. Whether petitioner was a person responsible for the collection of sales tax on behalf of Parkline Corp. for the periods September 1, 1981 through May 31, 1986 and June 1, 1988 through November 30, 1989.

IV. Whether petitioner is a person required to collect and pay over withholding taxes due from Parkline Corp. within the meaning of Tax Law § 685(g) for the period January 1, 1989 through April 7, 1989 and, if so, whether he "willfully" failed to collect, account for and pay over withholding taxes for such periods.

V. Whether sales tax penalty and interest in excess of the minimum rate should be abated due to reasonable cause and the absence of willful neglect.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "97" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Parkline Corp. (the "company") was a manufacturer and remodeler of elevator cabs which filed for Chapter 11 bankruptcy on March 28, 1990.[1]

In 1981, the company's offices were located on Webster Avenue and 166th Street in the Bronx (tr., p. 48). The company's offices remained in the Bronx until 1986, when it moved to a new facility located at 65 Railroad Avenue, Ridgefield, New Jersey, where it remained until it went out of business.

Historically, the company's name was closely associated with the Klein name. It was founded by petitioner Robert Klein's father and it was a Klein family business for two generations (tr., p. 47).

Petitioner began working for the company's predecessor, Park Avenue Woodworking Company, while he was in high school and started working full time for the company in 1949. It was his full-time job for his entire life. Petitioner served as the company's president from 1970 until the day the company filed for bankruptcy on March 28, 1990[2] (tr., p. 47).

Prior to 1983, petitioner and Gilbert Magaziner each owned 50% of the company.[3]

In 1981 and for a few years following, petitioner's major role was sales and marketing of the product, while Mr. Magaziner's role was to handle the administrative and operational aspects of the company, including financial matters (tr., pp. 25-26, 52).

On April 27, 1982, petitioner, as president of the company, executed a Consent to Fixing of Tax Not Previously Determined and Assessed for sales and use taxes in the amount of $28,282.96 for the period June 1, 1976 through May 31, 1981. The box was checked next to the statement: "After issuance of a Notice and Demand (AU-16.1) which includes tax, penalty

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[1]The record is silent as to the date upon which Parkline Corp. filed for liquidation of the corporation assets.

[2]According to the affidavit of Fred B. Ringel (Petitioner's Exhibit "1"), petitioner submitted his written resignation as president of the company on or about March 28, 1990, which was accepted by the company on that date.

[3]Petitioner acquired his 50 shares in 1965 and Gilbert Magaziner acquired his 50 shares in 1977 (see, Division's Exhibit "J", Form CT-6, Election by shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes).

and/or interest accrued, I agree to pay the amount due."

Petitioner and Gilbert Magaziner each received $13,000.00 as compensation from the company during 1982 and 1983.

The company began having financial difficulties starting in the late 1970's until the early 1980's. When asked during the hearing why the company ran into these financial problems, petitioner responded as follows:

> "Well, the major problem was that we had made a major expansive move into the building that we were in at that time. And probably mid '70s early to mid '70s, just before construction actually stopped dead and we moved in, there was no work and just construction throughout the country had stopped. It was a similar situation then in the mid '70s that it is right now. And we had this new facility that we had moved into and we couldn't support it with work. And we just kept going into a deeper hole and once things turned around in 1979 or '80 to where work started coming in, we were just constantly fighting an uphill battle" (tr., pp. 53-54).

The company's financial difficulties continued in 1983.

To help the company out of its financial difficulties, petitioner's attorney, Lawrence Kalik, in late 1983, arranged for him to meet with Fraydun ("Fred") Manocherian, one of three Manocherian brothers (Fraydun, Amir and Eskandar) and their cousin, Parviz Yaghoubzadeh ("the Manocherian Group"), who were prominent real estate developers and who might be interested in investing in the company (tr., pp. 54-55).

In December 1983, Fred Manocherian entered into negotiations to acquire a controlling interest in the company. Fred Manocherian was to acquire Gilbert Magaziner's 50% interest and half of petitioner's interest (tr., p. 56).

Fred Manocherian agreed to make an immediate investment of $1,000,000.00 in the company to pay off some of the existing liabilities, including taxes. He also agreed to additional financing as needed. An additional $1,000,000.00 was invested by the Manocherian Group within a few months of the initial investment. Petitioner testified that the $2,000,000.00 investment by the Manocherian Group paid the company's outstanding liabilities. Petitioner submitted as his Exhibit "4" copies of the checks written by the Manocherian Group, payable to the company, dated December 28, 1983, totalling $1,000,000.00. A copy of Amalgamated

Business Corp.'s check, dated January 16, 1984, payable to the company in the amount of $1,000,000.00 was submitted as petitioner's Exhibit "5".

On December 14, 1983, petitioner and Gilbert Magaziner executed Form CT-6, Election by shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes ("Sub S election form"), the Division's Exhibit "J". This Sub S election form contains the following information, inter alia, concerning the company: it was incorporated in New York on May 17, 1932 and its principal business activity was manufacturing elevator cabs. There were 100 shares of stock issued and outstanding, which were held equally by petitioner and Gilbert Magaziner. The Federal election to be treated as a subchapter S corporation became effective on October 1, 1983. The election for New York purposes was "to become effective for period beginning October 1, 1983 through Dec. 31, 1983." The signatures of both petitioner and Gilbert Magaziner appear in the middle and at the bottom of this form.

Petitioner testified that the Manocherians made the determination to file as a subchapter S corporation. He further testified that he did not recall signing any consent to effectuate the election. However, when asked to review his signature on Exhibit "J", he confirmed that it was his signature (tr., pp. 88-89, 118-120).

The Division of Taxation ("Division") submitted as part of its Exhibit "S" the 1983 Federal Form 1120S for the company and attached Schedule K-1's for petitioner and Gilbert Magaziner. The 1983 Form 1120S for the tax year beginning October 1, 1983 and ending December 31, 1983 shows an ordinary loss of $149,496.00. Petitioner and Gilbert Magaziner each received $74,748.00 as their respective distributive shares of the 1983 ordinary loss reported on the 1983 Form 1120S.

Initially, it appears Fred Manocherian acquired 75% of the company's stock, which included Mr. Magaziner's 50% interest and half of petitioner's stock. Petitioner's interest was

reduced to 25%.[4]

According to petitioner's Exhibit "6", a draft agreement made in December 1983 between Fraydun Manocherian, Robert I. Klein, Parkline Corporation, Linepark Realty Corp., Parkline Shelters, Inc. and Agatha Realty Corp., the directors of the company were to be petitioner and Fraydun Manocherian.

During the hearing, petitioner testified that he did not receive anything for the shares which he transferred. He stated that he was asked to contribute and did contribute $200,000.00 as a show of good faith on his part[5] (tr., pp. 56-57, 103-105).

During the hearing, petitioner testified that he and Fred Manocherian had discussions about what his role would be in the company. He described his role as follows:

> A. "Very specifically, my role was to be in the sales, marketing and PR of the company, to build back up the Parkline name, and that they would take -- that he and his group would take all of the burdens of operations away from me and just I would go out and do my thing in sales and marketing as I had done in the past and that would be my strict function, my only function."
>
> Q. "And so you were to play what role in managing the company, in the operations of the company?"
>
> A. "Work in the sales and marketing, try to make some program arrangements with the elevator companies, go out and visit customers that we had for so many years, build back their comfort level with the company, that we do not have financial problems any longer and it's the Parkline of old, and just go out and continue to sell the company and the product" (tr., pp. 63-64).

Petitioner testified that he was to have no role in the finances of the company (tr., pp. 64, 69).

Fred Manocherian and petitioner agreed to an employment arrangement whereby petitioner would devote full time and his best efforts to the company and would be paid a salary

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[4]It is unclear when Fred Manocherian transferred a portion of the acquired stock to the other members of the Manocherian Group.

[5]The record is silent as to the exact date that he made this additional capital contribution.

(tr., p. 108).

It is unclear when petitioner's interest in the company was reduced from 25% to 20%.

It is unclear exactly when Fred Manocherian transferred some of his shares to the other members of the Manocherian Group (his brothers and cousin), attorney Lawrence Kalik, and Parvis Motamed ("Motamed"). Motamed was an associate of the Manocherians and a former industrialist in Iran (tr., p. 65).

During the hearing, petitioner offered the following testimony as to why he retained the title of president after the investment by the Manocherian Group:

> "Well, they felt and I agreed that the name Parkline was synonymous with my name, that I would build Parkline as my name and that it was more of an image value than anything else, that I was still operating the company, I didn't sell the company to someone else and not participate in the company. So it was mainly just a public relations, image type of thing" (tr., p. 64).

In late December 1983 or early 1984, Motamed, as representative of the Manocherian Group, joined the company (tr., pp. 65-66).

Petitioner described Motamed's initial role with the company as follows:

> "His initial role was to take the funds that were just invested in the company and allocate them properly, and put out the so-called fires with vendors, and work out arrangements with vendors, and get us back on our feet the best way that he possibly could with the funds that were put in this trust" (tr., p. 67).

Motamed was given an office at the company, worked out repayment schedules with creditors, and addressed many of the problems facing the company. According to petitioner, eventually Motamed:

> "got into every aspect of the business. He took charge of the manufacturing of the plant layout, the finances of the company, he -- he was in charge of operations of the company. Everything but sales and marketing" (tr., pp. 67-68).

It is unclear from the record what position Motamed held in the company.

Although petitioner and Fred Manocherian had discussions about his salary, petitioner testified that he did not know what Motamed's salary was for a long time (tr., p. 108).

Petitioner testified that, after the end of 1983, in the course of his work in sales, he was

out of the office traveling at least 50% of the time (tr., p. 69).

Because he was frequently away from the company's office, he had a rubber stamp signature prepared for use in signing checks when he was not at the office. The record is silent as to exactly when he had this rubber stamp created (tr., pp. 76-77).

After the Manocherian Group's investment in late 1983 and early 1984, all the company checks required two signatures. Petitioner and Motamed were co-signatories on the company's checking account (tr., pp. 73, 102).

When asked why his signature was required on all checks, he responded as follows:

> "Once again for the same reason, as my so-called honorary title as president so that both the factory workers and the vendors would see that I was still involved with the company and active in the company. And that again was for image" (tr., p. 74).

Petitioner averred that the accounting department had custody of a rubber stamp with a facsimile of his signature (tr., p. 74).

Carlos Vanga was employed by the company as controller from September 1980 until March 1984. He testified that he took care of the financial aspect of the company. When asked what role Mr. Magaziner played in the company, he responded as follows:

> "Well, basically between both of the partners, Mr. Magaziner would handle the administrative end of the business as far as guiding the finances of the business, and Mr. Klein would be more involved in the marketing and sales -- or sales and marketing of the product" (tr., pp. 25-26).

Mr. Vanga testified that he reported to both petitioner and Gilbert Magaziner. "Each of the individuals had a separate function within the company" (tr., p. 33).

After Motamed joined the company, Mr. Vanga testified that he reported to him about financial matters and the administration of the business (tr., pp. 27, 36).

Beginning in the mid-1960's, the company's outside accountants were Putterman, Rush & Shapiro. The partners in charge from Putterman, Rush & Shapiro were Abraham Shapiro and Joseph Crane, who worked in this capacity through 1990 (tr., pp. 37-38).

Joseph Crane testified that the accounting firm "did their annual accounting and closing, prepared their annual tax statements and corporation income tax returns" (tr., p. 38). He further

testified that:

> "At year end we reviewed all their bookkeeping accounts, so to speak, for correctness and made appropriate adjustments and put them in proper form so that an annual report would be accurate and the tax returns would be accurate" (tr., p. 38).

He also stated that his accounting firm did not handle the sales tax or withholding tax work for the company, it "was handled internally" (tr., p. 39).

Mr. Crane testified that he dealt with Motamed after he joined the company because, in his view, Motamed represented the Manocherian Group. He stated that the meetings with Motamed and the company's controller focused on "financial matters, accounting, tax matters" (tr., p. 39). He further testified that he did not speak to petitioner about those financial matters (tr., p. 40).

Mr. Crane testified that he viewed Motamed as the chief operating officer; the one who "took care of all the administrative aspects of the company" and who "was a representative of the major investors at that time that had put money into the corporation . . ." (tr., p. 40).

Mr. Crane, when asked to describe petitioner's role in the company after Motamed joined the company, stated that "Mr. Klein was the rainmaker, so to speak. He brought in all the business. He was the head of sales and marketing" (tr., p. 41). He further stated that petitioner retained the title of president because:

> "Mr. Klein always had been associated with Parkline. He was the name behind Parkline from a marketing, a sales point of view, and that understanding wanted to be maintained in the marketplace" (tr., p. 41).

The Manocherian Group continued to invest additional capital into the company as needed. Petitioner testified that his stock interest was reduced further from 20% to 10% because he did not make any further capital contributions (tr., p. 82).

From a review of the record, it appears that, sometime in 1984, petitioner's stock interest in the company decreased to 10%. One of the documents submitted as the Division's Exhibit "S" was the 1984 CT-3S, S Corporation Information Report, with an attached rider which contained "Schedule B - Shareholder Information". This schedule contained the names of the individuals who owned company stock and their respective percentage of ownership.

According to this schedule, the following individuals owned interests in the company in 1984: (1) Eskander Manocherian - 20.75%; (2) "Amin" [sic] Manocherian - 20.75%; (3) Fraydun Manocherian - 36.50%; (4) Parviz Yaghoubzadeh - 5.00%; (5) Parviz Motamed - 5.00%; and (6) Robert Klein - 10.00%.[6]

Between December 1983 and December 1988, the Manocherian Group invested approximately $6,000,000.00 of capital in the company.

Petitioner testified that, after the investment by the Manocherian Group, he did not play a role in obtaining bank financing and that he did not personally guarantee the company's debt (tr., pp. 84-85).

The affidavit of Michael Manderson was submitted as petitioner's Exhibit "14".

Mr. Manderson was the sales manager of the company during the period November 1984 through August 1986.

Mr. Manderson, in his affidavit, stated that in his capacity as sales manager he was responsible for preparing and submitting bids to elevator companies, general contractors and real estate property management companies for sales of elevator cabs manufactured by the company.

He stated that, in the course of soliciting project bids, he reported to and worked closely with petitioner, "who oversaw the sales operations" of the company. He explained that he and petitioner "established sales prices for project orders based on estimates of the cost of materials, labor and overhead necessary to complete a project." He further explained that, prior to making a bid for a project order, all pricing estimates developed by petitioner and Mr. Manderson were submitted to Motamed for his approval.

Mr. Manderson averred that petitioner was the front man for the company, its "marquee name" and its success in winning business depended heavily on his personal reputation. He further stated that virtually all of the company's bids were based on plans and specifications

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[6]Although this schedule does not include Lawrence Kalik, according to the record Mr. Kalik owned 2.00% of the company's stock in 1984.

submitted to it through petitioner's extensive contacts in the elevator industry.

Mr. Manderson stated that Motamed was responsible for finances and general management. He explained that:

> "Motamed was at the plant on a day-to-day basis, oversaw all aspects of the business, regularly asked questions of and supervised employees, and was the person who called and ran meetings involving Parkline employees."

He affirmed that he and other employees viewed Motamed as the person in charge of the company, not petitioner.

Petitioner testified that he did not have the authority to hire and/or fire employees, including salespeople, after Motamed came into the business (tr., pp. 77-78).

During the hearing, petitioner stated that Motamed prepared pricing worksheets and estimating sheets, created a bid sheet for bidding on jobs, and inserted the hourly billing rate for labor in addition to the financial data necessary for making bids (tr., pp. 69-70, 106).

Petitioner testified that all bids for large jobs which he had solicited could be accepted only with Motamed's approval. When asked what type of bid had to be approved by Motamed, petitioner responded as follows:

> "What I would call architectural jobs, major jobs, higher end jobs as in custom jobs. We had certain -- for example, we had certain standard designs that we had a set price on, we didn't even need a bid sheet for; it was one of the standard designs. The estimating department could send out an estimate without approval because it was pre-priced. So we would be talking about any job as to a substantial amount of a bid. When I say 'substantial,' I mean, if I had to pick a number I would say $50,000 and up" (tr., p. 107).

Petitioner further testified that there were times when Motamed did not approve a bid (tr., pp. 73, 97, 107).

The Division conducted a sales tax field audit of the company for the period September 1, 1981 through May 31, 1986. The record is silent as to exactly when the audit which is the subject of these proceedings commenced.

Petitioner submitted, as his Exhibit "11", copies of nine consents extending the statute of limitations for assessment of sales and use taxes for the period at issue which he had executed.

The consents executed were as follows:

Date Signed	Period Extended	Extended Date
12/1/84	9/1/81 - 8/31/82	12/20/85
11/8/85	9/1/81 - 11/30/82	2/28/86
1/31/86	9/1/81 - 2/28/83	6/20/86
5/30/86	9/1/81 - 8/31/83	12/20/86
10/16/86	9/1/81 - 11/30/83	3/20/87
2/6/87	9/1/81 - 5/31/84	9/20/87
8/3/87	9/1/81 - 11/30/84	3/20/88
2/12/88	9/1/81 - 5/31/85	9/20/88
8/10/88	9/1/81 - 5/31/86	9/20/89

Petitioner testified that he signed each of the consents on behalf of the company. He stated that he had no idea that he was extending the statute of limitations for himself (tr., pp. 80-81).

Petitioner was asked if he was concerned about the sales tax audit after having signed so many consents over such a long period of time. He stated that:

> "I was just under the impression that they needed more time to prepare whatever it was that they were preparing, but that it was being taken care of" (tr., p. 310).

On May 6, 1985, a letter was sent to the New York State Tax Department[7] by petitioner, as president of the company, requesting an abatement of penalties on sales taxes for the period December 1, 1980 through August 31, 1983 in the total amount of $32,290.04. In support of his request for an abatement of penalties, petitioner stated the following reasons:

> "The taxpayer has been in business manufacturing elevator cab [sic] in the South Bronx since 1932. During the above referenced periods, the controller was reorganizing the entire accounting procedures of the taxpayer by instituting a new computer system for paying all its creditors including payments to taxing authorities. It was the responsibility of the general ledger bookkeeper to utilize to [sic] system to pay creditors and all taxes. In addition, the taxpayer was attempting to refinance its accounts receivables and raise investment capital with various lending institutions. This required an overwhelming amount of the controllers time and attention as he was constantly involved in meetings trying to raise the investment capital and save the jobs of all the employees at Parkline Corporation.
>
> "The sudden departure of the bookkeeper and the length of time it took

[7]The letter addressed to "N.Y.S. Tax Department, #2 Trade Center, Room #6280, New York, New York 10047" with the salutation "Dear Sirs" was submitted as the Division's Exhibit "N".

> to raise the investment capital were two of the main reasons for the failure in filing and payment of the sales taxes. The new bookkeeper was not familiar with the accounting system, and therefore caused further delays in payment of the company's creditors and taxes.
>
> "In October of 1983, a new group of investors brought funds in to Parkline Corp. and by December 31st, 1983 all of the back taxes were paid for the periods including sales taxes for the quater [sic] ended 8/31/83. At this point N.Y.S. Sales Taxes amounting to $206,080.47 were paid and the corporation was led to believe that the penalties relating to late filing would be abated in order to facilitate and ease the burden on the new investors.
>
> "Parkline Corporation operates in a severely depressed section of the South Bronx, employing more than 90% minority labor. The new investors have invested a great deal of capital in trying to save Parkline Corporation and the jobs of all the employees.
>
> "New York State would be doing a great service to the South of Bronx, over 100 minority workers and Parkline Corporation by abating the penalties imposed."

Petitioner acknowledged that he read and signed this letter (tr., p. 307).

The Division submitted, as its Exhibit "K", numerous New York State and local sales and use tax returns (Forms 810 and 809) filed by the company prior to and during the audit period. Review of these returns indicates that petitioner did not sign these returns. These returns were signed by either the controller or a member of his bookkeeping staff.

Petitioner, as president of the company, signed Form CT-3S, S Corporation Information Report, for tax years 1984, 1985, 1986 and 1987 (see, Division's Exhibits "S", "H" and "BB").

Review of the 1985 S Corporation Information Report reveals that there were seven shareholders, that there was an ordinary loss of $193,040.00, and that petitioner's distributive share of the ordinary loss was $19,304.00 based on ownership of 10% of the stock. During 1985, Motamed was listed as owning 5% of the stock. The 1987 S Corporation Information Report states there were seven shareholders who shared an ordinary loss totalling $1,066,530.00. Petitioner, as a 10% shareholder, received as his distributive share an ordinary loss of $106,653.00. In 1987, Motamed was listed as a 5% owner of stock.

During the audit period, petitioner was one of the highest paid officers of the company. When asked if the compensation he received had a direct relationship to the involvement he had

with the corporation, he stated "absolutely" and that he believed his true compensation should have been even more than it was (tr., pp. 95-96).

Copies of petitioner's and his wife, Bernice Klein's, 1987 and 1988 New York State resident income tax returns (Form IT-201) were submitted as part of the Division's Exhibit "S". According to the 1987 Form IT-201, petitioner's salary from the company was $78,000.00. His company salary in 1988 was $78,000.00 and his 1988 distributive share of the company's S corporation ordinary loss was $134,657.00.

It appears that two auditors were assigned to the company's audit prior to the assignment of Mohmed Zagzoug (tr., p. 146). The Division assigned Mohmed Zagzoug, a sales tax auditor, to the company's audit on March 1, 1988.

Petitioner submitted as his Exhibit "10" a copy of the Audit Method Election form for the company for the audit period September 1, 1981 through May 31, 1986. Petitioner's signature and the date of April 25, 1988 appear on the bottom of this form.

Petitioner was asked to identify the signature on the lower lefthand side of this exhibit. His response follows:

> A. "The signature is my signature, although it's a rubber stamp signature; it's not my actual signature."
>
> Q. "Do you recall seeing this form before?"
>
> A. "No, I don't."
>
> Q. "Do you recall authorizing anyone to use your rubber stamp signature to affix to this document?"
>
> A. "No. My rubber stamp was supposed to be solely for checks" (tr,. p. 79).

According to petitioner's Exhibit "10", the audit method elected was a utilization of a representative test period audit method to determine any sales or use tax liability. This audit method was to be used in the audit of sales and recurring expense purchases.

The test period used by the auditor was the three-month period March 1, 1984 through May 31, 1984.

The auditor stated that he dealt with the controller concerning the company's audit.

According to Mr. Zagzoug, the controller supplied information concerning the corporate officers.

The auditor was asked what information he was given by the controller about petitioner. He responded:

> "The only time he give me information about Mr. Robert Klein [was] when I give him the waiver. I give him the waiver. 'I am going to take this waiver to Mr. Robert Klein as the president,' his words -- 'as president and responsible officer'" (tr., p. 145).

On September 20, 1989, the Division issued to petitioner, Robert Klein, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (S890920915K) for the period September 1, 1981 through November 30, 1984 for tax due in the amount of $123,365.13, penalty due of $30,841.31 and interest due of $136,529.38, for a total amount due of $290,735.82.

On September 20, 1989, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (S890920916K) for the period December 1, 1984 through May 31, 1986 for tax due in the amount of $54,050.67, penalty due of $15,063.46 and interest due of $32,693.51, for a total amount due of $101,807.64.

Each of these notices stated that petitioner was personally liable as responsible officer of Parkline Corporation under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).[8]

On December 15, 1989, petitioner, as president of Parkline Corporation, executed a power of attorney (corporate) in favor of Louis F. Brush, Esq. This power of attorney form appointed Mr. Brush to appear before the Division on behalf of Parkline Corporation in connection with a proceeding involving sales and use taxes for the period September 1, 1981 through May 31, 1989.[9] This executed power of attorney form was submitted by Parkline

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[8]Notice No. S890920915K and Notice No. S890920916K were submitted as the Division's Exhibit "B".

[9]A copy of the executed power of attorney form was submitted as the Division's Exhibit "W" along with an affidavit of Joseph Chyrywaty, Supervisor of Tax Conferences for the Division's Bureau of Conciliation and Mediation Services ("BCMS"). P. Motamed's signature also appears on this executed power of attorney.

Corporation along with its request for a BCMS conference and was received by BCMS on December 19, 1989.

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 099438), dated August 2, 1991, which recomputed the statutory notices (Notice Numbers S890920915K and S890920916K) as follows:

Determination	$89,180.32
Penalty	Computed at Applicable Rate
Interest	Computed at Applicable Rate

On October 30, 1991, petitioner filed a petition with the Division of Tax Appeals challenging the assessment of sales and use taxes personally against him.

By letter dated November 4, 1991, the Division of Tax Appeals notified petitioner that his petition was not in proper form because he had failed to use the proper forms. Petitioner was requested to complete the enclosed forms and return them to the attention of Frank A. Landers. Mr. Landers informed petitioner in this letter that, for purposes of timing, the petition would be deemed to have been filed on October 30, 1991.

On November 22, 1991, petitioner submitted a petition in proper form. This petition was assigned DTA No. 810209.

Petitioner asserts, inter alia, that: (i) the assessments against him are untimely and are barred by the statute of limitations; (2) even if the assessments are not time barred, he "was not a person required to collect sales and use tax on behalf of Parkline and thus is not personally liable for taxes"; and (3) even if the assessments are not time barred and he is liable, "the amounts alleged to be due are grossly excessive."

The Division filed an answer dated February 27, 1992 (Division's Exhibit "D").

On December 21, 1992, the Division issued to petitioner a Notice of Deficiency (L-006881351-6) for withholding tax penalties under Tax Law § 685(g) in the amount of $65,283.59 for the period January 1, 1989 through April 7, 1989.

On December 21, 1992, the Division also issued to petitioner a Notice of Deficiency (L-

006881350-7) for withholding tax penalties under Tax Law § 685(g) in the amount of $85,200.00 for the year 1990.

On March 15, 1993, petitioner filed a petition challenging the two notices of deficiency which determined that petitioner was personally liable for the withholding tax penalties for the period January 1, 1989 through April 7, 1989 and the year 1990. The Division of Tax Appeals assigned DTA No. 811722 to this petition.

The petition asserts, inter alia, that petitioner "was not a person required to collect and pay over withholding tax on behalf of Parkline and thus is not personally liable for the taxes" and even if he "was a person required to collect and pay over withholding tax on behalf of Parkline, his failure to collect withholding tax was not willful." The amount of tax contested by petitioner was "$150,483.59 (withholding)".

The Division filed an answer dated July 13, 1993.[10]

The Division submitted as part of its Exhibit "E" another petition filed by petitioner on March 15, 1993, which seeks a revision of a determination or refund of sales and compensating use taxes. The petition contests tax in the amount of $495,535.80. Petitioner attached a schedule entitled "Attachment A" which lists the notice numbers he is protesting. According to "Attachment A", petitioner is protesting the following six notices: L-006901024-7; L-006901023-8; L-006901022-9; L-006901021-1; L-006901020-2; and L-006901019-2.[11]

Attached to this petition are six notices of estimated determination dated December 28, 1992 issued to petitioner. Notice number L-006901019-2 asserts an estimated sales and use tax liability of $49,842.15, interest of $22,444.98 and penalties of $15,451.02, for a total estimated amount due of $87,738.15 for the sales tax quarter ending November 30, 1989. Notice number L-006901020-2 asserts an estimated sales and use tax liability of $49,842.15, interest of

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[10]The petition and answer were submitted as the Division's Exhibit "F".

[11]Petitioner also lists L-006881350-7 which is being protested in the petition filed under DTA No. 811722 based on the agreement of petitioner and the Division (tr., pp. 9-10). Petitioner did not attach a copy of Notice Number L-006881350-7 to the petition filed in connection with this matter. He did attach it to the petition filed under DTA No. 811722.

$24,655.68 and penalties of $15,451.02, for a total estimated amount due of $89,948.85 for the sales tax quarter ending August 31, 1989. Notice number L-006901021-1 asserts an estimated sales and use tax liability of $49,842.15, interest of $27,185.82 and penalties of $15,617.16, for a total estimated amount due of $92,645.13 for the sales tax quarter ending May 31, 1989. Notice number L-006901022-9 asserts an estimated sales tax liability of $49,842.15, interest of $29,253.43 and penalties of $15,451.02, for a total estimated amount due of $94,546.60 for the sales tax quarter ending February 28, 1989. Notice number L-006901023-8 asserts an estimated sales and use tax liability of $49,842.15, interest of $31,664.73 and penalties of $15,451.02, for a total estimated amount due of $96,957.90 for the sales tax quarter ending November 30, 1988.[12] Notice number L-006901024-7 asserts an estimated sales and use tax liability of $16,614.05, interest of $11,100.92 and penalties of $4,984.20, for a total estimated amount due of $32,699.17 for the sales tax quarter ending August 31, 1988.

Each of these notices of estimated determination were issued to petitioner as an officer/responsible person of Parkline Corporation in accordance with Tax Law §§ 1138(a), 1131(1) and 1133. These notices were issued because the sales and use tax returns for the quarters referenced in each notice were delinquent.

The Division of Tax Appeals assigned DTA No. 811723 to this petition.

The petition filed in DTA No. 811723 asserts, inter alia, that petitioner "was not a person required to collect sales and use tax on behalf of Parkline and thus is not personally liable for the taxes", and even if he is liable, "the amounts alleged to be due are grossly excessive."

The Division's answer filed July 14, 1993 is part of the Division's Exhibit "E".

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[12]Petitioner did not attach the computation summary section page of this notice of estimated determination. However, the last page attached to the petition is entitled "Consolidated Statement of Tax Liabilities". This page sets forth the period and the amount asserted in this notice, as well as numerous other sales tax notices, and a withholding tax notice. The second page attached by petitioner to this notice is entitled "Consolidated Statement of Tax Liabilities" which lists two withholding tax notices which had been issued to petitioner: (1) Assessment ID L-006318148-6, for the tax period ended December 31, 1983 - interest amount assessed of $1,988.11 and penalty amount assessed of $3,278.89 less payments/credits of $820.12, for a current balance due of $4,446.88; and (2) Assessment ID L-006881351-6, for the tax period ended April 7, 1989 - penalty amount assessed of $65,283.59, for a current balance due of $65,283.59.

Paragraph 11 of this answer states "that the Division issued Notices of Deficiency numbered L-006901023-8 for the period 12/31/83 and 4/7/89 asserting 685(g) penalties in the aggregate amount of $69,730.47."[13]

During the hearing, in connection with DTA No. 811722, the Division cancelled the withholding tax liability for the year 1990 because petitioner had resigned from the company on or about March 28, 1990 (tr., pp. 16, 85; Petitioner's Exhibit "1"; Division's brief, p. 5).

During the hearing, petitioner filed and the Division accepted sales and use tax returns covering quarters from September 1, 1988 through March 31, 1990 (tr., pp. 9-10). Petitioner submitted copies of the sales and use tax returns which he filed at the hearing as his Exhibit "13" (tr., p. 123). The sales and use tax returns filed at the hearing report the following unpaid sales and use tax liabilities (exclusive of any late filing charges):

Period Ending	Sales and Use Tax
November 30, 1988	$7,201.74
February 28, 1989	8,796.39
May 31, 1989	6,936.60
November 30, 1989	1,373.71
August 31, 1989	4,595.58
February 28, 1990	5,321.57
March 31, 1990	2,312.18[14]

The amounts in dispute with respect to DTA No. 811723 for the period September 1, 1988 through November 30, 1989 are the amounts reported on the sales and use tax returns submitted at the hearing, not the amounts listed in the notices of estimated determination (tr., p. 10).

Review of the copies of the sales and use tax returns submitted as petitioner's Exhibit

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[13]This paragraph is incorrect. Notice number L-006901023-8 is a sales and use tax assessment for the period ended November 30, 1988 in the tax amount of $49,842.15, interest of $31,664.73 and penalties of $15,451.02, for a total amount due of $96,957.90.

[14]The quarters covered by the returns filed at the hearing exceed the quarters covered by the notices of estimated determination referenced in the petition filed in connection with DTA No. 811723. The last sales tax quarter reflected in the notices is the quarter ending November 30, 1989 (Notice number L-006901019-2). A return was filed for the sales tax quarter ending February 28, 1990 reporting a sales and use tax liability (exclusive of late charge) in the amount of $5,321.57 and a monthly return was filed for the month ending March 31, 1990 reporting a sales and use tax liability (exclusive of late charges) in the amount of $2,312.18.

"13" indicates that on each of these returns, at some point, in the box designated for "Signature of Vendor" there was a signature which has been almost completely whited out.

Petitioner's representative questioned Kevin Liss, an associate at Baker & McKenzie, about his conversation with Mr. Fritz, the company's last controller, about Exhibit "13". Mr. Liss's response was:

> "He said that these were the original tax returns that is to say that they were not the copies -- they were not simply copies that were retained by the company. Those were the originals that had not been filed. And I asked him why they had not been filed. He said Mr. Motamed told him not to file them, so he kept them and held onto them until he provided a copy to us at our request in late 1993" (tr., pp. 133-134).

Mr. Liss testified that the returns given to him by Mr. Fritz appeared to have had signatures on the returns "but they were incomplete, whited out, 85 to 90 percent whited out" (tr., p. 134).

The company's business consisted of manufacturing new cabs and remodeling existing cabs. Petitioner testified that about 90% of the company's business was attributable to the manufacture of cabs for customers, which to a major degree were elevator companies, such as Otis, Westinghouse and Dover Electric, as well as developers and general contractors. He further testified that about 10% of the company's business was attributable to remodeling (tr., pp. 48-49).

Petitioner explained the manufacturing process and the materials involved in that process as follows:

> "starting with the raw materials, working from either a standard design that we might have had or architecture, custom architectural design itself, taking raw materials and building the entire outer shell structure of the cab, then applying the interior finishes, then dismantling the cab for shipment to the job, and then the elevator to be -- the cab would be installed by the elevator company.
>
> * * *
>
> "All types, many types of materials: steel, wood, plywood, plastic laminates, Formica type of plastics, laminate wood veneers, architectural metals, plastics; just about any material that you can think of" (tr., pp. 49-50).

He testified that the elevator companies were not charged sales tax because they had

resale certificates (tr., p. 307).

Petitioner explained the remodeling process and the materials involved in that process as follows:

> "Remodeling, we would put new interior finishes into existing cabs that were already installed in a building. And in that case we would supply these interior finishes and send our mechanics to the site to install them.
>
> * * *
>
> "Well, the remodeling was more limited to the interior synthetic finishes such as wood veneer rather than the basic wood core material, not really any steel required because we're not building the structure of the cab. It could be carpet panels that are being installed or plastic laminate panels or just interior designs" (tr., pp. 49-50).

He explained that the company was generally employed by the building owner or developer when remodeling was done. He stated there would be a contract between the company and the building owner for the remodeling job. Petitioner stated that for remodeling jobs where there was an improvement to the building, the company received a capital improvement certificate (tr., pp. 300-302).

Petitioner testified that approximately 15% of materials purchased during the year were used on remodeling jobs (tr., p. 51). He stated that his 15% estimate was based on the estimate made when a job was figured up by either himself or the estimating department, not on actual figures (tr., p. 98).

The notices of determination, notice numbers S890920915K and S890920916K (Division's Exhibit "B"), were issued by the Division as a result of its audit. The auditor testified that there were five areas which were reflected in his audit conclusions: fixed assets; expense purchases; use tax on materials used in capital improvements; disallowed exempt sales; and sales tax delinquency (tr., p. 177). The Division submitted the audit workpapers as its Exhibit "O". The auditor explained his calculations with references to Exhibit "O".

The workpapers reveal that a review was made of all sales and use tax returns filed by the company during the period September 1, 1981 through May 31, 1986. There was one

delinquent period, the quarter ending August 31, 1984. The auditor determined the sales tax for the delinquent quarter to be $5,388.00.

The auditor reviewed all the sales invoices for the test period March 1, 1984 through May 31, 1984 to determine which sales represented new cabs and which represented remodeling and total nontaxable sales for the test period. The auditor determined that the total nontaxable sales were $1,685,137.00 (Division's Exhibit "O", p. 7). He also reviewed the nontaxable sales to determine which sales were capital improvement jobs.[15]

The auditor determined that there were 17 capital improvement jobs during the test period. Six of these jobs did not have exemption certificates and were disallowed (tr., p. 239; Division's Exhibit "O", p. 6). The disallowed sales totalled $12,094.00 and the nontaxable capital improvement sales totalled $171,824.75. The auditor computed the percentage of disallowed sales over total nontaxable sales in the following manner:

$$\frac{\text{disallowed sales}}{\text{total nontaxable sales}} = \frac{\$12{,}094.00}{\$1{,}685{,}137.00} = .007177$$

The auditor's workpapers classify the .007177 as the margin of error ("M.E.").

Page 18 of Exhibit "O" contains the nontaxable sales for the entire audit period, period by period. Total nontaxable sales for the entire audit period were $25,282,135.00. The auditor used the following computation to determine the sales tax due on the disallowed sales: ([nontaxable sales x M.E.] x 8.25). According to page 4 of Exhibit "O", the disallowed sales totalled $181,449.00 and the total tax due on the disallowed sales was $14,969.62.

The auditor testified that he first asked Mr. Castamto for the exemption certificates for the six disallowed sales and later asked Mr. Fritz for them; however, neither controller produced them. He further testified that he asked for them again at the BCMS conference, but they were not produced (tr., pp. 241-242).

The auditor made use tax adjustments in three categories: (1) fixed assets; (2) capital improvement material; and (3) expense purchases.

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[15]Capital improvement jobs were remodeling jobs.

The auditor testified that because the company failed to give him invoices for fixed assets, he had to rely on the Federal Form 4562 depreciation schedule for the years 1981 through 1986. He explained that because he did not have invoices, he could not determine what a particular fixed asset was and whether any tax had already been paid on it (tr., pp. 177, 243-247). According to page 33 of Exhibit "O", the fixed asset purchases totalled $791,895.00 for the entire audit period. The auditor determined there were 19 quarters during the relevant period. He divided $791,875.00 by 19 and came up with fixed asset purchases of $41,678.00 per quarter. Using the tax rate of 8.25%, he determined use tax per quarter to be $3,438.44 ($41,678.00 x .0825). The total fixed asset use tax was determined to be $65,330.36 (see, Division's Exhibit "O", p. 3).

The auditor testified that as a result of petitioner's BCMS conciliation conference, the fixed asset tax liability was reduced to $11,904.84. The adjustment was made to reflect the fact that after the company moved to New Jersey in April 1986, it made major purchases of fixed assets. The auditor testified that he was given new information and a worksheet at the BCMS conference, and that he accepted petitioner's computations (tr., pp. 182-183).

To determine the tax due on capital improvement materials, the auditor made the following computations. First, he determined the ratio of nontaxable capital improvement sales to total nontaxable sales. As was stated in Finding of Fact "88", the auditor determined the nontaxable capital improvement sales to be $171,824.75 and the total nontaxable sales to be $1,685,137.17. He computed the ratio to be $171,824.75/$1,685,137.17, or .101965 (see, Division's Exhibit "O", p. 19; tr., pp. 185, 248).

The auditor testified that the company did not have records which reflected the material used in each job, i.e., the "job jacket". The auditor explained that the job jacket would contain the information related to a particular job, including revenue and expense information. He stated that the job jacket would contain information about the materials used on that job. He stated that he had to rely on the Federal return, Form 1120, to arrive at the percentage of the material used in capital improvement work. He explained that the information on page 17 of

the Division's Exhibit "O" was supplied by the company, in particular, Mr. Fritz.

Using the Federal Form 1120 for the years 1981 through 1986, the auditor determined materials purchases and gross sales for each year. He took the ratio of each year's material purchases to gross sales, added each year's ratios together and divided the sum by the number of years (6) to determine the average. He determined the averages for each year to be: 1981 - 33%; 1982 - 24%; 1983 - 28%; 1984 - 56%; 1985 - 27%; and 1986 - 28%. The average of the six years was determined to be 32.9%. The auditor testified that the controller gave him the average of 32.9% also.

The auditor explained that the sales tax returns listed on the "Schedule of Sales Tax Returns" (Division's Exhibit "O", p. 1) reflect the company's self-assessed purchases for each quarter. He stated that he gave the company credit for whatever it reported on the sales tax returns. The self-assessed purchases for all the quarters in the audit period, except the delinquent quarter ending August 31, 1984, total $499,303.00 (see, Division's Exhibit "O", p. 2).

To determine the materials purchases subject to tax, the auditor took nontaxable sales per quarter, multiplied that by the capital improvement percentage of 10.1965 to determine the capital improvement sales per quarter. The auditor multiplied the capital improvement sales per quarter by 32.9% (percentage of materials used) and subtracted the self-assessed purchases per quarter to find the materials purchases subject to tax. According to the computations on page 16 of the workpapers (Division's Exhibit "O"), the additional total materials purchases subject to tax was $348,823.00. Using a tax rate of 8.25%, the auditor determined capital improvement material tax to be due in the amount of $28,774.94 (tr., pp. 185-189, 248-253, 261-263).

The last area for which the auditor made tax adjustments was expense purchases. The auditor testified that the expense area was tested for three months, March 1, 1984 through May 31, 1984. He referenced pages 23 through 30 of his workpapers (Division's Exhibit "O"). According to page 22 of the workpapers, total expenses for the test period were $403,022.48; the auditor allowed a total of $21,095.84; he determined materials to total $327,466.75 and

other expenses to total $54,459.89. He computed the margin of error in the following manner:

Expense purchases subject to use tax (tested 3/1/84 to 5/31/84)	$ 54,459.89
Total Expense 3/1/84 to 5/31/84	$2,455,610.00
Less Material	- 735,846.00
	$1,719,764.00

$$\frac{\$54,459.89}{\$1,719,764.00} = .031668$$

He determined the tax due on expense purchases in the following manner: (total expense purchases for audit period x M.E.) x tax rate). His computation was: ($24,095,597.00 x .031668) = $763,059.00 x .0825 = $62,952.39 (see, Division's Exhibit "O", p. 15). The auditor thus determined tax on expense purchases to be due in the amount of $62,952.39.

The auditor testified about the adjustments made at the BCMS level in the expense purchases area. He explained that adjustments were made in the amount-allowed column because evidence was produced of shipping by United Parcel Service (tr., p. 192). The auditor had made adjustments on page 22 of his workpapers. The Division submitted as its Exhibit "P" the modified worksheet, page 22, entitled "Summary of Expense Test". The auditor's adjustments were made in the following columns of page 22: "amount allowed" totalled $30,516.57; "material" totalled $348,158.76; and "other expense" totalled $24,347.15. The margin of error was recomputed to be .014157, or $24,347.15/$1,719,764.00. The auditor's calculations of additional tax due on expense purchases using the adjusted margin of error are contained in the Division's Exhibit "Q".

Division's Exhibit "Q" consists of three worksheet pages, 14A, 33A and 15A, which are modified Exhibit "O" worksheet pages 14, 33 and 15. According to worksheet page 15A (Division's Exhibit "Q"), the auditor calculated the adjusted additional tax due on expense purchases in the following manner: total expenses for audit period x M.E. x tax rate ([$24,095,597.00 x .014157] x .0825) = $28,142.48. The tax due on expense purchases, as adjusted after the BCMS conference, was $28,142.48 (tr., pp. 191-193; Division's Exhibit "Q", p. 14A).

The auditor testified on cross-examination that he examined all of the company's purchase receipts for the test period and identified all the purchases for items other than materials. He stated that he reviewed each of those purchases to ascertain the expenses or purchases which were subject to tax and for which no tax had been paid. He averred that the expenses he was looking for had "nothing to do with the manufacturer or subcontractor" (tr., p. 256). He further testified that the type of expenses he was looking for were reflected in pages 23 through 30 of his audit workpapers (Division's Exhibit "O"; tr., pp. 254-256).

According to the Division's Exhibit "R" entitled "Summary of Sales & Use Tax Deficiency", based on the adjustments made after the BCMS conference, the deficiency was reduced to $89,180.32, which is comprised of the following five items:

(a) Fixed Assets - Use Tax	$11,904.84
(b) Expense Purchases - Use Tax	28,145.43
(c) Capital Improvement Material - Use Tax	28,774.94
(d) Disallowed Sales	14,969.62
(e) Delinquent Sales Tax	5,388.49

These figures are reflected in the Conciliation Order (CMS No. 099438) dated August 2, 1991 and are the subject of the petition in DTA No. 810209.

We modify finding of fact "97" of the Administrative Law Judge's determination to read as follows:

> The Division submitted a computer printout, generated by the Division, entitled "Schedule of Returns filed for the company", as its Exhibit "U". This schedule lists the period, whether the return was timely or late, gross sales, taxable sales, tax due, prepaid tax, balance due and tax paid with the filing for the audit period. Review of this schedule indicates that nine sales and use tax returns were filed late, seven of which were filed without any tax payments. The return for the period 184 (June 1, 1983 through August 31, 1983) was timely filed without any tax paid. No return was filed for the period 385 (June 1, 1984 through August 31, 1984). With this exception, all returns for the audit period (September 1, 1981 through May 31, 1986)

were filed by June 20, 1986.[16]

Petitioner testified that, in late 1988, the Manocherians' stock interest was sold to Motamed (tr., pp. 81-82).

Petitioner was asked to explain the circumstances under which he would sign a document on behalf of the company. His response was:

> "Well, if a document was brought to me to be signed and I was told that it was my signature that was required and I didn't see or I didn't feel there was any reason not to sign it, I would sign it" (tr., p. 303).

Petitioner was asked if the situation in terms of signing documents was different for him before 1984 and after 1983 -- before the Manocherians invested in the business and Motamed appeared on the scene and afterwards. He responded:

> "No, I don't think so. When it came to the financial part of the business, even before Motamed came on the scene, if it was something I was told required the signature of the president of the company at that time, again, if I didn't see anything there I felt was wrong with the document, I would sign it" (tr., p. 304).

Petitioner testified that he understood that Motamed was taking care of the audit. He also stated that he never met the auditor, Mr. Zagzoug (tr., p. 304).

Review of the record indicates that the company had numerous controllers during the relevant period. The auditor testified that the last controller with whom he dealt was Mr. Fritz.

The Division submitted an organizational chart for the company as its Exhibit "L".[17] The auditor testified that he first saw this chart during the BCMS conciliation conference for Motamed. He testified this chart reflected the organization of the company in about March 1989 because Mr. Fritz was controller then (tr., pp. 148-150).

The organizational chart contains the following information: (1) the box containing "Board of Directors" is at the top of the organizational chart -- the makeup of the board is not enumerated; (2) the box containing "P. Motamed" is directly below the board of directors --

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[16]We modified finding of fact "97" of the Administrative Law Judge's determination by adding the last two sentences in order to more fully reflect the record.

[17]The copy of this organizational chart submitted into the record is somewhat illegible.

there is no title next to his name; and (3) below P. Motamed's box is the box containing "R. Klein" (petitioner) -- there is no title next to his name. According to the chart, petitioner was in charge of sales, as well as having C. Sammarco and E. Fritz answering to him. Neither C. Sammarco's nor Mr. Fritz's titles are listed on this chart. C. Sammarco had responsibility for, inter alia, purchasing, scheduling, customer service, manufacturing, quality, and shipping and receiving. Mr. Fritz had responsibility for accounting.

Petitioner was asked if he agreed with the organizational chart which had the controller reporting to him. His response was:

> "Not at all. That chart doesn't have any relation to me in that area. My responsibility was strictly sales, marketing and public relations of the company with my name at its masthead, and I had absolutely nothing to do -- or I should say the controller did not report to me at all" (tr., pp. 304-305).

Petitioner was asked if the company was having cash flow problems towards the end of the sales tax audit period, May 1986. His response was:

> A. "Well, the end of May of 1986 we should not have been having that bad a cash flow problem because the investors had just come in with money and guaranteed whatever capital flow was needed to get the company moving along successfully."
>
> Q. "When did the cash flow problems after that investment commence?"
>
> A. "I would probably have to say at the time that Mr. Motamed took over the controlling share of the company" (tr., pp. 310-311).

He testified that the investors invested money as needed. He further stated that he was unaware of any cash flow problems in 1986 because he was not involved in the financial portion of the business. Rather, he was trying to build up sales and marketing. When asked if he was aware of any cash flow problems in 1987 or 1988, he stated that he was not. He further testified that, although he did not have the sales figures, he doubted sales decreased in the late 1980's and he thought that they increased because there was a lot of construction activity during those years (tr., pp. 311-313).

Petitioner, in response to the question, "What led to the corporation filing bankruptcy?",

stated:

> "Probably the fact that there was an overextension; the decision of the Manocherians and Motamed to move into a 125,000 square foot plant was an over-ambitious move on their part, with their ultimate goal of going public with the company and putting on an outward impression of a larger company than we actually were; the purchase of so much new equipment, just general overextension" (tr., p. 313).

Petitioner stated that he did not have to reassure the company's customers that it was financially secure. However, he stated that the only problems that he "had to ensure people on is if there was ever a time when we were late or starting to be late on deliveries or delinquent on payments" (tr., p. 313).

Petitioner submitted the affidavit of Fred B. Ringel, Esq., as his Exhibit "1". Mr. Ringel is associated with the law firm of Robinson, Brog, Leinwand, Reich, Genovese & Gluck, P.C.

In his affidavit, Mr. Ringel stated that his firm was retained as counsel to and rendered legal services to the company for several years and that he personally assisted in the Chapter 11 bankruptcy petition filed on behalf of the company on March 28, 1990 with the Bankruptcy Court for the District of New Jersey.

He stated that he was present when petitioner submitted his written resignation to the company on or about March 28, 1990, which was accepted by the company on that date. Mr. Ringel stated that he has been unable to locate a copy of petitioner's written resignation letter; however, he has seen it. He affirms to the best of his knowledge that petitioner ceased to have any subsequent involvement with the company. Attached to Mr. Ringel's affidavit are three exhibits: Exhibit "1" is a statement declaring that a Statement of Assets and Liabilities of Parkline is true and correct; Exhibit "2" is a statement declaring that a Statement of Financial Affairs for Parkline is true and correct; and Exhibit "3" is a statement declaring that a list of Parkline's 20 largest unsecured creditors is true and correct. Each of the statements on these three exhibits was executed by P. Motamed on March 23, 1990. Each statement commences with the following phrase: "I, Parvis Motamed, Exec. Vice President of the corporation named as debtor in this case . . . ."

Mr. Ringel averred that petitioner did not supply any information used in the preparation of the exhibits attached to his affidavit or any financial information regarding the company used in connection with the filing of the Chapter 11 bankruptcy petition.

Petitioner gave the following reasons for his resignation from the company:

> "the direction of the company under Mr. Motamed's operation was heading very similar to what it was before he came in. I saw no reason for me to remain and bring in sales that couldn't be accounted for, couldn't be -- there was no way for them to manufacture it and get it out. They were being late on delivery, short on deliveries again and Mr. Motamed took over the stock ownership. The funds and the cash flow suffered a great deal and we were just back in -- getting back into the same problems that we had before and I felt there was no need for me to be there at time" (tr., p. 85).

He testified that he submitted a written resignation at the attorney's office when the Chapter 11 bankruptcy filing was signed. He stated that he had verbally resigned prior to that. He testified that Motamed had selected the bankruptcy attorney. He also stated that he signed some of the bankruptcy papers (tr., pp. 85-86).

Petitioner's representative asked him about his knowledge of the sales and use taxes and employment taxes which were the subject of the various notices issued by the Division. The questions and his responses were as follows:

> Q. "So that there is no doubt about this, did you know that there were taxes, sales and use taxes of Parkline for the period 1981 through 1986 and for periods in 1988 and 1989, that were not paid over to New York State prior to -- I'm talking prior to any communication from New York State?"
>
> A. "I did know there was an audit going on for the period 1981 to '86. The period of '88 on, I knew absolutely nothing about. I didn't know anything about any sales tax deficiencies."
>
> Q. "And what about employment taxes?"
>
> A. "Or employment taxes or any tax deficiencies."
>
> Q. "And with respect to any sales and use tax that may have been due for periods beginning in '84, what if any role did you play in the filing of returns or payment of those taxes?"
>
> A. "None whatsoever" (tr., pp. 86-87).

Petitioner submitted 121 proposed findings of fact.[18] In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated into the Findings of Fact herein except: numbers 8, 25, 26, 38, 43, 47, 50, 53, 57, 78, 81, 82, 83, 90, 91, 101, 109, 110 and 118, which are not supported by the record; numbers 5, 7, 9, 11, 12, 15, 17, 20, 22, 23, 27, 30, 31, 33, 39, 51, 54, 55, 56, 58, 59, 61, 62, 63, 64, 65, 67, 68, 70, 71, 76, 77, 79, 80, 85, 88, 89, 94, 98, 99, 102, 103, 104, 105, 106 107, 110, 111, 112, 113, 115, 117, 118, 119 and 120, which were modified to more accurately reflect the record; numbers 16, 18, 19, 28, 29, 34, 44, 52, 69, 73, 86 and 122, which are conclusory in nature; and numbers 35 and 36, which are irrelevant.

OPINION

In her determination, the Administrative Law Judge concluded that there was a rational basis for the assessments issued to petitioner as a result of the audit and that the auditor's methodology and calculations were not unreasonable or erroneous.

The Administrative Law Judge concluded that the assessments against petitioner were not time-barred. She concluded that a consent by a corporation pursuant to Tax Law § 1147 to extend the period for assessment of sales and use tax extends the liability of those persons required to collect tax under Tax Law §§ 1131(1) and 1133(a) as well. Thus, petitioner's liability was extended for the same period as that of the corporation.

The Administrative Law Judge concluded that, for the period September 1, 1981 through December 31, 1983, petitioner was a responsible officer of Parkline Corp. for purposes of sales and use tax liability based on his position as president of the company (an office held since 1970), his 50% ownership of the corporation, his lifetime of work for the company and the fact that his family name and the company were synonymous. Based on his authority over, involvement in and control of the financial affairs of the company, the Administrative Law Judge concluded that petitioner had a duty to act on behalf of Parkline Corp. in complying with

[18]Petitioner had two number "102s", the numbers after the first number 102 have been renumbered upwards by 1 and it is this renumbering that is reflected herein.

the requirements of Article 28 of the Tax Law.

The Administrative Law Judge found that petitioner's role in the company did not significantly change after 75% of the company's stock was purchased in late 1983 by the Manocherian Group. Petitioner continued as president of the company and he continued to focus on sales and marketing as he had done in the past. He was one of two members of the board of directors. He was the rainmaker, the person behind the company's name. Petitioner's signature appeared on all checks issued by the company along with that of Parvis Motamed, although neither of them alone could issue a check. The Administrative Law Judge concluded that petitioner made no inquiries into matters of finances or tax compliance, delegating these matters to Motamed. Therefore, concluded the Administrative Law Judge, petitioner was a responsible officer for the period after December 1983 and for the entire period at issue -- September 1, 1981 through November 30, 1989.

The Administrative Law Judge also concluded that petitioner failed to establish that reasonable cause exists to abate the penalties and interest assessed pursuant to Tax Law § 1145(a)(1)(i) and (ii).

Finally, she concluded that petitioner failed to sustain his burden to prove that he was not a person responsible under Tax Law § 685(n) for the collection and remittance of withholding tax. Choosing not to exercise his authority over financial matters, petitioner delegated his duties with respect to the corporation's withholding tax responsibilities to Motamed. Petitioner was unaware of the failure to pay the taxes only because he failed to inquire. Thus, concluded the Administrative Law Judge, petitioner was liable for penalty under Tax Law § 685(g).

On exception, petitioner argues that the auditor misunderstood the nature of the business of Parkline Corp., treating the corporation as a contractor rather than as a manufacturer. Since only a small portion of that corporation's sales were for capital improvements, petitioner argues that only a small portion of its materials purchased were used for capital improvement jobs. Petitioner argues that the assessments issued against him as a result of the audit are time-barred because they were issued more than three years after the filing of all returns due for the audit

period. Any extensions of that time period were executed by petitioner in his capacity as an officer of the corporation and cannot bind him personally. Petitioner argues that he was not a responsible person for purposes of either sales and use tax or withholding tax due to his limited involvement in the affairs of the corporation except for sales and marketing during the periods at issue. As to withholding tax, he did not voluntarily or intentionally fail to pay taxes he had an obligation to pay. Finally, petitioner argues that even if he is found to be a responsible person for payment of sales and use tax, the failure to report and remit such taxes was due to reasonable cause and not willful neglect.

The Division argues in opposition that the Administrative Law Judge was correct in her determination and relies on her findings of fact and conclusions of law.

The first issue to be decided in this matter is whether the statute of limitations for the assessment of additional sales and use taxes for the period September 1, 1981 through May 31, 1986 expired prior to the issuance of the notices of determination by the Division on September 20, 1989. For the reasons set forth below, we reverse the determination of the Administrative Law Judge on this issue. Her determination was issued before our decision in Matter of Bleistein (Tax Appeals Tribunal, July 27, 1995) in which this very issue was considered. We find our decision in that matter to be dispositive in this case.

In Bleistein we stated:

> "We find that the three consents to extend the period of limitations . . . were signed on behalf of Second Street Deli, Inc., thereby binding the corporation. We find no basis on which to decide that petitioner was likewise bound . . . . [A]ll three consents to extend the period of limitations list the 'vendor' as the corporation. These forms do not in anyway suggest or imply that they apply to any other taxpayer. Petitioner, by affixing his signature to a consent to extend the period of limitations . . . did so in his capacity as officer with the only effect that the corporation was bound thereby . . . .
>
> "We conclude that it cannot be inferred from petitioner's signature . . . that petitioner consented on his own behalf . . . to assess tax against him. To do so would be to ignore the principles of statutory construction . . . .
>
> * * *
>
> "The natural and obvious import of [Tax Law §§ 1138(c) and 1147(c)]

> is that the only tax . . . that can be assessed during the extended period is the tax of the taxpayer who signed the consent extending the period of limitation. In this case, that person and taxpayer was the corporation, i.e., Second Street Deli, Inc.
>
> "We further conclude that to read the forms as binding on both the corporation and its officers would be inconsistent with the principle of the separate liability of the officer from the corporation.
>
> * * *
>
> "While the State Tax Commission reached a different result in Matter of Playmor Amusement Co. (State Tax Commission, September 27, 1982) and in subsequent decisions with respect to a consent to extend the period of limitations, we decline to follow . . . . We find the Commission's conclusions in Playmor and similar cases are inconsistent with the body of case law developed by the courts and this Tribunal establishing the independent liability of officers. Consequently, we reject the Commission's conclusion that a consent to extend the period of limitations signed on behalf of the corporation by the officer binds the officer" (Matter of Bleistein, supra).

The notices of determination issued to petitioner assessing him for sales and use tax for the period September 1, 1981 through May 31, 1986 (S890920915K and S890920916K) were issued on September 20, 1989. With one exception (the period June 1, 1984 through August 31, 1984), this date was beyond the three-year period provided by Tax Law § 1147(b) for the assessment of additional tax. Therefore, on the basis of our decision in Matter of Bleistein (supra), the assessments against petitioner for the period September 1, 1981 through May 31, 1986 (with the exception of the period June 1, 1984 through August 31, 1984) are all time-barred and are hereby dismissed.

The Tax Law requires all vendors to file sales tax returns with the Division, reporting gross sales, taxable sales and the tax due on such sales (Tax Law § 1136). Tax Law § 1136 provides that any vendor whose taxable receipts total $300,000.00 or more in any quarter of the preceding four quarters "shall, in addition to filing a quarterly return . . . file either, a long-form or short-form, part-quarterly return monthly" (Tax Law § 1136[a]). A long-form part-quarterly return is defined as:

> "a return . . . providing for the calculation of the actual sales and compensating use taxes for the preceding month in the manner set forth in subdivisions (a) and (b) of section eleven hundred thirty-seven" (Tax Law § 1136[a][i]).

A person filing such a return for each of the months contained in a quarter is also "required to file a quarterly return for such quarter" (Tax Law § 1136[a][i]).

Parkline Corp. filed part-quarterly returns for the months of June and July 1984 but failed to file a quarterly return as required by Tax Law § 1136(a)(i) for the period June 1 through August 31, 1984. The first issue is whether the notice of determination was time-barred for the months of June and July 1984.

A quarterly return serves as both a monthly return for the last month in the quarter and as a reconciliation for the quarter (20 NYCRR 533.3[b][3]). However, we find no basis on which to conclude that a part-quarterly return filed in accordance with Tax Law § 1136(a)(i) is not a "return" within the meaning of Tax Law § 1147(b) (see, Matter of Mast, Tax Appeals Tribunal, July 29, 1993).

Tax Law § 1147(b) provides:

> "except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law, the tax may be assessed at any time."

Generally, the words of a statute are to be given their usual and ordinary meaning unless it is plain from the statute that another meaning was intended (Regan v. Heimbach, 91 AD2d 71, 458 NYS2d 286, lv denied 58 NY2d 610, 462 NYS2d 1027, rearg denied 59 NY2d 969, 466 NYS2d 1029). Applying this principle of construction, we conclude that the filing of a part-quarterly return triggers the statute of limitations found in section 1147(b). Accordingly, on the basis of our holding in Matter of Bleistein (supra), the Division was barred from assessing petitioner for additional tax (Tax Law § 1147[b]) for the months of June and July 1984. However, since a quarterly return was not filed for August 1984, the Division had authority to determine additional tax due for August 1984.

Gross sales of $495,438.00 and $364,178.00, respectively, were reported for the part-quarterly periods of June and July 1984. The sums of $656.64 and $1,684.77, respectively, were reported as tax due for those periods. In contrast, the auditor's workpaper entitled

"Schedule of Sales Tax Returns Filed 9/1/81 - 5/31/85" shows reported gross sales of $1,256,615.00 for the quarterly period ending August 31, 1984. Further, the auditor's workpapers show tax of $5,388.49 due but not remitted for this same period. It must be concluded that the large discrepancy between actual reported gross sales, actual reported tax due and the figures appearing in these workpapers purporting to be reported gross sales and tax due are estimates of gross sales and tax due for the month of August 1984 made by the auditor.

From the entry appearing on page 2 of the auditor's workpapers, it appears that the auditor may have obtained his figures from a delinquency assessment issued to the corporation on its failure to file a return for that period. However, that delinquency assessment is not in the record and speculation on its contents does not suffice to support the auditor's figures.

What is clear from the auditor's testimony is that the starting point for his calculations of additional tax due was gross sales as reported on the sales and use tax returns filed by Parkline Corp. However, there is no basis in the record for determining how the auditor arrived at his estimate of gross sales for the month of August 1984. As a result, while an assessment for August 1984 was not time-barred, there is no rational basis supporting the assessment which includes this period and it must be dismissed. Since this is dispositive of the last period of the audit remaining in issue, we need not address the remaining issues raised by petitioner concerning the audit.

Still at issue, however, is whether petitioner was a responsible officer of Parkline Corp. and, therefore, liable for sales and use tax for the period June 1, 1988 through November 30, 1989.

The Administrative Law Judge found petitioner to be a responsible officer of the corporation and liable for the tax reported due and unpaid for the period September 1, 1981 through November 30, 1989. She divided her analysis into two periods: the period September 1, 1981 through December 31, 1983 and the period thereafter. Since the assessments for the period September 1, 1981 through May 31, 1986 have been dismissed, the issue of petitioner's responsible officer status for this period is moot. However, there is no evidence in

the record to indicate that petitioner's corporate duties and responsibilities changed in any significant manner for the remaining period at issue -- June 1, 1988 through November 30, 1989 -- from what the Administrative Law Judge found them to be for the period subsequent to December 1983. We find that the Administrative Law Judge fully and correctly considered the factors relevant to a determination of petitioner's status as a person required to collect tax and we affirm her determination on this issue for the reasons set forth in her determination.

The next issue for consideration is whether or not petitioner is liable for withholding tax penalty for the period January 1, 1989 through April 7, 1989. Tax Law § 685(g) penalizes persons who are responsible for withholding and paying over income taxes deducted from employee wages for willfully failing to do so. This section provides:

> "[w]illful failure to collect and pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No addition to tax under subsections (b) or (e) shall be imposed for any offense to which this subsection applies. The tax commission shall have the power, in its discretion, to waive, reduce or compromise any penalty under this subsection."

Tax Law § 685(n) defines persons subject to the section 685(g) penalty as follows:

> "[p]erson defined.--For purposes of subsections (g), (i), (o), (q) and (r), the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

The determination that petitioner is subject to the Tax Law § 685(g) penalty is a two-step process. First, petitioner must be a responsible officer and, second, his actions must be willful. Petitioner has the burden of proof to establish that he was not a person required to pay over withholding tax or, if he is such a person, that his failure to do so was not willful.

The Administrative Law Judge determined that the question of whether someone is a "person" under a duty to collect and pay over withholding taxes is similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. The

Administrative Law Judge concluded that:

> "[p]etitioner asserts that he did not have knowledge of the financial affairs of the business. It is clear that petitioner took a 'hear no evil, see no evil' approach to the company's financial matters by choosing to focus only on sales and marketing. The evidence clearly reflects that his access to information concerning the financial stability of the company and its ability to pay its creditors was not restricted in any way. He had dual signatory authority on the only corporate checking account. His signature stamp was used only when he was out of the office and at all other times he signed the checks, which included ones for payroll and tax payments. He signed the Form CT-6, subchapter S corporation information return, filed for the years 1985 through 1987. Attached to each year's form was a list of the seven stockholders and their respective distributive shares of the corporation's ordinary loss. He claimed his share of the distributive losses on his personal income tax returns. Although he executed nine consents to extend the statute of limitations for assessment of sales and use tax for the audit period, he never inquired about the progress of the audit or took an active role in it. He testified that his decision whether or not to sign a document presented to him for signature in his role as president did not change after 1984. He stated that if he did not have a problem with the document, he would sign it. There is no indication in the record that he made any inquiries into the reasons for the need for his signature on any document.
>
> "It is clear that petitioner chose not to exercise his authority over financial matters and was not restricted in the performance of his duties in any way. Petitioner has failed to sustain his burden of proving that he was not a responsible person under Tax Law § 685(n)" (Determination, conclusion of law "S").

We agree with the Administrative Law Judge's determination of petitioner's authority. As with her analysis of liability for sales and use tax, her conclusion is premised on a delegation of authority by petitioner to either Motamed or other employees of the corporation. Just as with the issue of liability for sales and use tax, the record supports her conclusion.

The Administrative Law Judge concluded that:

> "The crux of the willfulness standard 'is that the person must voluntarily and consciously direct the trust monies from the State to someone else' (Matter of Gallo, Tax Appeals Tribunal, September 9, 1988). Therefore, a lack of knowledge that withholding taxes were not being paid over at the time of the failure would negate a finding of willfulness (Matter of Gallo, supra; Matter of Flax, Tax Appeals Tribunal, September 9, 1988; Matter of Lyon, supra). Nevertheless, if a responsible officer disregards his corporate responsibility to see that taxes are paid, the conduct can be willful despite a lack of actual knowledge (Matter of Gallo, supra; Matter of Lyon, supra; Matter of Flax, supra)" (Determination, conclusion of law "S").

Using this analysis, the Administrative Law Judge concluded that petitioner did not meet

his burden to prove that he made a reasonable delegation of authority to ensure that withholding taxes were paid. We agree and affirm her conclusion that petitioner was liable under Tax Law § 685(g) for the reasons set forth in her determination.

The final issue concerns whether petitioner has established that the failure to timely file and pay sales tax for the period June 1, 1988 through November 30, 1989 was due to reasonable cause and not due to willful neglect. The returns for the period September 1, 1988 through November 30, 1989 were filed at the hearing on January 5, 1994. No return was filed for the period June 1, 1988 through August 31, 1988. There is no evidence in the record to support petitioner's argument that reasonable cause existed for the failure to timely report and pay taxes due for this period. Therefore, we affirm the determination of the Administrative Law Judge upholding the imposition of penalty.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Klein, Officer of Parkline Corp., is granted to the extent that the assessments for the period September 1, 1981 through May 31, 1986 are hereby cancelled;

2. The determination of the Administrative Law Judge is modified to the extent indicated in number "1" above, but is otherwise affirmed;

3. The petitions of Robert Klein, Officer of Parkline Corp., are granted in part as indicated in number "1" above, but are otherwise denied; and

4. The Division of Taxation is directed to cancel the notices of determination dated September 20, 1989, and the notices of deficiency dated December 21, 1992 and the notices of estimated determination dated December 28, 1992, as modified by the actual returns filed at the hearing on January 5, 1994, are hereby sustained.

DATED: Troy, New York
January 25, 1996

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner