STATE OF NEW YORK

DIVISION OF TAX APPEALS

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 811723 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.	:	DETERMINATION DTA NOS. 810209, 811722 AND
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.	:	

Petitioner, Robert Klein, officer of Parkline Corp., 1112 Park Avenue, New York, New York 10128, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 1981 through May 31, 1986 and June 1, 1988 through November 30, 1989, and for redetermination of a deficiency or

forrefund 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.

A hearing was commenced before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on January 5, 1994 at 11:45 A.M. and continued to conclusion on April 6, 1994 at 11:15 A.M., with all briefs to be submitted by August 4, 1994. Petitioner, appearing by Baker & McKenzie, Esqs. (Michael I. Saltzman, Donald Kravet and Kevin Liss, Esqs., of counsel), submitted a brief on May 27, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (Vera Johnson, Esq., of counsel), submitted its brief on July 15, 1994. Petitioner submitted a reply brief on August 4, 1994.

ISSUES

I. Whether petitioner properly protested the assessment of withholding taxes against him pursuant to Tax Law § 685(g) for the period ended December 31, 1983.

II. Whether the Division of Taxation properly determined additional sales and use taxes due from petitioner for the period September 1, 1981 through May 31, 1986.

III. Whether petitioner is liable for the sales and use taxes due on behalf of Parkline Corp. as a person responsible for the collection of sales tax pursuant to Tax Law § 1131 for the periods September 1, 1981 through May 31, 1986 and June 1, 1988 through November 30, 1989.

IV. Whether the statute of limitations expired prior to the issuance of the notices of determination to petitioner.

V. 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 the year 1990 and, if so, whether he "willfully" failed to collect, account for and pay over withholding taxes for such periods.

VI. Whether liability for penalties and interest in excess of the minimum rate should be remitted due to reasonable cause and the absence of willful neglect.

FINDINGS OF FACT

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

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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).

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 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).

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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.

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 (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 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.

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[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".

"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 Corporation along with its request for a BCMS conference and was received by BCMS on

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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.

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

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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.

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 $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

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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.

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".

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

[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.

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 "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

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[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.

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:

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

[15]Capital improvement jobs were remodeling jobs.

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.

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 creditor 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.

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.

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".[16]

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

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 -- 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.[17] 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.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that he properly protested the assessment of withholding tax for the period ending December 31, 1983.

He asserts that the sales and use tax assessment reflected in DTA No. 810209 was based on the fundamental error that the company was a contractor, rather than a manufacturer. He contends that the auditor erroneously classified the company as a contractor because it manufactured elevator cabs to the specification of customers. He argues that the company was engaged in the business of manufacturing cabs, as the term manufacturing is defined

in 20 NYCRR 541.2(n). He asserts that the evidence showed that 90% of the company's sales consisted of sales of new elevator cabs which it produced out of raw materials and delivered to elevator companies at a job site for installation by the elevator company. He maintains that only for a small portion of its sales did it act as a contractor. He contends that only 10% of the company's total sales were "capital improvement" sales in which it acted as a contractor.

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[17]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.

Petitioner contends that the "implications of the auditor's error are profound because the sales/use tax treatment of manufacturers and contractors is very different" (Petitioner's brief, p. 28).

Petitioner maintains that, as a manufacturer, the company should not owe any use tax on fixed assets. He argues that there is an exemption for use tax for fixtures purchased by a manufacturer. He maintains that the fixed assets reported on the company's depreciation schedule of its Federal income tax return were used in the manufacturing process.

He also maintains that the company did not have to pay use tax on expense purchases because, as a manufacturer, it was exempt from use tax on purchases of supplies.

Petitioner contends that the percentage of 32% materials to sales used by the auditor as a basis for the computation of use tax on materials used in capital improvements was "artificially" high. He argues that the evidence shows that "capital improvement jobs, which involved remodeling, were more labor-intensive, and thus the materials component was a smaller component of the sales price" (Petitioner's brief, p. 32).

Petitioner contends he should not be held personally liable as a responsible person where only six exempt sales were unsubstantiated during the audit test period which computed to be a noncompliance rate of 0.7% (margin of error). He argues that the company "was substantially in compliance with the law and suggest that the missing paperwork was most likely a result of human error rather than misfeasance" (Petitioner's brief, p. 33).

Petitioner asserts that the sales tax assessments against him are time-barred because the consents to extend the statute of limitations were executed on behalf of the company and not on his personal behalf. He argues that he executed the consents as agent, not principal, of the company. He asserts that there is nothing on the face of any of these consents which indicates that they are binding on the corporation's agent in his individual capacity. He maintains that "neither the law of principal and agent nor the law of joint and several liability provides any basis for concluding" that he waived the statute of limitations on his personal liability when he signed the consents (Petitioner's reply brief, p. 11).

Petitioner also asserts that the responsible officer collection device is not intended to be used for audit adjustments. He contends that he acted in good faith and with reasonable cause. He argues that he was president of the company in name only, and that he did not have effective control over the company or its financial affairs and therefore he was not a responsible person within the meaning of the Tax Law. He further argues that he is not liable for the audit adjustments because he was not a responsible officer when they were determined.

Petitioner contends that he did not willfully fail to pay over withholding taxes for the period January 7, 1989 through April 7, 1989. He argues that he "did not have knowledge of the nonpayment of sales and withholding taxes, and so could not have intentionally violated a known duty to pay over the taxes" (Petitioner's brief, p. 49).

Lastly, he argues that he had reasonable cause for the nonpayment of taxes. He asserts that the adjustments for the 1981 through 1986 periods were based on an audit, not a failure to pay over taxes. He argues that he could not be chargeable with knowledge in 1981 through 1985 that deposits or payments of sales and use tax were understated. The audit was completed in 1989 and petitioner argues that the auditor's adjustments are not free from doubt. He maintains that since the Division has offered no rebuttal to his claim that he had reasonable cause, the penalties should be abated.

The Division asserts that petitioner did not properly protest the assessment of withholding tax for the period ending December 31, 1983 and therefore the Division of Tax Appeals is without jurisdiction to entertain that notice (tr., p. 15).

The Division argues that when petitioner signed the nine consents extending the periods of limitation in his representative capacity, he also signed in his personal capacity. Citing relevant case law, it contends that the "signing of the consents on behalf of the corporation manifested an intention to extend the periods of limitation as to the petitioner's personal liability" (Division's brief, p. 14).

It contends that petitioner is a responsible officer. The Division argues that "[t]he crux of the issue at bar is whether the petitioner was significantly excluded from the decision making

process or incapable of playing a meaningful role in the business affairs" (Division's brief, p. 17). It maintains that the hearing record shows that he played a significant and active role in operating the corporation. The Division contends that petitioner is a person who willfully failed to pay over withholding taxes for the period January 1, 1989 through April 7, 1989. It asserts that petitioner's delegation of authority was not reasonable. It contends that "[t]he evidence in the hearing record shows that the petitioner was to a large extent inattentive to business matters" (Division's brief, p. 26). The Division maintains that petitioner had the authority and control necessary to ensure compliance with the New York State withholding tax law, but recklessly disregarded his duties.

The Division contends that the auditor correctly computed the sales tax liability for the period September 1, 1981 through May 31, 1986. It contends that:

> "[t]he party seeking a manufacturing exemption or an exemption for purchases and tools must be able to demonstrate that the specific items for which the exemption is sought was predominantly for the exempt purposes" (Division's brief, p. 29).

It further contends that petitioner has failed to do that.

The Division asserts that because the company did not maintain adequate books and records, the auditor had to use the depreciation schedules from the corporation's Federal returns to determine what percentage of the capital improvement sales figure represented the amount of the cost of materials incorporated into capital improvements, which the auditor determined to be 32.9%. It argues that petitioner has not provided any documentation or basis for his contention that the auditor's ratio of cost to sales is too high and should be approximately 15%. Citing relevant case law, the Division maintains that exactness is not required in estimating tax due where records are inadequate.

It maintains that there is no basis in law for petitioner's contention that because of the de minimus number of unsubstantiated exempt sales he should not be held liable for any sales tax due.

The Division asserts that petitioner's contentions that there was a misunderstanding as to whether the company was a manufacturer or a contractor is meritless. It argues that "[b]oth a

manufacturer and a contractor are required to substantiate any exempt sales to which they claim they are entitled" (Division's brief, p. 32).

The Division also contends that petitioner was properly assessed the tax for the sales tax quarter ending August 31, 1984 pursuant to Tax Law § 1138(a).

Lastly, the Division argues that the penalties should not be abated because petitioner has failed to show the absence of willful neglect and any grounds for reasonable cause.

CONCLUSIONS OF LAW

A. Petitioner contends that he properly protested the assessment of withholding tax penalties for the period ending December 31, 1983. He asserts that "[b]ased on notice of deficiency number L-006901023-8, which was properly protested, and paragraph 11 of the Division's answer to that petition,[18] that period is part of this case" (Petitioner's brief, p. 4). The Division contends that petitioner did not properly protest the assessment of withholding tax penalties for the period ending December 31, 1983 and therefore the Division of Tax Appeals is without jurisdiction to entertain that notice.

The Division is correct. Petitioner did not properly protest the Notice of Deficiency issued by the Division in connection with the assessment of withholding tax penalties for the period ending December 31, 1983. 20 NYCRR 3000.3(b) generally sets forth the information which must be included in a petition filed with the Division of Tax Appeals. A petition must include, inter alia: the date of the notice, tax article involved

and the nature of the tax; the taxable years or periods involved and the amount of tax in controversy; as well as a legible copy of the statutory notice being protested (see, 20 NYCRR 3000.b[3], [4], [8]). Contrary to petitioner's contention, the withholding tax penalty assessment for the period December 31, 1983 is not part of notice of estimated determination L-006901023-8. Notice number L-006901023-8 is a sales and use tax assessment issued for the delinquent

[18]DTA No. 811723.

sales tax quarter ending November 30, 1988. The Notice of Deficiency which was issued by the Division for the withholding tax penalties for the period ending December 31, 1983 is notice number L-006318148-6 (see, Finding of Fact "76").

It is clear from a review of the notice of estimated determination (notice number L-006901023-8) that it does not include any withholding tax penalties. It is a sales and use tax assessment only. It should be noted that petitioner did not include a complete copy of this notice of estimated determination. He did include as part of this notice a page entitled "Consolidated Statement of Tax Liabilities" which referenced the withholding tax penalty assessment (notice number L-006318148-6) for the period ending December 31, 1983, as well as the withholding tax penalty assessment (notice number L-006881351-6) for the period ending April 7, 1989. This page contains a summary statement of petitioner's tax liabilities, nothing more. In fact, the first sentence on this page states:

> "This is a Statement of your Tax Liabilities, including the liability(ies) referred to in the enclosed NOTICE OF ESTIMATED DETERMINATION."

It should also be noted that notice of estimated determination number L-006901023-8 was protested in the petition (DTA No. 811723) filed for revision of a determination or for refund of sales and use taxes due under Articles 28 and 29 of the Tax Law. Withholding tax penalties are not assessed pursuant to either Article 28 or 29 of the Tax Law. Petitioner protested six notices of determination, listing them on a separate sheet entitled "Attachment A".[19] Notice of Deficiency number L-006318148-6 is not listed on that attachment (see, Finding of Fact "76").

B. Petitioner did protest the assessment of withholding tax penalties for the period January 1, 1989 through April 7, 1989 and the year 1990 in the petition assigned DTA No. 811722. Petitioner listed only two notice/assessment numbers on the first page of the petition. They were L-006881350-7 and L-006881351-6. Copies of these two notices of deficiency were attached. The amount of tax being protested in this petition is $150,483.59, which is the sum of

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[19]Notice number L-006881350-7 is whited out.

the total amount due on notice numbers L-006881350-7 and L-006881351-6. The petition does not reference Notice of Deficiency number L-006318148-6, which assessed the withholding tax penalty for the period ending December 31, 1983 against petitioner, or include a copy of this Notice of Deficiency (see, Findings of Fact "72" and "73").

Petitioner's reliance upon paragraph 11 of the Division's answer filed in with regard to DTA No. 811723 is misplaced. This paragraph states that "the Division issued Notices of Deficiency L-006901023-8 for the period 12/31/83 and 4/7/89 asserting 685(g) penalties in the aggregate amount of $69,730.40." This statement is totally incorrect. Notice number L-006901023-8 is a notice of estimated determination of sales and use tax for the quarter ending November 30, 1988 which assessed tax, interest and penalties in the total amount of $96,957.90 (see, Findings of Fact "76" and "79").

Petitioner did not protest Notice of Deficiency number L-006881348-6, which asserted withholding tax penalty for the period ending December 31, 1983, in either the petition filed in connection with DTA No. 811722 or the petition filed in connection with DTA No. 811723. There is neither a reference to this Notice of Deficiency nor a copy of it in either petition. Since petitioner has not properly protested this Notice of Deficiency, the Division of Tax Appeals does not have jurisdiction to hear this matter (see, 20 NYCRR 3000.3[b][4], [8]).

C. Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

> "If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance[20] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

D. Petitioner contends that the sales and use tax audit assessment against the company was based on a fundamental error. He asserts that the auditor erroneously treated the company

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[20] Prior to October 1, 1987, the statute referred to the former State Tax Commission.

as a contractor rather than as a manufacturer. He maintains that the evidence showed that the company engaged in manufacturing as it is defined in 20 NYCRR 541.2(n). He further maintains that 90% of the company's total sales consisted of sales of new elevator cabs which were mainly sold to elevator companies, while only 10% of its total sales were capital improvement jobs where it acted as a

contractor. Petitioner asserts that the sales and use tax treatment of manufacturers and contractors is quite different. He notes that:

> "Whenever a contractor performs a capital improvement job, it is viewed as an end user for use tax purposes. Sec. 1101(b)(4); Reg. Sec. 526.6(b). Accordingly, it is required to pay use tax in respect of its own purchases (of items used in capital improvement jobs), and it may not charge customers which have capital improvement certificates any sales tax for its work . . . . By contrast, manufacturers are treated as vendors, rather than as end users. For this reason, virtually all of a manufacturer's purchases are exempt from sales or use tax. See Reg. Sec. 541.11(c)(4) (machinery and equipment exempt); Reg. Sec. 526.3 (materials exempt); Reg. Sec. 528.13(e)(1) (parts exempt); Tax Law Sec. 1105-B(a) (tools and supplies exempt). The only taxable purchases a manufacturer makes are for items not related to the manufacturing process, e.g., a light bulb or a desk and chair" (Petitioner's brief, pp. 28-29).

Petitioner contends that because the company is a manufacturer, it should not owe any taxes on fixed assets. He claims that the company is entitled to the exemptions under 20 NYCRR 541.11(c)(4) and 528.13(a)(4) for fixtures purchased by a manufacturer. He argues that the fixed assets reported on the company's depreciation schedule of its Federal income tax return were used in the manufacturing process.

Petitioner asserts that the company did not have to pay use tax on expense purchases because, as a manufacturer, it was exempt from use tax on purchases of supplies. He cites Tax Law § 1105-B(a). He asserts that "the auditor failed to distinguish between manufacturers and contractors in making an adjustment for expense purchases" (Petitioner's brief, p. 30).

He maintains that the percentage of 32% materials to sales used by the auditor as a basis for the computation of use tax on materials used in capital improvements was "artificially" high. He argues that the evidence shows that capital improvement jobs are more labor intensive, and the materials component was a smaller component of the sales price. He also contends that he

should not be held personally liable as a responsible person where only six exempt sales were unsubstantiated during the audit test period, which computed to be a noncompliance rate of 0.7% (margin of error). He maintains that the company was substantially in compliance with the law and he further suggests that the missing paperwork was most likely the result of human error rather than malfeasance.

E. The company was required to maintain records sufficient to verify all transactions, in a manner suitable to determine the correct amount of sales tax due (Tax Law § 1135[a]; 20 NYCRR 533.2). When a taxpayer's records are inadequate, the Division may select an audit method reasonably calculated to reflect the sales and use taxes due (Tax Law § 1138[a][1]; see, Matter of Grant v. Joseph, 2 NY2d 196, 206, 159 NYS2d 150, 157, cert denied 355 US 869). It is only necessary that sufficient evidence be produced to demonstrate that a rational basis existed for the auditor's calculations (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219). The burden is then placed upon petitioner to show, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

F. I have reviewed the auditor's workpapers and I find that the auditor conducted an in-depth audit of the company's records. The record reveals that he reviewed all the records made available to him by the company. He found that the company did not maintain adequate records, particularly in the areas of fixed asset purchases and materials used in capital improvement jobs (see, Findings of Fact "87", "88", "91" and "92"). The auditor used the company's Federal income tax returns, Forms 1120, for the years 1981 through 1986, as well as information supplied by the company's controller to determine the average percentage of materials used in capital improvement sales (see, Finding of Fact "92"). He also used Federal Form 4562, the depreciation schedule attached to the Federal Form 1120, to determine each year's fixed asset purchases (see, Finding of Fact "91"). The auditor made numerous requests for exemption certificates for the six capital improvement sales which he found to be

unsubstantiated in the audit test period (see, Finding of Fact "89"). The controller failed to produce any documents to substantiate the exempt nature of these six sales.

I find there was a rational basis for the auditor's calculations. His extensive workpapers indicate that he used the company's records to calculate the additional sales and use tax due.

G. Since it is concluded that the assessment was rational, whether petitioner has met his burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous must be addressed. Petitioner contends that the auditor incorrectly classified the company as a contractor when 90% of its sales were as a manufacturer. Petitioner is incorrect. The auditor did not erroneously conclude that the company acted as a contractor.

Petitioner testified that about 10% of the company's sales were remodeling jobs (see, Finding of Fact "83"). It is clear from the auditor's workpapers that he determined that approximately 10% of the company's sales represented capital improvement sales (see, Finding of Fact "92"). Petitioner contends that the auditor's determination that materials represented 32.9% of each capital improvement sale was too high. He argues that remodeling jobs were more labor intensive and that materials represent a smaller percentage of the sales price. The auditor testified that the job jacket for each capital improvement sale would list the material used in that particular project. He further testified that because the company did not have records which reflected the material used in each job, he had to rely on the Federal Form 1120 and the information supplied by the controller to make his determination (see, Finding of Fact "92"). Petitioner testified that approximately 15% of materials purchased during the year were used on remodeling jobs. This estimate was based only on the estimates made when he or his staff were preparing bids for jobs, not on actual records (see, Finding of Fact "86"). He failed to submit any documentary evidence to support his testimony. Exactness is not expected when the Division makes an estimation of tax due, as such accuracy was prevented by petitioner's failure to maintain adequate records (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, lv denied 44 NY2d 645, 406 NYS2d 1025; Matter of Markowitz v. State Tax

Commn., 54 AD2d 1023, 388 NYS2d 176, affd 44 NY2d 684, 405 NYS2d 454).

Petitioner contends that the auditor treated the company as a contractor when he calculated the additional use tax due on fixed asset purchases and expense purchases. He claims that the company, as a manufacturer, is exempt from sales and use tax on fixed assets used in the manufacturing process, as well as expense purchases.

Statutory exemptions are strictly construed against the taxpayer, who must demonstrate that the only reasonable interpretation of the provision provides his entitlement to the exemption (Matter of Grace v. State Tax Commn., 37 NY2d 193, 371 NYS2d 715, lv denied 37 NY2d 708, 375 NYS2d 1027; Matter of Old Nut Co. v. State Tax Commn., 126 AD2d 869, 511 NYS2d 161, lv denied 69 NY2d 609, 516 NYS2d 1025; Matter of Bredero Vast Goed N.V. v. State Tax Commn., 146 AD2d 155, 539 NYS2d 823, appeal dismissed 74 NY2d 791, 545 NYS2d 105). Petitioner argues that because the fixed assets are depreciated on the Federal return and only assets used in the business are depreciable, these assets were used in the manufacturing process. He also contends that because the auditor failed to distinguish between manufacturers and contractors in making an adjustment for expense purchases, the company has no liability for use taxes on expense purchases. Petitioner has failed to carry his burden of proving that the company was entitled to the exemptions available to a manufacturer in both the fixed asset area as well as the expense purchase area. He has made only general assertions. He has failed to submit any evidence which identifies the items comprising the fixed assets reported on the Federal Form 4562 depreciation schedule and which explains each item's use by the company. He has also failed to identify which of the recurring expense purchases were incorrectly taxed by the auditor and has failed to submit any documentary evidence concerning those purchases.

Petitioner's argument that he should not be held personally liable for unsubstantiated exempt sales because the auditor's computed margin of error was only 0.7% is meritless. The auditor reviewed the company's sales for the audit test period and determined there were 17 capital improvement jobs. He found that six of these jobs did not have exemption certificates

(Finding of Fact "88"). He made numerous requests for these exemption certificates; however, the company failed to produce them (Finding of Fact "89"). The company had the burden of proving that a particular sale was exempt from tax (20 NYCRR 532.4[b]). It was required by Tax Law § 1132(c) to obtain the exemption certificate for each job within 90 days of the completion of the job. Petitioner did not submit any substantiation concerning the disallowed exempt sales in the audit test period at the hearing. The auditor's use of the 0.7% margin of error to determine the disallowed exempt sales for the entire audit period is reasonable and should not be disturbed.

Petitioner has failed to prove, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (Matter of Meskouris Bros. v. Chu, supra; Matter of Surface Line Operators Fraternal Org. v. Tully, supra). His mere assertion that the audit was flawed, absent substantiation, fails to rise to the level of clear and convincing evidence of an unreasonable or erroneous audit method or result (Matter of Surface Line Operators Fraternal Org. v. Tully, supra). The sales and use tax, as modified by the Conciliation Order, is correct.

H. Tax Law § 1133(a) states that:

> "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article . . . ."

I. Tax Law former § 1131(1) defines "persons required to collect tax" and a "person required to collect any tax imposed by this article [Article 28]" to include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]."

J. It has been held that corporate office does not, per se, impose sales tax liability upon an officeholder (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 430; Matter of Unger, Tax Appeals Tribunal, March 24, 1994). Rather, whether a person is a responsible officer must be determined based upon the particular facts of each case (see, Matter of Cohen v. State Tax

Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448; Chevlowe v. Koerner, supra, 407 NYS2d at 429; Matter of Hall, Tax Appeals Tribunal, March 22, 1990, confirmed 176 AD2d 1006, 574 NYS2d 862; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, confirmed 162 AD2d 890, 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). Factors stated by the Division's regulations are: whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

The Tax Appeals Tribunal, in Matter of Constantino (Tax Appeals Tribunal, September 27, 1990), stated:

> "[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (Cohen v. State Tax Commn., supra, 513 NYS2d 564, 565; Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d 862, 865; Chevlowe v. Koerner, supra, 407 NYS2d 427, 429; Matter of William D. Barton, [Tax Appeals Tribunal, July 20, 1989]; Matter of William F. Martin, supra; Matter of Autex Corp., supra)."

K. Petitioner contends that he was not a responsible officer within the meaning of Tax Law § 1133(a) because he did not have full authority over the company's financial affairs. He contends that although he held the title of president, he:

> "was a figurehead president for 'business appearances' and did not exercise any control of the company after the Manocherian group purchased a controlling interest in it at the end of 1983" (Petitioner's brief, p. 39).

He argues that the evidence shows that he:

> "was instructed by the new owners to devote himself to sales and marketing and to leave the day-to-day operation of the business to the new owners and their designated representative" (Petitioner's reply brief, p. 17).

Petitioner asserts that Parvis Motamed, the Manocherian Group's representative, oversaw the

financial and day-to-day operation of the company.

Petitioner admits that he was authorized to sign checks; however, he maintains that his signature alone was not sufficient to draw funds on the corporate checking account. He contends that he did not sign checks unless authorized by Motamed to do so. He states that he was not allowed to have any involvement in, control over or knowledge of the company's finances after 1984. He maintains that Motamed and the company's controllers met with the outside accountants and he never participated in any of those meetings. He contends that after the 1984 takeover of the company, his exclusive focus was on sales and marketing and that he spent over half of his time on the road travelling.

He asserts that although he supervised the sales staff, he did not have the authority to hire or fire employees. He contends that evidence was presented that the company's employees "viewed Motamed as the person who was ultimately running the company on a day-to-day basis" (Petitioner's brief, p. 42). He states that he did not sign any sales tax returns.

Petitioner contends that "his minority stock interest in a corporation controlled entirely by the Manocherians and then Motamed was virtually valueless" (Petitioner's brief, p. 43). He asserts that he received nothing for the reduction in his shareholdings from 20% to 10% and was required to contribute cash to the company. He maintains that when he resigned from the company after it filed for bankruptcy, he received nothing for his shares and never recouped his investment. Furthermore, he asserts that, as a minority shareholder, he was not the keeper of the corporate records.

L. The audit covered the period September 1, 1981 through November 30, 1986. Petitioner's arguments concerning his status as a responsible officer focus on the period after the investment by the Manocherian Group, in late December 1983 or early 1984. I will first address whether petitioner was a responsible officer during the period September 1, 1981 through December 31, 1983.

Petitioner was a responsible officer during this period. He was president of the company, a position he had held since 1970. He had worked in the company all of his adult life, a

business founded by his father. The Klein family name was synonymous with the company's name (see, Findings of Fact "3" and "4"). He was not a figurehead president and he took an active part in all aspects of the business. He was owner of 50% of the company's stock. The owner of the remaining 50% of the stock was Gilbert Magaziner. Petitioner's role in the company was sales and marketing, while Mr. Magaziner had responsibility for the administrative and operational aspects of the business, including financial matters (see, Finding of Fact "6").

The record reveals that petitioner was involved in financial matters during this time and that he was aware of the financial difficulties the company suffered during the late 1970's through 1983. In fact, it was his attorney who found Fred Manocherian, a potential investor, in late 1983. Petitioner, not Gilbert Magaziner, negotiated with Mr. Manocherian about his potential investment in the company. It is significant that Mr. Manocherian purchased all of Mr. Magaziner's shares of the company, not petitioner's. The record is silent as to who had check-signing authority, who could hire and fire employees and who were members of the board of directors. The record does reveal that, in 1982, petitioner executed the consent which fixed the tax not previously assessed for the period June 1, 1976 through May 31, 1981 (see, Finding of Fact "7"). Both petitioner and Gilbert Magaziner executed the Form CT-6, subchapter S election form, which was effective for the period October 1, 1983 through December 31, 1983. They each received $74,748.00 as their distributive share of the company's loss.

It is clear that petitioner had sufficient authority over, involvement in and control over the financial affairs of the company to conclude that he had the duty to act on behalf of the business in complying with the requirements of Article 28 of the Tax Law

M. Petitioner has argued that his role in the company changed after the Manocherian Group's investment in the company in late 1983 or early 1984. He asserts that he was a figurehead president for business appearances who had no control, authority over or involvement in the day-to-day operations and financial matters of the business. He contends

that Parvis Motamed was responsible for the day-to-day operations of the company, including all financial matters. He also contends that he reported to Motamed on sales matters. Petitioner's arguments that he was not a responsible officer after the Manocherian Group's investment is meritless.

I see no change in petitioner's role in the company after the purchase of 75 shares of the company's stock in late 1983 or early 1984 by the Manocherian Group. He continued to be president of the company and to focus on sales and marketing as he had done in the past (see, Finding of Fact "20"). There is no evidence in the record that his duties as president were restricted in any way by either the corporation's by-laws or the board of directors. In fact, petitioner was one of the two members of the board of directors, Fraydun Manocherian was the other member (see, Finding of Fact "18"). It appears Mr. Motamed assumed the function Mr. Magaziner had performed (see, Findings of Fact "27", "36" and "37"). The record is silent as to what Motamed's position was in the company when he first joined it. It is also silent as to when he assumed the position of executive vice president. Petitioner was an integral part of this company. He had devoted his whole life to it and it had been his family's business for two generations. He was described as the rainmaker, the person behind the company's name and it was based on his reputation that sales were generated. It appears that if petitioner was not involved in the company, there would be very little, if any, business.

Petitioner's signature appeared on all checks issued by the company along with Motamed's; neither of them alone could issue a check (see, Finding of Fact "32"). Petitioner either signed each check or the signature stamp he had made was used on all the checks. It is unclear whether Motamed also had a signature stamp made as well.

Petitioner's reliance on Matter of Constantino (supra) is misplaced. There is no evidence in the record that petitioner would have lost his job if he inquired into financial matters. He was one of the highest paid officers of the company during this period (see, Finding of Fact "58"). He was a member of the board of directors, as well as a shareholder. It is clear from the record that petitioner chose not to be involved in the financial matters of the company, delegating that

authority to Motamed. Although petitioner executed nine consents to extend the statute of limitations for assessment of the sales and use taxes for the audit period over a number of years, he stated he was not concerned about the audit and understood that Motamed was handling it on behalf of the company (see, Findings of Fact "53", "54" and "100"). He stated that his decision on whether or not to sign a document as president of the corporation did not change after the investment by the Manocherian Group. If he was told that a document required the president's signature and he saw nothing wrong with it, he signed it (see, Finding of Fact "99"). In 1985, he signed a letter to the Division requesting an abatement of penalties for the period December 11, 1980 through August 31, 1983. This letter discussed in great detail the problems which the company was having with its finances, bookkeeping staff and the conversion to a new computer system. Petitioner acknowledged he read and signed this letter. He obviously had knowledge of the company's finances and its accounting and recordkeeping methods or he would not have signed this letter (see, Finding of Fact "55").

Petitioner never signed sales and use tax returns. The records reveals that they were always signed by the controller or a member of the bookkeeping staff (see, Finding of Fact "56"). However, he did sign the CT-38S, Corporation Information Report, for the years 1985, 1986 and 1987. Attached to each of these reports was the list of the seven shareholders, their respective interests in the company's stock and their respective distributive shares of the ordinary loss for each year. Petitioner, upon review of this document, would have been aware of the financial condition of the company (see, Finding of Fact "57"). He also reported his share of the loss on his personal income tax return each year (see, Findings of Fact "58").

Petitioner also contends that he knew nothing about the finances of the company. Yet he explained that he handled customer service as well as sales and marketing and that he had to assure customers when the company was late with deliveries or with payments (see, Finding of Fact "107"). He argues that he did not have authority to hire or fire after Motamed joined the company. The record is silent as to whether he ever had that authority prior to 1984.

Petitioner maintains that Motamed was in control of the company and is responsible for

the sales and use tax. He contends that he was a figurehead president who did not have authority or control over the finances because the majority shareholders would not allow him to have any authority. He cites to Matter of Turiansky (Tax Appeals Tribunal, January 20, 1994) and Matter of Napoli (Division of Tax Appeals, April 1, 1994) to support his position that he was not a responsible officer.[21] I disagree. The record clearly indicates that petitioner continued his role as head of sales and marketing and delegated the responsibilities of the day-to-day operations and finances to Motamed. There is no indication in the record that he ever asked about the finances or whether the taxes were being paid and was rebuffed. He made no inquiries into these matters, delegating them to Motamed. His delegation of authority argument must fail. Tax Law § 1133(a) allows for joint and several liability; therefore, more than one officer can be responsible for sales and use tax. The Tax Appeals Tribunal, in Matter of Kropf (Tax Appeals Tribunal, March 21, 1991), addressed the issue of responsible officer joint and several liability. The Tribunal stated:

> "[A]s the court in Blodnick noted, 'corporate officials responsible as fiduciaries for tax revenue cannot absolve themselves merely by disregarding their duty and leaving it to
>
> someone else to discharge' (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d 536, 538 quoting Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 451 NYS2d 301)" (Matter of Kropf, supra).

Petitioner is a responsible officer for the period after December 1, 1984. Based on a review of the record, petitioner is a responsible officer for the entire audit period, from September 1, 1981 through November 30, 1989.

N. Petitioner argues that the responsible officer collection device is not intended to be used for audit adjustments. He contends that personal liability should not be imposed on him for the amounts of the audit adjustments made long after the periods in issue. He maintains that there is no evidence that he did not act in good faith or with reasonable cause.

He further argues that he is not liable for the audit adjustments because he was not a

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[21]Matter of Napoli (supra) is an Administrative Law Judge determination and therefore is not binding precedent (see, Tax Law § 2010[5]).

responsible officer when they were determined. He asserts that, in 1989, he owned only 10% of the company's stock and that he was an employee in charge of sales and marketing with the figurehead title of president. He maintains that, at the time that the additional liability accrued, he "did not, and could not, control the payment of the amount the Division of Taxation said was due even assuming it was correct" (Petitioner's brief, p. 36).

Petitioner's arguments are meritless. He has not cited to any authority to support these two arguments. I do not find any such restrictions in either Tax Law §§ 1138 or 1133 (see, Conclusions of Law "C" and "H"). The statutory framework concerning liability for sales tax is straightforward and clearly imposes personal liability for sales tax on responsible officers of corporations (see, Blodnick v. State Tax Commn., supra; Cohen v. State Tax Commn., supra; Chevlowe v. Koerner, supra; Matter of Laschever, Tax Appeals Tribunal, March 23, 1989).

Petitioner was a responsible officer who was under a duty to comply with any provision of Article 28 of the Tax Law. He has failed to prove he was not a person responsible for the collection and payment of sales and use tax for the period September 1, 1981 through November 30, 1989 pursuant to Tax Law §§ 1131 and 1133 and therefore is personally liable for the sales and use tax, as modified by BCMS, due on behalf of the company.

O. Petitioner has asserted that the sales tax assessments against him are time-barred because the consents to extend the statute of limitations were executed on behalf of the company and not on his personal behalf. He argues that he executed the consents as agent, not principal, of the company. He maintains that "neither the law of principal and agent nor the law of joint and several liability provides any basis for concluding" that he waived the statute of limitations on his personal liability when he signed the consents (Petitioner's reply brief, p. 11).

Petitioner is incorrect. The sales tax assessments against him are not time-barred. Tax Law § 1147 provides that, prior to the expiration of the period for the assessment of additional tax, a taxpayer may consent in writing to an extension of the period within which additional tax due may be determined. Such consent by a corporation extends the liability of its corporate officers required to collect tax under Tax Law §§ 1131(1) and 1133(a) for the period consented

to by the corporation. Petitioner, as president of the company, executed the nine consents which extended the statute of limitations (see, Findings of Fact "53" and "54"). Petitioner has been determined to be an officer required to collect the tax pursuant to Tax Law §§ 1131(1) and 1133(a). Therefore, his liability has been extended for the same period as the company's (see, Matter of Galione, State Tax Commn., October 6, 1982; Matter of Playmor Amusement Co., State Tax Commn., November 5, 1982; Matter of Karakashian, State Tax Commn., November 12, 1986; Matter of Beit Najjar, Inc., State Tax Commn., February 27, 1987).

P. Conclusion of Law "J" summarizes the factors which are considered relevant in determining whether an individual is responsible for the sales and use taxes from a corporation.

Section 685(g) of the Tax Law provides:

> "Willful failure to collect or 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."

Section 685(n), in turn, furnishes the following definition of "persons" subject to the section 685(g) penalty:

> "[T]he 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."

Q. The question of whether someone is a "person" under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. Factors which should be considered are, inter alia, whether the particular individual signed tax returns, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; see, Matter of MacLean v. State Tax Commn., 69 AD2d 951, 415 NYS2d 492, 494, affd 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (Matter of Amengual v. State Tax Commn., 95 AD2d

949, 464 NYS2d 272, 273; see, Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799, 801).

R. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had or could have had sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (Matter of Constantino, supra; Matter of Chin, Tax Appeals Tribunal, December 20, 1990). Furthermore, in the withholding tax situation, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g). More is required. As the Court of Appeals indicated in Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623), the test is:

> "whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes . . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required" (id., 396 NYS2d at 624-625; see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

It is equally true that "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge" (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

S. The burden of proof is on the taxpayer to prove that a tax assessment is improper (Tax Law § 689[e]). Petitioner asserts that he did not willfully fail to pay over withholding taxes for the period January 1, 1989 through April 7, 1989. He contends that he did not unreasonably or recklessly delegate his authority over corporate affairs. He maintains that there was a clear division of responsibility after Motamed joined the company and subsequently became its 90% shareholder, and that his role was limited to sales and marketing. He asserts that the evidence

shows that, after the Manocherians' takeover in 1984, he had no input, control over or knowledge of the financial affairs of the company. He avers that the evidence shows that Motamed operated and managed the business and only discussed with him those matters which he needed to know to bid on a job, such as the hourly rate and overhead factors -- "not the finances of the business in the sense of which creditors would be paid and when" (Petitioner's brief, p. 49). He maintains that he did not have knowledge of the nonpayment of sales and withholding taxes, and therefore he could not have intentionally violated a known duty to pay over the taxes.

Petitioner asserts that he became a figurehead president after the investment by the Manocherian Group and Motamed's subsequent acquisition of 90% of the company's stock in late December 1988. The record does not reflect that his responsibilities as president were in any way restricted after 1984. Petitioner had worked for the company his entire adult life. The company had been founded by his father. He had been president since 1970 and continued to retain that title after Motamed joined the company and subsequently acquired a 90% interest. In fact, he remained president until March 28, 1990, the day the company filed for bankruptcy and he tendered his written resignation. He has submitted no evidence to show that his responsibilities as president were in any way restricted by either the corporation's by-laws or by the board of directors after either the Manocherian Group's investment or Motamed's subsequent acquisition of the stock. The record clearly reflects that, after 1984, petitioner was one of two directors on the board. There is no evidence that, once Motamed became the majority shareholder, petitioner was removed as a director.

Petitioner contends that, after 1984, his role was limited to sales and marketing and that he did not have control of, authority over or involvement in the financial matters of the company. I do not see any change in petitioner's role within the company. Prior to 1981, petitioner was responsible for sales and marketing, while his equal partner, Gilbert Magaziner, had responsibility for the day-to-day operation of the business, including financial matters. Petitioner's role vis-a-vis the company did not change once Motamed joined the company. It

appears that Motamed assumed the function previously performed by Gilbert Magaziner. Petitioner was also one of the highest paid officers during this period.

Petitioner 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).

I will next address the issue of whether petitioner's failure to collect and pay over such tax was willful within the meaning of Tax Law § 685(g). The fact that one is determined to be a responsible officer does not necessarily mean that the person is liable for the taxes in issue (see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

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).

I find that petitioner did not prove that, as a responsible officer, he made a reasonable delegation of authority to ensure that the withholding taxes were paid. The record reflects that petitioner focused on the sales and marketing areas of the business and basically ignored the financial aspects of the business. He only skimmed documents given to him for his signature, he made no inquiries about the progress of the sales tax audit, and he did not consult with employees about financial matters. Petitioner has not identified to whom he delegated his duties with respect to the corporation's withholding tax responsibilities. He has not identified anyone on whom he relied within the company. It should be noted that, during this period, the company had numerous controllers. Petitioner, as president and board member, should have been aware of this fact and made some inquiries as to what impact, if any, that would have had on the business. There is no evidence in the record that he made any inquiries at all. The withholding tax penalty is being assessed against petitioner for the period January 1, 1989 through April 7, 1989. This period begins right after Motamed's acquisition of the Manocherians' interest in the company stock. There is no evidence in the record that petitioner ever made any inquiries as to what impact Motamed's acquisition would have on the financial aspects of the business. Assuming petitioner had, in fact, delegated his duties with respect to the corporation's withholding tax responsibilities to Motamed, he has not demonstrated that it was reasonable to rely on this person (see, Matter of Flax, supra).

Furthermore, petitioner did not prove that he could not easily have determined that the taxes were not paid. He was unaware of the failure to pay the taxes only because he failed to

inquire. Petitioner, as a responsible officer, cannot insulate himself from liability by such a "hear no evil, see no evil" policy (Matter of Flax, supra). Petitioner is liable under Tax Law § 685(g).

T. The last issue to be addressed is whether reasonable cause exists to abate the penalties and interest in excess of the minimum. Tax Law § 1145(a)(1)(iii) allows the Commissioner of Taxation to remit the penalties and interest in excess of the minimum rate if reasonable cause has been shown.

Petitioner contends that reasonable cause exists. He argues that the adjustments for the 1981 through 1986 periods were based on an audit, which was not completed until 1989, not on a failure to pay over taxes. Therefore, he could not be chargeable with knowledge in 1981 through 1985 that deposits or payments of sales and use tax were understated. In addition, he asserts that the auditor's conclusions are not free from doubt and his conclusions are still being contested. He notes that there is independent evidence to support his assertion; the original audit adjustments were reduced substantially by BCMS. He also contends that the auditor incorrectly classified the company as a contractor based on his misunderstanding of the definition of contractor.

Petitioner has failed to establish that there is reasonable cause. He has argued that reasonable cause exists because the additional tax assessed is a result of audit adjustments rather than a nonpayment of the tax. Petitioner has been found to be a responsible officer who was under a duty to collect the sales and use tax (see, Conclusions of Law "L" and "M"). The Appellate Division, Third Department, in Matter of Hall v. Tax Appeals Tribunal (176 AD2d 1006, 574 NYS2d 862), affirmed the Tribunal's holding that a responsible officer could be liable for penalty and interest in excess of the minimum. As noted by the Division, the Tax Appeals Tribunal has consistently held that the penalty provisions are applicable to a responsible officer (see, Matter of J & L Home Improvement Corp., Tax Appeals Tribunal, August 1, 1991; Matter of Basile, Tax Appeals Tribunal, December 2, 1993). Petitioner, as a responsible officer of the company, is liable for the penalties and interest assessed pursuant to

Tax Law § 1145(a)(1)(i) and (ii). It should be noted that the company has a history of filing sales and use tax returns late. 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 payment (see, Finding of Fact "97"). Petitioner, in 1985, requested an abatement of penalties for the period December 11, 1980 through August 31, 1983. He was aware at that time that the company had been filing its returns late, yet he made no effort to ascertain whether subsequent tax returns were timely filed with payments or not. There is no indication that, prior to his resignation from the company, he made any effort to determine whether all sales and use tax returns had in fact been filed. At the hearing, petitioner submitted and the Division accepted sales and use tax returns for delinquent periods which had never been filed by the company (see, Finding of Fact "81"). Based on the company's delinquent filing history, reasonable cause does not exist (see, 20 NYCRR former 536.1, now 20 NYCRR 536.5).

Petitioner's alternative argument is that because the audit adjustments are questionable, he should not be liable for penalties and interest in excess of the minimum. This argument is meritless. I have found that the auditor's adjustments were reasonable and sound (see, Conclusion of Law "G").

For all of the above reasons, petitioner has failed to establish that reasonable cause exists to abate the penalties and interest assessed pursuant to Tax Law § 1145(a)(1)(i) and (ii).

U. The petitions of Robert Klein are denied. The statutory notices of determination (S890920915K and S890920916K), as modified by the Conciliation Order, are sustained; the statutory Notice of Deficiency (L-006881350-7) was cancelled by the Division as indicated in Finding of Fact "80"; Notice of Deficiency number L-006881351-7 is sustained and statutory notices of determination numbers L-006901019-2, L-006901020-2, L-006901021-1, L-006901022-9, L-006901023-8 and L-006901024-7, as reduced by the Division's concession of the taxes in Finding of Fact "81", are sustained; Notice of Deficiency number L-006318148-6 was not petitioned and the Division of Tax Appeals has no jurisdiction to render a

determination thereon.

DATED: Troy, New York
February 6, 1995

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE