

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MICHAEL LARDNER :
for Redetermination of a Deficiency or for Refund of New : DETERMINATION
York State and New York City Personal Income Taxes : DTA NO. 820490
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Period January 1, 2002 :
through September 30, 2002 and for Revision of a :
Determination or for Refund of Sales and Use Taxes :
under Articles 28 and 29 of the Tax Law for the Period :
March 1, 2002 through May 31, 2003. :
:

Petitioner, Michael Lardner, 56 Dryden Road, Montclair, New Jersey 07042, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period January 1, 2002 through September 30, 2002 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2002 through May 31, 2003.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York, on November 9, 2005 at 10:30 A.M., with all briefs submitted by February 23, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Sweeney Lev, LLC (Dennis M. Haase, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael J. Hall, Esq., of counsel).

ISSUE

I. Whether petitioner, Michael Lardner, is liable for the penalty asserted against him pursuant to Tax Law § 685(g) with respect to New York State withholding taxes due from Atlantis Imaging Corporation for the periods ended March 31, 2002 and September 30, 2002.

II. Whether petitioner is liable for the sales and use taxes due on behalf of Print Ink Corporation as a person responsible for the collection and payment of sales and use taxes pursuant to Tax Law §§ 1131 and 1133 for the quarters ended May 31, 2002, August 31, 2002 and November 30, 2002.

FINDINGS OF FACT

Petitioner submitted three numbered proposed findings of fact. The first has been incorporated into the findings below and the third has been excluded because it was conclusory in nature. The second proposed finding has been incorporated to the extent it was consistent with the record, but characterization of Mr. Freda as a “nonvoting shareholder” was excluded.

1. Petitioner was involved in the printing industry for many years prior to the collective period in issue for both the sales and use and withholding taxes, December 1, 2001 through May 31, 2003.¹

2. Between 1984 and 1990, petitioner managed a printing company called City Imprint, which he left to start a design studio with his wife, which they operated until 1995. While conducting business for both of these entities, petitioner was aware of the responsibility for collecting sales tax on the sales of tangible personal property and personally handled finances,

¹It should be noted that the statutory notices in the record, and which grant the Division of Tax Appeals jurisdiction to hear this matter, specifically refer to taxes due only for the quarters ended May 31, 2002, August 31, 2002 and November 30, 2002 for sales and use taxes and for the periods ended March 31, 2002 and September 30, 2002 for withholding tax. Sales taxes due for the period December 1, 2002 through May 31, 2003 were canceled by stipulation of the parties.

which included negotiating loans and addressing cash flow issues. He had responsibility for hiring and firing employees as well.

3. On or about July 1, 1995, petitioner and Mark Kloda (“Kloda”) merged their separate printing companies and formed Atlantis Imaging Corporation (“Atlantis Imaging”), with each of them owning a 50-percent share of the business. In 1998, petitioner and Kloda formed a second company, Atlantis Color Services Corporation (“Atlantis Color”), which provided printing and other graphic products for the jewelry industry. Both companies operated in lower Manhattan.

4. The World Trade Center attacks on September 11, 2001 had a severe, negative economic impact on the printing industry in lower Manhattan, including the companies owned by petitioner and Kloda. With shrinking profits, petitioner and Kloda brought in a new partner, Edward Boginsky (“Boginsky”), who received an equal share in Atlantis Imaging and Atlantis Color.

5. In addition, the three men started a new company, Print Ink Corporation, incorporated on November 19, 2001, which was intended to print postcards and books for the fashion industry, reflecting Mr. Boginsky’s past relationship with that industry. Mr. Boginsky kept a very active role in these accounts, to the exclusion of petitioner in the affairs of Print Ink. In fact, petitioner’s requests to view the records of the business were denied by Frieda Kloda, the bookkeeper.

Boginsky used Print Ink as a conduit for continuing his business with the fashion industry. The name Print Ink was chosen to attract clientele in that industry. From the beginning Mr. Boginsky’s actions underscored his control of Print Ink and its business operations. He took the office of president, handled the day-to-day management, signed the tax returns for the company and prevented access to the company’s records by petitioner.

6. Petitioner's involvement with the operations of Print Ink appeared to be solely his designation as an officer and shareholder of the corporation, although he signed a factoring agreement with Entrepreneur Growth Capital LLC ("EGC") as president of Atlantis Imaging which said that Print Ink was a "DBA" or "tradename" used by Atlantis Imaging. It is clear from the agreement that the accounts receivable of Print Ink were intended to be included in those accounts subject to factoring, although no officer, director or shareholder executed the agreement on behalf of Print Ink.

7. Pursuant to the terms of the First Amendment to Shareholders' Agreement, dated January 1, 2002, Richard Freda, a prepress manager for Atlantis Imaging and Print Ink since 1998, became a fourth shareholder in Print Ink Corp., receiving 50 shares of stock, or a 25% share for a stated purchase price of \$500,000.00. The Amendment referred to a Shareholders' Agreement and a Master Agreement, both dated November 19, 2001, but neither were placed in evidence.

8. Paragraph "4" of the Amendment stated that the Shareholder Agreement of November 19, 2001 had been amended by the deletion of language calling for the "unanimous vote of the directors" and replaced by the phrase " the affirmative vote of three (3) out of the four (4) directors."

9. Subsequent to Mr. Freda's joining the company in January 2002, he and petitioner participated in meetings with the other directors, but no corporate minutes were entered into evidence. Meetings among the directors were informal and took place without advance notice, and petitioner actively participated in the decision-making process on behalf of the companies,²

²When the term "companies" is used herein, it refers to Print Ink, Atlantis Imaging and Atlantis Color. It appears from testimony and documentation that they shared the same directors and shareholders. The relationship between the companies may have been explained in the Master Agreement or Shareholders Agreement referred to in

but was frequently outvoted by Mr. Boginsky and Mr. Kloda. Although a 25% shareholder, director and officer, Mr. Freda did not believe he had the ability to vote on issues affecting the corporation he owned despite the fact that the First Amendment to Shareholder Agreement did not mention his lack of voting rights.

10. One such decision with which petitioner disagreed was the hiring of 17 employees who had formerly been employed by Mr. Kloda in a separate business. This included Mr. Kloda's sister, Frieda Kloda, who assumed bookkeeping responsibilities for the companies in early 2002.

11. During the period in issue, petitioner had the authority to sign checks on behalf of Atlantis Imaging and did so on an "as needed" basis. He executed a bank signature authorization for North Fork Bank on July 3, 2002 as president of Atlantis Imaging. Also, petitioner had the authority to hire and fire employees, although he only terminated three individuals at the specific request of Kloda and Boginsky.

12. During 2001, petitioner borrowed \$50,000.00 from his parents and established a \$27,000.00 home equity line of credit, both of which he contributed to the business. Subsequently, in mid-2002, petitioner extended his investment, contributing \$200,000.00 from a home equity loan and \$50,000.00 from a loan from his mother-in-law. In addition, petitioner used his private credit to purchase supplies.

13. With the companies facing financial peril, Atlantis Imaging entered into an agreement with EGC whereby Atlantis Imaging agreed to sell its interest in certain of its accounts receivable and those of Atlantis Color, Print Ink and National Offset Plate Service, Inc. in order to raise cash (the "factoring agreement"). The agreement, entitled "Invoice Purchase and Sale

the First Amendment to Shareholders' Agreement, but those records were not submitted into evidence.

Agreement,” was executed by petitioner on July 1, 2002, as president of Atlantis Imaging, on behalf of all the companies, although his legal authority to do so was not explained. In connection with this agreement, petitioner executed a personal guaranty, a personal financial statement and a background information questionnaire.

14. Petitioner’s 2001 New York State Nonresident and Part-Year Resident Income Tax Return indicated wages from Atlantis Imaging of \$119,365.42, nonpassive losses from the companies of \$65,700.00 and a refund due of \$11,314.00. For 2002, petitioner’s New York Nonresident and Part-Year Resident Income Tax Return indicated wages from Atlantis Imaging of \$53,789.92, a nonpassive loss from Atlantis Imaging of \$161,544.00 and a refund due of \$3,656.00. The 2002 personal income tax return did not reflect a loss of \$372,036.00 set forth on the form K-1 attached to the 2002 corporation tax return of Atlantis Imaging or the loss in the sum of \$5,112.00 from the form K-1 attached to the 2002 corporation tax return of Print Ink. No testimonial or documentary evidence explained these discrepancies.

15. During the audit period, petitioner had the authority to, and did, sign various documents filed with the Division, including the Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return of Atlantis Imaging for the period January through March 2002; the 2001 New York S Corporation Franchise Tax Return for Atlantis Imaging; and the sales tax registration application for Atlantis Imaging, dated October 4, 1995. The New York S corporation franchise tax returns filed for the year 2002 for both Print Ink and Atlantis Imaging were signed by an unknown individual on August 27, 2003, after petitioner had left the companies.

16. Also in 2002, when the companies faced mounting debt, it was decided to pursue a loan from the U.S. Small Business Administration on behalf of Atlantis Imaging, which was

approved in December 2002. At least part of the proceeds were earmarked for taxes, according to the loan documents. When payment of the proceeds of the loan in the sum of \$601,700.00 was received in 2003, it is not clear how the proceeds were applied. Petitioner had departed the companies on or about April 30, 2003 according to the terms of the Separation Agreement he executed on March 5, 2003.

17. During shareholders' meetings in which the mounting debt was discussed, the priority of creditors was considered. First priority was given to payroll, after which the suppliers were paid to assure a steady stream of raw materials to keep the business in operation. Other creditors, like the Division of Taxation, were assigned lower priority although the importance of paying payroll and sales taxes was not overlooked.

18. During the period in issue, the companies operated a division called "Bartelby's" which was managed by petitioner. Bartelby's was a variable or static, short-run digital printing operation that was not printing-plate based.

19. On March 5, 2003, petitioner entered into an agreement with Atlantis Imaging, Atlantis Color, Print Ink, Mr. Kloda, and Mr. Boginsky whereby the companies would cease all involvement with Bartelby's and allow petitioner to continue to operate that business on his own while simultaneously terminating his involvement with the other companies. Petitioner's termination date was set forth as April 30, 2003. Pursuant to the terms of the agreement, certain assets of the companies relating to Bartelby's were to have been transferred to petitioner and he promised to pay up to \$250,000.00 of the companies' outstanding payroll and sales tax obligations. In addition there were provisions for the transfer of a lease and sublease between the parties, delineation of business operations each company would pursue, covenants not to compete and compensation to be paid to petitioner. However, due to severe financial pressures

on the corporations and the individuals, the parties never discharged their duties and obligations under the agreement, other than that petitioner surrendered his shares in the companies.

20. The Division of Taxation placed in evidence five tax returns: three sales and use tax returns for Print Ink Corp. and two withholding tax returns for Atlantis Imaging Corp. The sales and use tax returns for Print Ink Corp. stated the following information:

| Quarter Ending | Date Filed | Taxable Sales | Sales and Use Tax Due |
|----------------|------------|---------------|-----------------------|
| 5/31/2002 | 10/21/2002 | \$212,066.00 | \$17,495.45 |
| 8/31/2002 | 6/10/2003 | 199,364.00 | 16,447.55 |
| 11/30/2002 | 6/10/2003 | 381,128.00 | 31,443.03 |

Only the return for the quarter ended May 31, 2002 was signed and dated (October 21, 2002) by the company president, Edward Boginsky, while the other two were unsigned and undated.

The quarterly combined withholding, wage reporting and unemployment insurance returns for Atlantis Imaging stated the following information:

| Quarter Ended | Date Return Filed | Withholding Tax Paid | Withholding Tax Due |
|---------------|-------------------|----------------------|---------------------|
| 3/31/2002 | 4/30/2002 | \$29,983.67 | -0- |
| 9/30/2002 | 10/31/2002 | 6,156.66 | 20,206.45 |

The withholding tax return filed for the quarter ended March 31, 2002 was signed by petitioner as president of Atlantis Imaging. The return for the quarter ended September 30, 2002 was signed by Edward Boginsky as vice president of Atlantis Imaging.

21. On January 20, 2004 the Division of Taxation issued to petitioner five statutory notices which set forth the following information:

| Type of Notice | Period Ended | Tax Article(s) | Corporation | Tax/Penalty Due |
|----------------------|--------------|----------------------|---------------------|-----------------|
| Notice of Deficiency | 3/31/2002 | 22/30 Withholding | Atlantis Imaging | 22,928.66 |

| | | | | |
|----------------------|------------|----------------------|---------------------|-----------|
| Notice of Deficiency | 9/30/2002 | 22/30 Withholding | Atlantis Imaging | 20,136.35 |
| Determination | 5/31/2002 | 28/29 Sales | Print Ink | 17,495.45 |
| Est. Determination | 8/31/2002 | 28/29 Sales | Print Ink | 17,495.45 |
| Est. Determination | 11/30/2002 | 28/29 Sales | Print Ink | 17,495.45 |

CONCLUSIONS OF LAW

A. Petitioner was issued two notices of deficiency for withholding taxes due from Atlantis Imaging for the periods ended March 31, 2002 and September 30, 2002. He was also issued three notices of determination for sales and use taxes due from Print Ink for the quarters ended May 31, 2002, August 31, 2002 and November 30, 2002. Therefore, petitioner's liability for each type of tax from each of the companies must be examined separately. Additionally, petitioner challenged the validity and correctness of the four returns he did not sign, specifically questioning the amount of tax due set forth thereon.

B. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director, employee or manager . . . is under a duty to act for such corporation . . . in complying with any requirement of [article 28]" (Tax Law § 1131[1]).

C. The determination that an individual is a responsible person depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 183, 368 NYS2d 448, 451; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial

income from the corporation or stock ownership (*Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NYS2d 822, 513 NYS2d 1027; *see*, 20 NYCRR 526.11[b][2]; *Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Matter of Rosenblatt v. State Tax Commn.*, 114 AD2d 127, 498 NYS2d 529, *revd in part on dissenting opn below* 68 NY2d 775, 506 NYS2d 675).

D. In *Matter of Vogel v. Department of Taxation and Finance* (98 Misc 2d 222, 413 NYS2d 862, 865), the court stated:

The general language of section 1131 (subd. 1), defining persons who are required to collect taxes, includes only those officers of a corporation who are 'under a duty to act for such corporation.' The resolution of whether an officer is under a duty to act, then, turns on a factual determination.

Indicia of this duty would include factors which directly relate to compliance with Article 28, such as the officer's day-to-day responsibilities and involvement, with the financial affairs and management of the corporation, his knowledge of such matters, the officer's duties and functions outlined in the certificate of incorporation and the bylaws, and the preparation and filing of sales tax forms and returns. Furthermore, in situations involving closely held corporations, as in the present case, an officer's knowledge of the corporate affairs and his benefits received from corporate profits would be extremely important considerations. (Citations omitted.)

Indeed, the Division's own regulations define a person under a duty to act on behalf of a corporation as follows:

[g]enerally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act. (20 NYCRR 526.11[b][2].)

E. The evidence in this case did not establish that petitioner was a person liable for the collection and payment of sales and use taxes on behalf of Print Ink. The First Amendment to the Shareholders' Agreement indicated that petitioner owned 50 shares of the stock, or a 25% share, of Print Ink and held the office of executive vice president as of January 1, 2002. Petitioner's Schedule K-1, attached to Print Ink's 2002 New York S Corporation Franchise Tax

Return, confirmed petitioner's percentage of ownership and listed his share of the company's losses as \$5,112.00.

In addition, petitioner signed the factoring agreement with Entrepreneur Growth Capital, LLC, as president of Atlantis Imaging with the authority to factor the accounts of Print Ink, which was listed as a "DBA" or "tradenname" in the background information provided to EGC. This designation in the agreement was inconsistent with the credible testimony adduced at hearing and other documentation in the record, specifically the tax returns, which indicated that Print Ink was a separate and distinct corporate and legal entity. This cannot be ignored based only on the inconsistent characterizations in the factoring documentation. Simply stated, the EGC factoring agreement sought to bind Atlantis Imaging, Atlantis Color, Print Ink and a company called National Offset, but was signed by petitioner only in his capacity as president of Atlantis Imaging. In contrast, the Separation Agreement, by and among Atlantis Imaging, Atlantis Color, Print Ink, petitioner, Mark Kloda and Edward Boginsky, was signed by all of the individuals and the presidents of each company. Therefore, the weight to be attached to the factoring agreement vis-a-vis petitioner's responsibility for the sales and use taxes determined to be due from Print Ink is seriously diminished.

During 2002, petitioner received no income from Print Ink, neither prepared nor signed tax returns on its behalf, had little if anything to do with its day-to-day operations and benefitted only to the extent of the \$5,112.00 business loss he received on the Schedule K-1 for the year 2002, and his income tax return for that year indicated a loss only from Atlantis Imaging. There was no evidence he issued any checks for Print Ink.

As petitioner credibly testified, Print Ink was created to manage the accounts brought to the companies by Mr. Boginsky, and Boginsky used the company as a conduit for continuing his

business which was specifically tailored to the fashion industry, even insisting that the name be of his choosing to comport with his clientele. Mr. Boginsky was covetous of his business and demanded the separate corporate entity to underscore his dominant ownership interest and control. He did not want his fashion industry business merged with the business operations of Atlantis Imaging. He took the title of president and excluded petitioner from day-to-day management and access to its records. Petitioner did not have, nor could he have exerted, sufficient authority and control over the business of Print Ink to be considered a person under a duty to collect and remit the unpaid taxes in issue. (*See, Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990.)

Consistent with these conclusions, Mr. Boginsky signed and filed (apparently without payment) the sales and use tax return on behalf of Print Ink for the quarter ended May 31, 2002, indicating sales tax due of \$17,495.45. Based on this information provided by Mr. Boginsky, this same amount was then used by the Division to generate the two notices of estimated determination for the quarters ended August 31, 2002 and November 30, 2002.

Although it would have been helpful to have had access to the original Shareholders' Agreement and Master Agreement, dated November 19, 2001, given the animosity among the corporate officers and petitioner's departure in April 2003, it was understandable why petitioner was not able to procure these corporate documents.

F. With respect to the sales and use tax returns in evidence, it is noted that petitioner specifically challenged their correctness during the introduction of the jurisdictional documents by the Division. It appears that the Division accepted the amounts as filed for the quarter ended March 30, 2002, but inexplicably rejected the amounts stated on the returns for the quarters ended August 31, 2002 and November 30, 2002 and apparently chose to utilize the amounts for

the quarter ended March 30, 2002 for all quarters in issue. However, since petitioner has been found not liable for the sales and use taxes due on behalf of Print Ink Corp., the rational basis for this methodology will not be discussed further since the issue has been rendered moot.

G. Tax Law § 685(g) 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.

Tax Law § 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, 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, manage or member is under a duty to perform the act in respect of which the violation occurs.

H. 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 considered are 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, 231, 412 NYS2d 186, 188; *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, 950, 464 NYS2d 272, 273; *see, Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 988, 417 NYS2d 799, 801).

I. Similar to the sales tax analysis, 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). In addition, and unlike the sales and use 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). As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623, 624-625), 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. (*See also, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

J. The burden of proof is on petitioner to prove that the tax assessment is improper (Tax Law § 689[e].) Petitioner asserts that he was not a "responsible party" as determined by the Division and that he did not willfully fail to pay over withholding taxes for the periods in issue, but the facts demand a contrary conclusion.

The issue with respect to petitioner's liability for Atlantis Imaging's withholding taxes indicated significantly different circumstances than those presented with Print Ink. While

petitioner's involvement with Print Ink was passive, limited and nominal, and his access to its books and records denied by Mr. Boginsky, his role with respect to Atlantis Imaging indicated an active management position as a shareholder, director and officer with daily responsibilities that included writing checks, signing tax returns, entering into contracts wherein he bound the company to specific financial obligations, and participation in the policy decisions made by the board of directors, regardless of his vote on any specific issue. Petitioner derived his entire wage income as reported on his 2001 and 2002 New York State income tax returns from Atlantis Imaging and made very substantial capital contributions at various times between 1995 and 2003.

K. It is also determined that petitioner's failure to pay the tax was willful. 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, supra*). However, the willfulness standard applicable to responsibility for withholding tax "is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else" (*Matter of Gallo*, Tax Appeals Tribunal, September 9, 1988).

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, a person's failure to withhold and pay over the tax has been held to be willful, notwithstanding his lack of knowledge, because the person disregarded his corporate responsibilities including the responsibility to see that taxes were paid (*Matter of Capoccia v. State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Flax, supra*). Petitioner's argument that he was prevented from paying taxes and inspecting Atlantis Imaging's books by Mr. Kloda and Mr.

Boginsky is not consistent with the facts adduced at hearing. Petitioner and Mr. Kloda created Atlantis Imaging in 1995 and managed it successfully until 2001, without running afoul of the New York Tax Law. In 2001, petitioner and Mr. Kloda jointly decided to accept a third, equal owner of Atlantis Imaging, Mr. Boginsky, and with business slipping, the corporation began to experience serious economic challenges, including the World Trade Center attacks. The business demanded large infusions of capital, much from petitioner of his own volition, and more from a factoring agreement with EGC. Mr. Freda credibly testified that the shareholders agreed that certain priorities were established in the company's expenditures which clearly favored those which preserved the company's existence: payroll and suppliers. There was no question that petitioner and the other shareholders, officers and directors were well aware of the requirement to pay withholding taxes, but the overriding concern was the very existence of the business, in which petitioner continued to work very hard until his departure in April 2003, albeit at great financial loss and considerable debt incurred. They simply chose not to pay the withholding taxes. Therefore it is determined that the failure to pay the withholding tax was willful.

The fact that petitioner was outvoted on issues of financial management did not alter his responsibility to see that taxes, which he knew were due and owing, were paid. His decision to continue to participate in the business operation of Atlantis Imaging was a conscious choice to delay the payment of taxes while trying to build revenue and maintain the business as a going concern. The notices of deficiency issued by the Division were the direct consequence of his choices, and his years of business experience and paying taxes on behalf of Atlantis Imaging and other companies he owned made him well aware of these consequences.

L. The petition of Michael Lardner is granted to the extent that the two notices of estimated determination, dated January 20, 2004, and the Notice of Determination, dated January 20, 2004, with respect to sales and use taxes assessed, are canceled, but in all other respects the petition is denied, and the two notices of deficiency dated January 20, 2004, with respect to withholding tax, are sustained.

DATED: Troy, New York
August 17, 2006

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE