

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>MICHAEL LARDNER</b>	:	
for Redetermination of a Deficiency or for Refund of New York State and New York 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.	:	DECISION DTA NO. 820490

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Petitioner, Michael Lardner, and the Division of Taxation, each filed an exception to the determination of the Administrative Law Judge issued on August 17, 2006. Petitioner appeared by Sweeney Lev, LLC (Dennis M. Haase, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq. and Michael J. Hall, of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioner's exception. Petitioner filed a brief in opposition to the Division of Taxation's exception and a reply brief. The Division of Taxation filed a letter brief in lieu of a formal reply brief. Oral argument, at the request of both parties, was held on October 24, 2007 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## ***ISSUES***

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***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

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.<sup>1</sup>

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

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<sup>1</sup>It should be noted that the statutory notices in the record, 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.

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.

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.

In addition, the three men started a new company, Print Ink Corporation (“Print Ink”), 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 and in the affairs of Print Ink, to the exclusion of petitioner. 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.

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 “tradenname” 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.

Pursuant to the terms of the First Amendment to Shareholders’ Agreement (“Amendment”), 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 into evidence.

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.”

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,<sup>2</sup> but was frequently outvoted by Mr. Boginsky and Mr. Kloda. Although a 25% shareholder, director and officer, Mr. Freda did not believe that he had the ability to vote on issues affecting

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<sup>2</sup>When 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 the First Amendment to Shareholders’ Agreement, but those records were not submitted into evidence.

the corporation he owned despite the fact that the Amendment did not mention his lack of voting rights.

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.

During the period at 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.

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.

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 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.

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.

During the audit period, petitioner had the authority to, and did, sign various documents filed with the Division of Taxation ("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.

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. Payment of the proceeds of the loan in the sum of \$601,700.00 was received in 2003; however, 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.

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, such as the Division, were assigned lower priority although the importance of paying payroll and sales taxes was not overlooked.

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.

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.

The Division 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.

On January 20, 2004 the Division 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

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge determined that the evidence 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 Administrative Law Judge also found that petitioner did not have, nor could he have had, 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.

The Administrative Law Judge noted that similar to the sales tax analysis, the issue to be resolved was 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. 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 Administrative Law Judge determined that petitioner's 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. The Administrative Law Judge also found that petitioner derived his entire wage income as reported on his 2001 and 2002 New York State income tax returns from Atlantis Imaging and made substantial capital contributions at various times between 1995 and 2003.

The Administrative Law Judge found that there was no question that petitioner and the other shareholders, officers and directors were well aware of the requirement to pay withholding taxes, but their overriding concern was the very existence of the business, in which petitioner continued to work very hard until his departure in April 2003. The Administrative Law Judge determined that they simply chose not to pay the withholding taxes. Therefore, it was determined that the failure to pay withholding tax was willful.

### ***ARGUMENTS ON EXCEPTION***

On exception, the Division argued that the Administrative Law Judge erred in finding that petitioner was excluded in the affairs of Print Ink, and was denied access by Frieda Kloda, the bookkeeper, and by Edward Boginsky, his fellow shareholder. The Division also argued that the Administrative Law Judge erred in finding that petitioner's involvement with the operations of Print Ink appeared to be solely his designation as an officer and shareholder of the corporation and that no officer, director or shareholder executed the factoring agreement on behalf of Print Ink. Finally, the Division argued that the Administrative Law Judge erred in finding that petitioner's legal authority to act on behalf of all the companies was not explained.

The Division requests that the we reverse the Administrative Law Judge's holding that petitioner was not a responsible officer with regard to the sales tax due from Print Ink and affirm the Administrative Law Judge's holding that petitioner was a person required to remit withholding tax on behalf of Atlantis Imaging.

On exception, petitioner argued that he lacked any meaningful authority or sufficient control, authority or knowledge over the financial affairs of the companies to be deemed a responsible person and should not be classified as a "responsible person" for purposes of

TaxLaw § 685(g). Petitioner also argued that if he is deemed to be a responsible person, he did not act willfully in the failure to collect and pay over the taxes required to be paid.

Petitioner requests that the we grant full relief from all assessments and the two notices of deficiency and demand for payment of withholding taxes.

### ***OPINION***

#### **A. Print Ink**

Tax Law § 1133(a) provides, in pertinent part, that every person who is required to collect the tax imposed by Article 28 of the Tax Law is personally liable for that tax. A person required to collect such tax is defined by Tax Law § 1131(1), in pertinent part, as follows:

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].

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities, so that the individual would have personal liability for the taxes not collected or paid, depends on the particular facts of the case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022 [1987]).

The Administrative Law Judge correctly determined that petitioner was not a person liable for the collection and payment of sales and use taxes on behalf of Print Ink. Petitioner's involvement with Print Ink was passive, limited and nominal, and his access to its books and records were denied by Mr. Boginsky. Petitioner received no income from Print Ink during 2002, neither prepared nor signed tax returns on its behalf, had little to do with its day-to-day operations and benefitted only in the amount of a \$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 is no evidence that petitioner issued checks on behalf of Print Ink.

Therefore, we affirm the determination of the Administrative Law Judge that petitioner did not have authority or control over the business of Print Ink to be considered a person under a duty to collect and remit the unpaid taxes at issue.

Similar to the sales tax analysis, petitioner is required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (*cf.*, ***Matter of Moschetto***, Tax Appeals Tribunal, March 17, 1994; ***Matter of Turiansky***, Tax Appeals Tribunal, January 20, 1994).

#### B. Atlantis Imaging

Tax Law § 685(n) defines, in relevant part, the “persons” subject to the section 685(g) penalty:

an individual . . . or an officer or employee of any corporation (including a dissolved corporation) . . . , who as such officer, employee, . . . is under a duty to perform the act in respect of which the violation occurs.

Whether a corporate officer comes within the definition set forth in Tax Law § 685(n) is a fact-based inquiry similar to that used to determine responsibility for sales tax purposes (***Matter of Cohen v. State Tax Commn., supra***). In ***Cohen***, the court noted a variety of factors as indicative of responsibility, including: status as an officer, director, or shareholder; an individual’s knowledge of and control over the financial affairs of the business; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and whether the individual had a financial interest in the company and had check signing authority. However, the holding of corporate office alone does not, in and of itself, warrant the imposition of liability (*see, Chevlowe v. Koerner*, 95 Misc 2d 388 [1978]).

In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the petitioner was a shareholder and officer of the company, had check signing authority, had signed at least one tax return, regularly signed payroll checks, was involved full time in the corporation's business, had the authority to hire and fire employees and had invested money in the business. Further, Constantino knew that the corporation was not making its tax payments. However, we found Constantino not liable for taxes due, since other shareholders not only controlled the finances and operations of the corporation but precluded Constantino from taking any action in these areas. We determined that Constantino lacked the power to ensure that taxes were paid on behalf of the corporation.

In the instant matter, Mr. Lardner's 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. Petitioner derived his wage income as reported on his 2001 and 2002 New York State income tax returns from Atlantis Imaging and made capital contributions at different times between 1995 and 2003. Accordingly, we affirm the determination of the Administrative Law Judge and conclude that petitioner was a person under a duty to act for the corporation within the meaning of Tax Law § 685(n).

Having concluded that petitioner was under a duty to act for the corporation to ensure that withholding taxes were paid, we must now determine whether his failure to do so was willful within the meaning of Tax Law § 685(g).

Tax Law 685(g) provides:

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 tax evaded, or not collected, or not accounted for and paid over.

The test for willfulness 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 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 (*Matter of Levin v. Gallman*, 42 NY2d 32, 35 [1977]).

A responsible officer's failure can be willful, notwithstanding his lack of actual knowledge, if it is determined that the officer recklessly disregarded his corporate responsibilities including the responsibility to see that taxes were paid (*Matter of Gallo*, Tax Appeals Tribunal, September 9, 1988, *citing Matter of Capoccia v. New York State Tax Commn.*, 105 AD2d 528 [1984]; *see also, Matter of Ragonesi v. New York State Tax Commn.*, 88 AD2d 707 [1982]).

Petitioner was well aware of the requirement to pay withholding taxes, but the overriding concern was the existence of the business. Petitioner simply chose not to pay withholding taxes. Further, the fact that petitioner was outvoted on the issues of financial management did not alter his responsibility to see that taxes, which he knew were due and owing, were paid. This constitutes a reckless disregard of petitioner's corporate responsibility, and was willful within the meaning of Tax Law § 685(g) (*cf., Matter of Gallo, supra*).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Michael Lardner is denied;
2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is affirmed;
4. The petition of Michael Lardner is granted to the extent indicated in conclusion of law “L” of the Administrative Law Judge’s determination, but is otherwise denied; and
5. The Notices of Deficiency dated January 20, 2004, with respect to withholding tax, are sustained.

DATED: Troy, New York  
April 17, 2008

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/ Robert J. McDermott  
Robert J. McDermott  
Commissioner