

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD M. MUFFOLETTO	:	DECISION
for Redetermination of a Deficiency or for	:	DTA Nos. 801567
Refund of Personal Income Tax under Article 22	:	and 802284
of the Tax Law for the Years 1981 through 1983.	:	

Petitioner Richard M. Muffoletto, Meadowspring Road, Glen Cove, New York 11542, filed an exception to the determination of the Administrative Law Judge issued on August 1, 1996. Petitioner appeared by Lane and Mittendorf, LLP (Alan R. Wentzel, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq. and James Della Porta, Esq., of counsel).

Petitioner filed a brief on exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Jenkins concurs. Commissioner Pinto took no part in the consideration of this decision.

ISSUE

Whether petitioner is liable for penalty pursuant to Tax Law § 685(g) as a person required to collect, truthfully account for and pay over withholding tax with respect to Mansfield Contracting Corporation and/or National Mansfield Corporation who willfully failed to do so.

FINDINGS OF FACT

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

On July 30, 1984 the Division of Taxation ("Division) issued to petitioner, Richard M. Muffoletto, a Notice of Deficiency and a Statement of Deficiency asserting penalties in the aggregate amount of \$268,387.49. The amount of penalty asserted represents the unpaid withholding tax on wages of employees of an entity known as Mansfield Contracting Corporation for the following periods:

<u>PERIOD</u>	<u>AMOUNT</u>
12/16/81 - 12/31/81	\$ 50.53
02/01/82 - 05/31/82	109,622.98
01/08/83 - 06/30/83	<u>158,713.98</u>
Total	<u>\$268,387.98</u>

On March 25, 1985, the Division issued to petitioner a Notice of Deficiency and a Statement of Deficiency asserting penalties in the aggregate amount of \$840,195.73. The amount of penalty asserted represents the unpaid withholding tax on wages of employees of an entity known as National Mansfield Corporation for the following periods:

<u>PERIOD</u>	<u>AMOUNT</u>
07/01/82 - 12/31/82	\$436,085.83
01/08/83 - 05/31/83	404,109.90
Total	<u>\$840,195.73</u>

Petitioner does not challenge the dollar amounts of the penalties set forth above, or the periods to which such amounts pertain. Furthermore, petitioner does not contest the \$50.53 penalty for the period 12/16/81 through 12/31/81, indicating the same to represent a minor (and inadvertent) underpayment for which he acknowledges responsibility. However, petitioner does contest the balance of the penalties asserted.

With respect to Mansfield Contracting Corporation and the period 02/01/82 through 05/31/82 petitioner argues, and the Division does not dispute, that the withholding tax amount (\$109,622.98), upon which the penalty against petitioner is based, has been paid. While not contesting that he was a person responsible to collect, account for and remit withholding tax for such period petitioner maintains, relying on Matter of Mark Phillips, Officer of ATI Video Enterprises, Inc., (Tax Appeals Tribunal, May 11, 1995), that the penalty should be cancelled

because the tax has been paid. The Division in response argued at hearing that the tax was not timely paid for such period, and that petitioner thus remains liable for the penalty notwithstanding payment of the tax. The date of payment of the tax is not specified in the record. However, payment was made prior to October 12, 1983, while the Notice of Deficiency was not issued to petitioner until July 30, 1984. The Division did not further address this issue in its brief. As to the balance of the penalties and periods in question, petitioner maintains that due to the intervention and acts of others, he was effectively precluded from paying the taxes and thus should be excused from liability premised on such nonpayment.

During all of the periods at issue herein, petitioner was the president and majority stockholder of a group of affiliated general and electrical contracting companies known collectively as the Mansfield Group ("Mansfield"). This group included the two entities noted above, Mansfield Contracting Corporation and National Mansfield Corporation.

Mansfield was engaged in public and private building construction, centered primarily around electrical contracting and the manufacture and installation of building automation and safety systems, including energy management systems, smoke and fire alarm systems, and the like. With the exception of work performed by technical employees servicing computer systems, and work performed by approximately ten electricians carrying out small office building tenant change contracts, Mansfield's work was covered by payment and performance bonds. These bonds covered more than 50 major contracts having a total contract value in excess of 69 million dollars. All but one of the bonds were issued by The Aetna Casualty and Surety Company ("Aetna"), with the exception being a bond issued by Insurance Company of North America ("INA") on a project for the New York State Dormitory Authority at Hunter College.

By late 1982, Mansfield had completed contract work valued at roughly 45 million dollars out of the 69 million dollar contract total. However, payments received as of such time amounted to only 39.8 million dollars. Thus, despite its projections that completion of all of the contracts would result in a surplus (profit) of approximately eight million dollars, the delay in receiving payments on completed work left Mansfield with a cash flow shortage in the third

quarter of 1982. A loan of 1.6 million dollars from Chemical Bank, which had provided previous financing on some of Mansfield's unbonded work, was not sufficient to cover petitioner's cash shortage.

In mid November 1982 Mansfield, through petitioner, approached Aetna and described the cash flow financial problem confronting Mansfield. Aetna's representative advised petitioner that Mansfield should prepare an analysis of its contracts and its financial situation for presentation to Aetna. In turn, a detailed analysis of Mansfield's contracts was prepared indicating that there were approximately 30 million dollars in payments to be received versus approximately 22 million dollars in costs to complete the contracts. Mansfield's analysis indicated a need for financing in an amount up to 3.5 million dollars to meet payroll expenses and vendor payables. Mansfield proposed to repay amounts advanced, after a six month standstill period, with interest over a five year term. Petitioner presented Mansfield's proposal to Aetna's representatives Eugene Ladd and Barbara Nimmich on December 7, 1982, explaining that state and federal withholding taxes and union benefits were due on jobs bonded by Aetna and that Mansfield needed funds to pay these items while it was awaiting payments under the contracts.

One week after its presentation to Aetna, and prior to Aetna's response, Mansfield ran out of money. Petitioner called Aetna in an attempt to obtain cash to meet Mansfield's December 16, 1982 payroll. Petitioner was referred to one Jerome Murray, a New York City attorney representing Aetna, who advised petitioner that if Aetna provided funding, all receipts on Aetna bonded jobs would belong to Aetna. Petitioner was also advised that any such contract payments received would not be allowed to be used for payment of taxes already due, notwithstanding that such receipts represented payments for work previously performed during periods and on jobs on which the tax liabilities had been incurred. Petitioner was advised by Mr. Murray that Aetna would advance funds to cover only net payroll, that is gross wages less payroll taxes and union benefits. This advice appears to be inconsistent with an Aetna proposal

to Mansfield, made at a meeting two days earlier, in which Aetna indicated that it would pay all labor and associated tax and union costs on bonded jobs.

Aetna sent its accountants to Mansfield's offices to review Mansfield's books and records and determine how much money would be advanced, both to pay net payroll and to pay vendors. With respect to vendors, a determination was made by Aetna as to which were critical, non-critical and deferrable, and funds were advanced only for the vendors deemed critical. Mr. Murray dictated a letter, to be signed by petitioner on behalf of Mansfield, requesting the funds as determined above. This procedure continued through the end of December 1982, and Aetna's accountants reviewed every check issued by Mansfield to determine that the Aetna advanced money was being spent only in accordance with the procedure just outlined.

As part of the above procedures, Aetna required Mansfield to open a "joint control bank account" at the Bank of New York, into which account receipts from Aetna bonded jobs were to be deposited. During the initial stages, receipts on bonded jobs were accumulated in this account while Aetna considered its position. At this time Aetna, through Mr. Murray, wanted to know whether petitioner would be able to convince the Internal Revenue Service (hereinafter "IRS") to allow additional time to pay past due withholding taxes. Petitioner was, on behalf of Mansfield, trying to work out a payment schedule with the IRS to permit Mansfield to continue operating. However, Aetna rejected a January 4, 1983 proposal made by petitioner which, contingent on reaching an appropriate payment schedule with the taxing authorities vis-a-vis past due taxes, would have seen Aetna advancing full ongoing payroll amounts, including taxes and union benefits, and allowing incoming contract receipts on bonded jobs to be used in meeting the past due tax payment schedule.

Notwithstanding the rejection of his proposal, petitioner continued to try to reach an agreement with the IRS regarding past due taxes. On January 11, 1983, petitioner met with IRS representative Anthony Venetz and reached an agreement whereby an immediate payment of approximately \$500,000.00 would satisfy past due federal taxes for all Mansfield companies except National Mansfield Corporation. With respect to National Mansfield Corporation, the

agreement called for an initial payment of \$75,000.00, with twelve additional monthly installment payments of \$50,000.00 each starting February 1, 1983. Petitioner had invited Aetna's representatives to attend this meeting, but they did not. However, Mr. Venetz telephoned Aetna's Eugene Ladd to obtain assurances that if Mansfield fell short in its monthly installments, Aetna would advance funds to meet such installments, noting that since Aetna controlled the receipts on bonded jobs (the bulk of Mansfield's work and receipts) Aetna's cooperation was necessary in order to assure fulfillment of the agreement. According to a memo by Mr. Venetz, he received the necessary assurances from Mr. Ladd. In addition, Mansfield notified Mr. Murray and other Aetna representatives of the terms of the agreement with the IRS.

Upon reaching this agreement, petitioner took all available funds in Mansfield's bank accounts, including all the funds in the joint control account, and paid them over to the IRS. This payment totalled slightly less than \$500,000.00 because Mansfield did not have the full amount available in cash.

In response to the foregoing agreement and payment to the IRS, Mr. Murray and Aetna's other representatives were angry that receipts from bonded jobs had been used in payment of past due taxes. Aetna demanded that the money paid be returned, repudiated Mr. Ladd's assurance of support for the monthly payments, and demanded that the joint control account be changed such that checks could be drawn on such account only with the presence of Aetna's signature thereon (either alone or in addition to petitioner's signature).

At this point in time (mid-January 1983), petitioner accused Aetna of destroying his business because of Aetna's refusal to pay vendors for materials to be delivered to job sites, its refusal to sign a long-term agreement for funding to establish stability, and its insistence (through Mr. Murray) upon not funding the agreement with the IRS so as to pay off back taxes. By a letter dated January 17, 1983, petitioner advised Aetna that he intended to close down Mansfield's operations effective January 19, 1983. Petitioner listed all union benefits and taxes which were due on Aetna bonded projects for the net payrolls previously financed by Aetna. In this regard, evidence in the record indicates that Aetna representatives did not dispute the

obligation to apply receipts on the bonded projects to tax liability (said funds being subject to a trust for the payment of, inter alia, taxes), at least for those payrolls which had been financed (as net payrolls) by Aetna. It also appears that miscommunication among Aetna's representatives may have led to a situation where one of such representatives believed that an escrow account for the payment of taxes on Aetna funded payrolls had been established when in fact no such account had been created or funded.

In response to petitioner's threat, Aetna representatives asked petitioner not to close down Mansfield's operations. Petitioner testified that Aetna completed the paperwork to require an Aetna signature on all checks drawn on the joint control account. However, the record does not contain any contemporaneous documentary evidence (bank resolutions or signature cards) showing that such paperwork was completed, at least not at any point prior to mid June of 1983. Aetna also began to limit future funding advances to the difference between net payrolls on bonded jobs versus receipts on bonded jobs. That is, Aetna's accountants would determine Mansfield's "needs" (i.e., net payroll, critical vendors, etc.), compare such amount to the amount of money in the joint control account, and Aetna would advance the difference or "shortfall" between such two amounts. Under this procedure, there were thus insufficient funds available to pay taxes. Petitioner noted that he was aware that Aetna had not paid the taxes due on payrolls funded by Aetna and that upon inquiry of Aetna's auditors regarding this issue petitioner was advised "[w]e haven't paid them yet. We're accumulating all of the information and we will pay them."

On or about January 20, 1983, having received no union benefit payments for over one month, the unions began to remove workers from Mansfield's job sites. In response, Aetna agreed to advance money for union benefits amounts. However, Aetna continued to advance Mansfield's payrolls net of taxes. Petitioner testified to his belief that Aetna was undertaking to file reports and pay weekly payroll withholding tax with its own checks. Aetna's representatives did not advise petitioner whether or not such tax payments were in fact made, and the record does not disclose whether, and to what extent, petitioner made additional inquiries on this issue.

Between February and May of 1983, the letters dictated for petitioner's signature, by which Mansfield requested funding advances, would list the amounts of advance requested by each project bond number. However, the amount advanced, in the aggregate, continued to consist of net payroll, union benefits and vendor payments.

In late June 1983, Mansfield and Aetna entered into a written agreement formalizing the procedure for Aetna's advances to Mansfield. This agreement reflected the steps allegedly in place as of mid-January 1983 following petitioner's act of paying all available funds to the IRS. Under this written agreement, an Aetna signature was required on all checks drawn on the joint control account, Aetna was authorized to unilaterally withdraw funds from the joint control account in reimbursement of its advances and expenses, Aetna held the right to determine which claims under the bonds to pay (including who, when and how much would be paid), and all Mansfield receipts on bonded jobs were assigned to Aetna with Aetna authorized to endorse any such payment checks. Finally, the agreement provided for Aetna to pay over to Mansfield an amount for "overhead", which Mansfield planned to use for payment of the monthly installments to the IRS. While Aetna and Mansfield had some initial disputes about the amount of such "overhead" payments, all of the money received as "overhead" was paid over to the IRS.

INA, which bonded Mansfield's project for the Dormitory Authority, followed the same procedure as Aetna with regard to advancing only net payroll to the extent that such net payroll exceeded payments received on INA's bonded project, thus leaving no funds available to pay taxes on an ongoing basis.

The receipts from Mansfield's unbonded jobs were covered by a security agreement with Chemical Bank. Until April 1983, Mansfield retained control over these receipts and the same were used to pay taxes on such unbonded job payrolls. In April of 1983, after unsuccessful attempts to meet and reach agreement with Aetna, Chemical Bank called the Mansfield loans and began to exercise control over the unbonded job receipts. The unbonded job contracts were sold by the end of April 1983.

On May 17, 1983, Aetna and Chemical Bank entered into an agreement to divide any surplus on Mansfield contracts. Pursuant to this agreement, Chemical would receive nothing on contracts resulting in a loss. On any profitable contracts Chemical would split the surplus with Aetna in the ratio of 30 percent (Chemical Bank) and 70 percent (Aetna). Ultimately, Chemical Bank sued Aetna for breach of contract, claiming that Aetna charged expenses to Mansfield contracts in such a manner as to show losses on as many contracts as possible thereby minimizing any payments to Chemical under the agreement.

Aetna exercised its control over the joint control account, including removal of monies therefrom. On one occasion in July 1983, Mansfield had received some \$389,000.00 in payments and asked Aetna to apply the same to trust fund (i.e., tax) purposes. However, Mansfield later learned that the joint control account was empty, with Aetna having transferred the funds therein to a home office account. In response to Mansfield's request for assurance that the monies were being held for trust purposes, Aetna acknowledged its obligation to apply the funds to trust fund liabilities including taxes. However, Aetna did not advise petitioner whether or not the funds were used to pay taxes and, in fact, the funds were not so applied but rather were credited against Aetna's claim files. Petitioner continued to sign and file the forms reporting taxes due from Mansfield, and stated his belief that Aetna was paying the taxes and filing its own forms. However, petitioner did not have confirmation in this regard. Cover letters from Aetna to the IRS regarding payments do not reflect that either Mansfield or petitioner were copied on such payment letters.

Petitioner was advised by IRS agent Venetz during their meetings that it was customary, after an agreement had been reached on federal taxes, for Mr. Venetz to contact his counterpart at the Division to invite the Division to join and work together on a payout. Mr. Venetz advised that he would contact the Division and try to work out an installment agreement similar to the Mansfield/IRS agreement of January 11, 1983. The record does not disclose whether this contact in fact occurred. In any event, petitioner was not contacted by the Division until

warrants were served in October 1983, after which Division field activity did not occur until November 1983. Petitioner did not meet with Division personnel until January 1984.

In July 1983, Mansfield sent to Aetna copies of correspondence showing Mansfield's payment of taxes on unbonded jobs, and enclosing therewith checks drawn on the joint control account to be countersigned by Aetna for payment of taxes due on bonded jobs. In October 1983, the Division served warrants demanding payment of \$140,923.95 in withholding taxes. Mansfield in turn forwarded to Aetna and INA a calculation of the the amounts due on their respective bonded jobs. The taxes due on the nonbonded jobs totalled \$17,919.18, which amount was paid by Mansfield using funds belonging to another entity in the Mansfield Group (Westover Technology). Petitioner was not informed whether Aetna or INA paid the balance of taxes due on the bonded jobs.

Aetna's funding of "overhead" to Mansfield for payment of the monthly IRS installments ceased shortly after the June 1983 Aetna/Mansfield agreement was entered into, and Aetna demanded that petitioner "restore" the approximately \$500,000.00 taken from the joint control account in January to pay the federal tax amount. On November 4, 1983, Mansfield and Aetna executed a new agreement under which Mansfield was required to advise all of its contract holders to make all payments to Aetna in care of Mr. Murray. This agreement again required the establishment of a joint control account, and noted that Aetna was to have sole control over such account. This agreement remained in place until the IRS seized Mansfield's assets in early 1984.

In late 1983, when the IRS began to levy on Mansfield's bank accounts, Aetna removed the money from the joint control account and redeposited the same in its own accounts. In response, the IRS pursued Aetna and also served notices of deficiency personally on Ms. Nimmich, Mr. Ladd and Mr. Murray for their failures to pay Mansfield's withholding taxes. The IRS pursued its claim against Aetna until December 28, 1992, when it was settled for the payment of \$400,000.00.

OPINION

Although initially assessed for penalty as an officer of Mansfield Contracting Corporation for the period February 1, 1982 through May 31, 1982, this portion of the assessment was cancelled by the Administrative Law Judge. Further, petitioner acknowledged his responsibility for the assessment pertaining to the period December 16, 1981 through December 31, 1981 for Mansfield Contracting Corporation. Accordingly, penalty assessed for the period January 8, 1983 through June 30, 1983 for Mansfield Contracting Corporation and penalty assessed for the periods July 1, 1982 through December 31, 1982 and January 8, 1983 through May 31, 1983 for National Mansfield Corporation remains at issue.

In his determination, the Administrative Law Judge found petitioner liable for taxes due from Mansfield for these periods. The Administrative Law Judge rejected petitioner's argument that dire financial circumstances left him no viable alternative other than to seek financing assistance for Mansfield, thus causing him to lose control over the corporations and to be unable to carry out the steps necessary to make payment of the withholding taxes due from Mansfield.

While an otherwise responsible person may be relieved of the obligation to pay over withholding taxes where a surety takes control of the company's funds and precludes an otherwise responsible person from paying taxes when due, the Administrative Law Judge concluded that the key to such a result is establishing that the surety in fact took over control of the funds establishing the point in time at which such control was taken away from the otherwise responsible person. The Administrative Law Judge concluded that while Aetna did take over control of Mansfield's funds at some point, leaving petitioner unable to carry out his responsibility, petitioner failed to establish that this occurred prior to the latter part of June 1983. Although petitioner claimed that he believed that Aetna was paying the taxes at issue, the Administrative Law Judge did not accept that this belief was reasonable under the circumstances. Rather, the Administrative Law Judge concluded that there was little evidence of any effort to make sure that New York State withholding taxes were being paid on an ongoing basis since

nearly all tax payment efforts during the first six months of 1983 involved the payment of Federal taxes.

On exception, petitioner argues that he did not willfully fail to collect and pay over 1982 payroll taxes; that he was not a responsible person after January 11, 1983 and, in any event, did not willfully fail to collect and pay over 1983 payroll taxes. Petitioner argues that the Administrative Law Judge erred in finding a failure of proof because Mansfield's records containing that proof had been seized and lost by the IRS. Petitioner argues that Aetna, as surety, was obligated to pay payroll taxes and Aetna promised petitioner that it would pay such taxes. Petitioner also argues that the Administrative Law Judge incorrectly concluded that petitioner made no efforts to address Mansfield's New York State payroll tax liability. Petitioner argues that he was led to believe that the IRS would contact New York State concerning payment of overdue payroll taxes and that he heard nothing from the State until late 1983, at which point he promptly demanded that these obligations be paid by Aetna and INA.

The Division, in opposition, argues that the Administrative Law Judge was correct in his determination. The Division argues that even if Mansfield's records were lost by the IRS, there is no basis for a presumption before the Division of Tax Appeals that the missing documents would be consistent with petitioner's testimony. Documents pertinent to this proceeding, argues the Division, could have been obtained from the bank at which the joint account between Mansfield and Aetna was established. The Division also argues that the record shows that Aetna did advance funds to Mansfield for payroll taxes but that such funds were misapplied. Further, petitioner did not establish that he reasonably relied on Aetna to pay the taxes at issue.

Tax Law § 685(g) provides:

"[w]illful failure to collect and pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(n) makes the following "persons" subject to the section 685(g) penalty:

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

In Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623), the Court stated that 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 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" (Matter of Levin v. Gallman, *supra*, 396 NYS2d, at 624-625).

The Tax Appeals Tribunal noted in Matter of Gallo (Tax Appeals Tribunal, September 9, 1988) that:

"a responsible officer's failure can be willful, notwithstanding his lack of actual knowledge, if it is determined the officer recklessly disregarded his corporate responsibilities including the responsibility to see that taxes were paid" (Matter of Gallo, *supra*, citing Matter of Capoccia v. State Tax Commn., 105 AD2d 528, 481 NYS2d 476; Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

After thoroughly reviewing the evidence submitted by petitioner, we affirm the determination of the Administrative Law Judge. We agree with the Administrative Law Judge that petitioner did not meet his burden to show that Aetna exercised such control of the Mansfield corporations during the periods at issue that petitioner was precluded from collecting and paying over withholding tax. Further, we agree with the Administrative Law Judge that petitioner's failure to collect and pay over withholding tax was willful.

As the Administrative law Judge concluded: "it is clear that petitioner was in full control of Mansfield's operations and its finances during the period 7/1/82 through 12/31/82, and that taxes were not paid during such period" (Determination, conclusion of law "F"). The Mansfield financial situation, existing in December 1982, did not excuse petitioner's failure to pay Mansfield's previously accrued withholding tax liability. Nor, as the Administrative Law Judge concluded, did any liability of Aetna to apply incoming receipts to past-due taxes overcome the fact that petitioner was in control of Mansfield, its receipts and disbursements during this period.

We note that liability for penalty under Tax Law § 685(g) is joint and several and there is no assertion by petitioner that any attempt is being made to collect more than the total amount of tax owed for the periods at issue (see, Matter of Phillips, Tax Appeals Tribunal, May 11, 1995).

As to the periods subsequent to January 8, 1983, we agree with the Administrative Law Judge that:

"[w]hat emerges most clearly is that petitioner desperately needed cash to keep his companies alive and that he was, notwithstanding his threat of January 17, 1983, strongly against giving up and closing down Mansfield's business. Petitioner chose not to close down Mansfield's business, but stayed on under the described circumstances of Aetna's funding which petitioner knew, or should reasonably have known, did not include the payment of taxes" (Determination, conclusion of law "J").

The evidence submitted by petitioner supports this conclusion. It appears from the transcripts submitted of testimony by employees of Aetna that, prior to the June Agreement, checks drawn on the joint bank account into which the Aetna advances and the Mansfield receivables were deposited were drawn by Mansfield and not Aetna. Although not entirely consistent, their testimony indicates that while payment of payroll taxes was initially considered by Aetna, it was never actually made part of its financing arrangements with Mansfield.

Accordingly, we agree with the Administrative Law Judge that petitioner was properly held responsible for penalties equal to the unpaid withholding taxes of Mansfield Contracting Corporation for the period January 8, 1983 through June 30, 1983 and of National Mansfield Corporation for the periods July 1, 1982 through December 31, 1982 and January 8, 1983 through May 31, 1983.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard M. Muffoletto is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Richard M. Muffoletto is granted in accordance with Conclusion of Law "D" of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Notice of Deficiency dated July 30, 1994, as reduced in accordance with paragraph "3" above, and the Notice of Deficiency dated March 25, 1985 are sustained.

DATED: Troy, New York
June 19, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

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