

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WINIFREDO MALPICA	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Period December 1, 1984	:	
through December 31, 1986.	:	

DETERMINATION

In the Matter of the Petition	:
of	:
CAROL MALPICA	:
for Redetermination of a Deficiency or for	:
Refund of Personal Income Tax under Article 22	:
of the Tax Law for the Period December 1, 1984	:
through December 31, 1986.	:

Petitioner Winifredo Malpica, 1348 Seagrape Circle, Fort Lauderdale, Florida 33326, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period December 1, 1984 through December 31, 1986 (File No. 805094).

Petitioner Carol Malpica, 1348 Seagrape Circle, Fort Lauderdale, Florida 33326, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period December 1, 1984 through December 31, 1986 (File No. 805095).

On February 23, 1989 and March 9, 1989, respectively, each petitioner and the Division of Taxation waived a hearing and agreed to have the controversy determined on submission of documents. After due consideration of the documents submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the petitions for redetermination of a deficiency should be dismissed for failure to file the petitions within 90 days of the mailing of the notices of deficiency.

II. Whether, if the petitions were timely, Carol Malpica was a person required to collect, truthfully account for, and pay over withholding tax imposed under article 22 and willfully failed to do so, thereby becoming liable for a penalty imposed under Tax Law § 685(g).

III. Whether the penalty asserted against Winifredo Malpica may be canceled on the ground of bankruptcy of the corporation or on the ground of personal financial hardship.

FINDINGS OF FACT

1. On May 19, 1987, the Division of Taxation issued to petitioner Winifredo Malpica a Statement of Deficiency asserting penalties under section 685(g) of the Tax Law, on the ground that Winifredo Malpica was a person required to truthfully account for and pay over withholding tax imposed under article 22 of the Tax Law on behalf of Best-Way Ambulette Service, Inc. Penalties were calculated as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
12/1/84 - 12/31/84	\$ 827.65
10/1/85 - 12/31/85	2,170.32
1/1/86 - 3/31/86	1,407.12
4/1/86 - 6/30/86	1,645.37
7/1/86 - 9/30/86	1,461.89
TOTAL	\$7,512.35

2. On June 30, 1987, the Division issued a Notice of Deficiency to Winifredo Malpica, asserting penalty of \$10,942.70 for the taxable year 1986. The notice does not explain the differences between the Statement of Deficiency and the Notice of Deficiency regarding tax periods or the total amount of the penalty asserted.

3. On December 10, 1987, the Division issued to Winifredo Malpica a Notice and

Demand for Payment of Income Tax Due in the amount of \$7,512.35.

4. On June 30, 1987, the Division issued to petitioner Carol Malpica a Statement of Deficiency, asserting a penalty under section 685(g) of the Tax Law, computed as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
12/1/84 - 12/31/84	\$ 827.65
10/1/85 - 12/31/85	2,170.32
1/1/86 - 3/31/86	1,407.12
4/1/86 - 6/30/86	1,645.37
7/1/86 - 9/30/86	1,461.89
10/1/86 - 12/31/86	984.23
7/1/86 - 9/30/86	1,461.89
10/1/86 - 12/31/86	<u>984.23</u>
TOTAL	\$10,942.70

As shown above, the statement contained an error for the periods July 1, 1986 through September 30, 1986 and October 1, 1986 through December 31, 1986, in that these periods and the penalty asserted for each period were listed twice.

5. On June 30, 1987, a Notice of Deficiency was issued to Carol Malpica, asserting a penalty of \$10,942.70 for the taxable year 1986. On February 5, 1988, a Notice and Demand for Payment of Income Tax Due was issued to Carol Malpica, asserting a penalty in the same amount.

6. Each petitioner filed a petition which was received by the Division of Taxation on

October 1, 1987. Each petition was sent by certified mail on September 29, 1987, and in each case, the return address is the same as the address shown on the notice of deficiency.

7. A worksheet prepared by a Division employee lists Winifredo Malpica and Carol Malpica as responsible officers of Best-Way Ambulette Services, Inc. The offices held are shown as president and treasurer, respectively. The bases for these findings are shown as an "Information subpoena", a "Bank signature card" and a "Corporate resolution". None of these documents were submitted in evidence.

8. On November 6, 1987, the Division issued identical conciliation orders to petitioners, dismissing each request for a redetermination of deficiency on the ground that the request was not mailed within 90 days of the issuance of a notice of deficiency.

SUMMARY OF THE PARTIES' POSITIONS

9. In this proceeding, the Division concedes that an error was made in calculating the penalties asserted and now asserts a penalty against each petitioner of \$8,496.58, calculated as follows:

<u>Withholding Tax Period</u>	<u>Amount</u>
12/1/84 - 12/31/84	\$ 827.65
10/1/85 - 12/31/85	2,170.32
1/1/86 - 3/31/86	1,407.12
4/1/86 - 6/30/86	1,645.37
7/1/86 - 9/30/86	1,461.89

10/1/86 - 12/31/86

984.23

10. It is the Division's position that the petitions under consideration were not timely filed. The Division further contends that both petitioners were responsible officers of Best-Way Ambulette Services, Inc.

11. By her petition to the Division of Tax Appeals, Carol Malpica denied being a responsible officer of Best-Way Ambulette Services, Inc., stating:

"I am the wife of one of the former owners, Winifredo Malpica. I am a full-time housewife, and take care of my two children and home.... I have worked for the business from time to time, but in a nominal capacity, doing clerical work, and was not a boss, and have had no connection with the corporation from the best of my recollection, for a very long time before the company closed."

12. Winifredo Malpica does not deny being a responsible officer but states that the corporation is in bankruptcy and that he does not have the financial resources to pay the penalty asserted against him.

13. Neither petitioner addressed the issue of the timeliness of the petitions.

CONCLUSIONS OF LAW

A. Section 689(b) of the Tax Law provides that a taxpayer may file a petition within 90 days of "the mailing of the notice of deficiency authorized by section six hundred eighty-one." Section 681(a) of the Tax Law provides: "A notice of deficiency shall be mailed by certified or

registered mail to the taxpayer at his last known address in or out of this state." Thus, to determine whether a petition is timely filed, it is first necessary to establish that a notice of deficiency has been mailed in accordance with section 681(a). It may be deduced from the fact of the filing of petitions in this matter that notices were issued and mailed. However, since the Division submitted no documents establishing either the exact date of mailing or that the notices were mailed by certified or registered mail, it cannot be concluded with certainty that the petitions were not filed within 90 days of the mailing of the notices. Where proper mailing of a statutory notice has not been established, the time period for the filing of a petition is not triggered (Matter of Mildred Colon, State Tax Commission, March 11, 1987). Accordingly, the petitions under consideration are deemed timely.

B. Where a person is required to collect, truthfully account for and pay over withholding taxes and willfully fails to collect and pay over such taxes, section 685(g) of the Tax Law imposes on such person "a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over." Section 685(n) of the Tax Law defines "person," for purposes of section 685(g) of the Tax Law, to include: "an individual, corporation or partnership or an officer or employee of any corporation... who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." Whether an individual was a person required to collect, truthfully account for and pay over withholding taxes during any given period is a question of fact (Matter of McHugh v. State Tax Commn., 70 AD2d 987, 988; Matter of Maclean v. State Tax Commn., 69 AD2d 951, affd 49 NY2d 920). Factors which are relevant to this determination include whether the individual signed the corporation's tax returns, derived a substantial part of his income from the corporation and possessed the right to hire and fire employees (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 950; Matter of Malkin v. Tully, 65 AD2d 228, 299). Other factors considered are the amount of stock owned, the authority to pay corporate obligations and the individual's official duties (Matter of Amengual v. State Tax Commn., supra).

C. This case exemplifies the difficulties that may be encountered when an issue must be determined upon submission of documents. Under Tax Law § 689(e), the burden of proof is placed upon petitioners to establish that they are not liable for the penalty imposed here. By her petition, Carol Malpica has asserted that she was not a person for purposes of Tax Law § 685(g) during the periods at issue; however, she submitted no documents, affidavits or other evidence in support of her position. The petition, of course, is not a sworn document. On the other hand, the only document in the record indicating that Carol Malpica was a person responsible for collection and payment of withholding taxes is a worksheet prepared by a Division employee. That worksheet merely indicates that Mrs. Malpica was once an officer of the corporation. It does not address the more fundamental question of whether she had the authority to pay corporate obligations and whether she engaged in conduct with knowledge that as a result monies belonging to the State would not be paid over but would be used for other purposes (see, Levin v. Gallman, 42 NY2d 32; Matter of Lillian E. Davison, Tax Appeals Tribunal, November 23, 1988). Inasmuch as there is no evidence in the record to the contrary, the statements in Carol Malpica's petition (see Finding of Fact "11") are deemed sufficient to establish that she was not a person as defined by Tax Law § 685(n) and, therefore, not liable for the penalty imposed under Tax Law § 685(g).

D. Petitioner Winifredo Malpica has not denied that he was a person responsible for collection and payment of withholding taxes on behalf of Best-Way Ambulette Service, Inc. Rather, he has asserted that the corporation is in bankruptcy and that he personally does not have the financial resources to pay the penalty imposed. The penalty assessed against a corporate officer for the failure to pay withholding taxes is separate and independent of the corporate liability for the unpaid withholding taxes (Matter of Yellin v. New York State Tax Commn., 81 AD2d 196). Thus, the bankruptcy of the corporation has no effect on Mr. Malpica's liability for the penalty imposed here. Furthermore, it is well established that financial hardship is not an excuse for failure to pay taxes (see, Wolfe v. United States, 612 F

Supp 605; Matter of Dworkin Construction Co., Tax Appeals Tribunal, August 4, 1988).

E. In accordance with Paragraph "9", the penalty asserted against each petitioner is revised to \$8,496.58. It is noted that petitioners raised no issue with regard to the sufficiency of the notices of deficiency.

F. The petition of Carol Malpica is granted and the Notice of Deficiency issued on June 30, 1987 is canceled.

G. The petition of Winifredo Malpica is granted to the extent indicated in Conclusion of Law "E"; the Notice of Deficiency issued on June 30, 1987 shall be modified accordingly, and in all other respects, the petition is denied.

DATED: Troy, New York

July 13, 1989

/s/ Jean Corigliano

ADMINISTRATIVE LAW JUDGE