Officer, Manager, Member or Partner Personal Liability for Unpaid Michigan Entity Taxes – A Trap for the Unwary

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One of the historic major advantages of the corporate entity is that, unlike the partnership, joint venture, or individual entrepreneurship, corporate shareholders, directors and officers are not liable for corporate debts beyond their capital investment simply because of their involvement with the corporation and its operations. The same advantage led to the statutorily created limited partnership, unknown at common law and first recognized in 1822 in New York. More recently, for similar reasons the limited liability company and limited liability partnership forms of business entity came into statutory being and have become popular. Indeed, Michigan’s Limited Liability Act specifically establishes, “(3) Unless otherwise provided by law or in an operating agreement, a person who is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company.” (MCL 450.4501) Obviously those dealing with these types of limited liability entities as possible creditors, know that as with corporations they must look only to the capital of the entity, not to the wealth of those involved with its business and operations, absent contractual or specific statutory or “charter” arrangements to the contrary.

Can officers of corporations, partners of partnerships, limited partnerships, members and managers of LLCs therefore rest secure in the knowledge that if they do their jobs properly and exercise good business judgment, should the business fail they will not be personally liable for its debts? The answer is no. This is not necessarily so if the business debt is for taxes the business entity owes to the Michigan Department of Treasury.

A. The Application of Section 27a(5) to Make Officers, Members, Managers and Partners Personally Liable for Unpaid Entity Taxes.

The Michigan Revenue Act contains a section that can only be described as, in operation, an unconscionable trap for the unwary officer, manager, member or partner. Such persons, due to no fault of their own, can be and are being held fully personally liable for unpaid entity taxes administered by the Department of Treasury.3

1 NY Laws 1820, 1822, c 244
2 Limited Liability Company Act, MCL 450.4101 et seq; Limited Liability Partnership Act, MCL 449.44 et seq.
3 E.g., Dombrowski v. Department of Treasury, MTT Docket No. 358560 (2012) and Cygan v. Department of Treasury, MTT Docket No. 135626 (1995). See also, Hickey v. Department of Treasury, MTT Docket No. 320519 (2009), when the Tribunal established that "liability will not attach to corporate officers of a corporation. The involvement must be tax specific." (Emphasis original.) There the petitioner was a vice president, the only officer in Michigan, who signed the tax returns and checks.
This is true even where the business entity has gone through bankruptcy or statutory dissolution. The Department has thus far successfully asserted that this is true even though the officer, manager, member or partner did not hold that position when the tax became due and was not paid. This has been held to be true even where the person was responsible only for preparing and possibly filing the return and had no power or authority over whether the tax would actually be paid. This is true even where the officer, manager, member or partners had himself/herself gone through bankruptcy. This is true even where he/she had delegated tax compliance to another responsible and qualified person. This is true even where he/she resigned before the return/payment was due.

These seemingly unconscionable results are accomplished by § 27a(5) of the Michigan Revenue Act MCL 205.27a(5) which currently provides:

(5) If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their

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4 MCL 205.27a(5), “the dissolution of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership does not discharge an officer’s...liability for a prior failure of the corporation...to make a return or remit the tax due.’ See e.g., Turner v. Hartman, Court of Appeals unpublished opinion, Docket No. 260522 (2005).

5 Limauro v. Department of Treasury, MTT Docket No. 415784 (2012), on appeal to the Court of Appeals, No. 314176; Musser v. Department of Treasury, unpublished opinion per curiam of the Court of Appeals, Docket No. 293480 (2010).

6 The Tax Tribunal early on correctly recognized, “the Tribunal finds that the statute before us imposes a type of street liability where intent of a party is not a consideration. ...Petitioner supervised the making of the tax return and submission of the return for payment to the owner.... Petitioner was unaware that the tax had not ultimately been paid... The Tribunal...must find Petitioner liable.’ Cygan v. Department of Treasury, 9 MTT 48, 50 (1995) (MTT No. 135626).


responsibility for making the returns and payments. The dissolution of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership does not discharge an officer’s, member’s, manager’s, or partner’s liability for a prior failure of the corporation, limited liability company, limited liability partnership, partnership, or limited partnership to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.


Most of the Michigan appellate decisions on “officer liability” dealt with similar but different provisions in other tax acts, such as § 15(2) of the Sales Tax Act (MCL 205.65(2)), which language was deleted by 2003 PA 25, effective June 24, 2003.

1. Section 27a(5) now imposes personal tax liability for a failure to make returns or payments.

There are critical differences between the old and the current statutory provisions which are not dealt with in most of the appellate decisions. Probably the most important difference is that the older provisions imposed officer liability for a failure in “making the returns and payments,” while the current Section 27a(5) provision imposes personal “officer liability” for a failure in “making the returns or payments.” Accordingly, an “officer” may now be held liable for failure to “make the return,” even though he/she was not responsible for the failure to pay the taxes the return showed were due.

10 See RAB 1989-38
11 As was acknowledged in Revenue Administrative Bulletin (“RAB”) 1989-38, the tax act provisions were different from § 27a(5) of the Revenue Act provision enacted by 1986 P.A. 58. The tax acts, however, had provisions making their provisions controlling over § 27a(5) in the event of a conflict and therefore were still controlling until deleted years later. (See, e.g., MCL 205.59 (Sales Tax Act) and MCL 205.100(1) (Use Tax Act).
12 Sales Tax Act § 15(2) (MCL 205.65) provided, before repeal: “(2) If a corporation licensed under this act fails for any reason to file the required returns or to pay the tax due, any of its officers having control, or supervision of, or charged with the responsibility for making the returns and payments is personally liable for the failure. The dissolution of a corporation does not discharge an officer’s liability for a prior failure of the corporation to make a return or remit the tax due. The sum due for the liability may be assessed and collected as provided in Sections 23 and 24 of 1941 P.A. 122, MCL 205.23 and 205.24.”
13 See fn. 6, supra.
2. **Section 27a(5) now imposes personal tax liability on managers, members and partners, as well as officers.**

A second difference is that the old provisions (and the new Revenue Act provision before 2003 PA 23), only applied to corporations failing to file returns and pay taxes and therefore only referred to personal liability of “officers.” Since 2003 not only “officers,” but also “members, managers or partners” can be personally liable for taxes due from not only a “corporation,” but also from a “limited liability company, limited liability partnership, partnership, or limited partnership.”

3. **Section 27a(5) provides that certain documents are *prima facie* evidence, which shift the burden to the officer, manager, member or partner.**

Another critical difference is that § 27a(5) adds for the first time the sentence, “The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is *prima facie* evidence of their responsibility for making the returns and payments.” The Department has admitted that it must bear the burden of proving officer personal liability. This loosely worded provision makes this much easier. The production of any “*prima facie* evidence” by the Department creates a rebuttable presumption of personal liability and the “officer” is then required to bear the burden of rebutting that presumption. Failure to rebut the presumption results in personal liability.

4. **Section 27a(5) requires the Department to conduct a pre-assessment “investigation or audit” before issuing an intent to assess an officer, manager, member or partner.**

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14 For convenience, the personal liability now imposed by Section 27a(5) on officers, managers, members and partners will be referenced herein as “officer liability” and the several types of entities now covered will be referenced as the “taxable entities.”

15 RAB 1989-38 (4/15/89), see also fn, 53 infra. The Tribunal has held that signed tax returns and negotiable instruments are *prima facie* evidence even if they relate to other tax periods than that at issue. Limauro v. Dept. of Treasury, MTT Docket No. 415780 (2012).

16 E.g., Klecha v. Dept. of Treasury, MTT Docket No. 357723 (2012) and Reschke v. Dept. of Treasury, MTT Docket No. 431691 (2012). See Malloy v. Department of Treasury, MTT Docket No. 329406 (2009); “The Tribunal notes the statutory presumption is not arbitrary. An officer’s signature on a return indicates that he or she had final authority over the return or that he or she had control or supervision of preparation of the return and the payments of taxes.” Several recent Tax Tribunal decisions, however, have cancelled the Department’s Section 27a(5) assessments where the Department failed to introduce the specific *prima facie* evidence specified in the statute. See, e.g., Denha v. Department of Treasury, MTT Docket No. 429971 (2012); Gaer v. Department of Treasury, MTT Docket No. 410947 (2012) and Russell v. Department of Treasury, MTT Docket No. 431417 (2012).
Section 27a(5) imposes the burden on the Department to assess personal “officer” liability only “...where the Department determines, based on either an audit or investigation” that the § 27a(5) elements of “officer liability” are met before assessing him/her. This new language must have been inserted by the Legislature to prevent the Department from arbitrarily assessing known officers, members, managers or partners without making the audit or investigation requisite to determining whether they were personally liable for the “failure to make the returns or payments.” (The Department’s current efforts in this regard, if this construction is correct, are token.)

5. Section 27a(5) personal liability applies to all Michigan taxes administered by the Department.

It is important to recognize that § 27a(5) does not impose personal liability only under the “trust fund theory” where the tax is required to be collected by the business entity and held in trust for the Department, as with withheld personal income taxes. There, the tax on the employee is withheld and held in trust by the employer for the Department. Section 27a(5), however, also applies to all other taxes administered by the Department such as the sales, use, income, business, single business, and others, regardless of whether the incidence of the tax is on the business entity or the tax is merely collected by that entity and held in trust for the Department.

C. There are Many Ambiguities and Uncertainties in Section 27a(5).

1. Most Section 27a(5) appeals are to the Michigan Tax Tribunal, where non-precedential Tax Tribunal and unpublished Court of Appeals decisions are often essentially treated as precedential.

There are many still-unresolved ambiguities and uncertainties involved with § 27a(5). Most, if not all appeals of officer liability assessments are to the Michigan Tax Tribunal rather than the Ingham County Circuit Court sitting as the Court of Claims. This is because § 22 of the Revenue Act requires that the person assessed must pay the tax under written protest to evoke Court of Claims jurisdiction, while an appeal can be taken to the Tax Tribunal before payment. Indeed, the

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17 See, e.g., Gaer v. Department of Treasury, MTT Docket No. 410947 (2012) and Denha v. Department of Treasury, MTT Docket No. 4 29971 (2012) (awarding costs to Petitioner). The elements of “officer liability” are adjusted for the statutory changes (a) control over making the return or payment, or (b) supervising the same or (c) being charged with the responsibility for making the returns or payments. Keith v. Department of Treasury, 165 Mich. 105; 418 N.W.2d 691 (1987).
18 See MAC Rule 206.20 et seq; e.g., IRC §§ 6656-6672.
19 MCL 205.22(2)
payment of a challenged tax appealed to the Tax Tribunal is not required to be made until the last appeal from the Tribunal’s decision is ultimately unsuccessfully resolved.\(^2\) This gives rise to decisions treated as precedential where the decision was by a single Tribunal Member and where the amount at issue was small or where the assessed “officer” did not have the resources to present a well-reasoned and briefed case.\(^3\) Of the Tax Tribunal decisions reported in Volumes 16 through 20 of *The Michigan Tax Tribunal Reports*, 17 out of 19 are written by two non-attorney members. Many Tax Tribunal members have adopted the practice of relying on prior Tax Tribunal decisions as if they were precedential, which they are not.\(^4\) Further, officer liability decisions are usually in large part factually driven determinations, often making the decisions of questionable value as precedents in any event. Treating these Tax Tribunal decisions as precedential precludes others later from accomplishing a different result in the Tribunal. This is particularly unfortunate where relatively complex factual and legal issues, evidentiary and procedural concepts as well as statutory construction issues are involved.

2. **The Tax Tribunal has not required the Department to first establish its *prima facie* case.**

   In terms of procedure, while the Department agrees it has the burden of going forward to establish a *prima facie* case of personal officer liability before the officer has any obligation to offer evidence to rebut that case, the Tribunal has nevertheless thus far required the taxpayer to proceed first, putting its case in rebuttal in the record before the Department has even attempted to establish in its *prima facie* case the presumption the taxpayer is required to rebut.

3. **Statutory construction issues also abound.**

   a. **Liability for not “making the return”?**

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\(^2\) MCL 205.744 and MCL 205.22(1)


\(^4\) The Tax Tribunal Act (MCL 205.701 et seq.) and the Tax Tribunal Rules AC R 205.1101 et seq are silent on whether a Tribunal decision is to be deemed precedential. The Act does provide that a small claims decision is not precedential unless so designated by the Tribunal. (MCL 205.765). The Tribunal early on held that its “entire tribunal” decisions are not precedential. E.g., *General Products Delaware Corp. v. Township of Elliott*, MTT Docket No. 249550 (2001); *Detroit Gun Club v. Township of Commerce*, MTT Docket No. 192817 (2002). Tribunal Rule 111(4) adopts the Michigan Court Rules (“MCR”) and Chapter 4 of the Administrative Procedures Act (MCL 24.297 – 24.287) when there is no applicable Tribunal statutory provision or rule. Under MCR 7.215(C)(1), unpublished Court of Appeals decisions are not precedential. Circuit Court (Court of Claims) decisions are not precedential.
Section 27a(5) applies, according to its first sentence, where the entity “fails...to file the required returns or pay the tax due...” and the “officer” is made personally liable for not “making the returns or payments.” What is meant by the phrase “making the returns,” and why did the Legislature use this language rather than the “failure to file” language it first used in Section 27a(5)? Is one responsible for “making a return” if he/she was to prepare but not to sign or file it, or if he/she did not prepare the return but was responsible for signing it but not filing it?

b. Failure to make what “payments”?

Another issue is whether the statutory language making an “officer” personally liable for failure to make “the returns or payments” refers to the taxes which became due when the officer had tax responsibility or to any and all taxes which remain unpaid and are therefore “due,” having become first due years earlier? The Department has argued, and the Tax Tribunal has held in one recent case that the statutory words, “failure to make payments,” refer to the failure to pay taxes which had first become due years earlier, before the “officer” acted as such, where the unpaid taxes remained due years later when the person became an officer and did not direct that the long-unpaid delinquent taxes be paid. 23

c. Signature on which returns?

Does the prima facie evidence which includes the officer’s signature on “returns or negotiable instruments submitted in payment of taxes” raising the presumption that he/she is personally liable for the “failure,” refer to only the signed returns for which the taxes were not paid, or to any returns, even though the taxes on the returns which were signed were paid? And does this

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23 See, e.g., Limauro v. Department of Treasury, MTT Docket No. 415784 (2012) holding, “The statute does not limit personal liability to an officer who was responsible for making the payment at the time the taxes were first due. The taxes continue to be due until paid, and any officer with authority over payment, who is responsible for the failure to pay, may be held liable.” In Limauro the Tribunal acknowledged but ignored, as a non-binding plurality opinion, the Supreme Court’s statement in Livingstone v. Dep’t. of Treasury, 434 Mich. 771, 800, fn 7; 456 NW2d 684 (1990), “In cases where a corporate tax default occurs before the officer assumes control over the respective tax activities of a corporation, the officer cannot be held personally liable for the corporation’s tax debts because he was not ‘charged with the responsibility for making the corporation’s returns and payments’ of the corporate taxes at the time the default occurred.” This, notwithstanding that numerous Tax Tribunal decisions cite Livingstone’s “plurality opinion” as precedent. (See, e.g., Reschke v. Dep’t. of Treasury, MTT Docket No. 451691 (2012) and Dombrowski v. Dep’t. of Treasury, MTT Docket No. 358560 (2012). But see Kosanke v. Dep’t. of Treasury, MTT Docket No. 332392 (2010), where the Tribunal surmised that the failure to pay occurred when the taxes became “due,” that “due” means “owing or payable, constituting a debt,” and that “debt” means “liability on a claim.” It was held that taxes were due when they were ‘incurred’ – that is, when the returns were due.”
presumption refer only to returns or checks signed during the tax period for which the officer is assessed as personally liable for unpaid taxes?24

d. De facto/de jure “officers.”

The earlier cases correctly held that with corporations one must have been an “officer,” being a responsible clerk or “Chairman of the Board” was not enough,25 although another case held that a statement by the person that he was the LLC’s “CEO,” when in fact he was not, satisfied the requirement that he be the LLC’s tax responsible manager or member.26 Some Tribunal decisions have held that responsibility for preparing and filing the return, but not for paying the tax required thereby, was enough to establish personal officer liability where the return was filed but the taxes shown as due were not paid27 while others have held that an “officer” without power to pay could not be liable when the taxes were not paid.28

D. Under Section 27a(5) Assessed “Officers” Cannot Rely on the Four-Year Statute of Limitations on Deficiency Assessments and Cannot Contest the Validity of the Entity Assessment.

Quite frequently the issue of officer liability arises where the taxpayer entity had become insolvent and was dissolved or simply became defunct. Where the entity was in the process of folding and the Department within the 4-year statute of limitations29 issued its Intent to Assess for unpaid taxes,30 the Intent has frequently been ignored by the entity. The Department after 60 days then issued its Final Assessment,31 which the failing entity frequently did not appeal, there being no money available for taxes in any event. That Assessment (correct or incorrect) then automatically becomes final.32 Next, at some future point, the Department initiates the same assessment procedure by issuing an Intent to Assess against an “officer” for the amount of unpaid entity taxes

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24 Contrast Limauro, supra, with Penner v. Dep’t of Treasury, MTT Docket No. 358583 (2010).
26 Limauro, supra and Gibb v. Dep’t. of Treasury, MTT Docket No. 149191 (1993). See also, Gibb v. Dep’t. of Treasury, MTT Docket No. 149191 (1993) (held himself out as Treasurer when he was not).
27 See fn 17, Supra.
28 E.g., Denha; supra and Gaer, Supra.
29 MCL 205.27a(2).
30 MCL 205.21(2)(b).
31 MCL 205.21(2)(f).
32 MCL 205.21(2)(f).
which had become “final.” At this point in time, the business entity may no longer exist, its records may be incomplete or unavailable, the “officer” may have been retired or employed elsewhere for some time, and potential witnesses may have become unavailable and/or have failing memories.

In this scenario, the officer cannot avail himself/herself of the 4-year statute of limitation on deficiency assessments. The Court has held that the 4-year limitation only applies to the assessment of the entity taxpayer. It does not apply to the subsequent personal liability assessment against one of its “officers.” Further, because the amount and correctness of the original assessment has become “final,” the only issues open to the “officer” being personally assessed for these unpaid entity taxes are whether the § 27a(5) officer liability provisions are applicable. If the officer was an “officer” when the entity failed to appeal that assessment, the Court has held he/she had an opportunity to protest against ultimate Section 27a(5) “officer” liability by intervening and appealing the amount and correctness of that assessment. If he/she did not move to contest the entity assessment when that opportunity existed, no due process defense exists.

E. Under Section 27a(5), the Department Can Assess Several “Officers” at the Same Time.

The Department can also separately assess several officers at the same time for the same amount under § 27a(5). Because Section 28(1)(f) of the Revenue Act (MCL 205.27) prohibits the Department from divulging “any facts or information obtained in connection with the administration of a tax,” the officer being assessed has not been permitted to ascertain whether other officers were assessed under § 27a(5) for the same original entity’s assessment and if so, whether any or all of the other officers’ personal liability assessments had been paid or, if an installment

34 MCL 205.22(4) provides: “The assessment...if not appealed in accordance with this section is final and not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.”
35 See fns 17 and 33, supra.
36 434 Mich. 771; 456 N.W.2d 684 (1990). See also, Keith v. Department of Treasury, 165 Mich. App. 105, 110; 418 N.W.2d 691 (1988). Query whether this would be true if the officer filed the return, paid the tax shown as due, then had left the employ of the entity after the tax year in question, but before the Department on audit determined the return understated the taxes due? (See Penner v. Department of Treasury, MTT Docket No. 328268 (2010).)
agreement had been signed, whether the Department was still trying to collect that same amount from this officer. Indeed, the Department was recently permitted to refuse to produce the entity tax records and returns when assessing under § 27a(5) a former officer of that entity who did not have access to the entity returns.38

F. Section 27a(5) Personal Liability of an Officer, Manager, Member or Partner With “...Control or Supervision of, or Responsibility for, Making the Returns or Payments...”

The Supreme Court in Livingstone vs. Department of Treasury, in a plurality opinion which the courts and Tax Tribunal have repeatedly accepted as precedential,39 held that to be liable under Section 6 of the Use Tax Act (MCL 205.96(3)), which as above noted has been replaced by § 27a(5),40 the person must be a “tax responsible officer.” The statute used the words, “...control or supervision of, or responsibility for, making the returns and payments...” While the Department has agreed that a corporate president is liable because he/she is “...responsible for” and “controls” all other officers and employees,41 the “tax responsible” requirement should limit personal tax liability to where the “officer” is directly in control, supervises, or is responsible for, making the returns or payments.42 Such an officer cannot escape personal liability by delegating the control, supervision, or responsibility to other non-officers, including the Board of Directors,43 but may be able to assign it to another officer such as an assistant treasurer. It is not clear, however, how far up the “chain of command” § 27a(5) permits the Department to go. If an assistant treasurer is made responsible but fails in exercising that responsibility, is the treasurer responsible for not properly supervising and controlling his/her subordinate assistant treasurer? If both fail, is the president responsible for not properly supervising/controlling the other inferior officers? Board members of a corporation, while possibly in fact responsible in some cases, can rest easy as they

38 Proceedings in Michael Limauro v. Department of Treasury, Supra.
39 See fn 36, supra.
40 See fn 11, supra.
41 See Limauro, supra.
42 E.g., Cicurel v. Department of Treasury, unpublished opinion per curiam of the Court of Appeals, Docket No. 198848 (1998). See also, Hickey v. Department of Treasury, MTT Docket No. 320519 (2009), where the Tribunal established that “liability will not attach to corporate officers of a corporation. The involvement must be tax specific.” (emphasis original.) There the petitioner was a vice president, the only officer in Michigan, who signed the tax returns and checks.
are not “officers.” Members and partners, on the other hand, cannot, as both positions are specifically included in the “new” § 27a(5) “officer liability” provision.

These issues become even murkier in the small entity context where one person, such as the corporate owner, may exercise control over such matters even though not an officer, by directing the officers in the performance of their tax return or tax payment duties. This is exacerbated by the new language in § 27a(5) which imposes personal liability for not “making the returns,” whatever that means, as well as for not paying “the tax due.”

**G. Section 27a(5) Now Applies to All Entity Officers, Managers, Members and Partners.**

The extension of the § 27a(5) personal liability for entity taxes to limited liability companies, limited liability partnerships, partnerships and limited partnerships, makes “members, managers or partners” also personally liable for unpaid entity taxes raises other unresolved issues. A limited liability company is managed by its members unless a manager is provided for and in place. Investors in an LLC are “members.” If the manager fails to make “the returns or payments,” are any of the members who were supervising and directing the manager also personally liable? Their corporate counterparts would be directors or shareholders who, because not “officers,” could not be assessed. But in the LLC context, § 27a(5) names both “managers” and “members” and both could be personally liable unless the reference to “members” is held to have been intended to confer potential liability only where the members themselves manage without a manager. What happens when the members together direct the business of the entity by consensus or majority vote without naming a manager? Are each personally liable? What about a “manager” which is a second LLC, the person acting as that second LLC’s manager being the person effectively managing the first LLC? Should LLCs engaged in risky enterprises all incorporate to escape potential § 27a(5) investor personal liability as members of the taxable LLC, or as members of a managing LLC entity?

**H. The Section 27a(5) Required Investigation and Audit and Section 21 Requires that the Department Must Have a “Belief”.**

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45 MCL 450.4401.

46 Section 27a(5) refers to the entity and imposes liability on “its officers, managers, members or partners.” *See Limauro, supra*, cf. *Absher v. Department of Treasury*, MTT Docket No. 329021 (2009).
1. **The Department has extensive investigation powers.**

The language added to § 27a(5) obligating the Department to base its determination to assess personal “officer” liability “…on either an audit or an investigation…” also raises serious issues. Section 3(a) of the Revenue Act⁴⁷ empowers the Department to “…examine the books, records, and papers touching the matter at issue.” It may issue subpoenas requiring persons to “…appear and be examined with reference to a matter within the scope of the inquiry or investigation… and produce any books, records or papers…” The Treasurer is empowered to, through “agents, referees or examiners,” administer oaths and examine persons, and the circuit courts are required to enforce such requests. The person to be examined may not take the Fifth Amendment. Section 21(1)⁴⁸ also authorizes an “…audit [of] the accounts of a person or any other records pertaining to the taxpayer.” Unfortunately, the Department apparently ignores these statutory investigatory and audit powers and looks no further than the ten classes of “documents” referenced in RAB 1989-38.⁴⁹ Where it finds that an “officer, member, manager or partner” has signed “returns or

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⁴⁷ MCL 205.3.

⁴⁸ MCL 205.21(1)

⁴⁹ RAB 1989-38 states, *inter alia*, ”RAB 1989 provides the following regarding evidentiary standards for officer liability: The Department considers certain documents that would further its ability to present facts regarding officer standing and officer responsibility. Any of the following documents may be utilized to support or demonstrate the facts necessary to assert officer liability:

1. Application for registration.
2. Returns filed by the corporation during the period noted on the proposed assessment.
3. Michigan Annual Reports which include the period assessed.
4. Audit or collection reports that identify an individual officer as responsible for payment and reporting of taxes.
5. Correspondence from the taxpayer that identifies an officer as responsible for payment or reporting taxes.
6. Collector reports establishing regular contact with a corporate officer regarding unpaid taxes.
7. Sales, use and withholding returns that identify corporate officers.
8. Payment plan agreements signed by corporate officers.
9. Checks in payment of taxes signed by an officer, or subpoenaed bank signature cards for the periods in question.
10. Any other documents that would tend to prove or disprove corporate officer liability.

The Tribunal has rejected some of these documents as establishing *prima facie* evidence in some, but not all, decisions. In *Gaer v. Department of Treasury*, MTT Docket No. 410947 (2012), it held,

“While explanatory guidelines, such as RABs, may be instructive, they ‘do not have the force of law and are not legally binding.’ *Ohio Savings Bank v. Dep’t. of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2009 (Docket No. 284656), p. 3, citing *Kmart Michigan Prop. Services, LLC v. Dep’t. of Treasury*, 283 Mich. App. 647, 654; 770 N.W. 2d. 915 (2009).
negotiable instruments submitted in payment of taxes,” the Department does not even examine the “officer” to see if he/she can explain the inference drawn from the signed documents is incorrect. The Department, having obtained *prima facie* evidence, apparently stops, relies on the *prima facie* presumption, leaving it to the “officer” it has assessed to rebut the presumption by proving that he/she was not a “tax responsible officer.”

The longer the Department waits, the four-year statute of limitations applicable to the entity liability not being applicable to the "officers," the more difficult the "officer's" task. This is particularly so where, as often happens in the Tribunal, the Tribunal Member concludes that the sworn testimony of the individual is to be given little weight because of the obvious self-interest, necessitating the introduction of corroborating testimony of other long gone employees or of old minutes and records not in the officer's possession. The Department’s investigative powers are far greater than those of a former “officer” of a defunct or dissolved business entity.

2. **The Section 27a(5) personal liability assessment can be collected first, even though the entity still exists.**

While the Department agrees that the “officer's” personal liability cannot be assessed until the assessment of the business entity’s delinquent taxes become final, there is nothing in § 27a(5) which requires the Department to first exhaust its ability to recover the assessed taxes from the entity before assessing persons who it perceives to be the tax responsible “officers.” “Deep pocket” officers be forewarned.

3. **Section 27a(5) officer, manager, member and officer personal liability may extend to officers residing in other states.**

Respondent relied on Installment Agreements and a Power of Attorney signed by Petitioner, which were filed with Respondent and are included as indicia of officer liability under RAB 1989-38, as evidence of Petitioner's tax-specific responsibility; however, the Tribunal agrees with Petitioner that the Installment Agreement and the Power of Attorney shall be viewed as contracts, rather than tax documents. At no point did Respondent provide any tax returns or checks signed by Petitioner, as is required under MCL 205.27a(5) to find a corporate officer personally liable for an entity's unpaid taxes.”

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50 RAB 1989-39. See also, *Dombrowski v. Department of Treasury*, MTT Docket No. 358560 (2012). ("Petitioner left the corporation in May 2004. After that time, he lacked access to corporate tax information and had no control over the appeal...in the Tax Tribunal.")

Other interesting issues are apparent. Section 27a(5) would appear to apply to tax responsible “officers” of any business entity “liable for taxes administered under this Act.” This would cover business entities located in, and the “officers” of such entities operating from, other states. The treasurer of a Texas-based corporation which solicits sales in, and sells by shipment into Michigan, for example, may be personally liable for the business entity’s sales taxes or for failure to collect and remit use taxes or its failure to pay the new Michigan corporate income tax.

4. The Department must “believe” the “officer” is liable, not merely rely on *prima facie* evidence.

The language of § 27a(5) makes it clear that the personal officer liability assessment must be based on “…either an audit or an investigation.” The issue is, how far must such efforts by the Department go? Should the Department stop when it finds a piece of “*prima facie* evidence,” or must it reasonably “believe” that personal liability can be established under § 27a(5)? Section 27a(5) directs that “The sum due for a liability may be assessed and collected under the related sections of this act.” Section 21(2)(b) of that Act which provides for such assessments requires the Department to initiate the assessment procedure by sending the person to be assessed an “Intent to Assess” notice. The Intent to Assess must “include the amounts of the tax the Department believes the taxpayer owes, reason for that deficiency…” Later, in § 21(2)(f), if the assessed taxpayer does not protest the Intent to Assess, the Department is authorized to “assess the tax and the interest and penalty on the tax that the Department believes are due and payable.” Query whether, reading § 27a(5) and § 21(2)(b) and (f) together, the Department would be held to have authority to issue an “officer” personal liability assessment unless it had in its investigation/audit obtained sufficient facts to entitle it to a reasonable “belief” that officer liability existed, not merely that a document discovered was *prima facie* evidence of that fact?

5. The ultimate burden of proof is still on the Department

Once the “officer” rebuts the *prima facie* evidence presumption, the burden of persuasion should shift back to the Department. It is well established, the burden of proving it has jurisdiction and authority to assess a tax is on the Department, with limited exceptions. The *prima facie* evidence

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52 MCL 205.21(b).

53 *Gillette Co. v. Department of Treasury*, 198 Mich. App. 303, 318; 497 N.W.2d 595 (1984) and *Gaer v. Department of Treasury*, MTT Docket No. 410947 (2012). But see, e.g., *Denha v. Dep’t. of Treasury*, 9 MTT 51 (MTT Docket No. 429971) (12/12/12), relying, as have several other Tribunal opinions, on *Drake v. Dep’t. of Treasury*, MTT Docket No. 204601 (1995). The *Drake* opinion, which was not appealed, stated only, “Petitioner, not Respondent, retains the burden to show that she was not the responsible corporate officer.” It
provision of § 27a(5) does not change this. Nor is the Tribunal able to “overrule” the appellate
precedents on this point. It can, however, determine the order of proofs.54 By forcing the “officer”
to enter rebuttal proofs first, with cross-examination not limited to scope of direct, the Department
can be permitted to conduct the “investigation” to support its § 27a(5) officer personal liability
assessment during the Tax Tribunal hearing long after it had issued the statutorily required Intent
to Assess and after it had issued the assessment itself.

The Department can assert that the person receiving an Intent to Assess officer liability can avail
himself/herself of the informal conference provided for in MCL 205.21(2)(d)55 to attempt to
persuade that § 27a(2) do not apply. This, of course, is after the § 27a(5) “investigation” or
“audit” and “belief” requirements should have been met. This would also be after the “officer” has
been put to the very considerable expense and time commitment which, if he/she succeeds in
persuading the informal conferee (a Department employee) that there is no § 27a(5) liability, that
conclusion would usually involve facts the Department’s investigation and/or audit should have
produced in the first instance. The “informal conference” also forces the potentially liable officer to
“show his/her hand” to the Department in advance. The “officer” has no ability to subpoena
documents from the Department or the failed business entity or to require witnesses to stand for
sworn examination at an informal conference. The Department has extensive pre-assessment
investigatory powers, the potentially liable “officer” has none.

6. The Department is not following its own RAB 1989-38.

The Department has succeeded in asserting that the officer’s signature on any return for any type
tax, even returns for earlier or later years than those for which unpaid taxes are at issue is §
27a(5) “prima facie evidence.”56 This directly contradicts the Department’s statement in RAB
1989-38, “Evidentiary Standards for Officer Liability,” Nos. 1, 2 and 3, which provide, “Returns filed
by the corporation during the period noted on the proposed assessment” and “Michigan Annual
Reports which include the period assessed” are documents which may be utilized to enable the
Department to bear its burden. Indeed, the Department routinely asserts that signatures of an
officer on any filing, such as a registration statement, installment agreement, annual reports, help

cited no authority for this statement, and it is unclear whether it referred to the burden to rebut the prima
facie case or the ultimate burden of proof.

54 In re Dodge Bros., 241 Mich. 665, 669; 217 N.W. 777 (1928) and Zenith v. Department of Treasury, 130


56 E.g., Limauro v. Dep’t. of Treasury, MTT No. 415784 (8/31/12).
establish the *prima facie* case of officer liability even if dated years earlier or later. As above noted, this contradicts the Department’s statement in RAB 1989-38. Several recent Tribunal opinions have rejected this approach.\textsuperscript{57}

The Department’s lament that the "officer" of a tax delinquent entity must be aware of "tax responsibility" facts not known to the Department is both irrelevant and off the point. The Department could make the same excuse with respect to every tax assessment as to which, before the Department’s audit and investigation, the taxpayer has more knowledge. The Department has not accepted the officer’s explanations where it has what it believes is *prima facie* evidence, asserting lack of credibility due to self-interest.\textsuperscript{58} Further, the officer has none of the Department’s investigatory or audit powers with which to collect corroborating evidence from other employees/officers (who may fear being subjected to a similar personal liability assessment). The Department can and should exercise its statutory powers to demand books and records, subpoena documents and sworn testimony before issuing its Intent to Assess.

Persons agreeing to act as "officers" of taxpayer entities should do so only with full knowledge of the almost impossible position they might find themselves in the future when they may be assessed "officer" personal liability taxes which could essentially destroy their lives.

I. Why Personal Liability for a Failure in “Making the Return” or “Payments”?  

Before the enactment of § 27a(5) in 1986 PA 58, indeed until their repeal in 2003 the “officer liability” provisions in the various Michigan tax acts imposed personal liability only when the tax responsible officer failed to make the “returns and payments.” Section 27a(5) changed the test by replacing “and” with “or.” Presumably this was to avoid the circumstance where a tax responsible officer elected not to pay the tax due, but was not responsible for “making” the return. But why make the officer responsible for making the tax return personally liable if he/she had nothing to do with whether the tax return was filed or the tax was paid or not?\textsuperscript{59}

\textsuperscript{57} See fn 16, *supra*.

\textsuperscript{58} Without disinterested testimony to support an "officer’s" testimony of lack of tax specific responsibility, such testimony will often not be found to rebut the presumption based on the documentary evidence.

\textsuperscript{59} See, e.g., fn 6, *supra*. Taxes can be paid, indeed in some instances are required to be paid, before the final return is due. Section 6 of the Sales Tax Act (MCL 205.56), for example, for large taxpayers requires monthly "estimates" for tax payments equal to 50% of the tax liability for the same month of the preceding year. Section 71 of the now-repealed Single Business Tax Act (MCL 208.71) required quarterly estimates, as does
Since § 27a(5) “officer” liability only comes into being after the tax assessment against the entity has become final, liability for responsibility for failure to pay only comes into being after the final return and tax had become due. That assessment must be made under § 21 of the Revenue Act which only authorizes an assessment where the “taxpayer fails or refuses to make a return or payment as required...” or if the department believes the return does not supply sufficient information. The assessment is for the amount of the tax still due. When the amount of tax has been paid, there can be no tax assessment, nor could there be a penalty assessment, for the failure to file the tax return.

Yet § 27a(5) makes the “officer” responsible for “making the return” personally liable for the entire amount of the delinquent tax assessment, even where he/she had nothing to do with the failure/refusal to pay the taxes due and may not even have known they were not paid. Indeed, as the Department reads § 27a(5), that officer who is only responsible for “making the return,” but not for payment of taxes, can even be assessed for taxes which became due years earlier which remain due and unpaid because others with tax payment responsibility had decided not to pay.

It would seem that § 27a(5) should logically impose “officer liability” on the tax responsible “officer” who had “control, or supervision of, or responsibility for” the failure to make the tax payments when due. Only when that failure was caused by the failure of another tax responsible “officer” who did not prepare the return for filing, which rendered it impossible for the amount of tax due to be reasonably estimated, should the person failing to make the return be deemed to be an “officer” personally liable for the unpaid tax.

Section 681 of Michigan’s Corporate Income Tax (MCL 206.81), as did § 501 of Michigan’s former “Business Tax Act” (MCL 208.1501).

See fns 32 and 34, supra.

Section 23 of the Revenue Act (MCL 205.23) imposes 10%, 25% and 100% penalties, all based on the amount of the unpaid tax deficiency (or excessive claim for credit). There is also no penalty for failure to file a proper return if there is no unpaid tax deficiency (or excessive tax credit claims). Put differently, the statutory penalties are for the failure to pay the taxes due not for failure to file the proper return. See, e.g., Kolender v. Department of Treasury, MTT Docket No. 307832 (2006).


See fn 23, supra.

Obviously if an “officer” did not timely prepared the return, precluding the entity from knowing exactly how much tax to pay, the return could be prepared by another and filed late, before the Department initiated an assessment against the entity. An extension could be requested accompanied by a voluntary estimated payment. It is not the failure to prepare or file the return which should lead to an “officer's” personal liability, it is the failure to pay the taxes due, or which are later determined to be due.
Further, to codify the Court’s plurality opinion in Livingstone, § 27a(5) should be amended to make it clear that a tax responsible “officer” is not liable for taxes which became due before he/she assumed that responsibility, including taxes assessed, after audit, against the entity for tax periods prior to such employment.65

J. Unpaid Entity Tax Liability Arising From Current Assessments Based on Department Audits from Prior Years.

The officer liability decisions have not yet apparently dealt specifically with the liability of a current tax responsible “officer” for a current final entity tax assessment resulting from an audit, relating to much earlier years before that officer had such responsibility. The Department has four years to initiate such an audit which while in process (which could last for years) tolls that statute of limitations.66 Indeed, a deficiency assessment resulting from such an audit, if appealed, could linger for years before becoming final with the decision of the last court to which appealed.67 A final entity assessment, accordingly, could come into being ten or even twenty years after the tax period to which it relates. Since “officer” liability only comes into being when an assessment has been litigated and becomes final, this liability may “spring into being” years, even decades, after the tax period giving rise to the tax. The Tax Tribunal has held that the persons who had tax responsibility ten or twenty years earlier become currently personally liable?68 Do the officers who now hold tax responsible positions also become currently personally liable for taxes the audit and litigation determined should have been paid 20 years ago?69

Without reasonable statutory amendments or possibly a promulgated rule resolving these ambiguities,70 why would any reasonably informed person be willing to assume a tax responsible position as an “officer” of a promising entity subject to Michigan taxes, the future of which, or even

65 See fn 23, supra.
66 MCL 205.27a(3).
69 The Department would assert that they do. (See fn 23)
70 While such a promulgated may or may not be deemed a legislative rule to be given the force of law, even as an interpretative rule it, while not binding, should provide adequate guidance to both zealous auditors and administrators and to the Tax Tribunal and courts. But see, McKim, S., The Sometimes Dubious Officacy Of Michigan Department Of Treasury “Rules,” “Revenue Administrative Bulletins,” “Letter Rulings,” “Questions and Answers,” And Other Publications, The Tax Lawyer, p. 1019 (2007).
the past of which (with respect to possible audit deficiencies), is uncertain? An entity indemnification would be of little value if the entity had no ability to pay the taxes due. Without tax responsible “officers” such entity businesses cannot exist.

K. Pending Proposed Amendments to Section 27a(5).

At this writing, a proposed amendment to Section 27a(5) has been introduced in the Michigan Senate.71 This proposal would limit “officer” liability to the collected tax trust fund approach, involving only taxes collected by a business entity from others. It would not impose officer liability for unpaid taxes levied on the business entity as such. Quare whether it would apply to the sales tax which has its legal incidence on the retail seller, but can be, and usually is, passed on to the purchaser, or of the use tax for which the lessor is liable but also passes on to and collects from the lessee.

The proposed Bill would also attempt to limit liability to “officers” responsible for non-payment when the payment first became due, but only if their failure was intentional, or “willful.” Prima facie evidence would be limited to documents from the original period of default. It would impose a four-year statute of limitations on “officer liability” assessments, starting with the date of the assessment against the entity. A purchaser of the entity’s business would be assessed first72 and if more than one person is assessed, the Department would be required to disclose this fact and report collections. It would require the Department to proceed first at hearing to establish its prima facie case and would permit the officer being assessed to challenge the validity of the entity assessed, just as the entity could have. If several persons are assessed, each would bear only a proportionate amount of liability and the Bill permits officers to sue other liable officers in circuit court for their proportionate share of the ”officer” liability.

Passage of such an amendment to §27a(5) would serve to ameliorate most of the unconscionable applications discussed above. Hopefully such an amendment would be fully retroactive. Until legislative relief is forthcoming, however, one must advise officers, managers, members and partners of corporations, LLCs, LLPs, partnerships or limited partnerships that they risk personal liability for unpaid entity taxes which could later unexpectedly spring into being, effectively destroy their financial lives and burden them for as long as they live.

71 Sen. Bill No. 64
72 MCL 205.27a(1).
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