



STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

RICK SNYDER
GOVERNOR

NICK A. KHOURI
STATE TREASURER

REVENUE ADMINISTRATIVE BULLETIN 2015-23

Approved: November 3, 2015

OFFICER LIABILITY

Replaces Revenue Administrative Bulletin 1989-38

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2015-23. This Revenue Administrative Bulletin (RAB) explains the law governing assessments of officers, members, managers of a manager-managed limited liability company, or partners (referred to in this RAB, collectively, as an “officer” unless otherwise provided) for certain tax liabilities of corporations, limited liability companies, limited liability partnerships, partnerships or limited partnerships (referred to in this RAB, collectively, as a “business”¹ unless otherwise provided) under the Revenue Act, 1941 PA 122, MCL 205.1 *et seq.*

This RAB replaces RAB 1989-38 due to significant changes in the law governing officer liability.² This RAB is applicable to all assessments issued pursuant to MCL 205.27a(5).³

INTRODUCTION

When a business fails to fully pay certain tax liabilities, its officers may be held personally liable for the debt. This is known as derivative liability or more commonly as “corporate officer liability.” The Revenue Act, specifically MCL 205.27a, sets forth procedures the Department must follow when issuing an assessment for corporate officer liability.

Prior to assessing an officer, the Department must first determine if there is a succeeding purchaser (successor) of the assessed business that is liable under MCL 205.27a(1). If the Department has information that clearly identifies a successor, and it determines that assessing the successor would allow the Department to collect the entire assessment against the assessed business, it must assess the successor prior to assessing an officer. However, if the successor fails to pay a final assessment within the later of two years after the date the Department issues

¹ The Revenue Act defines “business” as “a corporation, limited liability company, limited liability partnership, partnership, or limited partnership.” MCL 205.27a(15)(a).

² See 2014 PA 3.

³ Amendments to MCL 205.27a(5) made by 2014 PA 3 are retroactive to all tax years. *Shotwell v Dep’t of Treasury*, 305 Mich App 360, 368 (2014).

the assessment against the business or 90 days after the issuance of the assessment against the successor the Department may then assess officers it determines to be “responsible persons.”

A “responsible person” is a person that:

1. Was an officer of the business;
2. Controlled, supervised, or was responsible for the filing of returns or payment of taxes;
3. Was an officer during the “time period of default;” and,
4. “Willfully” failed to file a return or pay the tax due.

The “time period of default” begins on the date the tax period begins and runs through the later of the date set for filing the return or making the required payment.

A person’s actions are “willful” if the person knew, or had reason to know, of the obligation to file a return or pay a tax, but intentionally or recklessly failed to file the return or pay the tax. Determining whether a person’s actions are willful is a fact-intensive inquiry and will be made on a case-by-case basis.

Prior to assessing someone as a responsible person, the Department must first produce *prima facie* evidence or establish a *prima facie* case that the person is a responsible person. If the Department produces *prima facie* evidence, it is presumed that the person was a responsible person and that person may rebut the presumption by demonstrating that any of the four elements required to be a responsible person has not been met.

There are two types of *prima facie* evidence: (1) if an officer signs a tax return or negotiable instrument in payment of a tax *during* the time period of default, or (2) if an officer signs a tax return or negotiable instrument in payment of a tax *before* the time period of default and evidence other than that return or negotiable instrument demonstrates that the person was an officer *during* the time period of default.

When the Department is unable to produce *prima facie* evidence, it must establish a *prima facie* case that the person is a responsible person. Establishing a *prima facie* case requires the Department to establish every element required to be a “responsible person.”

If the Department produces *prima facie* evidence or establishes a *prima facie* case, the taxpayer may rebut it by providing evidence that any of the elements required to be a “responsible person,” as set forth above, are not met.

The Department must assess a responsible person within four years of the date the assessment against the business was issued. “Assessment” means a final assessment and not merely an intent to assess. A responsible person may challenge the validity of the assessment issued to the business to the same extent the business could have challenged it.

A person found liable for taxes as a responsible person may bring a cause of action in the appropriate circuit court to recover damages from other responsible persons in an amount equal

to the assessment or for the portion of the assessment for which another responsible person was liable.

ISSUES

- I. What are the prerequisites to the Department assessing a responsible person?
- II. For what taxes may a responsible person be derivatively liable?
- III. What is a “responsible person?”
- IV. What is *prima facie* evidence? What is a *prima facie* case?
- V. How does a responsible person contest the underlying assessment?
- VI. What information must the Department disclose to a responsible person?
- VII. What affect does a business’ bankruptcy petition or an order appointing a receiver have on corporate officer liability?

CONCLUSIONS

I. PREREQUISITES TO ASSESSING A RESPONSIBLE PERSON

The Department may assess a responsible person if a business that is liable for an applicable tax⁴ fails to file a required return or pay a tax due for any reason after assessment.⁵ If an officer is determined to be a responsible person the Department may assess the responsible person any time after a final assessment has been issued to the business if it fails to pay the tax due and does not appeal the assessment to the Tax Tribunal or the Court of Claims.⁶ If the business appeals the assessment the Department will not assess a responsible person until the conclusion of the litigation. Additionally, if the business enters into an installment agreement with the Department covering the period at issue, no assessments will be issued against any responsible persons so long as the business does not default on the agreement.⁷

Example 1:

The Department assessed ABC Inc. for unpaid sales tax. ABC admits liability, but is unable to immediately pay the entire assessment. ABC enters an installment agreement with the Department to begin to pay its liability. ABC timely makes the payments agreed upon in the installment agreement. The Department will not assess any officers it

⁴ See *infra* Section II Conclusions for a discussion of the types of taxes a responsible person may be held derivatively liable for.

⁵ MCL 205.27a(5).

⁶ The Department must assess a responsible person within 4 years of the date of the assessment that is issued against the business. MCL 205.27a(5).

⁷ A default occurs if a required payment is not timely remitted according to the terms of the agreement.

determines to be responsible persons so long as ABC complies with the installment agreement.

Example 2:

The Department assessed ABC Inc. for unpaid sales tax. ABC admits liability, but is unable to immediately pay the entire assessment. ABC enters an installment agreement with the Department to pay its liability. After several months of making the agreed upon payments, ABC fails to make a payment and defaults on the agreement. The Department revokes the agreement. The Department may assess responsible persons on or after the date it revokes the agreement.

However, if the Department has information that clearly identifies a successor that is liable under MCL 205.27a(1) and determines that assessing the successor would allow the Department to collect the entire amount of the tax assessed against the business, the Department must assess that successor prior to assessing any responsible person(s).⁸ The Department will look to all relevant information available to it in determining if the successor is able to pay the entire amount of the assessment.

If the successor fails to pay the assessment within the later of two years after the date the Department issues the assessment against the business or 90 days after the issuance of the assessment against the successor, and the Department has determined that the successor is not capable of paying the entire assessment, the Department may assess an officer if it can produce *prima facie* evidence or establish a *prima facie* case that the officer is a “responsible person.” However, if the successor appeals its assessment and the appeal lasts beyond the periods noted above, the Department and an officer the Department believes is a responsible person may stipulate to extend the time in which the Department may assess the responsible person — rather than assessing the responsible person — to preserve the statute of limitations.⁹ If the Department assesses a responsible person after assessing a successor it will provide notice to the responsible person that a successor was previously assessed.¹⁰

If the successor enters into an installment agreement with the Department, the Department will not pursue any responsible persons so long as the successor does not default on the agreement.

If the Department lacks information identifying a successor at the time it properly assesses a responsible person, but subsequently identifies a successor, it will assess the successor; however, the assessment against the responsible person remains valid and the Department will continue to pursue that assessment.

⁸ *Id.*

⁹ The Department must assess responsible persons within four years of the date of the final assessment issued to the business. MCL 205.27a(5). This period may be extended by written waiver.

¹⁰The Department is prohibited from disclosing the identity of the successor. MCL 205.28(1)(f).

Example 3:

The Department assesses CEO as a responsible person for his role as a former officer of ABC Inc. At the time CEO is assessed the Department has no information indicating that there was a succeeding purchaser of ABC. However, after assessing CEO the Department obtains information that indicates XYZ Inc. may be the successor of ABC. The Department's assessment against CEO is valid because at the time it assessed CEO it did not have information that clearly identified a succeeding purchaser. Once a succeeding purchaser is identified, however, the Department may assess it, in addition to CEO.

Example 4:

ABC Inc. is assessed for unpaid sales tax and does not appeal. XYZ Inc. purchases ABC Inc. without obtaining tax clearance or escrowing sufficient funds as required by law; XYZ is subject to successor liability as a result. The Department determines that XYZ has insufficient assets to pay the entire tax liability. The Department may assess a responsible person while simultaneously seeking from Successor XYZ Inc. such amount (less than the total amount due) that the successor may be able to pay.

Example 5:

Successor XYZ Inc. purchases ABC Inc. without obtaining tax clearance or escrowing sufficient funds as required by law; XYZ is subject to successor liability as a result. ABC is issued a final assessment for the unpaid sales tax and does not appeal or pay it. XYZ is incapable of immediately paying the entire assessment. XYZ enters an installment agreement with the Department to pay its liability. XYZ consistently makes the payments agreed upon in the installment agreement. The Department will not assess any officers it determines to be responsible persons so long as XYZ complies with the installment agreement.

Example 6:

Successor XYZ Inc. purchases ABC Inc. without obtaining tax clearance or escrowing sufficient funds as required by law; XYZ is subject to successor liability as a result. XYZ is incapable of immediately paying the entire assessment. XYZ enters an installment agreement with the Department to pay its liability. After several months of making the agreed upon payments, XYZ defaults on the agreement by failing to make a payment and cure the default. The Department revokes the agreement. The Department may assess responsible persons on or after the date it revokes the agreement.

Example 7:

ABC Inc. is assessed for unpaid sales tax on January 1, 2016. ABC fails to pay its liability. The Department identifies XYZ Inc. as a successor to ABC and assesses XYZ

on June 1, 2016. The Department will not assess any responsible persons before January 1, 2018.

Example 8:

ABC Inc. is assessed for unpaid sales tax on January 1, 2016. ABC fails to pay its liability. The Department identifies XYZ Inc. as a successor to ABC and assesses XYZ on December 1, 2017. The Department will not assess any responsible persons before March 1, 2018.

II. APPLICABLE TAXES

Corporate officer liability applies only for the failure to file a return for or pay the following taxes:

- Sales tax;¹¹
- Use tax, but only in instances where the business is required to or actually did collect tax from a third party for remittance to the State;¹²
- Tobacco products tax;¹³
- Motor fuel tax and motor carrier fuel tax;¹⁴
- Income tax withholding,¹⁵ and;
- Any other tax administered under the Revenue Act for which a business is required to collect tax from or on behalf of a third party for remittance to the State.¹⁶

The Single Business Tax, Michigan Business Tax, and Corporate Income Tax are not subject to corporate officer liability.

III. RESPONSIBLE PERSON

A person is a “responsible person,” for purposes of corporate officer liability, if all of the following elements are met:

1. The person was or is an officer of the business;
2. The officer controlled, supervised, or was responsible for the filing of returns or payment of taxes;
3. The officer was an officer during the “time period of default;” and,
4. The officer “willfully” failed to file a return or pay the tax due.¹⁷

¹¹ 1933 PA 167, MCL 205.51 to MCL 205.78

¹² 1937 PA 94, MCL 205.91 to 205.111.

¹³ 1993 PA 327, MCL 205.421 to 205.436.

¹⁴ MCL 207.1001 to 207.1170; MCL 207.211 to 207.234.

¹⁵ MCL 206.1 to 206.713.

¹⁶ The taxes subject to corporate officer liability are collectively referred to in this RAB as “taxes” unless otherwise provided.

¹⁷ MCL 205.27a(15)(b).

Before assessment, the Department must first produce *prima facie* evidence or establish a *prima facie* case that the officer is a responsible person, which may be rebutted by the officer by proving that any element required to be a responsible person is not met.¹⁸

Before assessing a responsible person, the business must first be assessed and fail, for any reason, to file the required return or pay the taxes due. After this failure the Department may assess a responsible person.¹⁹

A. Officer

In order for a person to be held liable as a responsible person, that person must have been an officer, whether *de jure* (i.e., legally authorized) or *de facto*, of the business during the time period of default.

A “*de facto*” officer is an “officer who exercises the duties of an office under color of an appointment or election, but who has failed to qualify for office for any one of various reasons”²⁰ The Michigan Supreme Court has long recognized the *de facto* officer doctrine and indicated that the liability and authority of a *de facto* officer is no greater (or less than) the liability and authority of a *de jure* officer.²¹ A person may be a *de facto* officer under any of the following three circumstances:

- (1) He or she was made an officer, however, the appropriate corporate procedure for appointing an officer was not followed;
- (2) He or she held himself or herself out as an officer; or,
- (3) He or she induced others to believe he or she was an officer.²²

Determining if a person is a *de facto* officer is a fact-intensive inquiry. In general, the Department will only pursue a person as a *de facto* officer in exceptional circumstances. For example, if a business fails to name *de jure* officers as required by law, but an owner or other person with clear authority holds himself or herself out as an officer and signs returns and/or negotiable instruments in payment of taxes, he or she may be a *de facto* officer and assessed as a responsible person if a return is not filed and/or payment is not remitted.

Example 9:

CEO is the sole officer and owner of XYZ, Inc. CEO dies and his will appoints Administrator as administrator of his estate, which includes XYZ. Administrator signs tax returns and payments of taxes as “president” while he is winding down the business.

¹⁸ MCL 205.27a(5).

¹⁹ Assuming there is no successor the Department is required to pursue prior to assessing the responsible person. See Conclusions Section I.

²⁰ Black’s Law Dictionary (8th ed).

²¹ See e.g., *Martin et al v Miller*, 336 Mich 265, 277-278 (1953). See also *Greyhound Corp v MI Pub Serv Comm*, 360 Mich 578 (1960).

²² *Circurel v Dep’t of Treasury*, unpublished opinion per curium of the Court of Appeals, issued March 10, 1998 (Docket Nos. 198812, 198848).

Administrator is not a *de facto* officer because the actions of an administrator of an estate are taken on behalf of the estate in its capacity as shareholder of the company, not on behalf of the company as an officer unless the administrator is appointed or elected as an officer.

Example 10:

Employee is an employee of XYZ Inc. and has never been appointed as a *de jure* officer of XYZ. The CEO of XYZ has delegated his authority to file tax returns and make payments of taxes to Accountant. Accountant is out of the office when a return becomes due. Employee takes it upon himself to file the return and signs it as CFO. This is the only time Employee has ever represented himself as an officer of XYZ. Employee is not a *de facto* officer.

Example 11:

CEO is the sole officer of XYZ, Inc. CEO resigns from XYZ and no officer is appointed to replace her. Employee assumes the responsibilities and exercises the authority of CEO. This includes entering contracts on behalf of XYZ, filing tax returns, and remitting payments of tax. Employee signs documents as “CEO.” Employee is a *de facto* officer.

B. Time Period of Default

The “time period of default” is the tax period for which the business failed to file the return or pay the tax due and lasts through the later of the date the return or payment was due.²³ A responsible person is not required to be an officer during the entire time period of default, only some portion of it. The dissolution, discontinuance, sale, or restructuring of a business does not discharge a responsible person’s liability for failure to file a return or pay a tax due.²⁴

Example 12:

ABC Inc. is a retailer and is required to file monthly sales tax returns with the Department. ABC fails to file and pay its June 2015 sales tax. The time period of default is the date the tax period began, June 1, 2015, through the date the return or payment is due, July 20, 2015. CEO is hired as an officer of ABC on July 6, 2015, and remains an officer through July 20, 2015. CEO was an officer during the time period of default.

Example 13:

ABC Inc. is a retailer that is an annual filer for sales tax purposes.²⁵ ABC fails to file and pay its tax liability for 2015. The time period of default is the date the tax period began,

²³ MCL 205.27a(15)(c).

²⁴ However, the Department may be required to pursue the purchaser of the business in the case of a sale prior to pursuing the responsible person. See *infra* Section I. Prerequisites to Assessing a Responsible Person.

²⁵ A business that has a total tax liability of less than \$750 for a calendar year is only required to file an annual return.

January 1, 2015, through the date the return or payment is due, February 28, 2016. CEO is hired as an officer of ABC on October 1, 2015, and remains an officer through February 28, 2016. CEO was an officer during the time period of default.

Example 14:

ABC Inc. is a retailer that is a monthly filer for sales tax purposes. ABC fails to file and pay its tax liability for June 2015. The time period of default is the date the tax period began, June 1, 2015, through the date the return or payment is due, July 20, 2015. CEO is hired as an officer of ABC on June 1, 2015, however, CEO is terminated by ABC on June 20, 2015. CEO was an officer during the time period of default. However, see Example 17.

C. Willfulness

For an officer's actions to be considered "willful," the officer must have known, or had reason to know, that the business was obligated to file a return or pay the tax, but intentionally or recklessly failed to file the return or pay the tax.²⁶ Willfulness for purposes of officer liability does not require a bad purpose, intent, or motive as may be required in a criminal prosecution. The officer must only intentionally or recklessly fail to file a return or pay a tax the officer knew, or should have known, was due.

"Intentionally" means that the officer knowingly disregarded the laws, rules, or instructions published and/or administered by the Department. "Recklessly," on the other hand, means the creation of a substantial and unjustifiable risk that a return would not be filed or the tax would not be paid, or by a conscious disregard for or indifference to that risk by the officer.

Payment of any other debt, including employee payroll, when the officer knew, or should have known, there was an outstanding tax liability constitutes willfulness. A mistaken belief that payments to other creditors were required to be made in preference to applicable taxes does not make the failure to pay non-willful. Demonstrating that the task of filing a return or paying taxes was delegated to another does not establish a lack of willfulness.

Example 15:

CEO is an officer of ABC Inc. CEO delegates his authority to file sales tax returns and make payments of sales tax to Employee. CEO takes no steps to ensure that Employee is properly filing sales tax returns or remitting sales tax payments. Employee fails to properly remit sales tax payments. CEO's actions are reckless and, therefore, willful.

Example 16:

CEO is an officer of ABC Inc. CEO directs Employee to pay a vendor instead of paying ABC's sales tax liability. CEO's direction is intentional and, therefore, willful.

²⁶ MCL 205.27a(15)(d).

Example 17:

Assume the facts in Example 14, CEO's failure to file and pay June 2015's tax liability was not willful.

IV. *PRIMA FACIE*

When the Department has produced *prima facie* evidence that an officer is a responsible person, all of the requirements of MCL 205.27a(15), including willfulness, are presumed to be met and the officer may rebut by providing evidence that any of the elements required to be a responsible person have not been met.

There are two types of *prima facie* evidence:

A. Signature During the Time Period of Default

The signature, including an electronic signature, of an officer on a return or negotiable instrument submitted in payment of taxes during the time period of default is *prima facie* evidence that the officer is a responsible person.²⁷ The return or negotiable instrument that is signed does not need to be for the type of tax or tax period being assessed or be a Michigan return or negotiable instrument for payment of Michigan tax to constitute *prima facie* evidence.

Example 18:

ABC Inc. is a retailer and is required to file sales tax returns on a monthly basis. ABC failed to file its return and remit tax for June. The Department assessed ABC for its unpaid sales tax liability and it failed to pay the assessment. An officer of ABC, CEO, signed a corporate income tax return on July 8. That return is *prima facie* evidence that CEO is a responsible person because it was signed during the time period of default (June 1 through July 20).

B. Signature Before the Time Period of Default

The signature, including an electronic signature, of an officer on a return or negotiable instrument submitted in payment of tax before the time period of default, along with evidence other than that document that sufficiently demonstrates the person was an officer during the time period of default, is *prima facie* evidence that the officer is a responsible person.²⁸

Example 19:

ABC Inc. is a retailer and is required to file sales tax returns on a monthly basis. ABC failed to file its return and remit tax for June. The Department assessed ABC for its

²⁷ MCL 205.27a(15)(b).

²⁸ MCL 205.27a(15)(b).

unpaid sales tax liability and it failed to pay the assessment. CEO, an officer of ABC, signed a sales tax return for the period of April on May 8. Additionally, on June 15, CEO, as an officer on behalf of ABC, signed contracts with wholesale vendors. There is *prima facie* evidence that CEO is a responsible person because he signed a return before the time period of default and there is other evidence demonstrating he was an officer during the time period of default (June 1 through July 20).

Example 20:

ABC Inc. is a retailer and is required to file sales tax returns on a monthly basis. ABC failed to file its return and remit tax for June. The Department assessed ABC for its unpaid sales tax liability and it failed to pay the assessment. CEO, an officer of ABC, signed a sales tax return for the period of April on May 8. There is no evidence that CEO was an officer during the time period of default (June 1 through July 20). The Department has not produced *prima facie* evidence that CEO is a responsible person.

C. No Signature Before or During the Time Period of Default

When the Department fails to produce *prima facie* evidence, it must establish a *prima facie* case that the person was a responsible person. Establishing a *prima facie* case requires the Department to produce evidence of each element required for an officer to be a responsible person:

1. The person was or is an officer of the business;
2. The officer controlled, supervised, or was responsible for the filing of returns or payment of taxes;
3. The officer was an officer during the “time period of default;” and,
4. The officer “willfully” failed to file a return or pay the tax due.²⁹

The Department may establish the second element,³⁰ i.e., that the officer had control, supervision, or responsibility for the filing of returns or paying of taxes, by establishing any of the following:

- (a) the officer had control over the preparing of the business’ returns or payment of tax;
- (b) the officer supervised the preparing of the business’ returns or payment of tax, or;
- (c) the officer was charged with the responsibility of preparing the business’ returns or payment of tax.³¹

Any evidence that documents the officer’s control, supervision, or responsibility, or a lack thereof, will be considered. This includes, but is not limited to, the signature of an officer on a return or negotiable instrument submitted in payment of tax after the time period of default, registration for tax, audit or collection reports that identify a person as an officer with tax

²⁹ MCL 205.27a(15)(b).

³⁰ See *infra* Section III, A. Conclusions for a discussion of establishing the first element.

³¹ *Peterson v Dep’t of Treasury*, 145 Mich App 445, 450 (1985); *Keith v Dep’t of Treasury*, 165 Mich App 105, 108 (1987).

responsibilities, payment plan agreements signed by the officer, contracts signed by the officer, filings with any local, state, or federal agency, or any other information that indicates the person was an officer with control, supervision, or responsibly for filing returns or paying tax.

Example 21:

The Department assessed ABC Inc. for failing to remit sales tax; ABC fails to pay the assessment. Officer is listed as an officer on ABC's registration for Michigan taxes. Officer has never signed a tax return or negotiable instrument in payment of tax on behalf of ABC. During the time period of default an employee of ABC, Accountant, signed returns and negotiable instruments in payment of tax on behalf of ABC, but only upon review and approval of Officer. Officer was an officer during the time period of default and directed Accountant to pay the company's payroll instead of sales tax causing the failure to remit. A *prima facie* case that Officer is a responsible person has been established.

Example 22:

The Department assessed ABC Inc. for failing to remit sales tax; ABC fails to pay the assessment. Officer is listed as an officer on ABC's registration for Michigan taxes. Officer has never signed a tax return or negotiable instrument in payment of tax on behalf of ABC. However, the Department determines that during the time period of default, Officer directed an employee of ABC, Accountant, to sign returns and negotiable instruments in payment of tax on behalf of ABC. Furthermore, the Department establishes that Officer did not take any measures to ensure that Accountant properly filed returns or remitted tax. A *prima facie* case that Officer is a responsible person has been established.

Example 23:

The Department assessed ABC Inc. for failing to remit sales tax; ABC fails to pay the assessment. Officer is listed as an officer on ABC's registration for Michigan taxes. Officer signed a tax return after the time period of default, but not before or during. There is no other evidence that suggests Officer had any tax specific authority or responsibilities. A *prima facie* case that Officer is a responsible person has not been established.

V. UNDERLYING ASSESSMENT

Prior to passage of 2014 PA 3, an officer assessed for corporate officer liability was prohibited from challenging the underlying assessment against the business for which the officer was derivatively liable. Instead, the officer was limited to challenging only the validity of the assessment issued pursuant to MCL 205.27a(5).³²

³² *Keith, supra.*

2014 PA 3 expressly granted responsible persons the right to challenge the validity of the assessment issued against the business. The responsible person may challenge it to the same extent that the business could have challenged it under Sections 21 and 22 of the Revenue Act, MCL 205.21 and MCL 205.22, when originally issued.³³

Thus, upon issuance of an intent to assess against the officer, the officer may request an informal conference as provided by Section 21 challenging the officer's status as a responsible person and/or the validity of the assessment that was originally issued against the business. Similarly, the officer may appeal a final assessment issued by the Department as provided by Section 22 of the Revenue Act, challenging the officer's status as a responsible person and/or the validity of the original assessment.

VI. DISCLOSURES

2014 PA 3 requires the Department to provide an assessed responsible person notice of any amounts collected from other responsible persons or successors attributable to the same assessment. The Department will notify responsible persons if a successor has been assessed.³⁴ The Department will also provide an assessed responsible person notice of any amounts collected from the business attributable to the same assessment. However, the Department is only authorized to disclose the amount collected; it is not authorized to disclose the party from which it collected.³⁵

Additionally, upon written request of an officer that has been assessed as a responsible person, the Department will disclose any documents it considered in its audit or investigation in determining that the officer is a responsible person liable for the tax.³⁶ When a written request is made, the Department will provide any documents that it considered as the basis for its assessment within a reasonable time, in redacted form where necessary.

VII. BANKRUPTCY PETITIONS AND RECEIVERSHIPS

A responsible person may be assessed for tax liability incurred by the business *prior to* the date the business filed its petition under the United States Bankruptcy Code. Taxes incurred *subsequent to* filing under the Bankruptcy Code are the responsibility of the debtor-in-possession or trustee in bankruptcy.

However, if the business is the debtor-in-possession and no bankruptcy trustee is appointed, then the responsible person retains control of the filing of tax returns and/or payment of taxes. Therefore, a responsible person may be liable for any unpaid taxes of the business while the business is the debtor-in-possession and no bankruptcy trustee has been appointed after the business has been assessed.

³³ However, if the business previously litigated the assessment, the officer may be precluded from challenging the underlying assessment based on the doctrines of collateral estoppel or *res judicata*.

³⁴ However, the Department is prohibited from disclosing the identity of the successor. MCL 205.28(1)(f).

³⁵ MCL 205.28(1)(f).

³⁶ MCL 205.27a(6).

In cases where a business files a petition in bankruptcy, the Department will issue an assessment against a responsible person at approximately the same time it prepares a bankruptcy claim to be filed through the Attorney General's office if the business has already been assessed. This would place a responsible person on notice that there is potential officer liability.

Receiverships are authorized by state law. There are generally two types of receiverships, general and limited. A general receiver is analogous to a bankruptcy trustee and takes charge of the business entity entirely, either for purposes of winding down the business or to continue operating it as a going concern.³⁷ A limited receiver, on the other hand, has control over only limited assets of the business. An officer is not liable for the failure to file returns or remit taxes as a responsible person if a general or limited receiver, validly appointed under state law, has the specific duty, pursuant to applicable receivership documents, to file returns and remit tax. Conversely, if the receiver is not required to file returns and/or remit tax, an officer may be liable for the failure to file a required return or remit tax even though the receiver controls some or all of the business's assets.

³⁷ *In Re Newport Offshore Ltd.*, 219 B.R. 341 (R.I. 1998).