STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Dale B. Mahrle,
Petitioner,

v

MTT Docket No. 435038

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

ORDER VACATING DECEMBER 20, 2012 FINAL OPINION AND JUDGMENT

FINAL OPINION AND JUDGMENT ON REMAND

INTRODUCTION

Petitioner, Dale B. Mahrle, filed this appeal with the Tribunal on May 14, 2012, challenging Final Assessment No. R937939 relating to corporate officer liability under MCL 205.27a(5). The assessment related to SBT liability of QMC, LLC, for the 12/07 tax period. The Final Assessment established that Petitioner owes tax in the amount of $58,965, plus interest in the amount of $12,793.36 and penalties in the amount of $25,145.46.

On December 20, 2012, the Tribunal issued a Final Opinion and Judgment granting summary disposition in favor of Respondent and affirming Final Assessment No. R937939. This decision was appealed to the Michigan Court of Appeals COA Docket No. 314859). On July 15, 2014, the Court of Appeals issued an Order remanding this case to the Tribunal for further proceedings consistent with Public Act 3 of 2014 and *Shotwell v Dep't of Treasury*, 305 Mich App 360; 853 NW2d 414 (2014). On December 19, 2014, the Court of Appeals issued an Order dismissing the appeal, pursuant to the parties stipulation to dismiss.

A hearing on remand in this matter was held on August 24, 2015. Gregory A. Nowak, Attorney, represented Petitioner, and James A. Ziehmer, Attorney, represented Respondent. Petitioner's sole witness was Dale B. Mahrle. Respondent did not call any witnesses.

The parties filed their respective post-hearing briefs on October 5, 2015.

Based on the evidence, testimony, and case file, the Tribunal finds that the tax, interest, and penalties are as follows:

Assessment Number: R937939

Taxes	Interest	Penalties
$58,965	$12,793.36[1]	$25,145.46

PETITIONER'S CONTENTIONS

Petitioner contends his failure to pay the tax was not willful as required under MCL 205.27a(15)(b) and (d). Petitioner argues that Respondent has not published guidance on the amended standards under the revised statute and as Michigan has adopted the federal standard that the failure must be willful, Petitioner argues "there is no evidence that Petitioner deliberately chose not to pay the taxes or recklessly disregarded an obvious risk that the taxes would not be paid."[2] Petitioner asserts the company did not have the funds to pay the taxes when they became due and entered into an installment agreement, with payment on the installment agreement ceasing after Lauderdale took control of the company's finances. Petitioner further asserts that this failure to pay did not occur until after he was no longer in a position of responsibility and control.

Petitioner also argues that Respondent had an obligation, under the amended statute, to assess Lauderdale as the successor entity. Petitioner states that under MCL 205.27a(1), Stefan Wanczyk, Lauderdale Development Corporation, and QMC Asset Acquisition, as purchasers of QMC's assets, were required to establish an escrow account for the payment of the taxes. Petitioner contends this liability for the taxes was assumed on July 20, 2010, the day before QMC was assessed by Respondent. Petitioner argues that the Tribunal has recognized that liability arises even when the successor purchaser acquires a business in liquidation of a debt.[3] Petitioner further argues that successor liability in a UCC Article 9 sale recognizes the common law concept that imposes liability on the successor "for claims of a seller when there is both continuity of enterprise and ownership."[4]

PETITIONER'S ADMITTED EXHIBITS

P-1 Articles of Incorporation – Lauderdale Development Corporation
P-2 Articles of Incorporation and Certificate of Amendment – QMC Asset Acquisition, Inc.

[1] Interest accruing and to be computed in accordance with 1941 PA 122.
[2] Petitioner's Brief at 9.
[3] Citing *Greenfield Plaza Assoc v Dep't of Treasury*, 14 MTT 19 (Docket No. 278490), issued January 19, 2005.
[4] Petitioner's Brief at 13.

P-3 Amendment to Operating Agreement – QMC, LLC
P-4 Notification of Disposition of Collateral on behalf of Lauderdale Development Corporation, published by Legal News – July 12, 2010 and July 19, 2010
P-5 Notification of Public Sale of Collateral under UCC § 9-611 – dated July 16, 2010 on behalf of lender, Grioc Properties, LLC
P-6 Notice of State Law Lien dated September 8, 2010, Assessment No. P089221
P-7 Bill for Taxes Due (Intent to Assess) dated June 14, 2011, Assessment No. R937939
P-8 Request for Informal Conference dated August 12, 2011
P-9 Decision and Order of Determination issued April 9, 2012 (with Informal Conference Recommendation)
P-10 Final Opinion and Judgment entered December 20, 2012
P-11 Order Denying Petitioner's Motion for Reconsideration entered January 28, 2013
P-12 Documents from *Mahrle v Dep't of Treasury*, COA Docket No. 314859
   a. Claim of Appeal filed February 19, 2013
   b. Docket Statement filed March 19, 2013
   c. Appellant's Brief filed June 11, 2013
   d. Reply Brief filed August 6, 2013
   e. Supplemental Authority filed May 29, 2014
   f. Order filed July 15, 2014

PETITIONER'S WITNESS

Petitioner, Dale B Mahrle, was called as the sole witness. He testified that: (i) QMC, LLC was an engineering company started in 1988, by himself and two other people; (ii) 80 – 90% of its business was directed to or received from automotive suppliers and automobile OEMs; (iii) the company began to experience financial distress in 2007 – 2008; (iv) the company had an asset-based loan originally financed by Citizens Bank, with the availability for working capital based on the balance of the accounts receivable; (v) the company refinanced this loan with Crestmark who cut off all financing during the automotive industry bankruptcies; (vi) once the company saw it could not make it with their own cash flow, it went to the Lauderdale investment company, owned and operated by Stefan Wancyzk and Tom Carter; (vii) in March of 2009, Lauderdale financed the company in exchange for 50% of the ownership, making it the majority shareholder; (viii) Crestmark did not foreclose on the company, Lauderdale went to Crestmark and bought out the bank's position; (ix) the company continued to make accounts receivable reports and provided Lauderdale a list of operating expenses to be paid; (x) Lauderdale would review this list and cross out items they did not want to pay; (xi) in July of 2010, Lauderdale decided to foreclose on the company and started another corporation, QMC Acquisition, later renamed QMC, Inc; (xii) Lauderdale moved the company to a different office,

but kept all of the employees except for Petitioner and one other person; (xiii) his title was managing partner or manager, and after Lauderdale became involved in 2009 he became co-manager with Stefan Wancyzk.

Mr. Mahrle further testified that he did not recall the circumstances surrounding the 2007 SBT return at issue in the assessment and does not know when the return was filed. He testified that Lauderdale took everything after they foreclosed and the original documentation is not available to him. He stated that Plante Moran was the accountant and did all the company's tax returns. He does recall owing SBT tax and entering into an installment agreement to pay the tax, but then started to miss some of the installment payments and contacted Treasury by letter on September 30, 2009, about modifying the installment agreement.

RESPONDENT'S CONTENTIONS

Respondent contends that prima facie evidence exists that Petitioner was a responsible person under MCL 205.27a(15) as he signed returns prior to the default, signed annual statements and signed an installment agreement during the time period of default, and also signed checks submitted in payment of taxes after the time period of default. Respondent argues that willfulness does not require a bad purpose or intent but only that the responsible person intentionally or recklessly fails to file a return or pay the tax that was known, or should have been known, was due. Respondent states that Petitioner has admitted that he knew of the obligation for filing and payment as he had previously entered into payment arrangements on behalf of the company for unpaid taxes. "Despite this knowledge, existing during the time periods of default, Mahrle made no effort to pay these taxes on time and in full."[5] Respondent further contends that Petitioner knew that returns and payments were due and "he deliberately ignored them"[6] and failed to file the returns or pay the taxes due. Respondent references the definition of "recklessness" found in *Black's Law Dictionary*, as well as a decision by the Texas Court of Appeals, which summarized the federal standard. Respondent argues that under the federal standard, Petitioner "recklessly failed to pay the tax"[7] as Petitioner knew that taxes were

[5] Respondent's Brief at 7.
[6] *Id*.
[7] *Id* at 9.

due, had control and could review business records to see what taxes were due, and could see what the anticipated liability would be in order to set aside the funds to make the payments.

Respondent further argues that there is no successor purchaser under MCL 205.27a(1) because QMC, LLC did not sell anything or voluntarily cease operation; the secured party foreclosed on its interest and sold the assets at a public auction. Respondent states "[s]uccessor liability arises in situations where the preceding business voluntarily sells or ceases operations and a successor acquires the business or assets."[8]

Lastly, Respondent states that P089211 is a separate assessment for prior taxes on a preexisting debt for the 2006 SBT taxes. An installment agreement for this debt was entered in December 2007. Respondent states that Petitioner was unable to recall at hearing whether the assessment under appeal was ever incorporated into this installment agreement, but Respondent did not contest the allegation that the assessment was incorporated into the existing agreement and "it can be assumed that at least at some future date, the assessment at issue was incorporated into the ongoing installment agreement."[9] Respondent argues that the 2006 SBT debt and installment agreement reflect Petitioner's knowledge that taxes were due and required to be paid and the consequences for not paying the taxes under appeal.

RESPONDENT'S ADMITTED EXHIBITS

R-1 Intent to Assess (Mahrle)
R-2 Intent to Assess (QMC, LLC)
R-3 Final Assessment (QMC, LLC)
R-4 Affidavit of Angela Helm
R-5 Letter dated September 30, 2009
R-6 Installment Agreement entered December 17, 2007
R-7 Installment Agreement entered May 14, 2008
R-8 Check dated October 17, 2008
R-9 Check dated June 24, 2008
R-10 Check dated July 8, 2005
R-11 Articles of Organization
R-12 Michigan Payroll Agent Notification
R-13 2003 Limited Liability Annual Statement
R-14 2004 Limited Liability Annual Statement
R-15 2006 Limited Liability Annual Statement
R-16 2007 Limited Liability Annual Statement

[8] *Id* at 10.
[9] *Id* at 12.

R-17 2009 Limited Liability Annual Statement
R-18 2010 Limited Liability Annual Statement
R-19 Registration for Michigan Taxes
R-20 2002 SBT Return
R-21 2003 SBT Return
R-22 Power of Attorney dated May 6, 2010
R-23 Petitioner's Response to Respondent's First Interrogatories and Requests to Produce

FINDINGS OF FACT

1. QMC, LLC[10] was an engineering company, established in 1998, with a large portion of business directed to and received from the automotive industry.
2. QMC, LLC was a manager-managed LLC[11] with Petitioner, Robert Berry, and Jeffrey Perry as its members.
3. Petitioner was the president, manager, managing partner, managing director, and the registered agent of QMC, LLC.[12]
4. QMC, LLC was originally financed by Citizens Bank (First Merit Bank); QMC, LLC later refinanced with Crestmark.
5. Petitioner entered into an Installment Agreement on behalf of QMC, LLC on December 17, 2007, for Assessment No. P089221.
6. Petitioner entered into an Installment Agreement on behalf of QMC, LLC on May 14, 2008, for Assessment No. P089221.
7. Crestmark terminated its financing in 2009 and QMC, LLC contacted Lauderdale, an investment company owned and operated by Stefan Wancyzk and Tom Carter.
8. QMC, LLC's amended operating agreement, dated March 10, 2009, shows 50% membership interest by Lauderdale, 32% by Petitioner, and 18% by the other two members of QMC, LLC.[13]
9. Petitioner, as managing partner, sent a letter to Respondent dated September 30, 2009, regarding inability to make the monthly installment payments and indicating QMC, LLC would like to resume installments payments in January 2010.[14]

[10] Also known as QMC Merger LLC (see R-11).
[11] R-11.
[12] See R-11 through R-22.
[13] P-3.
[14] R-5.

10. Intent to Assess (Assessment No. R937939) was issued to QMC, LLC on May 12, 2010, related to SBT liability for the 2007 tax period.
11. Lauderdale foreclosed on its interest in QMC, LLC at a public sale under Article 9 of the Michigan Uniform Commercial Code on July 20, 2010.[15]
12. Petitioner had no involvement with QMC, LLC following the foreclosure of Lauderdale's interest.
13. The Final Assessment (Assessment No. R937939) was issued to QMC, LLC on July 21, 2010.
14. QMC, LLC's Articles of Organization were amended July 26, 2010, changing the name to QMC, Inc.[16]
15. An Intent to Assess (Assessment No. R937939) was issued to Petitioner on June 14, 2011.

CONCLUSIONS OF LAW

As an initial matter, the Tribunal finds that a Final Opinion and Judgment was entered on December 20, 2012, holding in favor of Respondent. Given the revisions to the applicable statute and the Court of Appeals' directive on remand that the Tribunal review its decision in light of these revisions and *Shotwell v Dep't of Treasury*, 305 Mich App 360; 853 NW2d 414 (2014), the Tribunal finds that the December 20, 2012 Final Opinion and Judgment shall be vacated.

In *Shotwell*, the Court of Appeals held that MCL 205.27a(5) applied retroactively:

> By stating that § 27a(5) applies to taxes related to tax assessments issued to responsible persons *before* January 1, 2014, the Legislature clearly expressed an intent that § 27a(5) apply retroactively. Indeed, the amendments were approved by the Governor on January 30, 2014, and took effect February 6, 2014, yet they concerned, not only a prospective timeframe, but also the applicability of § 27a(5) to past tax assessments issued before the act's effective date and, more particularly, before January 1, 2014. Given this clear indication that the current version of § 27a(5) should apply to taxes administered before January 1, 2014, we conclude that the statute has retroactive effect.[17]

[15] See P-4.
[16] See P-2.
[17] *Shotwell v Dep't of Treasury*, 305 Mich App 360, 368; 853 NW2d 414 (2014).

Accordingly, the revised provisions are applicable in the present case. MCL 205.27a(5), as amended states:

> If a business liable for taxes administered under this act fails, for any reason after assessment, to file the required returns or to pay the tax due, any of its officers, members, managers of a manager-managed limited liability company, or partners who the department determines, based on either an audit or an investigation, is a responsible person is personally liable for the failure for the taxes described in subsection (14). The dissolution of a business does not discharge a responsible person's liability for a prior failure of the business to file a return or pay the tax due. The sum due for a liability may be assessed and collected under the related sections of this act. The department shall provide a responsible person assessed under this section with notice of any amount collected by the department from any other responsible person determined to be liable under this subsection or purchaser determined to be liable under subsection (1) that is attributable to the assessment. The department shall not assess a responsible person under this section more than 4 years after the date of the assessment issued to the business. A responsible person may challenge the validity of an assessment to the same extent that the business could have challenged that assessment under sections 21 and 22 when originally issued. The department has the burden to first produce prima facie evidence as described in subsection (15) or establish a prima facie case that the person is the responsible person under this subsection through establishment of all elements of a responsible person as defined in subsection (15). In a separate proceeding before the circuit court, a responsible person found to be liable for the assessment under this section may recover from other responsible persons an amount equal to the assessment or portion of the assessment based on that person's proportionate liability for the assessment as determined in that proceeding. Before assessing a responsible person as liable under this subsection for the tax assessed to the business, the department shall first assess a purchaser or succeeding purchaser of the business personally liable under subsection (1) if the department has information that clearly identifies a purchaser or succeeding purchaser under subsection (1) and establishes that the assessment of the purchaser or succeeding purchaser would permit the department to collect the entire amount of the tax assessment of the business. The department may assess a responsible person under this subsection notwithstanding the liability of a purchaser or succeeding purchaser under subsection (1) if the purchaser or succeeding purchaser fails to pay the assessment.

Petitioner was a member and the manager of QMC, LLC, a manager-managed limited liability company, and if a "responsible person" he would be liable for the failure of QMC, LLC to pay the 2007 SBT liability at issue in this case. "Responsible person" is defined under MCL 205.27a(15)(b) as:

> an officer, member, manager of a manager-managed limited liability company, or partner for the business who controlled, supervised, or was responsible for the filing of returns or payment of any of the taxes described in subsection (14) during the time period of default and who, during the time period of default, willfully failed to file a return or pay the tax due for any of the taxes described in subsection (14). The signature, including electronic signature, of any officer, member, manager of a manager-managed limited liability company, or partner on returns or negotiable instruments submitted in payment of taxes of the business during the time period of default, is prima facie evidence that the person is a responsible person. A signature, including electronic signature, on a return or negotiable instrument submitted in payment of taxes after the time period of default alone is not prima facie evidence that the person is a responsible person for the time period of default but may be considered along with other evidence to make a prima facie case that the person is a responsible person. With respect to a return or negotiable instrument submitted in payment of taxes before the time period of default, the signature, including electronic signature, on that document along with evidence, other than that document, sufficient to demonstrate that the signatory was an officer, member, manager of a manager-managed limited liability company, or partner during the time period of default is prima facie evidence that the person is a responsible person.

Petitioner is not contending that he was not an officer, member, manager of a manager-managed limited liability company, or partner; Petitioner's contentions against liability are (i) the failure to pay was not willful, and (ii) the successor purchaser is liable for the taxes, notwithstanding that QMC, LLC's assets were purchased in an Article 9 sale under the UCC. Respondent has submitted sufficient evidence, in the form of Petitioner's signature on the 2002 and 2003 SBT returns, and checks dated July 8, 2005, June 24, 2008, and October 17, 2008, along with the 2003 – 2010 Limited Liability Annual Statements and December 17, 2007 and May 14, 2008 Installments agreements, to establish that Petitioner meets the preliminary requirements for being a responsible person.

Although Petitioner was the manager of QMC, LLC and signed checks and tax returns, Petitioner is not liable for QMC, LLC's failure to pay the taxes due unless it is established that he "willfully" failed to pay the tax due. "Willfully" is defined in MCL 205.27a(15)(d) as "the person knew or had reason to know of the obligation to file a return or pay the tax, but **intentionally or recklessly** failed to file the return or pay the tax." [Emphasis added.] Regarding the taxes due, Petitioner contend he "knew that he was not able to pay them due to the financial distress that QMC was in and thereafter entered into an installment agreement on May 14, 2008

with the Department."[18] Petitioner asserts that QMC did not willfully fail to pay its taxes; it did not have the funds to pay the taxes. Petitioner testified "[w]e owed them money and, you know, obviously it was our intent to save the company. I responded to the State and came up with this installment agreement so that we could pay our taxes. We didn't willfully not pay them."[19] Petitioner further testified that after Lauderdale took over in March of 2009, he became co-manager with Stefan Wanczyk but he had no control over what receivables were paid; "in essence they financially ran the company. I signed the checks along with another person or two other people, but at the end of the day we had no authority as to what we had to pay or what we could pay."[20] Both parties make reference to the federal standard for willfulness in their post-hearing briefs. Petitioner argues that under the federal standard, Respondent must show that Petitioner "was aware of the outstanding taxes and either deliberately chose not to pay the taxes or recklessly disregarded an obvious risk that the taxes would not be paid."[21] Respondent cites to *State v Crawford*, which stated that under federal case law, willfulness "requires 'a voluntary, conscious, and intentional act, but not bad motive or evil intent'" and that willfulness "is normally established by evidence that the responsible person had knowledge that the taxes were due . . . and yet paid other creditors."[22] Respondent also points to the definition of "recklessness" found in *Black's Law Dictionary*. "Recklessness" is defined as:

> **1.** Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing. **2.** The state of mind in which a person does not care about the consequences of his or her actions.[23]

The Tribunal finds that Petitioner did not act recklessly in failing to pay the taxes of QMC, LLC. Petitioner did, however, *intentionally* fail to pay the taxes when due. Petitioner makes much of the fact that QMC, LLC did not have sufficient funds available to pay all of its obligations, including its SBT liabilities. The amended statute does not excuse the failure to pay in circumstances where the company lacked the financial resources to pay its debts owed to the

[18] Petitioner's Brief at 3.
[19] TR at 20 -21.
[20] TR at 22-23.
[21] Pet Brief at 7-8, citing to *Phillips v United States*, 73 F.3d 939 (9th Cir. 1996).
[22] *State v Crawford*, 262 SW3d 532, 538 (Texas App 2008); Res Brief at 8.
[23] *Black's Law Dictionary* (10th ed. 2014).

State of Michigan. Petitioner intentionally and deliberately chose to pay other obligations and not pay the 2007 SBT liability when it first became due. Petitioner also tries to argue that he "had limited knowledge of the SBT liability"[24] citing to his testimony that he was not sure when he became aware of the ongoing liability and that the SBT was "very complicated."[25] Petitioner also admitted "I guess I'm generally aware that there's usually an SBT tax that has to be paid."[26] Petitioner's awareness and understanding of an SBT liability is further supported by the installment agreements entered into by Petitioner on December 17, 2007 and May 14, 2008, relating to the outstanding 2006 SBT liability.[27] Although not submitted into evidence, both parties have stated that the 2007 SBT liability at issue in this appeal was also subject to an installment agreement. The Tribunal finds that Petitioner had knowledge of the company's continuing tax liabilities, signed returns and checks in payment of taxes, and intentionally did not pay the company's 2007 SBT liability, and therefore, "willfully" failed to pay the taxes due as that term is used and defined in MCL 205.27a(15)(b) and (d).

In addition to being a manager who willfully failed to pay the tax, MCL 205.27a(15)(b) further mandates that to be a "responsible person" Petitioner must have been a manager responsible for payment of the taxes "during the time period of default" and willfully failed to pay the tax due "during the time period of default." "Time period of default is defined in MCL 205.27a(15)(c) as "the tax period for which the business failed to file the return or pay the tax due under subsection (5) and through the later of the date set for the filing of the tax return or making the required payment." Neither party addressed the beginning and end dates for the "time period of default" in the submitted post-hearing briefs. QMC, LLC failed to pay the tax due for the tax period ending December 31, 2007. The date set for filing the 2007 SBT annual return and paying any tax due was April 30, 2008. It is undisputed that QMC, LLC failed to pay the taxes due for the December 31, 2007 tax period on or before April 30, 2008. Petitioner argues that he entered into an installment agreement that satisfied QMC, LLC's obligation for the taxes and it was when Lauderdale took control in 2009 that payments on the installment agreement were no longer being made. Petitioner testified that after Lauderdale became the majority shareholder,

[24] Pet Brief at 8.
[25] Pet Brief at 8-9, citing Tr at 28.
[26] *Id*.
[27] See Res. Brief at 11 - 12.

they would review the list of operating expenses that needed to be paid "and then they would cross out items that they didn't want us to pay."[28]

The Tribunal finds that the failure to pay first occurred at a time when Petitioner was president/manager of the company and *prior to* the assignment of 50% of the membership interest to Lauderdale, which took place on March 10, 2009. To be a "responsible person" under MCL 205.27a(15)(b), Petitioner must be a manager who controlled, supervised, or was responsible for payment of the taxes and who willfully failed to pay the taxes due during the time period of default. The statute does not require that Petitioner have control or responsibility for the taxes during *the entirety* of the time period of default, i.e., from the start date of the time period through the end date. Accordingly, even if it is determined that date set for making the required payment under the definition of "time period of default" extended up to the end date for payment under the installment agreement, the statute does not require that Petitioner be in control of tax payments for QMC, LLC up to that unspecified end date. The Tribunal finds it sufficient that Petitioner was the manager with control, supervision, and responsibility for filing the 2007 SBT return and making the payment during the 2007 tax period, during the April 30, 2008 deadline for the filing of the return and payment, and beyond that time into at least March of 2009 when he contends his duties changed to that of a co-manager once 50% of the membership interest was transferred to Lauderdale. Petitioner also points to the Intent to Assess as having significance; however, the date of the Intent to Assess the company for outstanding unpaid 2007 SBT taxes is *not* the start date for when the taxes first became due or when the time period of default started to run under MCL 205.27a(15)(c). The date QMC, LLC was assessed for the 2007 SBT liability is not determinative as to whether or not Petitioner was a "responsible person." As such, Petitioner meets all requirements for a "responsible person" found in MCL 205.27a(15)(b) and would be liable for the taxes subject to the assessment under appeal.

MCL 205.27a(5), however, also provides

> **Before assessing a responsible person** as liable under this subsection for the tax assessed to the business, **the department shall first assess a purchaser or succeeding purchaser of the business** personally liable under subsection (1) if the department has information that clearly identifies a purchaser or succeeding purchaser under subsection (1) and establishes that the assessment of the purchaser or succeeding purchaser would permit the department to collect the

[28] Tr at 23.

> entire amount of the tax assessment of the business. The department may assess a responsible person under this subsection notwithstanding the liability of a purchaser or succeeding purchaser under subsection (1) if the purchaser or succeeding purchaser fails to pay the assessment. [Emphasis added.]

Respondent argues that *there is no successor purchaser* within the meaning of MCL 205.27a(1) which provides:

> If a person liable for a tax administered under this act **sells out his or her business or its stock of goods or quits the business**, the person shall make a final return within 15 days after the date of selling or quitting the business. The purchaser or succeeding purchasers, if any, **who purchase a going or closed business or its stock of goods** shall escrow sufficient money to cover the amount of taxes, interest, and penalties as may be due and unpaid until the former owner produces a receipt from the state treasurer or the state treasurer's designated representative showing that the taxes due are paid, or a certificate stating that taxes are not due . . . . [Emphasis added.]

Respondent contends that QMC, LLC did not sell anything or voluntarily cease its operation; Lauderdale, as the secured party, foreclosed on its interest in QMC, LLC and sold the company's assets at public auction. According to Respondent, "[s]uccessor liability arises in situations where the preceding business voluntarily sells or ceases operation and a successor acquires the business or assets."[29] Respondent further contends that Petitioner's argument that the new business was operating in the same manner as QMC, LLC is not relevant, "absent a determination that the sale was fraudulent and the new business and the secured party are merely a continuation of the old . . . ."[30]

The Tribunal finds that MCL 205.27a(5) requires Respondent to "first assess a purchaser or succeeding purchaser of the business *personally liable under subsection (1)* . . . ." [Emphasis added.] subsection (1) ascribes personal liability to a succeeding purchaser when a person liable for taxes "sells out his or her business or its stock of goods or quits the business . . . ." Respondent raises the argument that QMC, LLC did not sell out its business or stock or quit the business; it was involuntarily foreclosed upon in a UCC Article 9 sale. Petitioner cites the Tribunal's decision in *Greenfield Plaza Assoc v Dep't of Treasury*,[31] for the proposition that "the liability for unpaid taxes arises even where the successor acquires the business in liquidation of a

[29] Respondent's Brief at 10.
[30] *Id.*
[31] *Greenfield Plaza Assoc v Dep't of Treasury*, 14 MTT 19 (Docket No. 278490), issued January 19, 2005.

debt."[32] *Greenfield Plaza*, however, is not factually similar, as in that case, there was a sale of assets pursuant to a Sale Agreement, with the Tribunal finding that a transfer of "substantial business assets" occurred "for valuable consideration."[33] There was no sale, transfer of substantial business assets, or valuable consideration in the present case. Petitioner, citing a case out of Connecticut,[34] further argues that successor liability can be imposed against a purchaser in an Article 9 sale. This case, however, did not address whether the successor met the definition of a "purchaser" under the Connecticut statute, but rather vacated a lower court decision for further fact finding on the issue of whether an exception to the general common law rule against successor liability had been met.

The Tribunal finds that Respondent is correct in its assertion that QMC, LLC did not sell out the business or stock or quit the business, and Lauderdale was *not* a purchaser or succeeding purchaser "who *purchase[d]* a going or closed business or its stock of goods" within the meaning of MCL 205.27a(1). [Emphasis added.] While factually different, the issue of successor liability under MCL 205.27a(1) was recently before the Tribunal in *Hayes LB, Inc v Dep't of Treasury*.[35] In that case, the Administrative Law Judge recognized that there is no Michigan case law directly on point; however, states with similar statutes have held that a secured creditor foreclosing on its interest is not a purchaser.[36] In the present case, the Tribunal finds that Lauderdale asserted its rights and foreclosed on its interest at a public auction; it did not purchase the business, stock, or assets of QMC, LLC. Accordingly, there is no successor purchaser within the meaning of MCL 205.27a(5) that Respondent was required to first assess before issuing the assessment against Petitioner in the present case.

Having found that no successor purchaser exists, and having further found that Petitioner meets all statutory requirements of a "responsible person" under MCL 205.27a(5), Petitioner is therefore liable for the taxes, penalty, and interest contained in Assessment No. R937939.

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[32] Petitioner's Brief at 12.
[33] 14 MTT 19 at 22.
[34] *Call Ctr Technologies, Inc v Grand Adventures Tour & Travel Pub Corp*, 635 F3d 48, 49 (CA 2 2011).
[35] *Hayes LB, Inc v Dep't of Treasury*, MTT Docket No. 14-003902, Proposed Opinion and Judgment issued August 31, 2015.
[36] See *Hayes LB* at 17 – 20, citing to *Ohio v Standard Oil Co*, 39 Ohio St2d; 313 NE2d 838 (1974) and *LKS Pizza, Inc v Kentucky*, 169 SW3d 46 (2005).

JUDGMENT

IT IS ORDERED that Final Assessment R937939 is AFFIRMED as set forth in the Introduction section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed Opinion and Judgment within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

APPEAL RIGHTS

If you disagree with the Tribunal's final decision in this case, you may either file a motion for reconsideration with the Tribunal or a claim of appeal directly to the Michigan Court of Appeals ("MCOA").

A motion for reconsideration with the Tribunal must be filed, by mail or personal service, with the $50.00 filing fee, within 21 days from the date of entry of this final decision.[37] A copy of a party's motion for reconsideration must be sent by mail or electronic service, if agreed upon by the parties, to the opposing party and proof must be submitted to the Tribunal that the motion for reconsideration was served on the opposing party.[38] However, unless otherwise provided by the Tribunal, no response to the motion may be filed, and there is no oral argument.[39]

A claim of appeal to the MCOA must be filed, with the appropriate entry fee, unless waived, within 21 days from the date of entry of this final decision.[40] If a claim of appeal is filed

[37] See TTR 257 and TTR 217.
[38] See TTR 225.
[39] See TTR 257.
[40] See MCR 7.204.

with the MCOA, the party filing such claim must also file a copy of that claim, or application for leave to appeal, with the Tribunal, along with the $100.00 fee for the certification of the record on appeal.[41]

By: Steven H. Lasher

Entered: November 4, 2015
klm

[41] See TTR 213 and TTR 217.