Legislative Analysis

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OFFICER LIABILITY FOR UNPAID TAXES

Senate Bill 64 (Substitute H-2 as amended)
Sponsor: Sen. Jack Brandenburg
House Committee: Tax Policy
Senate Committee: Finance

Complete to 12-17-13

A SUMMARY OF SENATE BILL 64 AS ENROLLED 12-12-13

Under Section 27a of the Revenue Act, 1941 PA 122, the officers, members, managers, and partners of a corporation, limited liability corporation (LLC), limited liability partnership (LLP), partnership, and limited partnership (LP) that the Department of Treasury determines to have control or supervision of, or responsibility for, making tax returns or payments may be personally liable if the business fails to file a return or pay the required tax.

(This officer liability provision was added to the Revenue Act with the enactment of 1986 PA 58 to apply to all taxes administered under the act, including the main business taxes. Previously, officer liability provisions were included in the statutes relating to only certain specified taxes, including the sales, use, motor fuel, and income (withholding) taxes, where a business had a responsibility remit taxes collected from other taxpayers. These taxes are generally referred to as "trust" taxes.)[1]

Senate Bill 64 would amend the officer liability provisions of the Revenue Act to limit the liability of individuals, to require certain disclosures on the part of the Department of Treasury when attempting to collect unpaid taxes, and to provide certain remedies.

Liability of Responsible Persons

Current law provides that if a business (corporation, LLC, LLP, partnership, or LP) fails to file a required return or pay the tax due for any tax administered under the Revenue Act, the officers, managers, members, and partners (hereafter collectively referred to as "officers") of that business may be personally liable for any unpaid taxes due.[2]

Senate Bill 64 provides that if a business fails to collect certain specified taxes the officers of that business who are considered to be "responsible persons" would be personally liable for the amount of those specified taxes that are unpaid. The bill provides that the personal liability for unpaid taxes administered under the act would apply for assessments issued prior to January 1, 2014.

[1] For an early discussion of this, see Department of Treasury, Revenue Administrative Bulletin 89-38, *Officer Liability*, http://www.michigan.gov/treasury/0,1607,7-121-44402_44415_44416-7321--,00.html.
[2] For a listing of taxes collected under the Revenue Act see, Department of Treasury, *Taxpayer Rights Handbook*, revised April 2013, http://www.michigan.gov/documents/taxes/TBOR_199483_7.pdf.

The bill provides that beginning with assessments issued after December 31, 2013, the taxes to which personal liability attaches would include the sales tax, use tax (to the extent collected by the business or required under the Use Tax Act to be collected and remitted by the business), tobacco products tax, motor fuel tax, motor carrier fuel tax, income (withholding) taxes, and any other tax administered under the Revenue Act collected from another person.

Definition of "Responsible Person"

Under current law, officer liability extends to only those officers determined by the Department of Treasury to have control or supervision of, or responsibility for, filing tax returns or making the tax payments.

Senate Bill 64 would apply officer liability to the officer who at the "time period of default" controlled or supervised the collection, accounting, or filing of tax returns during that time[3] and who *willfully* failed to pay the collected taxes that were due.[4] The "time period of default" would be the time period during which the taxes were collected and a return was required to be filed. The bill would define "willfully" as knowing or having reason to know of the obligation to file a return or pay the tax, but intentionally or recklessly failing to file the return or paying the tax.

Officer Signature: *Prima Facie* Evidence

Current law provides that the signature of any officer on tax returns or negotiable instruments submitted in payment of taxes is considered *prima facie* evidence of that officer's responsibility for making returns and payments.

Senate Bill 64 generally retains this provision, but specifically adds a reference to returns or negotiable instruments submitted in payment of collected taxes during the time period of default, i.e. when the collected taxes were originally due. The bill also provides an exception for signatures made by an officer on a document prepared after the time period of default. Signatures on those documents would not be considered as *prima facie* evidence of that officer's responsibility for making payments and returns that were

[3] In *Livingstone v. Department of Treasury* (1990), the plurality (non-binding) opinion states in a footnote that, "In cases where 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 corporations returns and payments of the corporate taxes at the time the default occurred." Evidently, many decisions of the Michigan Tax Tribunal, however, impose liability on an officer for taxes not filed or remitted during a time when that officer was not then an officer with responsibility for filing or remitting taxes. For instance, in *Limauro v. Department of Treasury*, MTT Docket No. 415784, the tribunal held that "[t]he 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." (See the Proposed Opinion and Judgment of the Administrative Law Judge, dated August 31, 2012.) However, in *Kosanke v. Department of Treasury*, MTT Docket No. 332392, the MTT stated "[t]he statute provides that a responsible corporate officer is one with control and authority **at the time the tax liability is incurred**." (Emphasis in original.)

[4] In *Cygan v. Department of Treasury*, MTT Docket No. 135626, the MTT held that "the Tribunal finds that the statue before us imposes a type of strict liability where intent of the party is not a consideration….even with no intent established on the part of the Petitioner, [the MTT] must find Petitioner liable."

originally due during the time period of default. (These two provisions would seem to limit the liability of any successor officer for any previously unpaid taxes.)

Time Limit on Assessing Responsible Persons
Senate Bill 64 would prohibit the Department of Treasury from assessing a responsible person more than four years after the date of the assessment issued to the responsible person's business.[5]

Notice Requirements
Senate Bill 64 would require the Department of Treasury to provide responsible persons with a notice of any amount collected by the department from other responsible persons or the purchaser of the business.

Challenging an Assessment
Senate Bill 64 would add that a responsible person could challenge the validity of an assessment as provided under Sections 21 and 22 of the Revenue Act. [Those sections generally allow aggrieved taxpayers to contest tax assessments via an informal conference with the department, and allow taxpayers to appeal decisions by the department to the Michigan Tax Tribunal or the Court of Claims.]

In responding to any challenge, the Department of Treasury would have the burden of proof to first produce *prima facie* evidence or establish a *prima facie* case that the person is a responsible person.[6]

Collecting an Assessment
Senate Bill 64 would add that before the department could issue an assessment against a responsible person, it would have to first assess the purchaser of the business that is personally liable (if one can be identified), if the department establishes that assessing the purchaser would allow of the collection of the entire amount owed. The department could still assess the responsible person if the purchaser fails to pay the assessment.

A responsible person could initiate a proceeding in circuit court to recover from other persons (including other responsible persons and persons who are not responsible persons) an amount of the taxes paid equal to the assessment or a portion of that assessment based on the responsible person's proportionate share.

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[5] In *Livingstone v. Department of Treasury*¸ the Michigan Supreme Court generally held that the four-year statute of limitations applies to the assessment made against the business. It doesn't also apply to a personal liability assessment against an officer.

[6] On this, one tax practitioner notes, "[i]n 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." See, Samuel J. McKim III, *Officer, Manager, Member or Partner Personal Liability for Unpaid Michigan Entity Taxes – A Trap for the Unwary*, June 2013, http://www.schiffhardin.com/File%20Library/Publications%20(File%20Based)/PDF/salt_061813.pdf.

Disclosure of Records

Upon the request of a responsible person issued a notice of intent to assess for a personal liability, the Department of Treasury would have to disclose any documents considered during an audit or investigation in determining whether a person is a responsible person that is personally liable for unpaid taxes of a business, and any other documents determined to be necessary by the tax tribunal or courts.

FISCAL IMPACT:

The bill is likely to reduce revenues by an indeterminate amount. Because specific characteristics of individual taxpayers are not known, a precise fiscal impact cannot be determined.

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