



Tax

Tax liability can extend to former directors

By AdvocateDaily.com Staff



While most sitting directors of corporations know that they may be held personally liable for a corporation's failure to remit taxes, many are not aware that this obligation may also persist after they resign, Toronto tax litigator [Adrienne Woodyard](#) writes in [Lawyers Weekly](#).

Most director tax assessments are challenged on the basis of either the due diligence defence or the "two-year" rule, writes Woodyard, partner with Davis LLP. The "two year" rule provides that former directors cannot be assessed more than two years after they have resigned.

"The application of the two-year rule arises frequently in situations where all of the directors have formally resigned and none has been replaced; in these situations the courts have often been asked to consider whether another person has acted as a 'deemed' or de facto director," she says.

The courts have recognized that even after a resignation, an individual may continue to act as a de facto director by performing functions that are usually reserved for directors, such as making company-related financial and administrative decisions.

One such case, writes Woodyard, is [Bremner v. Canada](#) [2009] F.C.J. No. 569.

"In that instance, Bremner was both a de facto director and a deemed director under the OBCA [Ontario Business Corporations Act] after his wife resigned. When the business finally shut down, Bremner claimed he was no longer a director. The minister issued an assessment against him exactly two years and one month later."



While the Tax Court of Canada observed that there is no fixed rule for determining when a de facto director ceases to be a director, it noted that the person's "course of conduct" in relation to the corporation must be examined, writes Woodyard.

"It found no evidence that Bremner had informed any third parties that he was no longer a director and that he continued to act on the corporation's behalf in winding up the business; most damaging to his case was a letter he wrote to the CRA on the corporation's behalf seven months after he claimed to have ceased to be a director.

"The Federal Court of Appeal upheld the Tax Court's decision and confirmed that a de facto directorship must be held to endure 'at least as long' as a person manages or supervises the management of the corporation's affairs, 'however minimal those actions may have been.'"

As this and other recent cases show, writes Woodyard, "when closely-held corporations are unable to meet their remittance obligations, the post-resignation conduct of former directors will be subject to close scrutiny by the CRA."