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Ceasing To Be a Director

Directors can face significant liabilities for a corporation's failure to remit taxes. The three main sections that impose liability are subsection 227.1(4) of the Income Tax Act (ITA), section 322 of the Excise Tax Act (ETA), and section 43(5) of the Ontario Retail Sales Tax Act (RSTA).

A director's liability is not open-ended: statutory limits apply, and in appropriate cases a due diligence defence is available. One important provision limits to two years the time within which an assessment may be brought against a director for taxes unremitted by the corporation: see subsection 227.1(4) of the ITA, subsection 323(5) of the ETA, and section 43(5) of the RSTA.

Netupsky (TCC 2003) is a recent case that is helpful for a director who is struggling to prove non-involvement in a corporation's affairs for more than two years. It focuses on the importance of knowing what constitutes a valid resignation as a director, and when that resignation becomes effective.

Netupsky was the president and sole director of his company. He resigned as a director in 1995 by delivering a written resignation to the registered office of the company. The resignation was deposited in the company's minute book on December 14, 1995--more than two years before he was assessed as a director. However, the appropriate notice was not filed with the BC corporate registry, nor was the resignation entered in the company's register of directors. When the CCRA assessed directors' liability, it conducted a search of the BC provincial corporate registry and, finding *Netupsky* to be a director, assessed him.

At the Tax Court, the CCRA took the position that *Netupsky's* purported resignation was not valid because both the provincial corporate registry and the company's own register of directors still listed him as a director at the time the assessment against him was made. The Tax Court ruled that the resignation was valid because it was carried out in the manner prescribed in section 154 (now section 130) of the BC Company Act, which, at the relevant time, provided as follows:

- (1) A director ceases to hold office . . . when he (a) dies or resigns. . .
- (2) *Every resignation of a director becomes effective at the time a written resignation is delivered to the registered office of the company or at the time specified in the resignation, whichever is later.* (Emphasis added.)

The court held that the resignation became effective on delivery of a written resignation to the registered office of the company. Its effectiveness did not depend on delivery of a notice of resignation to the registrar of companies. Under the BC corporate statute, the company, not the director, is required to file the notice.

The Tax Court held that Netupsky's resignation was valid, and because it was tendered more than two years before the assessment, Netupsky was not liable for the assessment.

Netupsky underscores the importance of ensuring that a director's resignation is formally tendered to the corporation as soon as possible after the director decides to resign. That will start the clock ticking on the limitation period in most cases, thereby minimizing the director's exposure for any unremitted tax.

Although *Netupsky* was successful in relying on the technical requirements of the corporate law, the decision illustrates the practical importance of ensuring that any other corporate, legal, and quasi-legal requirements are also met. Understanding and abiding by the resignation requirements in the corporate legislation is just the first step in that process. In this regard, provisions similar to section 154 of the BC Company Act are found in section 108 of the Canada Business Corporations Act and section 121 of the Ontario Business Corporations Act. Note, however, that section 19(2) of the OBCA prohibits the resignation of a director named in the articles unless a successor is appointed or elected.

Although the court's decision, correctly, in our view, states the legal requirements for a valid director's resignation, in our experience neither the CCRA nor Ontario observes these requirements at the administrative level. Rather, they proceed on the basis that the resignation is not effective until the notice is filed with the Companies Branch. A director concerned about possible personal liability should ensure that the notice is filed with the ministry and delivered to the corporation.

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