Docket: 2008-851(IT)G

BETWEEN:

RON GOHEEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal is separate from the appeal of *Doug Jensen* – 2008-285(IT)G
both heard on May 1, 2, 3 and 4, 2017,
at Vancouver, British Columbia

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Alistair G. Campbell and Michelle Moriartey
Counsel for the Respondent:	Robert Carvalho, Ron Wilhelm and Geraldine Chen

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JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2000, 2001, 2002 and 2003 taxation years are dismissed.

Costs in accordance with the Tariff are awarded to the respondent to be payable within 30 days of the date of this decision.

Signed at Ottawa, Canada, this 26th day of March 2018.

"K. Lyons"

Lyons J.

Citation: 2018 TCC 62
Date: 20180326
Docket: 2008-851(IT)G

BETWEEN:

RON GOHEEN,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] Ron Goheen, the appellant, appeals the reassessment made by the Minister of National Revenue under the *Income Tax Act* in respect of the 2000, 2001, 2002 and 2003 taxation years ("relevant years"). The appellant claimed tax credit deductions ("Deductions") based on the total amount of $46,667 CDN or $30,000 U.S. (the "Amount") that he paid to Global Institute ("Global") in 2000 which he asserts is a charitable donation. The Minister disallowed the Amount on the basis it did not constitute a gift within the meaning of section 118.1; therefore, the appellant is not entitled to the Deduction pursuant to section 118.3 of the *Income Tax Act.* The Minister also levied a gross negligence penalty in respect of the Deduction.

[2] All references to provisions that follow are to the *Income Tax Act* (the "*Act*").

I. Issues

[3] The issues in this appeal are:

a. Whether the appellant made a "gift" of the Amount to Global within the meaning of subsection 118.1(1)?

b. Whether the Minister properly levied a gross negligence penalty pursuant to subsection 163(2)?

[4] The appellant testified on his own behalf and Wilma Goheen, his spouse, testified on his behalf (the "Goheens"). David Letkeman, a Canada Revenue Agency ("CRA") auditor, was called to testify on the respondent's behalf as to general information relating to Global Prosperity and Global.[1] Various objections were made by the appellant. Ultimately, the respondent chose not to rely on Mr. Letkeman's evidence.

II. Facts

Background

[5] In 2000 and 2001, the appellant was employed as a driver delivering meat products. At some point in 2001 and in 2002 he collected employment insurance benefits. The Goheens' net income for the relevant years is as follows:

Net Income (CDN)

	Appellant	Wilma Goheen
2000	$33,148	$27,331
2001	$35,273	$26,798
2002	$19,482	$30,728
2003	$41,849	$49,204
Total	**$129,752**	**$134,061**

[6] The Goheens have two sons.

Global

[7] Duncan Goheen, the appellant's brother, would visit the appellant two or three times a year from the mid-1980s through to 2004. The appellant first learned about Global in the late 1980s and that it was incorporated but did not know how long it had been in existence. Duncan Goheen was the co-founder and coordinator of Global. Global was granted registered charity status under paragraph 149(1)(*f*) of the *Act.*

[8] Duncan Goheen told the appellant he was involved in fundraising and assessment of projects in Canada and third-world countries and that he was doing or proposed to do works, such as water purification in different (impoverished) countries and helping people help themselves (the "project"). The appellant was aware his brother was involved in pranic healing but was unaware as to whether Global was.

[9] Other than his spouse and his brother, the appellant did not speak to anyone prior to providing the Amount to Global and knew only what his brother had told him.

Amount ($30,000 U.S.) paid to Global

[10] In 2000, the appellant entered into an arrangement with Global with the intention and expectation that he would pay the Amount to Global and he would receive a charitable donation receipt. The Goheens understood if the appellant received - or was promised - anything in return for the Amount, that claiming a donation tax credit in his income tax return would be improper as he would not be making a true gift.

[11] The Amount, $30,000 U.S. (equivalent to $46,667 CDN), was paid to Global in two payments, $10,000 U.S. and $20,000 U.S. (the "Payments"). At examination for discovery, the appellant was asked "how did you come to donate US $30,000 to" Global. He responded he could not recall if he suggested it or if his brother asked for it. At trial, he testified that his brother had made solicitations and asked for it. He also said that Global "ramped up" around 2000. Wilma Goheen said in 2000 Duncan Goheen was more persistent, although she did not know why, in wanting the Goheens to donate and was trying to raise more money to start doing the project. She viewed it was worthwhile to give the Amount and saw the benefit to what Global was doing in raising the money for the project.

[12] Because his net income, of $33,148 CDN, in 2000 was too low, he claimed the total of $46,667 CDN as charitable donation Deductions of $14,732 in 2000, $15,444 in 2001, $5,919 in 2002 and $10,572 in 2003, CDN, in his income tax returns. In the rest of these reasons, all amounts are expressed in U.S. dollars unless otherwise specified.

[13] The Goheens signed the same donor form for each of the Payments made to Global (the "Forms").[2] The Forms are dated the same date as the cheques in respect of the Payments made. Each Form states that "I hereby direct that the gift….be held for a period of not less than 10 years". They understood from that the Amount could not be used by Global for ten years and would be placed into an endowment fund except Global could use the interest earned on it.

Bank of Montreal U.S. Dollar Account

[14] A Bank of Montreal U.S. dollar account in the name of Wilma Goheen and their son, Gregory, was used to allow US funds to be sent to their children who attended school in the United States ("Account"). The Account was used for tuition and education payments. The Goheens testified a large amount was initially put in by them and that would be drawn upon for the education expenses. The Account was also used to make the Payments to Global because it was their only U.S. account.

The Payments

[15] Insufficient funds were in the Account to cover the Payments to Global. The Payments to Global were made by cheque and signed by Wilma Goheen. The first cheque for $10,000 is dated October 15, 2000. The second cheque for $20,000 is dated November 15, 2000. The appellant explained the Payments were made because the Amount was not available at the particular time.

[16] At the examination for discovery, he said he did not know why $10,000 was chosen. At trial, he stated that the $10,000 was "what they could probably do" when the issue of how much to donate was discussed. Nor was there a particular reason behind the amount of $20,000 donated to Global.

$10,000 Payment to Global

[17] The October 15, 2000 cheque to Global was drawn on the Account and is represented by the entry "CK" on November 7, 2000.[3] The source of the funds to

cover it was already known by October 15, 2000 as Wilma Goheen had approached her father, Karl Kutschenreiter. He had agreed to loan her $10,000 before Wilma Goheen wrote the cheque to Global; he did not ask her why she needed to borrow the funds. He held a joint account with his spouse Juliana Kutschenreiter (the "joint account") which was a U.S. bank account upon which his cheques to his daughter were written.[4]

[18] Wilma Goheen's Account bank statements show "CD", customer deposit, in the amount of $10,000 deposited on October 31, 2000 to cover the $10,000 cheque to Global.[5]

[19] At the examination for discovery, the appellant undertook to provide copies of Mr. Kutschenreiter's $10,000 cheque to cover the $10,000 cheque to Global. However, he produced a cheque for $5,000 dated October 31, 2000 made payable to Wilma Goheen only and executed by her father on the joint account.[6] Notably, the $5,000 cheque is not disclosed as a "CD" on October 31, 2000 on the Account bank statements, but the appellant agreed it is represented by the $10,000 "CD" entry on October 31 in Exhibit A-2. Before issuing the $5,000 cheque, Mr. Kutschenreiter did not know he would be giving a further $20,000 to Wilma Goheen.

[20] With respect to the remaining $5,000 that made up the $10,000 deposit on October 31, 2000, the appellant stated "the only other thing we could think of was [it was] $5,000 US cash from Mr. Kutschenreiter." On cross-examination, he admitted it could have been cash from himself and his spouse.

[21] In direct examination, Wilma Goheen initially said the remaining $5,000 was cash but agreed that the deposit slip dated October 31, 2000 , Exhibit R-2, that she initialled, was the deposit slip that related to the $10,000 "CD" entry on October 31, 2000 in Exhibit A-2. She agreed that deposit slip indicated the deposit was made up of two cheques of $5,000 each and not one cheque plus cash. She then testified that the $10,000 customer deposit may have been made up of two cheques. That other cheque for $5,000 was not produced in evidence. The appellant's explanations are unconvincing and lack credibility.

$20,000 Payment to Global

[22] The $20,000 November 15, 2000 cheque to Global was drawn on Wilma Goheen's Account and is shown as the entry marked "CK" dated November 21, 2000 on the Account bank statements.[7]

[23] A $20,000 cheque, dated November 17, 2000, made payable to Wilma Goheen and executed by Mr. Kutschenreiter on his joint account, was deposited into Wilma Goheen's Account as "CD" on November 17, 2000 to cover the cheque that was written by Wilma Goheen to Global.[8]

[24] The Goheens said that Mr. Kutschenreiter was not told that the $10,000 or $20,000 were to be donated to Global nor had he given any money to the Goheens for such purpose nor had any involvement with Global. In cross-examination, Wilma Goheen said she did not ask her parents to donate because she knew they would not be interested in investing anything outside their normal realm and her father did not want to deal with Duncan Goheen.[9]

Repayment of the Payments

[25] The Goheens say they borrowed the funds from Mr. Kutschenreiter to donate the Amount and then repaid that borrowing.

[26] In direct examination, the appellant explained that they had "very little debt at the time" and did not want to cash out their investments to make the first donation of $10,000. Both testified the $20,000 was a loan, no interest was charged or paid on the loan and has been fully repaid. He asserted after the second borrowing of $20,000, they commenced repayment to Mr. Kutschenreiter in amounts of $1,000 per month by cheque for the first few months and then cash after that. In cross-examination, he was asked about his statement that at the time of the donation of the Amount they had "very little debt", the appellant responded that he presumed what was meant was debt aside from debt to Mr. Kutschenreiter.

[27] When Wilma Goheen was asked whether she and her spouse were already making $1,000 payments to her father at the time the Amount was paid and if the Goheens had been making regular monthly $1,000 payments by cheque to her father since January 2000, she denied both aspects. However, she then identified a series of cheques, signed by her, written on the 4th of each month commencing January 4, 2000 to her father in the amount of $1,000 each but indicated she did not know what these cheques represented.[10] The appellant was recalled to testify regarding what the cheques represented. He also did not know but stated that he and his spouse borrowed from Mr. Kutschenreiter on a regular basis. He was their "personal bank" and the deal was they would repay him $1,000 month. No documents exist regarding the repayment.

Deposit of $30,000 - January 30, 2001

[28] On January 30, 2001, approximately two and a half months after the Amount was paid to Global, $30,000 was deposited (the “Deposit’) into the same Account out of which the Amount previously came. An entry in the Account bank statements on January 30, 2001 reveals “CD”, customer deposit, for $30,000.[11]

[29] When asked at discovery in 2010 if there was a deposit of $30,000 into the Account in January 2001, the appellant's answer was “I can't recall”. Aside from the entry on the Account bank statement, no documents have been presented with respect to the Deposit. At trial, he testified the Deposit was a $30,000 cheque from Mr. Kutschenreiter. At discovery, in answer to the question as to what that "CD" entry for $30,000 on January 30, 2001 represented, the appellant did not say it was a cheque from Mr. Kutschenreiter. His answer was it was a “GIC that rolled over and was reinvested every 59 days”. He did not identify the source of the $30,000 used to purchase that term deposit.

[30] Despite a letter from the bank, dated October 20, 2005, indicating that the $30,000 Deposit cheque, along with two other cheques, could not be located, the other two cheques were located and proferred at trial.[12] However, the Deposit cheque representing the January 30, 2001 "CD" entry for $30,000 could not be located nor did the appellant provide any credible explanation.

[31] The next entry on the Account bank statement shows a "OM" for $30,000 on January 30, 2001. The reference "TOR 2369-9950238" refers to a term deposit. That term deposit rolled over every 59 days. When asked at discovery for any documents relating to this entry on the statement, the appellant answered there are no documents in existence regarding the term deposit. The term deposit was in the name of Wilma Goheen and her father and the interest earned on that term deposit was deposited into the same Account out of which the Amount came.

[32] On each of the rollover days for the term deposit there appears an entry "IN" that represents the interest earned on the term deposit. Credits to the Account for interest in 2001 were $235.19 on March 30, $197.26 on May 29, $145.45 on July 27 and $130.93 on September 24.

[33] Entries labelled "FX", beginning on November 27, 2000 are disclosed on Exhibit A-2. There are no such entries from December 31, 1999 up until November 27, 2000 (the latter entries started after the appellant's Payments to Global). Similar entries occurred on January 16, 2001, February 5, 2001, March 13, 2001, March 26, 2001, April 23, 2001 and May 28, 2001. The appellant was asked at discovery

what these "FX" entries relate to. His answer was he could not recall and could not even say with certainty they were transfers from another account.

[34] From December 31, 1999 up until the deposit of the $10,000 cheque on October 31, 2000, there were no credits to the Account except for $2 worth of interest every month. The balance started at $9,300 and reduced due to cheques being written on the Account.

[35] The appellant's explanation for the Deposit on January 30, 2001, the interest entries and the "FX" entries is mere coincidence; he claims that all this took place and is completely unrelated to his Payments to Global. The appellant denied these entries represented the return from the Payments to Global and denied he was promised this as a return for the Amount. According to the appellant, Mr. Kutschenreiter wanted to repatriate $30,000 back to Canada to put it in a U.S. dollar term deposit. The appellant's explanation is that the Amount paid to Global happened to coincide with his father-in-law wanting to hold a $30,000 U.S. term deposit and use Wilma Goheen's Account to do it and have the interest credited to Wilma Goheen.

[36] Wilma Goheen testified that other than the receipt and a plaque indicating thank you for donating, they did not receive any amount from Global to any bank account that she held personally or jointly with any family member nor did she receive any return or property from Global with respect to the Amount. I do not accept the appellant’s or Wilma Goheen’s evidence as credible and reject it.

Cheques to Duncan Goheen in 2002

[37] The appellant testified he did not borrow any money from his brother between 2000 and 2002. On September 10 and 25, 2002, the appellant issued two certified cheques for $16,000 each from a joint account with Wilma Goheen at Dundalk Credit Union and the appellant admitted both were issued and made payable to Duncan Goheen. The bank statements confirms the September 25 cheque was issued to "Duncan Goheen" and there was a deposit of $16,000 to that account on September 10, 2002. The cheques nor entries were explained.

[38] The appellant became and still is, a shareholder of Groen Brothers Aviation Inc., because Duncan Goheen told him it was an interesting company with interesting people. The appellant does not know if his brother or Global also held Groen shares and does not know of any other shareholders. He acknowledges he has heard the name Simeon Capital Incorporated but only in connection with

Duncan Goheen. He recalls driving his brother to meetings in Toronto with Simeon Capital. The Goheens became shareholders of Landmark Capital Corporation in 2003-2004.

[39] In his Notice of Appeal, the appellant pled only the following "Material Facts":

> 1. The Appellant is and was a Canadian Resident.
>
> 2. The Appellant became aware of Global Institute (Global), a registered charity under s. 248 of the *Income Tax Act.*
>
> 3. Global conducted charitable works to alleviate poverty in undeveloped areas.
>
> 4. The Appellant made a charitable donation to Global, obtained a charitable receipt for the amount donated, and claimed the charitable donation in his Tax Return filed with the Minister.
>
> 5. The Minister disallowed the charitable donation.

[40] In her Reply, the respondent admitted paragraphs 1 to 5 of the Notice of Appeal except for paragraph 3 was denied to the extent it relates to 2000, 2001, 2002 and 2003 and also denied, in paragraph 4, that "The Appellant made a charitable donation to Global." She also pled assumptions of fact many of which are in paragraphs 18 f) to nn), under the subheadings "The Charity", "The Charity Scheme", "The Flow of Funds", "Omnicorp and the Omnicorp Group" and "Omnicorp Defaults"("Assumptions"). Of the Assumptions, only 18 g), h), part of 18 j), part of 18 l) and part of 18 s) were admitted by the appellant.[13]

III. Law

"Gifts" in section 118.1

[41] To be eligible to deduct tax credits under section 118.1, the amount claimed by the individual must be a "gift."

[42] Subsections 118.1(3) and (1) are the relevant provisions and read as follows:

> **118.1(3)** For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted such amount as the individual claims not exceeding the amount determined by the formula

(A × B) + [C × (D – B)]

where

…

B is the lesser of $200 and the individual's total gifts for the year;

118.1(1) In this section

"total charitable gifts", of an individual for a particular taxation year, means the total of all amounts … made by the individual in the year or in any of the 5 immediately preceding taxation years … to

(a) a registered charity,

…

"total gifts" of an individual for a taxation year means the total of

(a) …

(i) the individual's total charitable gifts for the year, …

IV. Parties' positions

[43] The appellant's position on the first issue is that donative intent existed at the time he made the Payments to Global and since there was no intention and expectation that he would receive a return for the Amount paid, it constitutes a "true gift" to help Global with the endowment fund from which it would realize income to fund its charitable activities. Furthermore, the appellant contends the general rule should not apply and the burden of proof should be shifted to the respondent to prove the disputed Assumptions because these lay outside his personal (direct) knowledge and were within the Minister's particular knowledge.

[44] The respondent's position is that the Amount was not a "gift" because the appellant entered into arrangements with Global that he would pay the Amount to it with the intention and expectation he would receive a charitable donation receipt from Global and would materially benefit by receiving a return on the Amount which he gave with an investment intent, not donative intent.

V. Analysis

Onus

[45] In tax litigation, unless an exception applies a taxpayer must prove disputed facts and rebut disputed assumptions of fact underlying a disputed assessment. Generally, the Minister's assessing assumptions, as pled, are taken as true again unless rebutted by the appellant.[14] The initial onus of "demolishing" such assumptions is on the appellant by making out at least a *prima facie* case.[15] If the appellant demolishes such assumptions, on the balance of probabilities, the onus is said to shift to the respondent to rebut the *prima facie* case and prove the assumptions.[16]

[46] The Federal Court of Appeal in *House* endorsed the view that "A *prima facie* case is one 'supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved.'"[17]

[47] Exceptions to the general rule and that shifting the burden of proof to the respondent may be warranted in exceptional circumstances where the assumed facts, as pled, are solely, exclusively or peculiarly within the knowledge of the Crown.[18] However, such shifting should not be lightly, capriciously or casually shifted to the respondent.

"Gift" defined

[48] Under subsection 118.1(3), an individual may claim a tax credit deduction calculated on that individual's "total gifts" for the year made to a registered charity. The term "total gifts", defined under subsection 118.1(1), means the individual's "total charitable gifts" for the year as defined above.

[49] Under the *Act*, "gift" is not defined. For income tax purposes, the jurisprudence has established that "a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor."[19] Tax advantages received from a gift, however, is not normally considered a "benefit" that would vitiate the gift because doing so means charitable donations deductions would be unavailable to donors.

[50] Accordingly, there must be: (1) a voluntary transfer of property by the donor; (2) the donor owned the property immediately prior to the transfer; and (3) the donor did not receive a non-tax benefit from the donation.

[51] Subsequently, the Federal Court of Appeal clarified the third requirement in *Friedberg*, that anticipation of or expectation of a material benefit by the donor is sufficient to vitiate an otherwise valid gift.[20] The third no-benefit requirement is also expressed as whether the donor had donative intent at the time the donor made the gift.[21] Accordingly, the issue in this appeal is whether the appellant had the donative intent when he made the Payments to Global.

Donative Intent

[52] The donor's intention differs from motivation; one may donate with the principal motivation of obtaining a tax advantage but still have the requisite intent to give charitably.[22]

[53] To demonstrate donative intent, a donor must be aware at the time of the donation that the donor will not receive any compensation other than pure moral benefit and must have intended to impoverish himself or herself from the gift in such a manner that the donor does not benefit from the deprivation.[23]

[54] The benefit or expectation does not necessarily have to come from the donee and can be provided to the donor by a third party via an interconnected arrangement; the no-benefit requirement is still contravened if the benefit from the third party forms part of the arrangement.[24]

Did the appellant have donative intent?

[55] The appellant accepts part of the assumptions in paragraph 18 s) of the Reply that he had entered into a transaction with Global with the intention and expectation that he would pay the Amount to Global and he would receive a charitable donation receipt. He then argued that since he did not expect to receive anything in return he had donative intent, thus he had made out a *prima facie* case having demolished the other pivotal assumptions in paragraph 18 s) of the Reply. Namely, that as part of his arrangements with Global and Omnicorp Inc. ("Omnicorp"), after he paid the Amount to Global, Global would transfer the Amount to Omnicorp for placement into a transitional account or investment fund in Global's name producing 35% in interest annually and the Amount would be tracked by Global in his name. Global would be paid 10% interest and he would be paid 25% annually for five years by one of three channels.[25] Thereafter, he would no longer receive interest and Global would have unencumbered use of the Amount.

[56] In cross-examination, the appellant said he did not know whether all of the payments received by Global from 2000 to 2002 were sent to Omnicorp, denies he had an arrangement with Omnicorp and denies that he never made enquiries about the fund because he knew he would be receiving his $30,000 back anyway. He has heard the names Sheldon Foss and Frank Sputek, who had also provided payments to Global. The appellant had read their examination for discovery transcripts prior to his examination for discovery. Aside from these two, the appellant did not know anyone else who had provided money to Global.

[57] Wilma Goheen testified she had not heard of Global Prosperity, Omnicorp, Solara Ventures nor Nelson Bayford. The appellant also said he did not know whether Global was a customer of Omnicorp but knew his brother had done "financial seminars" in Mexico. Neither of the Goheens ever attended a seminar or conference.

[58] Since the appellant paid the Amount to Global and alleges he did so as a charitable donation with donative intent, in my view, it is incumbent on him to prove the facts he alleges and disprove the disputed Assumptions of fact involving Global's program, its charitable work, the transaction involving the Amount and surrounding arrangements, including whether or not Omnicorp was involved, to show he had donative intent.[26] I draw an adverse inference from his failure to call Duncan Goheen as a witness who might have been able to corroborate the appellant's version of the events.

[59] Although the appellant testified that the Amount was paid to Global with donative intent and he did not expect nor receive a benefit in return, I find the Goheens' evidence lacks harmony, have too many glaring inconsistences and is not believable. In my opinion, their version of events is implausible and it is inherently improbable in light of the surrounding circumstances that the appellant had donative intent. Some of the factors that lead me to that conclusion and that their version of events lack credibility are as follows:

- The unusually large Amount and the appellant's testimony he did not know how the Amount was decided on as the amount to be donated.

- Between 1987 through to 1999, the appellant did not claim any charitable donation tax credit nor did Wilma Goheen between 1988 through to 2002.[27]

- Wilma Goheen indicated that $30,000 was borrowed from her father to donate the Amount to Global. It is highly improbable, given the Goheens'

financial circumstances, that they would be able to donate the Amount as alleged. In 2000, the appellant's net income was $33,148 CDN and the Goheens' net income combined totalled a modest $60,000 CDN yet the Amount paid to Global was the equivalent of $46,667 CDN. The Amount is approximately 75% of the family's net income and they had two sons in school. I am not satisfied the appellant had the wherewithal to donate such a large amount nor does it seem plausible he would borrow to donate given the Goheens borrowed from him on a regular basis.

- Relying solely on what his brother told him relating to Global and its activities without any independent inquiry, verification or review of any literature shows a lack of due diligence. He does not recall seeing any of its financial statements, nor promotional materials and was uncertain if he saw the website. Historically, he appears to have no connection or concern as to the types of causes Global was purportedly involved in.

- It is telling that the appellant testified that whilst he assumed Marilee Goheen, Duncan Goheen's wife, was involved he did not know whether she was involved with Global even though she had signed the Receipt on behalf of Global.

- The Goheens appeared to be indifferent as to what happened to the Amount. Except for knowing that the Amount was placed into an endowment fund for ten years, neither of them had asked Duncan Goheen about it, how a return would be earned by the fund or what it would be invested in. Nor did the Goheens have discussions with Duncan Goheen about the Amount and what he was going to do with the Amount for ten years. Wilma Goheen's explanation was that they probably looked at it that the Amount was given to Duncan Goheen to help third-world countries. She commented that she recalled from a discovery transcript they had signed something saying money would be held for five or ten years in an endowment fund, but professed she did not understand all that but thought okay, Duncan Goheen knows where it has got to go.[28]

- Notwithstanding Wilma Goheen said she saw the benefit in donating the Amount, no follow-up as to Global's activities took place after the Amount was paid. They each testified they did not know what happened to the endowment fund or the Amount.

- There were many discrepancies or inconsistencies in their testimony. One example is that the Forms are in both names, which the appellant was unable to explain, yet he claimed it was all his donation with no intention that his spouse would be donating $5,000 for the $10,000 Payment. However, receipt 60861 issued by Global on November 15, 2000 indicates it is an "official receipt for income tax purposes" and the amount of $46,593.30 CDN was received from "Ron and Wilma Goheen".[29] As to a receipt for the $10,000 Payment, at examination for discovery, he said he did not ask for a receipt and was unable to produce a receipt at that time. However, receipt 60861 combines both Payments and the date coincides with the date of latter donor form.

- Another example is despite the Goheens testified that the Amount was a $30,000 interest-free loan from Mr. Kutschenreiter, the Goheens admitted that the $5,000 "cash" amount may have come from the appellant or his spouse. There were inconsistencies within each of the appellant's and Wilma Goheen's testimony and even when compared to answers at examinations for discovery. There were instances of conflicting evidence as between the appellant and Wilma Goheen. Neither provided a credible explanation as to the $10,000 to cover the first Payment to Global nor if that amount was made up by two cheques, per the deposit slip, or cash. The other cheque for $5,000 was not produced. Such examples are detailed at paragraphs 19 to 21, 27 and 29 of these reasons.

- They both testified that the Forms were completed by Wilma Goheen. However, at examination for discovery, the appellant stated he had filled these in and indicated the Payments were made by both of them even though these were made from Wilma Goheen's and their sons' Account. None of the entries on the Account bank statements relate to the appellant.

- No documents nor cheques were proffered in evidence regarding the alleged repayment of any portion of the Amount, no entries were made in any bank statement that identified any repayments nor was there any explanation as to why none of the $1,000 cheques representing the alleged repayment of the Amount are in evidence.

- The appellant testified that Wilma Goheen's U.S. Account was used because Mr. Kutschenreiter did not have one. He had no explanation for the two U.S. cheques that had been written by Mr. Kutschenreiter on his U.S. account.

- As noted in paragraphs 28 to 30 of these reasons, the appellant was unable to adequately explain the Deposit made on January 30, 2001 into the Account and was unable to produce the cheque in respect of that Deposit that Mr. Kutschenreiter purportedly made.

- Finally, the paucity of information and documentation relating to the term deposit and related unexplained entries concerning interest placed into the Account and references to FX.

[60] The appellant's circumstances are strikingly similar to the circumstances in the decision in *Webb v Canada*, [2005] 2 CTC 2006. In that decision, Mr. Webb denied he received anything in return for the unsually large payment, there was a scant donation history, a lack of due diligence, no one was called as a witness from the charity to testify as to the transaction or its operations or about the donated funds. Such a witness would have been able to provide salient evidence and might have disproved the allegation that Mr. Webb had been promised a return for making the donation. Justice Bowie stated that:

> 14. Despite the lack of any such conclusive proof, I find that Mr. Webb either received such a payment, or at the least, wrote his cheque and gave it to Mr. MacPherson in anticipation of such a payment in return for it. … it is inherently improbable that a man who made virtually no charitable gifts during a period of more than ten years, would suddenly in one year only make a gift of the magnitude of this one, being something close to the amount of his after-tax income for the year, …[30]

[61] Similarly, there is sufficient evidence to show, and I find, that the appellant gave the Amount to Global not only with the intent and expectation of receiving a tax credit Deduction for a charitable donation, but when Global was paid, he anticipated a return of the Amount given to Global. I draw an adverse inference from the appellant's failure to provide the Deposit cheque made to Wilma Goheen's Account, two and a half months after the appellant gave the Amount to Global. I infer this represents a return of the Amount.

[62] Based on the detailed evidence outlined, the appellant did not prove or rebut through convincing evidence that he paid the Amount with donative intent; thus he did not make out a *prima facie* case. I have concluded when he paid the Amount to Global in 2000, this did not constitute a gift within the meaning of section 118.1 of the *Act* because he expected to receive back the Amount. Accordingly, he is not entitled to the Deductions claimed in the relevant years.

Disputed Assumptions

[63] In addition to his assertion he demolished certain assumptions, the appellant also claims he need not prove the disputed Assumptions as the respondent had a positive obligation to put evidence into the record to prove the disputed Assumptions. The thrust of his arguments being he did not bear the onus of demolishing these disputed Assumptions as these lay outside his "personal knowledge" and were within the "particular knowledge" of the Minister in support of the respondent's theory of a Charity Scheme involving Global, the appellant, Omnicorp and Solara.

[64] Although strictly unnecessary given my finding, the appellant's arguments, in my opinion, as to onus of proof and shifting burden as to the disputed Assumptions are misplaced. Arguments as to "personal knowledge" and the Minister's "particular knowledge" are not the correct principles to be applied. The Federal Court of Appeal instructs that onus of proof and shifting of the burden may be warranted, in exceptional circumstances, where the assessing assumptions of fact are solely, exclusively or peculiarly within the Minister's knowledge. It cannot be said that is the case. The appellant' brother, Duncan Goheen, played a pivotal role. The appellant could have accessed information from his brother by calling him as a witness and even subpoenaing him if necessary. In my opinion, the onus remained on the appellant to disprove the vast majority of the disputed Assumptions because these are not solely, exclusively or peculiarly within the Minister's knowledge warranting shifting the burden.

Subsection 163(2) penalty

[65] With respect to the second issue as to the subsection 163(2) penalty, taxpayers may be liable for gross negligence penalties for knowingly misstating information in their tax returns or doing so under gross negligence. The provision states:

> **163(2)** Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty …

[66] The Minister has the onus to establish facts supporting the assessment of a subsection 163(2) penalty.[31]

[67] The appellant's position is that as he was entitled to the tax credit Deduction and did not knowingly, or under circumstances amounting to gross negligence, make or participate in the making of false statements in his tax return such that there should be no adjustment to tax payable and the reassessments should be vacated and the penalty reversed.

[68] In *Venne*, the Court found that "'Gross negligence' must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not."[32] Such that a "…failure to exercise due diligence is not the same as gross negligence. Gross negligence connotes a much greater degree of negligence amounting to reprehensible recklessness."[33]

[69] The appellant's claim for the Deduction in his tax return must have been tantamount to intentional acting and rise to the level of reprehensible recklessness.

[70] Personal circumstances of a taxpayer must be considered in determining gross negligence penalties including the magnitude of the misstatement in the tax return, the taxpayer's opportunity to detect the misstatement, and the taxpayer's expected understanding of basic taxation principles given her or his education and apparent intelligence.[34]

[71] In 2000 and 2001, the appellant was employed as a driver delivering meat products. At some point in 2001, he collected employment insurance benefits which extended into 2002.

[72] The appellant's net income and proportion of the Deductions to his net income are as follows during the relevant years.

	Net Income	**Deductions**	**Proportion of Deductions to net income**
2000	$33,148	$14,732	44%
2001	$35,273	$15,444	44%
2002	$19,482	$ 5,919	30%
2003	$41,849	$10,572	25%

	Net Income	Deductions	Proportion of Deductions to net income
Total	**$129,752**	**$46,667**	**36%**

[73] Wilma Goheen's net income was $27,331, $26,798, $30,728 and $49,204 in the 2000, 2001, 2002 and 2003 taxation years, respectively. They had two sons attending school in the United States.

[74] I find that the appellant was fully aware of the situation and since he knew he did not make a "gift" to Global but nonetheless claimed the Deductions, I find and conclude that the appellant knowingly falsified his 2000, 2001, 2002 and 2003 tax returns and is liable for penalties under subsection 163(2) of the *Act*.

[75] The appeal is dismissed.

[76] Costs will be awarded to the respondent at Tariff. Costs are payable within 30 days of the date of this decision.

Signed at Ottawa, Canada, this 26th day of March 2018.

"K. Lyons"

Lyons J.

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[1] The hearing for each of the appeals for the appellant and Doug Jensen (Court File No. 2008-285(IT)G) are separate and were heard during the same week on different days. Initially, these appeals were part of a larger group of appeals under case management; Mr. Letkeman's evidence was to be on common evidence.

[2] Exhibits A-7 and A-9.

[3] Exhibit A-3 and A-2.

[4] Exhibits A-1 and A-4.

[5] Exhibit A-2.

[6] Exhibit A-1.

[7] Exhibit A-5 and A-2

[8] Exhibits A-4, A-2 and A-5.

[9] Transcript of Hearing, page 177.

[10] Exhibit R- 1.

[11] Exhibits A-1 and A-2.

[12] Exhibits A-4 and A-1, the $20,000 and $5,000 cheques from Mr. Kutschenreiter to Wilma Goheen.

[13] The Assumptions and parts of the parties' submissions were common to the appellant's and Doug Jensen's appeals.

[14] *Transocean Offshore Ltd. v Canada*, 2005 FCA 104 at para 35, 2005 DTC 5201 [*Transocean*].

[15] *House v Canada*, 2011 FCA 234 at paras 30-31, 2011 DTC 5142 [*House*] referring to *Hickman Motors Ltd. v Canada*, [1997] 2 SCR 336 at para 28 [*Hickman Motors*], *Johnston v Minister of National Revenue*, [1948] SCR 486, and *Orly Automobiles Inc. v Canada*, 2005 FCA, 425, [2005] FCJ No 2116 (QL).

[16] Hickman Motors, *supra* note 16. The term "*prima facie* case" was not defined by L'Heureux-Dubé J. in her minority reasons. If the usual meaning was being used, it was not articulated why the *prima facie* standard applies to determine if the Minister's assumed facts have been demolished or how that standard (evidential burden) dovetails with the persuasive (legal) burden.

[17] *House*, *supra* note 16 at para 57 in quoting *Amiante Spec Inc. v Canada*, 2009 FCA 139 at para 23, [2009] FCJ No 603 (QL). Tax appeals thus invoke different standards regarding the evidential and persuasive (legal) burdens than other types of civil actions. More recently in *Samardi v Canada*, 2017 FCA 131, 2017 DTC 5081 (FCA), Webb JA commented, amongst other things, that a *prima facie* case cannot represent a standard of proof that is less than proof on the balance of probabilities and clarified the ambiguity, in his view, in the meaning of *prima facie* case. Woods JA and Stratas JA, however, found it unnecessary to decide the meaning of *prima facie* case for the disposition of the appeal. In *Vine Estate v Canada*, 2015 FCA 125 at para 25, 2015 DTC 5063 (FCA), albeit in the context of the persuasive (legal) burden to establish misrepresentation attributable to carelessness, neglect or willful default, the Court unanimously held there is no shifting onus.

[18] *Transocean*, *supra* note 15 at para 35, *Anchor Pointe Energy Ltd. v Canada*, 2007 FCA 188 at paras 35-36, 2007 DTC 5379. See also *Mignardi v Canada*, 2013 TCC 67 at para 41, [2013] TCJ No 66 (QL).

[19] *Friedberg v Canada (F.C.A.)*, [1992] 1 CTC 1 at para 4 [*Friedberg*]. See also *Berg v Canada*, 2014 FCA 25 at para 23, 2014 DTC 5028.

[20] *Woolner v R*, [1999] FCJ No 1615 at para 7 (FCA).

[21] For example, *McPherson v Canada*, 2006 TCC 648, 2007 DTC 326.

[22] *Marcoux-Côté v Canada*, [2001] 4 CTC 54 at paras 8-10 (FCA). *Coleman v Canada*, 2010 TCC 109 at para 57, 2010 DTC 1096 [*Coleman*]. *Backman v Canada*, 2001 SCC 10 at para 22, [2001] 1 SCR 367. As explained by the Supreme Court of Canada, "[m]otivation is that which stimulates person to act, while intention is a person's objective or purpose in acting."

[23] *Mariano v Canada*, 2015 TCC 244 at paras 17-20 and 22, [2016] 1 CTC 2132, citing *Canada v Burns*, 88 DTC 6101 (FCTD), aff'g 90 DTC 6335 (FCA) and *Berg v Canada*, 2014 FCA 25, 2014 DTC 5028. In *Coleman, supra* note 24, this Court found a donor failed to meet the no-benefit requirement. First, there must be a benefit or expected benefit to the donor other than a pure moral benefit; the Federal Court of Appeal subsequently affirmed that the benefit to the donor does not need to be based on a legal obligation. Second, there must be a strong link between the donation and the benefit.

[24] *Maréchaux v Canada*, 2010 FCA 287 at para 7, 2010 DTC 5174.

[25] Directly, indirectly via an international business corporation owned by the appellant or via a debit or credit card furnished by Omnicorp.

[26] *Webb v Canada*, 2004 TCC 619, [2005] 3 CTC 2068 [*Webb*].

[27] Wilma Goheen claimed $72 in 1987 and $40 in 2003 unrelated to Global.

[28] Transcript of Hearing, page 178. Immediately before the hearing of this appeal, she had read the transcript from her husband's examination for discovery.

[29] Exhibit A-6.

[30] *Webb*, *supra* note 27 at para 14.

[31] Subsection 163(3) does not apply to relieve the taxpayer of the onus to demonstrate that the Minister's assessment of tax was incorrect.

[32] *Venne v Canada (Minister of National Revenue – M.N.R.)*, [1984] CTC 223 (FCTD).

[33] *Klotz v Canada*, 2004 TCC 147 at para 68, 2004 DTC 2236. ACJ Bowman as he then was.

[34] *DeCosta v Canada*, 2005 TCC 545 at para 12, 2005 DTC 1436.

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