Docket: 2008-285(IT)G

BETWEEN:

DOUG JENSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal is separate and heard consecutively with the appeal of *Ron Goheen* – 2008-851(IT)G 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 appeal from the reassessment made under the *Income Tax Act* for the 2001 taxation year is 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 22nd day of March 2018.

"K. Lyons"

Lyons J.

Citation: 2018 TCC 60
Date: 20180322
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BETWEEN:

DOUG JENSEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] Doug Jensen, the appellant, appeals the reassessment made by the Minister of National Revenue under the *Income Tax Act* in respect of the 2001 taxation year. The appellant claimed a tax credit deduction ("Deduction") based on the amount of $153,230 CDN or $100,000 U.S. (the "Amount") that he paid to Global Institute ("Global") 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. 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

[5] Since 1975, the appellant has provided oilfield drilling services through various companies including D.W. Jensen Drilling Ltd. ("Drilling").[2] The appellant was the main person responsible for and manager of Drilling. He owned 100% of its shares until the early 2000s at which point his spouse acquired 49% of the shares.

[6] Drilling's main area of activity is in shot hole seismic drilling plus it conducts other types of drilling, ice road construction and some geotechnical work. Drilling has been a successful business since 1993. By 2001, it had 50 to 60 direct employees plus hired subcontractors. Initially, Drilling owned the shop and land on which it was located. In the early 2000s, these were transferred to one of his numbered companies to separate operations from assets; the other numbered company held investments.

[7] At some point before 2000, Drilling had donated old track (off-road ambulance) equipment to a military museum in Alberta. Based on the value of that equipment, it received a tax donation receipt to use as a tax deduction.

[8] From that experience, the appellant understood where property is donated a charity would give a receipt, with the attendant tax benefit, to claim as a charitable donation deduction in his tax return, thus knew that making a donation was one way he could reduce his taxes.

Global Prosperity Conferences

[9] In each of 2001 and 2002, the appellant attended a Global Prosperity Conference in Cancun. A friend had promoted the April 2001 Global Prosperity Conference ("2001 Global Conference") to the appellant which put on and facilitated presentations for investment opportunities. The appellant attended with

his spouse and two or three few thousand others. He alluded to audio tapes that he had received as part of the Conference registration fee plus literature and correspondence which were no longer available. Presentations for investments were made in the Conference Hall.

[10] Nelson Bayford, who he met for the first time, made a presentation and held himself out as the main representative of Omnicorp Bank Inc. ("Omnicorp"). It was represented to the appellant that Mr. Bayford was the president of Omnicorp which is part of the Omnicorp Financial Group of Companies ("Omnicorp Group").

Global

[11] Duncan Goheen, the coordinator and co-founder of Global, made a Power Point presentation. Whilst the appellant did not recall specifics, in direct examination, he said that Duncan Goheen showed pictures describing the work in third world countries, the Phillipines and Honduras, involving "agricultural type stuff to improve farming techniques…to grow better crops and improve their quality of life of the people" (the "project") that Global was working on at that time and that "would be basically what I remember from memory". Small "get-togethers" occurred after that presentation; the appellant participated with three or four others plus Duncan Goheen who continued to "pitch what he was doing."[3] Funds were solicited but Duncan Goheen did not refer to goals for the fund nor what had been raised and said he would like to put the funds in an endowment fund for ten years and the interest therefrom would be used for the project. It made sense to the appellant as there would be continuous income and a budget for the project. He expressed interest by exchanging contact information with Duncan Goheen who later followed up with the appellant mostly through telephone conversations. Each phoned the other a few times before the appellant gave the Amount to Global. The appellant said he had no recollection as to the content of the discussions.

[12] The appellant indicated initially in cross-examination that at the end of the 2001 Global Conference he had not totally decided to donate to Global. At examination for discovery, six years before the hearing, his answer was he had made the decision before the Conference ended. He then said when he responded at the discovery that "I think I may have been deceiving myself a bit there. I had probably figured I was going to make a decision, but being as I didn't make it for another three months, I'm thinking that I must have thought about it." He reversed

course yet again and said "It says here that I said I'd made that decision" and "Maybe I had" made the decision to donate at the end of the Conference.[4]

[13] On his return from the 2001 Global Conference, and before providing the Amount to Global, he asked his accountant to confirm it was a registered charity with an eligible number because the appellant's sole concern was that Global was a registered charity with "certification" so that he could get a tax deduction. His accountant did not make any recommendation relating to Global nor was he involved in determining the Amount.

The Amount paid to Global

[14] As part of a business trip to British Columbia, the appellant personally delivered an Alberta Treasury Branch ("ATB") draft, dated July 12, 2001, in the amount of $100,000 U.S., to Duncan Goheen in Kelowna, British Columbia.[5] He wanted to ensure he was totally comfortable before he gave the Amount and spent the afternoon golfing with Duncan Goheen where Global was discussed a little more.

[15] The appellant does not recall completing the donor form ("Form"), also dated July 12, 2001, for $153,230 CDN but admitted it is his handwriting. In cross-examination, he said "yes" he had filled the Form out on that date which was witnessed. He agreed that the donor Form he signed contained a unique term which states "I hereby direct the gift noted below or any property substituted therefore made to Global Institute, registration number … be held for a period of not less than ten years." He did not remember any other time where he directed a charity to hold the donation for a period of time.

[16] A receipt, dated July 17, 2001 in the amount of $153,230 CDN (equivalent to $100,000 U.S.), was issued to the appellant by Global and is signed by Marilee Goheen, Duncan Goheen's spouse. In his 2001 return, the appellant claimed the tax credit Deduction for a charitable donation based on the Amount on the receipt.[6] At examination for discovery, he said he did not remember why the exact Amount was decided on or why it was denominated in U.S. dollars. At the hearing, in response to the question how did he come around to donating and donating such a large sum, he said "I don't remember how I came to that amount of money" but had said at another point his decision as to the Amount was based, in part, on how much taxes he wanted to reduce.[7]

[17] Although the appellant denied that when he paid the Amount to Global that he had an expectation that he would receive interest from the Amount back into his CIBC account, when asked in cross-examination that as part of the examination for discovery process to produce statements or documents regarding the CIBC account whether the appellant had failed to satisfy the request, he agreed he refused, in part, to answer the question in the letter and refused to identify who he spoke to at the CIBC to satisfy the request to produce his CIBC banking information.

[18] In 2003, the appellant gave an additional $3,000 to Global. He said in cross-examination aside from Duncan Goheen needing the money, part of his reason for giving the Amount was because the appellant's 2001 tax deduction relating to the Amount might be in jeopardy if Global did not pass the CRA audit.

Omnicorp Bank Inc. and Omnicorp Financial Group of Companies

[19] After the 2001 Global Conference, the appellant was in communication with Omnicorp. Because of his interest in investments, he attended two Omnicorp Group resort conferences in Mexico: Puerto Vallarta in November 2001 and Cabo San Lucas on June 13 and 14, 2002 ("2002 Omnicorp Conference"). He described these conferences as having promoted opportunities for different investments, including offshore investments, investments for upstart or expansion money (venture capital) and other services."[8]

[20] In cross-examination, the appellant was asked in relation to the Omnicorp Group, the following questions and gave the following answers:

> Q Do you know if Omnicorp claimed off of the services of recovering capital from the oppressive jaws of taxation by developing and implementing tax back strategies?
>
> A They offered a lot of services. To say that I remember exactly what all the services were, I don't know. That could have been one of the services that they offered.
>
> Q You just don't recall?
>
> A Just don't recall.
>
> Q But it might have been.
>
> A Might have been.

Q Do you recall anything about them providing the knowledge or saying they provide the knowledge and mechanisms necessary to deploy capital in jurisdictions that have no tax consequences?

A There again, they had a lot of things that they were – I probably did hear that, but to say for sure, I can't remember.

Q What about setting up offshore trusts, international business corporations and the structuring of indirect control of these entities?

A Same answer.

Q What about strategies able to eliminate or adduce personal corporate or capital taxes?

A There again, it was probably one of the services they were offering. I don't remember the exact details.

Q What about procedures that can eliminate current, previous or future tax liabilities?

A There again, they probably were. I don't remember specifically.

Q What about liberating registered funds without any tax consequences?

A There again, they were probably offering that. As I say, I don't remember the specific details of what they were offering.

Q What about liberating corporate retained earnings without tax consequences?

A There again, they were probably offering it. I do not remember specifically, you know, those offers.

Q What about removing or moving capital between countries without tax consequences?

A Same answer.

Q And asset protection and property transfers.

A. Same answer.

Q Ownership though an offshore trust with discretionary beneficiaries, purportedly eliminating offshore reporting requirements?

> A There again, they probably were. I do not remember specifics.
>
> Q What about creating an IBC to invest offshore tax free?
>
> A Same thing, they probably did. I just don't remember the specific they were doing.[9]

[21] In re-examination, he was asked in relation to the questions in paragraph 20 of these reasons as to what he recalled and what Omnicorp Group actually offered. He said that he recalls very little at this time but knows that they offered a lot of different options for offshore banking and "That was their main presentation was off-shore banking and investments. This all comes at their, you know, how to hide money and do all these things, and I'm thinking that that would have been the – the only thing I followed was I went into their investment side, I didn't go into hiding money, and transferring money." Other than OBI Securities Inc. ("OBI") and American Gold Mining Corporation ("AGMC"), the appellant said he knew very little and did not remember all that Omnicorp Group offered plus it was a long time ago.

OBI Securities Inc.

[22] At the 2001 Global Conference, the appellant learned of OBI. Omnicorp or Omnicorp Group promoted OBI and AGMC. He claimed he was told that he had to open an account with OBI if he wanted to be a shareholder of AGMC.

[23] On May 30, 2001, he instructed ATB to wire $3,850 U.S. to the Bank of America in Miami. The wire transfer document shows "Beneficiary Customer name and address as Omnicorp 8597 Douglas Jensen". An OBI Share Capital Account was opened for him, effective June 19, 2001, with an initial balance of 1,000 non-voting ordinary OBI shares and with a share certificate.[10] He said this enabled him to open an OBI investment account. He also said he was confused at the time but he did not recall OBI was a separate investment for which he would receive a return. Notwithstanding OBI's letter indicates a Share Capital Account summary statement will be issued on December 31 of each year, he did not recall receiving any annual statements.

AGMC shares

[24] After acquiring the OBI shares and account in June 2001, he eventually made some Omnicorp or Omnicorp Group related investments in May and July 2002.[11] At the 2001 Conference, Mr. Markham had made a presentation regarding AGMC, based in Nevada, United States. His presentation revolved around improvements to its Nevada mining property, the drilling and its small processing plant where they process drilling results. Money was sought for subscriptions to expand to prove the property held commercially grade gold so that eventually a larger mining company would buy the property. The appellant explained it cost a lot of money to prove property; he had read about it and looked into mining and had been involved in coal exploration and drilling.

[25] On May 22, 2002, the appellant authorized the ATB to transfer by wire the amount of $46,323 CDN ($30,000 U.S.), from his personal ATB line of credit account, to Toronto Dominion Bank to buy 4,000 AGMC shares. The wire document indicates "Beneficiary: OBI Securities" with its address as the National Commercial Bank. He said that the "Reference DJ…AGMC" on the document shows that the use of the money was for the AGMC shares. The appellant does not recall accessing his OBI account even though he had invested in AGMC shares in May 2002.[12]

Solara Ventures Inc.

[26] In cross-examination, he admitted that he attended the 2002 Omnicorp Conference because of investments plus the discussion about Solara Ventures Inc. ("Solara") taking over the assets of Omnicorp. He understood Solara was Vancouver-based with a background in mining but it was a venture capital company that invested in different projects; Ian Brody and Scott Maurice were two of its principals that he had met in Mexico. They provided a presentation as to Solara's background, promoted shares and solicited investment because some of the assets that they were taking over from Omnicorp required more money to finish.

[27] PricewaterhouseCoopers had been appointed to audit Omnicorp because it had been placed in receivership which he learned of from Mr. Bayford's presentation who spoke of the "woes" of Omnicorp. He announced Omnicorp was being shut down as a bank and they wanted to transfer their assets or investments to Solara. The appellant did not verify the accuracy of the information presented by the two principals nor Mr. Bayford.

Solara shares

[28] Solara's letter dated July 31, 2002, acknowledges his subscription for 10,000 Solara shares as confirmed in share certificate 178 which shows these were acquired on July 18, 2002. He had wired the amount of $25,000 U.S. ($38,622 CDN) on July 16, 2002 for these shares. He claimed he did not acquire any other Solara shares.[13]

Solara Deal

[29] He was aware that around September 23, 2002, Global and Omnicorp entered into agreements that Omnicorp certificates of deposit would be redeemed for shares in Solara (the "Solara Deal") as it was one of the items discussed at the 2002 Omnicorp Conference he attended.

[30] The appellant said that all the Omnicorp assets were transferred to Solara shares and because OBI was owned by Omnicorp, his account was moving over to Solara. When asked if his OBI shares were transferred for Solara shares, he said "I think it was more my investment in American Gold was transferred, but I couldn't say for sure that's exactly what was transferred. That was part of OIB (sic) Securities." When challenged that OBI is different than AGMC, the appellant said "I bought the shares through OBI Securities. That's where the money went to pay for them" and "it was his investment in AGMC that was transferred." He said that he did not know if the AGMC shares were transferred or not into Solara shares. He then agreed that the OBI shares were transferred to Solara but said he did not report that on his tax return because from his perspective no money (namely, loss or gain) actually changed hands. The appellant clarified in re-examination that to his knowledge and understanding, his OBI shares were transferred to Solara, not exchanged for Solara shares.

[31] In his mind, he said his investments to OBI via Omnicorp, OWN Costa Rica and AGMC via OBI were not connected to the Amount he gave to Global.

[32] He acknowledged that he had claimed a charitable donation deduction of $56,600 in 2003 that he paid to the Canadian Literacy Enhancement Society that was promoted by John Gillespie. The appellant said he had met him at a Global Prosperity conference. When asked if Mr. Gillespie was connected with Omnicorp, the appellant said he was unsure. However, as part of the undertaking responses provided to the respondent, the appellant's counsel indicated "To the appellant's

knowledge, Mr. Gillespie was connected to Omnicorp, but the appellant does not know in what capacity."[14]

[33] 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.

[34] 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 2001 and 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 15 d) to kk), 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 15 e), 15 g) and part of 15 p) were admitted by the appellant. The respondent served a Request to Admit the truth of facts, including the Assumptions, and authenticity of documents on the appellant's counsel.[15]

III. Law

"Gifts" in section 118.1

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

[36] 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

[37] The appellant's position on the first issue is that donative intent existed at the time he paid the Amount 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.

[38] 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

[39] 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.[16] The initial onus of "demolishing" such assumptions is on the appellant by making out at least a *prima facie* case.[17] 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.[18]

[40] 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.'"[19]

[41] 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.[20] However, such shifting should not be lightly, capriciously or casually shifted to the respondent.

"Gift" defined

[42] 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.

[43] Under the *Income Tax 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."[21] 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.

[44] 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.

[45] 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.[22] The third no-benefit requirement is also expressed as whether the donor had donative intent at the time the donor made the gift.[23] Accordingly, the issue in this appeal is whether the appellant had the donative intent when he paid the Amount to Global.

Donative Intent

[46] 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.[24]

[47] 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.[25]

[48] 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.[26]

Did the appellant have donative intent?

[49] The appellant conceded part of the assumptions in paragraph 15 p) 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 15 p) of the Reply. Namely, that as part of his arrangements with Global and 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.[27] Thereafter, he would no longer receive interest and Global would have unencumbered use of the Amount. In cross-examination, he said he knew nothing of tracking nor if it was invested in a certificate of deposit issued by Omnicorp by reference to his name. Nor did he have any knowledge as to whether when Solara took over the assets of OBI, that the certificate of deposit was transferred over to shares of equal value in Solara.

[50] 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.[28]

[51] Although he described the 2001 Global Conference as a trade fair with a chance to invest and the provision of services, other than signing up for his OBI account to invest, the only transaction that took place was the Amount paid to Global in July 2001. An investment was made in AGMC ten months later.

[52] After hearing Duncan Goheen's presentation regarding Global and the project at the 2001 Global Conference and receiving confirmation of Global's certification, he said he delivered the draft in the Amount to Duncan Goheen personally with the intent to help Global fund the endowment fund from which it would receive income to fund its charitable project. However, a donor's stated intention is not determinative. Donative intent is assessed on an objective standard. Determining whether the appellant expected to receive non-tax benefits or he had donative intent at the time the Amount was paid are questions of fact and highly fact dependent.

[53] Despite attending two presentations by Omnicorp at Global Prosperity conferences, communicating with Omnicorp after the 2001 Global Conference, attending two Omnicorp conferences, opening an investment account with OBI via Omnicorp, and investing in Omnicorp-related investments and having met Mr. Bayford twice, the appellant said he could not recall anything more about Omnicorp or its business promotion other than that it offered offshore banking and investing. In cross-examination, he agreed that he understood that OBI was connected to or was part of Omnicorp. Albeit, he said he was informed that OBI was an investment that could be made through Omnicorp he was unaware if that was correct. Notably, the ATB wire transfer relating to OBI shares clearly shows "Omnicorp 8597 Douglas Jensen" as the beneficiary. I find the appellant's answers

evasive and reject his explanations and evidence with respect to Omnicorp and the Omnicorp Group.

[54] He submitted because of the passage of time, he was unable to recall certain aspects; this was a consistent theme throughout his testimony. In some instances, his answers were inconsistent with his answer provided at discovery, his undertakings and during the hearing. In other instances, his answers were speculative. Despite his inability to recall, however, he failed to call any witnesses to corroborate his version of events.[29] Clearly, Duncan Goheen is featured prominently regarding Global's program and activities, in his interactions with the appellant in the context of the arrangements regarding the Amount and his alleged affiliation with Omnicorp as assumed in the Reply. He asserted it was the respondent's responsibility to call Duncan Goheen and Mr. Bayford as witnesses, in part, because eight months before trial she indicated she intended to call them as witnesses.[30]

[55] I have difficulty understanding why the appellant, of his own volition, failed to call at least Duncan Goheen as a witness whom might have corroborated weaker aspects of the appellant's testimony given his inability to recollect many aspects, and noting that several weeks before trial the appellant knew that the respondent no longer planned to call Duncan Goheen nor Mr. Bayford as witnesses. I draw an adverse inference from the appellant's failure to call Duncan Goheen and Mr. Bayford.

[56] Admittedly, memory can and does fade with the passage of time, as pointed out by the appellant in his submissions, however, it seems implausible to me given the magnitude of the Amount provided to Global that his recollection on at least fundamental elements, as follows, were not better than he presented during his testimony. He testified that in 2001 he was in a position to donate the Amount. Other than the tax advantage, however, he was unable to recall why the Amount was decided on, why the Amount was paid in U.S. currency and, significantly, he was unable to provide a credible answer as to why donate such an extremely large sum to Global especially since he had not made any personal cash charitable donations between 1990 to 2002.

[57] Where a donor shows little interest and understanding of the donation program other than the financial advantages that may result from participating in the program, this Court found that there was no donative intent.[31]

[58] When he responded to the CRA's March 2004 letter and request for information via a questionnaire, he indicated he had investigated and found Global to be government-accredited, by virtue of the "certification", thus refused to provide information and said it had nothing to do with him personally or with his taxes. Similarly, his notice of objection, filed on his behalf in 2005, indicates that he had no duty to inquire beyond the "certification" and during his testimony, confirmed that having the certification was all he cared about.[32]

[59] Apart from asking his accountant to confirm Global's certification, the appellant admitted neither he nor his accountant had checked out Global or Duncan Goheen. He agreed he did not know how Global was going to carry out its claimed charitable activities nor was he familiar with resources allocated to various activities or if it conducted any charitable activities in Canada. He did not show interest in the types of causes that Global claimed to be involved in. When asked in cross-examination if one of the reasons he gave the Amount to Global was because of a connection to pranic healing, he said he was unable to recall if it was involved in that and did not know whether or not in 2001 Global's primary purpose was to carry on support programs in British Columbia.

[60] Responding to questions put to him as to whether he knew how the Amount would be invested by Global, he said he understood it was to be placed into an endowment fund, it would generate interest but did not know where or how the endowment fund was going to earn income and acknowledged he had never donated anything to an endowment fund. In direct examination, he speculated that he "probably" called Duncan Goheen to clarify some of his concerns and "probably" find out exactly how the endowment fund was going to work and its duration. When asked whether Duncan Goheen gave answers to what the appellant had "probably" asked, he responded "I could say yes he gave me answers, but I don't know." He reiterated in cross-examination he did not remember the conversations and agreed he was guessing as to whether he asked the questions he had "probably" posed relating to the endowment fund.[33] Beyond that, he admitted that he did not know how it could be accomplished nor what Global was going to do.

[61] The appellant did not recall if Duncan Goheen had spoken of an extensive resume of the types of projects he was involved in and did not know a lot as to Duncan Goheen's background, his credentials or if he was bona fides. Instead, he largely relied on Duncan Goheen's generalized descriptor of the project in his presentation in promoting Global's program, the certification and followed Duncan Goheen's arrangements. Although he communicated with Duncan Goheen before

and after paying the Amount, he could not recall the content of the conversations and said the follow-up conversations were not that often.

[62] None of the foregoing information was sought by the appellant from Global before he paid the Amount. Aside from it being unusual for him to make personal charitable donations, it is implausible that someone would donate such a large amount without conducting due diligence concerning Global and Duncan Goheen. At minimum, assessing whether Global had carried on charitable work, finding out its goals, obtaining a minimal understanding of its donation program, its financial health and other information would normally factor into such decisions.

[63] The appellant's circumstances are virtually analogous to 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 – as here - 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, …[34]

[64] 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 receipt, but with an investment intent such that when it was paid, he anticipated a financial return and regardless of not knowing how the funds were returned to him. I infer that the Amount was paid to Global as a component of an interconnected arrangement entered into between him, Global and Omnicorp arising from Global's marketed donation program at the 2001 Global Conference with anticipation of a financial return which would be made by one of three channels. The factors identified, especially the unusually large amount, his lack of donation history and his lack of understanding and inquiry of what Global did, makes it inherently improbable this was a gift with donative intent. I do not find his evidence believable and reject it.

[65] Based on the foregoing, 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 conclude he had an investment intent when he paid the Amount to Global. Accordingly, it was not a gift within the meaning of section 118.1 of the *Act* and he is not entitled to the Deduction claimed.

Disputed Assumptions

[66] 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. Essentially, he argued he did not bear the onus of demolishing these 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. Therefore, he claims he need not disprove the disputed Assumptions.[35]

[67] In short, the difficulty with his argument is that "personal knowledge" and the Minister's "particular knowledge" is not the appropriate test. 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. His reference to personal knowledge implies that he had some type of knowledge.[36] In my opinion, the appellant was best placed 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 and is further borne out by the evidence that had been adduced.

Subsection 163(2) penalty

[68] 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 …

[69] The Minister has the onus to establish facts supporting the assessment of a subsection 163(2) penalty.[37]

[70] 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.

[71] 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."[38] 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."[39]

[72] 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.

[73] 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.[40]

[74] Of the Amount paid to Global, $54,100 CDN had been added to the appellant's ATB account by borrowing against his line of credit, secured against his house, on which interest was paid on the outstanding balance.[41] Around July 2001, the appellant and his spouse were in the process of building a custom home.

[75] Around 2000, and for the surrounding two or three years, he had a large quantum of income similar to 2001 and loaned a large part of his reported employment income back to Drilling for use in its operations. The appellant was a savvy businessman who knew that making a donation was one way he could reduce his taxes. With a specific amount in mind, he approached his accountant in or around 2000 who explained the tax implications of making a cash donation and suggested ways of reducing his taxes.

[76] In 2001, he reported net income of $613,623.[42] The Amount represents approximately 25% of his net income.

[77] The appellant had a clear appreciation of the situation and since he knew he did not make a "gift" to Global but nonetheless claimed the Deduction, I find and conclude that the appellant knowingly falsified his 2001 tax return and is liable for a penalty under subsection 163(2) of the *Act*.

[78] The appeal is dismissed.

[79] 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 22nd day of March 2018.

"K. Lyons"

Lyons J.

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[1] The hearing for each of the appeals for the appellant and Ron Goheen (Court File No. 2008-851(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] Exhibit R-5, Tab 1. He owned and incorporated 939878 Alberta Ltd. and 906955 Alberta Ltd. on June 19, 2001 and November 20, 2000, respectively. In the early 2000s, he became an investor in T.C. Equipment, a lawn and garden equipment business.

[3] Transcript of hearing ("Transcript"), pages 214 and 215.

[4] Transcript, pages 276 and 277.

[5] Exhibits A-1, A-2, A3 and R-3. A cheque, dated July 7, 2001, that he had written from his CIBC bank account to himself for $99,130 CDN was deposited into his ATB account to cover part of the draft for $100,000 U.S. $54,100 CDN was added to the account a few days later by borrowing against his line of credit (secured against their house) on which interest was paid on the outstanding balance.

[6] Exhibits A-2.

[7] Transcript, page 218.

[8] Transcript, pages 313 and 314.

[9] Transcript, pages 314 to 316.

[10] OBI's certificate of incorporation dated November 9, 2000 was also provided.

[11] Exhibits A-6 and A-7. On July 5, 2002, $16,000 U.S. ($24,716.66 CDN) was transferred by him to United Equity Ltd. for OWN Costa Rica for the purchase of one of the serviced

lots in a gated community in Dominical. Request and wire transfer were sent to Bankers Trust Co., New York for furtherance to the Parex Bank in Latvia.

[12] Exhibits A-4, A-5, R-3 and R-5.

[13] Exhibits A-8 and R-3, Tab 1.

[14] Transcript, page 313 and Exhibit R-5, Tab 1.

[15] The Assumptions and parts of the parties' submissions were common to the appellant's and Ron Goheen's appeals. Exhibit R-5 contains the Request to Admit dated April 13, 2017, Responses to Request and Admitted Facts and documents.

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

[17] *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).

[18] Hickman Motors, *supra* note 17. 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.

[19] *House*, *supra* note 17 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.

[20] *Transocean*, *supra* note 16 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).

[21] *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.

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

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

[24] *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."

[25] *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.

26 *Maréchaux v Canada*, 2010 FCA 287 at para 7, 2010 DTC 5174.

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

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

29 He relied on the decision in *Bekesinski v Canada*, 2014 TCC 245, 2014 DTC 1169, in which this Court noted that perfection in testimony is not expected and found the taxpayer to be credible even though her evidence was weak due to passage of time. However, unlike the appellant in the present case, her evidence was corroborated by other witnesses and she provided plausible explanations without glaring inconsistencies.

30 He also said the respondent should have called Duncan Goheen to prove the disputed Assumptions as to the Charity, other arrangements, roles, The Flow of Funds and the Solara Deal.

31 *Bandi v Canada*, 2013 TCC 230, 2013 DTC 1192. Conversely, in *Doubinin v Canada*, 2004 TCC 438, [2004] 4 CTC 2297 aff'g 2005 FCA 298, 2005 DTC 5624, the trial judge held that where a donor exercised reasonable diligence in confirming the legitimacy of the donee as a *bona fide* charity there was donative intent.

32 Exhibit R -2, Transcript, pages 287 to 289.

33 Transcript, pages 277 and 278.

34 *Webb*, *supra* note 28 at para 14.

35 Specifically, he argued he had acquired Solara shares with funds from his ATB account, demolished assumptions (paragraphs 15 jj) and kk)) that he participated in the Solara Deal because he retained an ownership interest in his donation to Global. Also, (as to paragraphs 15 d) to o), q) and r)), Global's filing information is in the Minister's possession. As to the Flow of Funds (paragraphs 15 1), q) to u)), Omnicorp and Omnicorp Group (paragraphs 15 v) to gg)) and Omnicorp Defaults (paragraphs 15 hh) to kk)), he was not in a position to have any particular or special knowledge of these alleged facts. Hence, the respondent had a positive obligation to put evidence onto the record to establish a prima case to support the disputed Assumptions.

36 In *Mungovan v Canada*, 2001 TCC 568, 2001 DTC 691, this Court noted, at paragraph 10, that the nature of assumptions is such that an appellant may need to disprove facts are not within his or her knowledge.

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

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

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

40 *DeCosta v Canada*, 2005 TCC 545 at para 12, 2005 DTC 1436.

41 In 2001, their home and his spouse's house were sold.

[42] He received employment income of $453,175 from Drilling, other employment income of $2,750, interest income of $2,702, RRSP income of $141,546, gross business income of $24,740 and net business income of $13,450. Exhibit R-5, Tab 1.

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