Citation: 2012 TCC 406
Date: 2012**1214**
Docket: 2010-1429(IT)G

BETWEEN:

ALLEN BERG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Bocock J.

I. Nature of Appeal

[1] This is an appeal in respect of reassessments made by the Minister of National Revenue (the "Minister") by a Notice of Reassessment dated June 19, 2009 for the 2002 taxation year and by Notices of Reassessment both dated January 4, 2007 for the 2003 and 2004 taxation years, respectively (the "Reassessments"). The Reassessments disallowed claimed charitable gifts in the amounts of $2,420,000.00, $1,786,000.00 and $718,380.00 for the 2002, 2003 and 2004 tax years, respectively.

[2] The parties filed a partial Agreed Statement of Facts. Subsequently, and at the outset of the Hearing, the Appellant abandoned his appeal with respect to a claimed capital loss in relation to certain guarantee fees described herein in the amounts of $254,100.00 and $183,065.00 for years 2002 and 2003, respectively (the "Abandoned Issue").

II. Facts and Issues

a) Agreed Facts

[3] On November 19, 2002 and February 12, 2003, the Appellant participated in a charitable donation program (the "Donation Program") and entered into a series of pre-determined donation transactions with Young Island Timeshare Inc. ("YITI") and SVG Bancorp. ("SVG")(the "Donation Transactions").

[4] By an agreement made November 19, 2002, the Appellant purchased 68 Timeshare Units (the "2002 Timeshare Units") from YITI. The purchase agreement provided for the payment by the Appellant of:

a) $60,500.00 payable on signing;

b) $181,500.00 payable on December 16, 2002; and

c) $2,178,000.00 payable by way of a promissory note in favour of YITI (the "2002 Promissory Note").

[5] Coincident with making the 2002 Promissory Note, the Appellant was provided with a written discharge of his ostensible obligations thereunder by YITI. It was a condition of his agreeing to participate in the Donation Program that the Appellant received such a discharge (the "Discharge").

[6] On the same day, the Appellant executed a pledge agreement by which the 2002 Timeshare Units were pledged to YITI as security for the Appellant's ostensible obligations under the 2002 Promissory Note. He also entered into a guarantee agreement with SVG. The terms of the guarantee agreement provided that SVG would guarantee payment of the Appellant's ostensible obligations under the 2002 Promissory Note in consideration of the payment by the Appellant to SVG of a fee in the amount of $508,200.00 (the "2002 Guarantee Fee"). Immediately thereafter, YITI executed a release releasing the Appellant from his pledge of the 2002 Timeshare Units.

[7] On December 6, 2002 the Appellant transferred the 2002 Timeshare Units to Cheder Chabad. Cheder Chabad was at all material times a "registered charity" within the meaning of subsection 248(1) of the *Income Tax Act* ("*Act*"). Cheder Chabad ("the Charity") issued to the Appellant a receipt otherwise containing the prescribed information (the "2002 Receipt") as required by paragraph 118.1(2)(*a*) of the *Act*.

[8] The gift amount shown on the 2002 Receipt was $2,420,000.00. However, the amount shown on the 2002 Receipt was not the fair market value of the 2002 Timeshare Units. The fair market value of the 2002 Timeshare Units was $242,000.00, the sum equal to the total of the two cash payments.

[9] In computing his tax payable for the 2002 taxation year, the Appellant claimed a charitable tax credit in relation to the donation amount shown on the 2002 Receipt, namely, $2,420,000.00 (the "Inflated Gift Receipt").

[10] One year later, the Appellant entered into a second series of donation transactions in the 2003 taxation year (the "2003 Donation Translations") which were virtually identical to the 2002 Donation Transaction. The 2003 Donation Transactions differed only as to the amount payable on signing and the amount of the 2003 Promissory Note. In 2003, such amounts were a cash payment of $133,950.00 and a Promissory Note in the amount of $1,652,050.00. The pledge agreement, guarantee fee and transfer of the units transpired in a similar fashion. Similarly, the fair market value of the 2003 Timeshare Units was $133,950.00 and not the $1,786,000.00 reflected on the charitable donation receipt (the "Inflated Gift Receipt").

[11] In computing his tax payable for the 2003 taxation year and for the 2004 taxation year, the Appellant claimed a corresponding charitable tax credit relative to the donations of $1,067,620.00 and $718,380.00, respectively.

[12] The Appellant never had an intention of paying any amounts against the 2002 Promissory Note nor against the 2003 Promissory Note (collectively, the "Promissory Notes"). To date, he has not made any payments thereon.

[13] The Promissory Notes, pledge agreements and guarantee agreements (the "Transaction Documents") were merely pretenses and did not, at any time, reflect *bona fide* obligations of the Appellant to YITI or SVG.

[14] Neither the 2002 Guarantee Fee nor the 2003 Guarantee Fee (collectively, the "Guarantee Fees") were paid in satisfaction of, nor in order to relieve, any obligation of the Appellant under the Promissory Notes. Rather, the Guarantee Fees were paid solely for the purpose of enabling the Appellant to participate in the Donation Program.

[15] It was a condition of his agreeing to participate in the Donation Program that the Appellant received tax receipts bearing amounts that, in the aggregate, were equal

to the total purported fair market value of the 2002 Timeshare Units and the 2003 Timeshare Units. If accepted as valid by the Minister, these inflated amounts would have entitled the Appellant to federal and provincial tax credits greatly exceeding his out-of-pocket cash payments for the property gifted to the Charity.

[16] In issuing the Reassessments, the Minister did not recognize the Appellant's entitlement to deduct any portion of the charitable donation amount described in the Inflated Gift Receipts, including the cash portions paid under the Donation Program to acquire the 2002 Timeshare Units and the 2003 Timeshare Units (the "Transferred Units"). These were $242,000.00 and $133,950.00, respectively (the "Cash Donation Amounts").

[17] In making the Reassessments, the Minister assumed that:

a) the Appellant had received benefits from the Donation Program in the form of:

i) a 20-year "unreasonable rate interest loan" from YITI; and

ii) the guarantee feature of the Donation Program allowing for full payment of the Promissory Notes for a fraction of their value; and

b) consequently the transfer of the Timeshare Units was not a valid gift, pursuant to section 118.1 of the *Act* since;

i) the Purchase Agreements were "legally ineffective or incomplete";

ii) the amounts shown on the Tax Donation Receipts were not the fair market value of the Timeshare Units; or

iii) the terms and conditions of the Promissory Notes indicated that there was no *bona fide* loan.

b) Preliminary Findings of Fact

[18] The Court accepts that the Appellant, either directly or indirectly, provided some direction that an additional charity or charities be selected which more closely reflected a preferred donee of the Appellant. The Court finds that the ultimate donee

Charity was preferred by the Appellant from those contained on a previous list of suggested charities presented to the Appellant by the promoter.

[19] There can be no question factually that the Transaction Documents were intended throughout to provide window dressing for the Donation Program, which if successful, would provide the obscurity necessary for the Canada Revenue Agency (the "CRA") to overlook the inflated values of the Inflated Gift Receipts and consequently the tangible donative value of the Transferred Units. As well, the Court finds that the pretense was intended to fool the tax authority and no one else.

[20] While much was made of the timing and need for the Discharge obtained by the Appellant for only a pretense, based upon the testimony and the Appellant's character and life experience, the Court finds that the ruse of the inflated value of the Transferred Units, while intended to fool the tax authorities, was, in turn, just too authentic looking for the Appellant. Therefore, the Appellant wanted to ensure he would not be "stung" in future with the surprise presentment for payment of Promissory Notes solely intended to fool the CRA. The Appellant and his directed professional advisers wanted to ensure, through the use of the "belt and suspenders" Discharge, that the Appellant himself was not the long-term intended dupe of a fake obligation, possibly alleged in future to be valid. The safekeeping of the undated Discharge until needed was therefore thought to be necessary should the surprise presentment of the Promissory Note be made after the time that the Inflated Gift Receipts had passed their usefulness.

c) Issue to be determined

[21] Subsection 118.1(1) of the *Act* does not define the term "gift." Among other requirements, it is legally essential that a gift exist at law in order for the Appellant to utilize the donated amount and claim the corresponding charitable tax credit. The Court finds that the intention of the Appellant regarding the Donation Program was twofold. Firstly, he wanted to maximize his tax donation receipt by executing all the documents placed before him in relation to the Donation Programs. Secondly, he intended to and did provide, valuable consideration for the privilege of participating in the Donation Program, knowing full well, that this was an essential price of entry. What he did not intend, was that the deductibility of the valuable cash consideration paid (albeit, worth a fraction of the amount stated in the Inflated Gift Receipts) would ever be at risk because of the allegation that his donative intent was nullified or rendered non-existent by the Donation Program. This final point is the precise legal issue for this Court to determine, namely, does the overall scheme of the Donation Program, the Inflated Gift Receipt and/or the bogus Transaction Documents

submitted in vain by the Appellant to the CRA, vitiate the donative intent or *animus donandi* regarding the Transferred Units donated to the Charity.

III. Summary of Submissions

a) Appellant's Submissions

[22] The Appellant submitted that the additional tax advantages sought by the taxpayer, whether legitimate or not, whether factual or pretense or whether accepted or rejected, cannot be considered a benefit received in exchange for the Transferred Units such that the tax advantage sought nullifies the donative intent.

[23] The Appellant's desire or motivation in seeking an ulterior result (an inflated tax credit) is concurrent with, but does not smother the value of the Cash Donation Amount nor the gift or receipt and acceptance by the Charity of the Transferred Units. Tangible value was paid by the Appellant for the Transferred Units and no benefit was received by the Appellant from either the recipient Charity or any other party.

[24] The inflated charitable donation ruse (or "charitable donation programme" in deference to the euphemism of the Appellant), however constructed, still embodies concurrent donative intent, impoverishment of the Appellant and unconditional gift of the Cash Donation Amount to the Charity without reciprocal consideration received in the hands of the Appellant. The current leading case law, reviewed below, does not allow conflation of the uncontroverted donative intent with the overarching motivation or goal of utilizing an inflated charitable tax donation scheme, where tangible value may still be apportioned to the gifted property and the sole consideration or benefits received were charitable tax receipts (albeit inflated ones). The bogus Transaction Documents, whether accompanied by a meaningless Discharge or not, cannot constitute consideration since they were legal nothings. The Appellant further states that not only is the Appellant's self-interested motivation insufficient to vitiate the donative intent without receipt of other benefit, but the 2003 proposed changes to certain sections and rules under the *Act* related to hybrid charitable donations clearly anticipate that, from a prospective policy perspective, Parliament recognizes that a benefit conferred on the donor and a valuable gift may exist concurrently within the "transaction". In any event, since all that was ever sought and received by the Appellant was a tax receipt, no benefit was ever received by, nor accrued to him sufficient to vitiate the donative intent.

b) Respondent's Submissions

[25] While tax incentives in the form of tax credits do not generally vitiate donative intent, the benefits received in this case do so. The inflated valuation terms of the purchase agreement, Promissory Notes, pledge agreements, the Discharge, guarantee agreement and Inflated Gift Receipts created a benefit, qualitatively and quantitatively, the culmination of which is a conferred benefit to the donor beyond the simple sought after Inflated Gift Receipt. The Appellant's request that the Transaction Documents and the Cash Donation Amount be segregated is not possible because there was an absence of subsisting intention on the part of the Appellant to be impoverished by the gift to the Charity. Furthermore, the Appellant ought to have known of the inflated value of the units because of the bogus Transaction Documents and therefore ought to have known the amounts of the Inflated Gift Receipts were inaccurate and in contravention of paragraph 118.1(2)(*a*).

[26] The magnitude of the unwarranted tax benefit, the possible valuable benefits conferred to the Appellant at the time the acquisition of the Transferred Units and the Appellant's non-disclosure and concealment of certain documents (collectively the "Vitiating Facts") all militate towards a valuable benefit conveyed upon the Appellant sufficient to nullify the donative intent in accordance with the relevant case law. At the time of the transaction, the benefits existed and were critical in enticing the Appellant to participate in the Donation Program and execute the Transaction Documents.

IV. Analysis

[27] Factually, the Court finds that the Appellant's primary goal and motivation in "doing the deal", as the Appellant himself describes the Donation Program, was to execute all such documents placed before him by the promoter (including the legally superfluous Discharges) in order to obtain a tax receipt nine times greater than the Cash Donation Amounts. As regards certain constituent elements of a charitable gift, the Court does find that the requisite need for a transfer and acceptance of the Transferred Units was satisfied. As well, unless the legal authorities direct that the Vitiating Facts, when existent, countermand the donative intent of the Transferred Units present in this case, then deductibility by the Appellant to the extent of the Cash Donation Amount is allowed under the *Act*.

[28] In the leading case of *Friedberg v. R*,[1] the Federal Court of Appeal stated as follows:

[1] 92 DTC 6031 (F.C.A.)

> **[4]** The *Income Tax Act* does not define the word "gift", so that the general principles of law with regard to gifts are utilized by the courts in these cases. […] Thus, 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 (see Heald, J. in *The Queen v. Zandstra*, [1974] C.T.C. 503, 74 D.T.C. 6416, at page 509 (D.T.C. 6420)). The tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors.
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> […]
>
> **[9]** It is clear that it is possible to make a "profitable" gift in the case of certain cultural property. Where the actual cost of acquiring the gift is low, and the fair market value is high, it is possible that the tax benefits of the gift will be greater than the cost of acquisition. A substantial incentive for giving property of cultural and national importance is thus created through these benefits. But not every gift will be found to benefit from these provisions. It all depends on how the transaction is characterized, for one cannot give what one does not own.

[29] At least to the extent of the Cash Donation Amount, the Appellant factually and intentionally transferred his ownership of the Transferred Units to the Charity without expectation in advance, nor receipt subsequently, of consideration or benefit from the Charity or third party beyond the Inflated Gift Receipts. Charitable gift receipts, on the authority of *Friedberg*, are not considered consideration sufficient to vitiate the donative intent in the absence of some evidence that the donor did not own, acquire and have authority to give the property transferred. No such proposition was alleged by the Crown in this case.

[30] In a case involving over-stated gift receipts issued in accordance with a charitable donation program involving paintings, this Court in the case of *Paradis v. R.*[2], stated:

> **[38]** Let us begin by addressing the first condition. The Minister claims that Dr.Paradis's principal motivation in acquiring the paintings and transferring them to the donees was strictly to obtain a tax benefit, not to divest himself of them in their favour. I do not deny that this motivation played an important role in Dr. Paradis's actions during the relevant years. However, I do not believe it is pertinent to consider the tax advantage in order to determine the validity of a gift in Quebec law. I believe this question must be decided strictly in the context of the legal relationship established between Dr. Paradis and each of the donees.

[2] [1997] 2 C.T.C. 2557

[39] Take the case of the gift of the Messier-Leduc painting. Dr. Paradis became the owner of this painting by purchasing it from Galerie des Maîtres Anciens. Under the gift agreement, Dr. Paradis disposed of the painting without receiving any consideration from Musée de Joliette, which as a consequence was enriched by the acquisition of a new painting and Dr. Paradis was impoverished by an amount equal to the value of that painting. I do not believe that the receipt for tax purposes can be looked upon as consideration for the painting. The receipt is merely a document establishing that a gift was received by Musée de Joliette. True, that document is necessary in order to claim the value of the gift for the purposes of the deduction for gifts. However, the extent to which Dr. Paradis is entitled to that benefit does not depend on the Musée de Joliette. That is determined by the Act. In my view, this tax advantage should not be considered in determining whether Dr. Paradis was impoverished.

[40] If such advantage were to be taken into account, a number of gifts might not qualify for the purposes of computing the deduction for gifts. I do not believe such an approach to be consistent with the spirit of the Act. This moreover is the point of view adopted by the Federal Court of Appeal in *Friedberg v. R.*,((1991), 92 D.T.C. 6031 (Fed. C.A.))(December 5, 1991), A-65-89. Linden J.A. wrote as follows at page 6032:

> Thus, 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 (see Heald, J. in *The Queen v. Zandstra* [74 DTC 6416] [1974] 2 F.C. 254, at p. 261.) The tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors.

[41] Nor was the gift a sham. The Musée genuinely acquired ownership of the painting. Furthermore, Dr. Paradis attached no condition to the donation of the painting. I do not believe that Dr. Paradis could ask the Musée de Joliette to return the painting to him on the basis that he had not obtained all the tax advantages that he had expected. It goes without saying that it would have been an entirely different matter if he had made the gifts conditional upon obtaining tax advantages.

[42] I am satisfied in this instance that, in respect of each of the gifts for which he claimed a tax deduction, Dr. Paradis wished to benefit the donees by depriving himself of the value of those paintings. The transfers of paintings to the donees constituted gifts within the meaning of the Act.

[31] *Paradis* is consistent in its approach that, although inflated receipts beyond the acquisition cost of the transferred property issued, such a collateral benefit alone is not sufficient consideration to nullify donative intent.

[32] Similarly, on the issue of whether potential incremental tax benefits constitute a benefit, this Court in *Doubinin v. R.*[3] stated at paragraphs 18 and 19:

> **[18]** He is not part of a tax evasion scheme and although he may have been motivated by *potential* tax benefits, I do not believe this can be equated to consideration for a gift because tax benefits are not considered a benefit. […]
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> **[19]** I conclude that based on these facts and my acceptance of the Appellant's evidence he had the requisite intent that his donation of $6,887.00 was a charitable donation to a registered charity for which he would receive a benefit. It was a genuine gift and not given with the expectation of receiving a material benefit or any other type of consideration from PPF [Note: PPF is a distinct benefactor who might have paid a superlative donation amount to the charity on the taxpayer's behalf.] The PPF donation was a mere possibility which should not operate to deny the Appellant his entitlement to a deduction in these circumstances.

[33] Consistently then, in the absence of some additional benefit or consideration beyond that of enhanced, supplementary or additional donation tax receipts, this Court and the Federal Court of Appeal have been reluctant to impugn donative intent where the underlying gift has some tangible property and is not otherwise co-mingled with a received tangible or potential benefit beyond the donation tax receipt; however inflated or unsupportable.

[34] As to the degree of a benefit received by the donor, even slight collateral benefits correlative to a donation program have been held to countermand the intention to give. In *Maréchaux v. R.*[4], at the trial level, this Court stated:

> **[32]** In applying the above definition to the facts of this appeal, it is clear that the appellant did not make a gift to the Foundation because a significant benefit flowed to the appellant in return for the Donation.
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> **[33]** The benefit is the financing arrangement. The $80,000 interest-free loan that was received by the appellant, coupled with the expectation of the Put Option, was a significant benefit that was given in return for the Donation. The financing was not provided in isolation to the Donation. The two were inextricably tied together by the relevant agreements.
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> **[34]** It is not necessary for purposes of this appeal to place a value on the benefit. However, it does appear to be somewhere in the neighbourhood of $70,000 ($80,000 received less outlays of $10,000), less a slight discount for the risk that the Put Option would not be effective. The benefit is certainly significant.

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[3] 2004 TCC 438, [2004] 3 C.T.C. 2297
[4] 2009 TCC 587, [2010] 2 C.T.C. 2099

> **[35]** I would also comment that, even without the Put Option, the financing provided a significant benefit. It is self-evident that an interest-free loan for 20 years provides a considerable economic benefit to the debtor. I would also note that the $8,000 security deposit could not reasonably be expected to accrete to anywhere near $80,000 in 20 years. The evidence of Mr. Johnson clearly showed this, even taking into account differences of opinion regarding some of his assumptions.
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> **[46]** I would comment briefly, though, on whether the appellant made a partial gift, consisting of his own cash outlay.
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> **[47]** The appellant did not argue this, and rightly so in my view.
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> **[48]** In some circumstances, it may be appropriate to separate a transaction into two parts, such that there is in part a gift, and in part something else.
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> **[49]** On the particular facts of this appeal, it is not appropriate to separate the transaction in this manner. There is just one interconnected arrangement here, and no part of it can be considered a gift that the appellant gave in expectation of no return. In this regard, I found assistance from the following decision referred to by counsel for the respondent: *Hudson Bay Mining & Smelting Co. v. R.* (1989), 89 D.T.C. 5515 (Fed. C.A.).

[35] The trial decision in *Maréchaux* was upheld by the Federal Court of Appeal[5]. The case before the Court is easily distinguishable, since the Respondent has conceded in the partial agreed statement of facts, that the Transaction Documents were pretenses and thereby not legally effective documents. Legally, no tangible or potential benefit to the Appellant, beyond the camouflage afforded by the Inflated Gift Receipts which were needed to enhance the purported gift value beyond the Cash Donation Amounts, can be ascribed to the Transaction Documents which, on admission by the Respondent, gave rise to no legal rights, obligations or benefits.

[36] One might again well ask, then why the Discharge delivered in respect of a pretense? The proposition that the Appellant believed that the Discharge (the existance of which was withheld until after examinations for discoveries) was evidence of a legal benefit cannot co-exist with the Respondent's admission that the Transaction Documents were bogus and a pretense. While the non-disclosure of the Discharge until later in the litigation process was not becoming behaviour of the Appellant, it speaks to his separate desire not to fall victim by being outsmarted via his own ruse. It did not relate to the Cash Donation amount given to the Charity, but

[5] 2010 FCA 287, 2010 DTC 5174(FCA)

his aversion to being asked to pay subsequently for a debt which did not exist and the likely related legal wranglings following such a demand. Had the Respondent not admitted that the Transaction Documents were pretenses, then the testimony of the Appellant regarding his view of the legal efficacy of the Discharge in relation to the Transaction Documents, at least at the outset, may have been relevant to the possible existance of a benefit beyond the Inflated Gift Receipts. The Respondent's admission removed that from the Court's purview.

[37] The Respondent referenced the case of *Webb v. Canada*[6], as evidence of this Court's willingness to distinguish a line of cases from that of *Friedberg*, where this Court stated at paragraphs 16, 17 and 18.

> **[16]** Much has been written on the subject of charitable donations over the years. The law, however, is in my view quite clear. I am bound by the decision of the Federal Court of Appeal in The Queen v. Friedberg, among others. These cases make it clear that in order for an amount to be a gift to charity, the amount must be paid without benefit or consideration flowing back to the donor, either directly or indirectly, or anticipation of that. The intent of the donor must, in other words, be entirely donative.
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> **[17]** The circumstances that I have referred to lead me to conclude that there was nothing donative at all about Mr. Webb's payment to ABLE. His intention was to receive a tax credit for a charitable donation, as well as a substantial refund of the amount he had given, such that when the two were aggregated they would exceed the $30,000 for which he wrote the cheque.
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> **[18]** I was referred in argument to the recent decision of Madam Justice Campbell in Doubinin v. The Queen and her statement in the first sentence of paragraph 18 where she said:
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> > He is not part of a tax evasion scheme, and although he may have been motivated by potential tax benefits, I do not believe that this can be equated to consideration for a gift because tax benefits are not considered a benefit. ...
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> I do not read Madam Justice Campbell as purporting there to extend what was said by Mr. Justice Linden in Friedberg to suggest that a scheme entered into whereby a person would be put in a position to claim tax credits for charitable donations in excess of the donations actually made, by the issuing of false receipts or by the kickback of part of the donation, to be a normal transaction and something that would not be considered a benefit within the context of the definition of what constitutes a gift. As Mr. Justice Linden put it in Friedberg:

[6] 2004 TCC 619, [2005] 3 C.T.C. 2068

> A gift is a voluntary transfer of property owned by a donee, owned by donor to a donee, in return for which no benefit or consideration flows to the donor.
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> I am bound, of course, by that definition and, I do not consider it to be qualified by what was said by Madam Justice Campbell in Doubinin. Clearly the amount paid in this case does not fall within that definition, and the appeal for 1998 will also be dismissed.

[38] As noted in *Webb*, a case under the Informal Procedures of this Court, the taxpayer was to receive and did receive a repayment equal to 75% of his initial donation. Factually, this is easily distinguished from the case before the Court, since in the present case no repayment of any sum to the Appellant occurred.

[39] The case of *Lockie v. R.*[7] heard after that of *Webb* and coincidentally also under the Informal Procedures, concluded differently. In *Lockie*, this Court recited the relevant authorities and held that the presence of certain consideration will vitiate donative intent when it stated:

> **[27]** In *Klotz v. R.*, 2004 TCC 147, 2004 D.T.C. 2236, [2004] 2 C.T.C. 2892 (T.C.C. [General Procedure]), Associate Chief Justice Bowman (as he then was) stated that:
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> > 22 One thing is clear, albeit probably irrelevant to what has to be decided here, and it is that Mr. Klotz's motivation in participating in this program was purely the anticipated tax benefit. The broadening of the cultural or intellectual horizons of the students at FSU was not a factor. He never asked what FSU was going to do with the prints. In 1999, FSU received 1,450 prints from various donors and presumably issued receipts for at least $1,450,000.
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> > 25 It is unnecessary for me to deal at any greater length with the donor. Mr. Klotz made a mass donation of limited edition prints to FSU. He did not see them or have them in his possession. He was indifferent as to what they were or who they went to or what the donor did with them. His sole concern was that he receive a charitable receipt. None of this is relevant to the issue. A charitable frame of mind is not a prerequisite to getting a charitable gift tax credit. People make charitable gifts for many reasons: tax, business, vanity, religion, social pressure. No motive vitiates the tax consequences of a charitable gift.

[7] 2010 TCC 142, [2010] 5 C.T.C. 2035

[28] The Respondent referred to the decision of Justice Little of this Court in *McPherson v. R.*, 2006 TCC 648, [2007] 2 C.T.C. 2277, 2007 D.T.C. 326 (Eng.) (T.C.C. [General Procedure]) as support for the position of the Respondent that the Appellant did not make a valid gift. However, it is clear from the decision of Justice Little that the taxpayer in that case did not make a gift because he expected to receive a "kickback". Justice Little stated as follows:

> 22 It is trite law (and common sense) that the anticipation and receipt of a cash kickback equal to 75% of the donation vitiates the gift. (See *Friedberg v. R., supra*.)
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> 23 Based on the detailed evidence outlined above I have concluded that the amounts transferred by the Appellant to A.B.L.E. in 1996 did not constitute a gift because the Appellant expected to receive a kickback equal to 75% of the amount that he contributed.

[29] In *Webb v. R.*, 2004 TCC 619, [2005] 3 C.T.C. 2068 (T.C.C. [Informal Procedure]), Justice Bowie held that the taxpayer did not make a gift to a charity that appears to be the same charity as in the *McPherson* case. Justice Bowie stated that:

> 15 Nevertheless the evidence satisfies me that Mr. Webb made the payment of $30,000, as I have already said, at least in anticipation of the future return of a large portion of his gift back to him, either from ABLE or through an indirect channel, in addition to the receipt itself.
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> 16 Much has been written on the subject of charitable donations over the years. The law, however, is in my view quite clear. I am bound by the decision of the Federal Court of Appeal in *Friedberg v. R.*, among others. These cases make it clear that in order for an amount to be a gift to charity, the amount must be paid without benefit or consideration flowing back to the donor, either directly or indirectly, or anticipation of that. The intent of the donor must, in other words, be entirely donative.
>
> 17 The circumstances that I have referred to lead me to conclude that there was nothing donative at all about Mr. Webb's payment to ABLE. His intention was to receive a tax credit for a charitable donation, as well as a substantial refund of the amount he had given, such that when the two were aggregated they would exceed the $30,000 for which he wrote the cheque.

[30] In *Norton v. R.*, 2008 TCC 91, 2008 D.T.C. 2701 (Eng.), [2008] 5 C.T.C. 2499 (T.C.C. [General Procedure]), Justice Archambault also found that there was no gift. This case also dealt with the same charity who provided a refund of a portion of the amount contributed as in *McPherson* and *Webb*.

[40] Continuing to apply those principles to the factual situation in *Lockie*, the Court further held:

> **[31]** In this case the Appellant did not receive any consideration from In Kind Canada or from any other person involved with the program. The Appellant only obtained a receipt from In Kind Canada which was based on what CEI and In Kind Canada had determined as the fair market value of the products. He did not receive any consideration or any benefit other than the benefit of a credit under the *Act* in relation to the amount of the donation to In Kind Canada.
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> **[32]** Although the Appellant was motivated by his potential return on investment, since the only benefit that flowed to the Appellant is the amount of the credit that he will receive under the *Act* (which credit, as claimed by the Appellant, was based on the fair market value of the property that he transferred to In Kind Canada as determined by CEI and In Kind Canada but which will be determined by the actual fair market value of these products), this benefit alone, in these circumstances, cannot vitiate the gift. Therefore I find that the Appellant did make a gift to In Kind Canada when he donated the products to this charity in 2003.

[41] In light of this clear line of cases and since factually no benefit beyond the Inflated Gift Receipts were received in the present case, this Court would need to legally determine that the concurrent non-charitable motivation or non-charitable purpose present before the Court is of such magnitude that it rescinds or demolishes donative intent related to the Cash Donation Amount. In short, given the absence of a benefit confirmed on the appellant, the overarching motivation and purpose must nullify the factually existent Cash Donation Amounts, and the gift of them.

[42] If such a legal rule existed, the Ontario Court of Appeal in *McNamee v. McNamee*[8] appears to have refuted same when it stated at paragraphs 33, 34, 35, 36 and 37:

> **[33]** The trial judge found that Mr. McNamee Sr. did not intend to gift the shares to his sons; rather, he intended to complete the estate freeze in order to protect his company from creditors (and to avoid potential tax consequences)
>
> […]
>
> **[34]** Respectfully, this analysis erroneously conflates *intention* with underlying *motivation* or *purpose*. They are not the same concepts and to treat them as such constitutes error in law. That Mr. McNamee Sr.'s primary purpose or motivation in transferring the shares was to underpin the estate freeze does not mean he did not intend to gift the shares in order to give effect to that purpose. Had the trial judge

[8] 2011 ONCA 533, 335 DLR (4th) 704

> focussed on Mr. McNamee Sr.'s intention in relation to the transfer of the shares itself, rather than on his ultimate purpose or motivation in putting the estate freeze in place, he would have realized – on the evidence here – that Mr. McNamee Sr. did intend to gift the shares: the documentation to that effect (the Declaration of Gift) is clear; the fact that he did not sell the shares to the boys because they had no money – as noted by the trial judge above – reinforces the notion that the transfer was by way of gift; and there was no "consideration" in law, as we have earlier explained. The *intention* respecting the transfer of shares was to do so gratuitously. The transfer was part of the corporate structure putting the estate freeze in place. And the estate freeze was the ultimate *motivation or purpose*.
>
> **[35]** Had he given effect to these distinctions, the trial judge would have recognized that Mr. McNamee Sr. had the requisite intention as donor to transfer the shares by way of gift.
>
> **[36]** In his analysis, the trial judge relied upon a Superior Court decision, *Traversy v. Glover* (2006), 30 R.F.L. (6th) 372 which, in turn, at para. 39, cited the following statement as part of the definition of "gift" from *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Group, 1979):
>
> > In tax law, a payment is a gift if it is made without conditions, from detached and disinterested generosity, out of affection, respect, charity or like impulses, and not from the constraining force of any moral or legal duty or from the incentive of anticipated benefits of an economic nature.
>
> **[37]** We are not able to find this reference in later editions of *Black's*. In any event, we are not persuaded that "inspired by affection, respect, charity, or like impulses" is the only type of donor intention that may found a valid gift – "the spirit of, say, cufflinks under the Christmas tree", as the trial judge put it. Here, the intention to transfer the shares had a perfectly legitimate legal objective, namely, to underpin the corporate restructuring in the form of an estate freeze. To the extent that *Traversy* and the trial judge here are suggesting that for a gift to be valid the donor's intention may only be motivated by altruism, we respectfully disagree. A transfer of property by way of gift may equally be motivated by commercial purposes provided the transfer is gratuitous, i.e., as McLachlin J. (as she then was) put it in *Peter v. Beblow*, *supra*, provided it involves "[the] intentional giving to another without expectation of remuneration."

[43] This Court subsequently considered the implications of *McNamee* in the recent case of *Kossow v. R.*[9]. The Court found factually at paragraph 69 as follows:

> **[69]** In the present case, Ms. Kossow's Donations to Ideas were not separate from the financing she received from Talisker. Her Donations were conditional on her

[9] 2012 TCC 325

> Loan Applications for interest-free loans being accepted. I conclude that, as in *Maréchaux*, Ms. Kossow did not make a gift within the meaning of section 118.1 of the *Act*. The 25 year interest-free loans were "significant benefits" which she received in return for making her Donations. The Appellant was able to transfer $50,000, $60,000 and $50,000 to Ideas by using only $17,000, $20,400 and $17,000 of her own money in 2000, 2001 and 2002 respectively. She accomplished this without having to pay interest on a commercial loan for the difference.

[44] In considering such facts in the context of *McNamee,* the Court concluded as follows:

> **[71]** Counsel for Ms. Kossow argued that a gift is only vitiated where there is evidence of consideration from the donee to the donor. In support of her position, counsel relied on the recent decision of the Ontario Court of Appeal in *McNamee v. McNamee*, 2011 ONCA 533 where the court stated:
>
> > 31 It is helpful to remember that the issue is not whether the donor (or, for that matter, the donee) received some benefit from the estate freeze (Mr. McNamee Sr. accomplished his corporate planning; the boys received their common shares). **The issue is whether the donee has provided any consideration to the donor for the transfer of the shares.** For the reasons outlined above, the appellant provided no consideration in that regard. The fact that Mr. McNamee Sr. accomplished his corporate planning goals - including capping his value in the company at $2 million, with the right to draw out more if he wished; protection from creditors; and relief from possible tax consequences on his death - do not amount to consideration flowing from the appellant to him. Nor, we would add, did the appellant's continued employment with McNamee Concrete constitute consideration for the transfer of the shares in the circumstances. The appellant receives a good salary for his services as an employee of the enterprise, and the father's vague hope that his sons would continue with the company does not constitute consideration flowing from the boys. The shares were not transferred in order to ensure the sons' continued involvement in the company; they were transferred to give effect to the estate freeze plan. Motive underlying a donor's conduct is not the same thing as consideration flowing from the donee. (emphasis added)
>
> **[72]** It is my view that the Appellant has taken the statement of the Ontario Court of Appeal out of context and she has misinterpreted its scope. The statement in *McNamee* was made in the context of a Family Law matter where there was a disagreement whether shares received by the husband from his father were part of the matrimonial property. The question revolved around whether the shares had been gifted to the husband by his father.

> **[73]** Further, the statement made in *McNamee* was not intended to be one of general application. It has to be read in the context of the facts in that particular case. The Ontario Court of Appeal did not impose a restriction on the definition of the word "gift". It did not purport to change the definition of gift. It relied on the following definition of "gift" in making its decision:
>
> > 24 The essential ingredients of a legally valid gift are not in dispute. There must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee, and (3) a sufficient act of delivery or transfer of the property to complete the transaction: Cochrane v. Moore, (1890), 25 Q.B.D. 57 (C.A.), at p. 72-73; Mossman and Flanagan, supra, at p. 441, Bruce Ziff, Principles of Property Law, 5th ed. (Toronto: Carswell, 2010), at p. 157.

[45] In making its decision, the Court found at paragraphs 74 and 75:

> **[74]** Counsel also argued that, if I concluded that the Appellant received a benefit in return for the Donation, the Appellant should receive a tax credit for the cash portion of her Donation, $10,000, in 2002.
>
> **[75]** I disagree. As in *Maréchaux*, there was "only one interconnected transaction here". No part of the Donation was given as a gift without expectation of a return.

[46] Consistently, the presence of any benefit conferred upon a taxpayer as part of a donation program, beyond that of a tax receipt, will vitiate or nullify donative intent *in toto*. *Kossow* reaffirms this. On that basis, *Kossow* is consistent with the *Friedberg* line of cases. However, *Kossow* does not state that donative intent may be nullified by the sheer magnitude or exaggerated quantum of an inflated charitable gift receipt in the factual absence of some other tangible or potential benefit conveyed upon, or received by, the donor.

V. Decision

[47] The Appellant was not overwhelmingly and perhaps only marginally motivated by donative intent when he gave the Transferred Units to the Charity. Factually, the Appellant had an intention to give the Transferred Units purchased with the Cash Donation Amounts without the condition of receiving any benefit beyond that of the tax receipts, however perversely inflated they may have been. Both counsel agreed the Appellant received no consideration beyond the possibility of the overstated tax receipt and the concordantly inflated charitable tax credit.

[48] The fact remains however, that to the extent the Cash Donation Amount related to the Transferred Units, the Appellant was impoverished by, paid valuable

consideration for, intended to give, and conveyed the Transferred Units which were, in turn, received by the Charity. Whatever opprobrium may be ascribed to the Donation Program, legally the Cash Donation Amount has met the legal test of a charitable gift. In the absence of some other benefit received beyond the Inflated Tax Receipts, no legal authority suggests donative intent as defined by the case law relevant to section 118.1 of the *Act* has been vitiated or nullified to the extent of the value of the Cash Donation Amount.

[49] Accordingly, the appeal is allowed to the extent of charitable gifts in the amounts of **$242,000.00** in 2002 and of **$133,950.00** in 2003.

VI. Costs

[50] In submissions, both parties have requested their costs in the event of the cause. Normally then, the Appellant would have his costs. Moreover, a principled approach is necessary where a party, who is otherwise successful is denied costs at trial. Although successful on the main issue placed before the Court, there shall be no order as to costs in favour of the Appellant on the following grounds which in the discretion of the Court constitute special circumstances, namely:

i) In self-assessing in the first instance and subsequent dealings with the CRA, the Appellant was not forthright as to the legally binding nature of the Transaction Documents (ultimately agreed to be a pretense) nor in respect of the Inflated Gift Receipts;

ii) the Appellant did not disclose, until after the discovery process, either through inadvertence or lack of diligence, the existence of the Discharge;

iii) the Appellant advised the Court at the opening of the Hearing of his withdrawal of the Abandoned Issue, but he had nonetheless negotiated and pursued that very issue, even including it in the partial Agreed Statement of Facts dated only ten (10) days prior to the Hearing; and

iv) the Appellant's use of the Transaction Documents and Inflated Gift Receipts as a pretense and ruse for the sole purpose of obsfucating CRA's determination of an accurate fair market value for the Transferred Units must be addressed in costs.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated November 19, 2012 in order to correct the figures underscored in paragraph 49 hereof.

Signed at Toronto, Ontario, this 14th day of December, 2012

"R.S. Bocock"

Bocock J.

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COURT FILE NO.:	2010-1429(IT)G
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