Docket: 2012-4731(IT)G

BETWEEN:

RONALD VAN DER STEEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on March 7 to 10, 2016; October 24 to 26, 2016;
June 7 to 9, 2017; and November 16 to 17, 2017 at Hamilton, Ontario
Written submissions filed on January 30, 2018

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	Alec McLennan
Counsel for the Respondent:	Nadine Taylor Pickering
	Natasha Wallace

JUDGMENT

IT IS ADJUDGED THAT:

1. The Appeal that pertains to the reassessment (the "2009 Reassessment") that was represented by the Notice of Reassessment dated March 26, 2009 and that assessed a penalty under subsection 163(2) of the *Income Tax Act* (the "*ITA*") is allowed and the 2009 Reassessment is vacated.

2. By reason of the 2009 Reassessment having been vacated, the reassessment (the "2008 Reassessment") that was represented by the Notice of Reassessment

dated March 3, 2008 and that disallowed the donation tax credit in respect of the Appellant's $65,000 payment to the Canadian Literacy Enhancement Society is reinstated.

3. The Appeal that pertains to the reinstated 2008 Reassessment is dismissed.

4. As success has been divided, there is no award as to costs.

Signed at Ottawa, Canada, this 23rd day of January 2019.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2019 TCC 23
Date: 20190123
Docket: 2012-4731(IT)G

BETWEEN:

RONALD VAN DER STEEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals by Ronald van der Steen in respect of two reassessments (or possibly a reassessment and an additional assessment) relating to his 2004 taxation year. In 2004 Mr. van der Steen made a payment in the amount of $65,000 to Canadian Literacy Enhancement Society ("CLES"), which was a registered charity. In completing his 2004 income tax return, Mr. van der Steen treated the payment as a gift and claimed a federal tax credit and a provincial tax credit in respect of the $65,000 payment (as well as three smaller donations to other registered charities). In 2008 the Canada Revenue Agency (the "CRA"), on behalf of the Minister of National Revenue (the "Minister"), reassessed Mr. van der Steen's 2004 taxation year so as to disallow the federal and provincial tax credits derived from the $65,000 payment. In a subsequent Notice of Reassessment the CRA imposed a penalty under subsection 163(2) of the *Income Tax Act* (Canada) (the "*ITA*").

[2] By way of preliminary background, the guiding mind behind the creation of CLES and the charitable donation arrangement that is the subject of this Appeal was Henry Nicholas Thill.[1] Mr. Thill was assisted by Keith Wilson and Steve

[1] This Court has previously considered the appeals of several other taxpayers who participated in donation arrangements structured by Mr. Thill; see *Julian v The Queen*,

Reynolds. Mr. Thill and Mr. Reynolds died before the commencement of the hearing of this Appeal.

[3] In auditing the numerous taxpayers who made donations to CLES, the CRA discovered that some of them were told by a representative of CLES that they (or an entity controlled by them) could expect to receive a payment (which the CRA calls a "kickback"), generally corresponding to approximately 70% of the amount donated. One of the fundamental questions in respect of this Appeal is whether Mr. van der Steen was told that he would receive a kickback in respect his $65,000 payment to CLES.

II. ISSUES IN DISPUTE

[4] The issues that are in dispute in this Appeal are summarized as follows:

a) Was Mr. van der Steen's payment to CLES in the amount of $65,000 a gift, so as to be included within his "total charitable gifts," as that term is defined in subsection 118.1(1) of the *ITA*?

b) Did the receipt issued by CLES to Mr. van der Steen in respect of the payment in the amount of $65,000 comply with subsection 118.1(2) of the *ITA* and section 3501 of the *Income Tax Regulations* (Canada) (the "*ITR*")?

c) In filing his 2004 income tax return, did Mr. van der Steen make a misrepresentation that was attributable to neglect, carelessness or wilful default or did he commit a fraud in filing the return, thus permitting the Minister, pursuant to subparagraph 152(4)(*a*)(i) of the *ITA*, to make a reassessment after Mr. van der Steen's normal reassessment period in respect of the 2004 taxation year, so as to assess a penalty payable by Mr. van der Steen in respect of that year?

d) By reporting the $65,000 payment as a gift in his 2004 income tax return and deducting a tax credit pursuant to subsection 118.1(3) of the *ITA*, did Mr. van der Steen knowingly, or under circumstances amounting to gross negligence, make a false statement in that return, so as to be liable to a penalty pursuant to subsection 163(2) of the *ITA*?

2004 TCC 330; *Doubinin v The Queen*, 2004 TCC 438; *aff'd*, 2005 FCA 298; *Webb v The Queen*, 2004 TCC 619; *McPherson v The Queen*, 2006 TCC 648; and *Norton v The Queen*, 2008 TCC 91.

[5] Initially, the CRA also alleged that Mr. van der Steen had participated in a "gifting arrangement," as defined in subsection 237.1(1) of the *ITA*, that such gifting arrangement had not received an identification number, and that Mr. van der Steen had not filed a prescribed form, for the purposes of subsection 237.1(6) of the *ITA*, with the result that Mr. van der Steen was not entitled to deduct a tax credit under subsection 118.1(3) of the *ITA*. At the commencement of the hearing of this Appeal, counsel for the Crown advised the Court that the Crown was no longer relying on section 237.1 of the *ITA*.

III. FACTUAL BACKGROUND

A. Chronology of Events (taken from Mr. van der Steen's evidence)

[6] In 2004 Mr. van der Steen, who was a lawyer and a member of a partnership carrying on the practice of law, determined, at a time when he had approximately $165,000 to $265,000 in his Registered Retirement Savings Plan ("RRSP"),[2] that it would be advisable for him to withdraw $100,000 or more from the RRSP. Mr. van der Steen, who had worked as an engineer before going to law school, explained that, when he was employed as an engineer, he found it beneficial to make RRSP contributions. However, as a self-employed lawyer and given his income, he had found it "difficult to make RRSP contributions and really benefit."[3]

[7] In a casual conversation with a business acquaintance named Michael Gomes, Mr. van der Steen mentioned that he was looking for a tax-efficient way to withdraw money from his RRSP. Mr. Gomes said that he knew someone who could assist Mr. van der Steen and referred Mr. van der Steen to Steve Reynolds. In late October or early November 2004, Mr. van der Steen telephoned Mr. Reynolds and explained his desire to withdraw approximately $100,000 from his RRSP on a tax-efficient basis. Mr. Reynolds advised Mr. van der Steen that, if he were to withdraw $100,000 from his RRSP and use the money (after topping it up to replace the income tax that would be withheld at source) to make a donation of $100,000 to CLES, he would be entitled to a tax refund that would offset the amount of the tax liability that he would incur in withdrawing the

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2 *Transcript*, March 7, 2016, p. 5, line 27 to p. 6, line 1, where Mr. van der Steen stated that in 2004, before making the $65,000 payment to CLES, he had almost $200,000 in his RRSP; and p. 114, lines 4-12, where he indicated that, after he withdrew the $65,000, the remaining balance was in the range of $100,000 to $200,000.

3 *Transcript*, March 7, 2016, p. 28, lines 18-19.

money from his RRSP, such that the transactions would be substantially tax neutral.

[8] On November 10, 2004 Mr. van der Steen discussed the proposal with Tom Birnie, who was Mr. van der Steen's financial advisor and broker. Mr. Birnie advised Mr. van der Steen that a significant portion of the funds in Mr. van der Steen's RRSP were invested in labor sponsored venture capital corporations and other investments which could not easily be liquidated. Accordingly, Mr. Birnie recommended that Mr. van der Steen not withdraw more than $65,000 from his RRSP.

[9] After making an online search to confirm that CLES was a registered charity, Mr. van der Steen made the arrangements to withdraw $64,854.52 from his RRSP. That withdrawal occurred on or about November 24, 2004. In conjunction with the withdrawal, Union Securities Ltd. ("USL") issued to Mr. van der Steen a cheque in the amount of $45,380.66. As well, USL withheld tax in the amount of $19,473.86 and presumably remitted that amount to the Receiver General for Canada.

[10] As Mr. Reynolds had advised Mr. van der Steen to contribute to CLES an amount approximately equal to the amount of the withdrawal from the RRSP, on November 26, 2004 Mr. van der Steen arranged a cash advance in the amount of $71,000.00 from his personal line of credit at the Bank of Nova Scotia ("BNS") and, on the same day, made a payment to BNS in the amount of $45,380.66,[4] so as to reduce the balance of that line of credit, resulting in a net borrowing of $25,619.34 (i.e., $71,000.00 − $45,380.66).

[11] Also on November 26, 2004, Mr. van der Steen obtained from BNS a bank draft in the amount of $65,000 payable to CLES. He used the remaining $6,000 (i.e., $71,000 − $65,000) of the cash advance for purposes that are not relevant to this Appeal.

[12] Sometime in mid- or late November 2004, Mr. van der Steen called Mr. Reynolds a second time to obtain mailing or delivery instructions for the $65,000 bank draft. Mr. van der Steen subsequently sent the bank draft to CLES and later received from CLES an official receipt dated December 2, 2004, stating that Mr. van der Steen had made a donation in the amount of $65,000.

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[4] As noted in paragraph 9 above, this amount represented the net after-tax withdrawal from his RRSP (i.e., $64,854.52 − $19,473.86).

[13] Mr. van der Steen testified that he had only two telephone conversations with Mr. Reynolds. In those conversations, Mr. Reynolds emphasized that it was important for Mr. van der Steen to donate to CLES the full amount withdrawn from the RRSP, even if that meant borrowing money to top up the donation by an amount equal to the tax withheld on the withdrawal from the RRSP. Mr. van der Steen testified that Mr. Reynolds did not promise him anything, other than that he would get a receipt. Mr. van der Steen stated he did not expect to receive anything (other than the receipt) in return for the $65,000 payment.[5] Mr. van der Steen stated that his intention in making the payment was "To make a donation and maximize the return on what I can get in a tax return for removing money from my RRSP."[6]

B. Charitable Donation History

[14] From 1987 to 2014 Mr. van der Steen contributed the following amounts to registered charities:

Year	**Amount ($)**
1987	20
1988	50
1989	70
1990	110
1991	75
1992	80
1993	0[7]
1994	0
1995	14
1996	0
1997	0
1998	0
1999	120
2000	0
2001	30
2002	2,555

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5 *Transcript*, March 7, 2016, p. 17, lines 20-26; p. 35, lines 5-18; p. 36, lines 9-18; p. 39, lines 8-16; and p. 40, lines 19-28.

6 *Transcript*, March 7, 2016, p. 17, line 27 to p. 18, line 3.

7 As Mr. van der Steen graduated from law school in 1996 (see *Transcript*, March 7, 2016, p. 79, lines 2-3), he was presumably a full-time law student from September 1993 to April 1996.

2003	2,803
2004	66,389[8]
2005	2,065
2006	1,909
2007	1,898
2008	80
2009	255
2010	100
2011	45
2012	250
2013	257
2014	0

[15] In 2004, in addition to the $65,000 payment to CLES that is the subject of this Appeal, Mr. van der Steen donated $1,389 to other registered charities.

[8] As noted in paragraph 12 above, in 2004 Mr. van der Steen paid $65,000.00 to CLES. As noted in paragraph 15 below, in 2004 he also contributed $1,389 to other registered charities. The CRA printout, described as Option C, which is found behind Tab 1 in Exhibit R-1 and which pertains to 2004 shows only the amount of $1,389, as this printout was prepared after the disallowance of the tax credit based on the $65,000.00 payment.

C. RRSP Contribution History

[16] The amounts of the contributions made by Mr. van der Steen to his RRSP during the period from 1987 to 2014, together with two withdrawals from his RRSP in 2004 and 2013 respectively, are set out below:

Year	Contributions (Withdrawals)
1987	1,835
1988	1,663
1989	2,119
1990	7,500
1991	7,927
1992	8,915
1993	9,977
1994	0[9]
1995	0
1996	0
1997	3,000
1998	0
1999	0
2000	9,616
2001	12,451
2002	0
2003	5,550
2004	(64,854.52)[10]
2005	0
2006	0
2007	29,908[11]

[9] As noted above, it appears that Mr. van der Steen was in law school from September 1993 to April 1996; see *Transcript*, March 7, 2016, p. 79, lines 2-3.

[10] The amount withdrawn by Mr. van der Steen from his RRSP in 2004 was $64,854.52. The CRA printout, described as Option C, for 2004, which is found behind Tab 1 in Exhibit R-1, shows RRSP income for 2004 in the amount of $64,829. The reason for the lesser amount being shown on the CRA's records was that the T4RSP issued to Mr. van der Steen by USL showed the amount of the withdrawal as $64,829.52. The T4RSP showed that the amount of income tax deducted and remitted by USL was $19,448.86, which is slightly less than the amount shown in Exhibit A-1, Tab 1, p. 1.

[11] The CRA printout, described as Option C, for 2007 shows an RRSP contribution of $29,908, and also shows RRSP income (presumably a withdrawal) in the amount of $10,091.

2008	21,909
2009	5,071
2010	0
2011	0
2012	6,000
2013	(107)
2014	92

The above table indicates that Mr. van der Steen's contributions to his RRSP were often sporadic and that, when he did make contributions, the amounts contributed were generally less than the RRSP dollar limit for the particular year. This suggests that Mr. van der Steen likely did not consider his RRSP to be a central feature of his retirement planning. In fact, he stated during his testimony that he anticipated that he would work for most of his life,[12] although he also acknowledged that the purpose of his RRSP was to save for retirement.[13]

D. Assessing History

[17] Leonard Cappe, a chartered accountant engaged by Mr. van der Steen and by the partnership of which Mr. van der Steen was a partner, prepared Mr. van der Steen's 2004 income tax return in mid-March 2005. Mr. Cappe filed the return electronically with the CRA, on March 18, 2005.[14]

[18] The Minister assessed Mr. van der Steen's 2004 income tax return and issued the initial Notice of Assessment on July 28, 2005.[15] This marked the beginning of the normal reassessment period. On August 22, 2005 the Minister reassessed the tax payable by Mr. van der Steen in respect of the 2004 taxation year so as to allow a federal political contribution tax credit in the amount of $103.50.[16]

[19] On March 3, 2008 the Minister reassessed the tax payable by Mr. van der Steen in respect of the 2004 taxation year so as to reduce the amount of his charitable gifts from $66,389 to $1,389.[17] In other words, it was this Notice of

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12 *Transcript*, March 8, 2006, p. 128, lines 14-20.
13 *Transcript*, March 7, 2016, p. 104, line 23 to p. 105, line 1.
14 Exhibit R-1, Vol. 1, Tab 1, p. 31.
15 Exhibit A-1, Tab 6.
16 Exhibit A-1, Tab 7.
17 Exhibit A-1, Tab 9.

Reassessment that disallowed the tax credits in respect of the $65,000 payment to CLES.

[20] On March 26, 2009 the Minister issued a Notice of Reassessment so as to impose a penalty, in the amount of $14,992.65, under subsection 163(2) of the *ITA*.[18] This Notice of Reassessment was issued after the expiration of Mr. van der Steen's normal reassessment period in respect of 2004.

[21] A question arose as to whether the Notice of Reassessment dated March 26, 2009 represented a reassessment or an additional assessment. Counsel for Mr. van der Steen takes the position that the reassessment of March 26, 2009 was an actual reassessment, and not an additional assessment. On the other hand, counsel for the Crown takes the position that the reassessment of March 26, 2009 was an additional assessment, whose only effect was to impose a penalty under subsection 163(2) of the *ITA*, and was not a true reassessment.

[22] On March 1, 2016 the Crown filed with the Court an affidavit of Barbara Harvey, a CRA Litigation Officer. In paragraph 7 of that affidavit, Ms. Harvey stated that Mr. van der Steen's "2004 income tax return was reassessed to levy gross negligence penalties…." In describing the electronic record kept by the CRA in respect of Mr. van der Steen's 2004 taxation year, in the same paragraph of the affidavit, Ms. Harvey indicated that the procedure was recorded as a reassessment. As well, in paragraph 8 of the affidavit, she described the process as a reassessment. However, in paragraph 7 of the affidavit, she also stated that, apart from the imposition of the penalty, no other adjustments were made by that reassessment.

[23] In addition to the above affidavit, several documents sent by the CRA to Mr. van der Steen may be of assistance in determining whether the assessing procedure on March 26, 2009 was a reassessment or an additional assessment. One such document was a letter dated June 2, 2008, in which the CRA stated:

> It has come to our attention that, due to technical errors in processing, the recent reassessment(s) giving effect to our proposal(s) did not include the subsection 163(2) penalties previously proposed. We wish to advise that the penalties will now be levied under a separate Notice of Reassessment to be issued to you in the very near future….

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[18] Exhibit A-1, Tab 11, p. 3; and Exhibit R-1, Vol. 1, Tab 1, p. 32.

> … if you have already filed an objection to the reassessment(s) relating to the Canadian Literacy Enhancement Society Donation Program, this penalty reassessment(s) will invalidate the previous Notice of Objection.[19]

In the Notice of Reassessment itself that was issued on March 26, 2009, the CRA stated:

> We have re-examined your return for the tax year indicated above. The details of the resulting reassessment appear below….
>
> If you filed a Notice of Objection for 2004, you must refile the objection.[20]

[24] The language of the CRA's letter of June 2, 2008 and the Notice of Reassessment of March 26, 2009, as quoted above, suggest that the effect of that Notice of Reassessment was to nullify and replace the Notice of Reassessment of March 3, 2008, otherwise there would have been no need for the CRA to have advised Mr. van der Steen that it would be necessary for him to refile his notice of objection.[21] On the other hand, the only effect of the Notice of Reassessment dated March 26, 2009 was to impose a penalty in the amount of $14,992.65; no other change was made to the total payable, as reassessed on March 3, 2008, in the amount of $47,527.40.[22]

[25] As explained below, it is not necessary for me to determine whether the assessing procedure represented by the Notice of Reassessment dated March 26, 2009 was a reassessment or an additional assessment:

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19 Exhibit A-1, Tab 15.

20 Exhibit A-1, Tab 11, p. 3.

21 See *Abrahams v MNR*, 66 DTC 5451, ¶9-10; *TransCanada Pipelines Inc. v The Queen*, 2001 FCA 314, ¶12; *Cameco Corp. v The Queen*, 2014 TCC 45, ¶8-9; *Gould v The Queen*, 2005 TCC 556, ¶4; and *Ramdeen v The Queen*, 2004 TCC 486, ¶5. These cases indicate that, when a subsequent reassessment nullifies or displaces a previous reassessment, the nullified reassessment is superseded and can no longer form the basis for an appeal, with the result that a new objection or an amended notice of appeal is required.

22 Compare the amount described as "total payable" in Exhibit A-1, Tab 9, p. 3 with the amount described as "previous assessment" in Exhibit A-1, Tab 11, p. 3. As well, in paragraph 7 of the affidavit of Barbara Harvey, she states, "On March 26, 2009, the Appellant's 2004 income tax return was reassessed to levy gross negligence penalties on the disallowed donation amount of $65,000. No other adjustments were made by this reassessment."

a) If Mr. van der Steen made a misrepresentation attributable to neglect, carelessness or wilful default, such that the reassessment (the "2009 Reassessment") of March 26, 2009 was valid, it both disallowed the tax credit that Mr. van der Steen had claimed in respect of the $65,000 payment to CLES and imposed a penalty under subsection 163(2) of the *ITA*. As well, if the Notice of Reassessment dated March 26, 2009 represented a reassessment, it displaced and nullified the reassessment (the "2008 Reassessment") of March 3, 2008.[23]

b) If the Notice of Reassessment dated March 26, 2009 represented a reassessment, but that reassessment is vacated pursuant to subsection 152(4) of the *ITA* (because there was no misrepresentation attributable to neglect, carelessness or wilful default), the 2008 Reassessment will be reinstated,[24] or there is a possibility that the 2008 Reassessment was never displaced or nullified.[25] As noted, the 2008 Reassessment disallowed the tax credit that Mr. van der Steen had claimed in respect of the $65,000 payment to CLES, but did not impose a penalty under subsection 163(2) of the *ITA*.

c) If the Notice of Reassessment dated March 26, 2009 represented an additional assessment, it only imposed a penalty, but did not displace or nullify the 2008 Reassessment. If the additional assessment is found to be invalid by reason of subsection 152(4) of the *ITA*, the penalty falls, but the disallowance of the tax credit is not affected.

Thus, regardless of the situation, I will need to determine whether the tax credit claimed by Mr. van der Steen was properly disallowed, and whether, by reason of subparagraph 152(4)(*a*)(i) of the *ITA*, the Notice of Reassessment dated March 26, 2009 was properly issued by the CRA.

[26] From a procedural perspective, if the Notice of Reassessment dated March 26, 2009 represented a reassessment, these proceedings constitute an appeal in respect of the reassessment represented by that Notice of Reassessment. If that appeal is successful and the 2009 Reassessment is vacated pursuant to subparagraph 152(4)(*a*)(i) of the *ITA*, the 2008 Reassessment will be reinstated,

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23 *684761 B.C. Ltd. v The Queen*, 2015 TCC 288, ¶9.

24 *Ford v The Queen*, 2014 FCA 257, ¶16.

25 *Lornport Investments Ltd. v The Queen*, [1992] 1 CTC 351, 92 DTC 6231 (FCA), ¶7-8. See also *The Queen v 594710 British Columbia Ltd*., 2018 FCA 166, ¶87-88.

and these proceedings will also constitute an appeal in respect of the 2008 Reassessment.[26] If the Notice of Reassessment dated March 26, 2009 represented an additional assessment, these proceedings constitute an appeal in respect of the 2008 Reassessment and an appeal in respect of the additional assessment.

E. Leonard Cappe's Evidence

[27] For many years Mr. Cappe had prepared the financial statements for the partnership of which Mr. van der Steen was a member in 2004. As well, Mr. Cappe prepared the personal income tax returns for the members of the partnership. Accordingly, in the first part of 2005, Mr. van der Steen and his two partners met with Mr. Cappe to review and finalize the partnership's financial statements, agree on the distribution of partnership income and begin the preparation of the partners' respective individual income tax returns for 2004. At that time Mr. van der Steen advised Mr. Cappe of the $65,000 payment to CLES and provided the official receipt to Mr. Cappe. Mr. van der Steen did not discuss the payment with Mr. Cappe, other than to advise that the payment had been made. Mr. Cappe was surprised to learn that Mr. van der Steen had paid $65,000 to CLES.

[28] During direct examination, Mr. Cappe stated that in 2005 the CRA requested that Mr. Cappe send to the CRA the official receipts for the charitable gifts made by Mr. van der Steen in 2004. Mr. Cappe did so. Those receipts were subsequently returned by the CRA to Mr. Cappe, with no action having been taken by the CRA.

[29] A year or two later, the CRA again requested that Mr. Cappe send to the CRA the official receipts for 2004. Mr. Cappe did so. Once again the receipts were returned in due course by the CRA to Mr. Cappe, without any official action having been taken by the CRA.

[30] In February 2007, the CRA sent a letter to Mr. Cappe, asking that Mr. van der Steen's 2004 official receipts be sent to the CRA a third time. Mr. Cappe sent those receipts to the CRA, which ultimately retained the receipts and eventually disallowed the tax credits claimed by Mr. van der Steen in respect of the $65,000 payment.

[31] Mr. Cappe testified that the official receipt issued by CLES to Mr. van der Steen in respect of the $65,000 payment appeared to be acceptable. Mr. Cappe also testified that he was not aware of any unreported income in respect of Mr. van der

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[26] *Bolton Steel Tube Co. Ltd. v The Queen*, 2014 TCC 94, ¶48.

Steen's 2004 taxation year, nor did he see any evidence of any false statement being made in that tax return. Mr. Cappe stated that he was surprised to learn that the CRA ultimately imposed a penalty under subsection 163(2) of the *ITA*.

F. Lakhwinder Saran's Evidence

[32] Counsel for the Crown subpoenaed Lakhwinder Saran and called him as a similar-fact witness, on the basis that the he too had made purported donations to CLES and had been reassessed by the CRA to disallow those donations.[27] Mr. Saran testified that in or about 2003 he attended a seminar at which Steve Reynolds was one of the speakers, and that the CLES donation program was explained to him and the other attendees. The attendees were told that, if they were to donate to CLES, altruistic foreign benefactors would arrange for certain trust distributions, not exceeding 50% (and perhaps significantly less) of the respective amounts of the donations, to be made available to them.[28] The attendees were provided with offshore investment opportunities in respect of the distributions to be arranged by the benefactors. Mr. Saran also testified that this was explained as all being appropriate and above board (notwithstanding that a significant portion of the attendees' respective donations would, in essence, circuitously be returned to them) and that the funds would be distributed as a tax-free gift, which did not need to be included in income. After attending the seminar, Mr. Saran made donations to CLES over three years, in the range of $35,000 to $40,000 each year.[29]

[33] Mr. Saran stated that he also invested $10,000 with Mr. Reynolds in an offshore gold account operated by Crowne Gold Inc. ("Crowne Gold") and that this investment was made by way of a cash payment that was not a charitable gift. Mr. Saran received periodic statements as to how this offshore investment was performing. Those statements were emailed to him. He did not receive any paper statements.

[34] Mr. Saran could not recall whether he received any periodic statements in respect of the purported investment of the donated funds that were to be returned to him. In fact, he stated that such funds never were returned to him. He could not remember whether he received bogus statements suggesting that the funds had

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[27] The admissibility of Mr. Saran's evidence was considered in *Ronald van der Steen v The Queen*, 2016 TCC 205.

[28] *Transcript* of the testimony of Lakhwinder Singh Saran, March 8, 2016, p. 11, line 25 to p. 12, line 3.

[29] Exhibit R-4.

been credited to an account in his name. In other words, Mr. Saran could not remember whether the periodic statements pertained only to his $10,000 investment in the offshore gold account or whether they also pertained to the purported investment of the funds that were to have been returned.

[35] My impression was that Mr. Saran's situation was different from that of Mr. van der Steen. Mr. Saran attended a seminar presented by Mr. Reynolds and others. Mr. van der Steen did not attend any such seminar. In addition to making donations to CLES, Mr. Saran also invested cash with Mr. Reynolds, which was invested in an offshore gold account. Mr. van der Steen made only the $65,000 payment to CLES, and did not make an investment in an offshore gold account.

[36] In deciding, in the context of an interlocutory motion, the admissibility of Mr. Saran's testimony, I concluded that:

a) the testimony of Mr. Saran is admissible, but only for the purpose of providing evidence of the state of affairs or context (including the existence, workings, scope, extent and duration of the payment arrangement) in which payments were made to CLES by Mr. Saran and by other donors in similar circumstances;

b) the testimony of Mr. Saran is not relevant or admissible for the purposes of implying or proving that Mr. van der Steen made a payment to CLES in circumstances similar to those of Mr. Saran; and

c) the testimony of Mr. Saran is to be given such weight (if any) as may be considered appropriate, recognizing that the circumstances in respect of Mr. Saran's payments to CLES were not necessarily the same as the circumstances in respect of Mr. van der Steen's payment to CLES.[30]

[37] Having reviewed the transcript of Mr. Saran's testimony, I have concluded that very little weight should be given to his evidence. Mr. Saran stated that CLES "has a scheme that was not explained," or that he "did not understand."[31] Mr. Saran's lack of understanding was illustrated by a statement that he made when responding to a question about a $40,000 pledge that he made to CLES. He stated that his understanding was that most of the pledged amount was supposed to be used to buy educational materials that would be distributed, but then went on to

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30 *van der Steen*, *supra* note 27, ¶10.

31 *Transcript* of the testimony of Lakhwinder Singh Saran, p. 35, lines 20-22.

state, in the same response to that question, that most of the amount was supposed to be invested in MEI (which was the acronym used by Mr. Saran to designate an investment fund that was connected to Mr. Reynolds).[32] Furthermore, as noted above, Mr. Saran's circumstances differed from those of Mr. van der Steen.

G. Shellen Leung's Evidence (Direct Examination)

[38] Shellen Leung was the auditor who concluded the audit of Prime Packaging Ltd. ("Prime") and other entities owned or controlled by Mr. Thill. That audit had been commenced by Shawn Mapoles and was subsequently taken over by Ms. Leung. After the Prime audit was completed, Ms. Leung then began to audit all of the donors to CLES, including Mr. van der Steen.

[39] In her testimony, Ms. Leung explained the manner in which the various iterations of the Prime/CLES donation program had been formulated. There were three main iterations, to which the CRA referred as Scheme I, Scheme II and Scheme III.

[40] In Scheme I, contributors paid cash to Prime to acquire Advanced Reading Courses ("ARCs"), and Prime issued a receipt to the contributors for the amount paid. Prime, on behalf of the contributors, then donated the ARCs to various high schools, and the high schools issued letters of appreciation to the contributors. The contents of those letters of appreciation all appeared to be the same and were presumably drafted by Mr. Thill. The contributors treated those letters of appreciation as receipts in respect of charitable gifts.

[41] When the letters of appreciation (which were not official receipts and which did not contain the information prescribed by subsection 3501(1) of the *ITR*) were filed with the contributors' income tax returns, the CRA obviously disallowed the charitable tax credits.

[42] To provide greater likelihood of tax success, Mr. Thill moved to Scheme II, which involved an actual registered charity, CLES, whose registration as a charity took effect on July 1, 2003. Under Scheme II, a donor made a donation to CLES, which then used the money to purchase an ARC from Prime. CLES issued an official receipt to the donor, who filed the receipt with his or her income tax return. By reason of an assignment of the copyright in respect of the ARCs which had happened previously, for each ARC sold by Prime to CLES, Prime paid a royalty

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[32] *Ibid.*, p. 41, lines 10-17.

to Gemini Ventures Inc. ("Gemini"), which was incorporated in the Turks and Caicos Islands.[33]

[43] Ms. Leung testified that the donors who participated in Scheme I and/or Scheme II were provided with various alternatives for having a portion of the amount of the gift circuitously returned to them, as set out in Schedules D(a) through D(e) of the Crown's Reply and Amended Reply. Ms. Leung spent a great deal of time explaining to the Court how the various circuitous arrangements worked. She used the term "kickback" to refer to the funds that were circuitously moved from a donor to CLES to Prime to Gemini to an intermediary agent and back to the donor or to the donor's nominee. Some of the circuitous arrangements were:

a) In some situations, Humber Financial Corporation ("Humber") loaned to a prospective donor approximately 70% to 75% of the amount that the donor intended to donate to CLES.[34] Using the borrowed money and the donor's own money (to the extent of 25% to 30% of the intended donation), the donor made a donation to CLES, which then used the donated money to purchase an ARC from Prime. Prime then paid a significant royalty to Gemini, which made a payment (approximately 70% to 75% of the amount of the donation) to another entity (referred to by the CRA as "Agent Co."), which then paid to Humber an amount equal to the loan made by Humber to the prospective donor. Humber later forgave the donor's obligation to repay the loan.

b) In other situations, the first several steps were the same as those described in the preceding subparagraph. However, Agent Co., rather than making a payment to Humber, made a payment to the donor of approximately 70% to 75% of the amount of the donation, after which the donor used that money to repay the loan that had been provided by Humber.

c) In other situations, the flow of funds was similar that described in subparagraph b) above, but the instructions to Agent Co. to make the payment to the donor came from Hastings Literacy Foundation ("Hastings"), which appears to have been a trust settled by Gemini or perhaps Mr. Thill

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[33] While the evidence was limited, it appears that Prime and Gemini did not deal with each other at arm's length.

[34] While the evidence was limited, it appears that Prime and Humber did not deal with each other at arm's length.

and which purported to be an offshore philanthropic society, one of whose purposes was to award cash gifts to parties supporting literacy in Canada and other countries.[35]

d) In other situations, rather than borrowing money from Humber, a prospective donor used his or her funds to make the entire donation to CLES. CLES used the donated money to purchase an ARC from Prime, which paid a royalty to Gemini, which then paid an amount equal to 70% to 75% of the donated amount to an offshore entity (such as an international business corporation, also known as an "IBC") or account (including an international credit card) designated by the donor.

e) In other situations, the arrangement was similar to that described in subparagraph d) above, except that Gemini paid the 70% - 75% kickback to a Canadian entity (rather than an offshore entity) designated by the donor.

Subparagraphs d) and e) above described the manner in which many donors were told that the arrangement would be structured. It is my understanding that, as events unfolded, Gemini did not actually pay any money to the entity or account (whether offshore or domestic) designated by the donor.

[44] While it is not relevant to this Appeal, in Scheme III there were inflated receipts, rather than kickbacks. An individual who attended a promotional seminar was given a gift certificate with a stated face amount of $4,500 (in 2005) or $5,000 (in 2006) merely for attending the seminar, and an additional gift certificate with a stated face amount of $4,500 (in 2005) or $5,000 (in 2006) if the individual made an actual payment of $1,000 (in 2005) or $1,500 (in 2006). The various gift certificates could be used only to make gifts to CLES. Upon giving a gift certificate to CLES, the donor received a purported official receipt in an amount equal to the stated face amount of the gift certificate. CLES then forwarded the donated gift certificates to Saskan Foundation ("Saskan")[36] supposedly for settlement with CLES.

[45] It is the position of the CRA that Mr. van der Steen participated in Scheme II; however, the CRA did not provide any evidence as to which, if any, of the five variations of Scheme II pertained to Mr. van der Steen. As noted above, it

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35 Exhibit R-1, Vol. 1, Tab 11, p. 4/20.

36 *Ibid*. While the evidence was limited, it appears that Saskan was founded by Mr. Thill and did not deal at arm's length with Prime.

is the position of Mr. van der Steen that he was unaware of the arrangements and kickbacks described above and that he merely made a payment of $65,000 to CLES without receiving, and without expecting to receive, anything in return, other than an official receipt.

IV. ANALYSIS

A. Disallowance of Tax Credit

[46] As noted, the CRA disallowed the tax credit claimed by Mr. van der Steen in respect of the $65,000 payment that he made to CLES in 2004. If Mr. van der Steen received, or expected to receive, a kickback, he would have lacked donative intent, with the result that his purported gift would have been vitiated.

[47] Mr. van der Steen testified that, in making the $65,000 payment to CLES, he did not expect to receive, nor did he actually receive, a kickback or other benefit by reason of the payment.

(1) Jurisprudence

[48] Mr. van der Steen relies on the following statements by Associate Chief Justice Bowman (as he then was) in *Klotz*:

> 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….
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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….
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> 55. In *Aikman*, [[2000] 2 CTC 221, *aff'd* 2002 DTC 6874], … I stated:

> The intent or expectation of obtaining a tax advantage does not vitiate the charitable gift.[37]

[49] The authoritative definition,[38] for the purposes of the *ITA*, of the term "gift" is found in *Friedberg*:

> … 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….[39]

The elements of the above definition reflect the general notion that a taxpayer, desiring to make a charitable gift, must have a donative intent in respect of the transfer of property to the charity.[40]

[50] An early description of donative intent was given in *Burns*:

> I would like to emphasize that one essential element of a gift is an intentional element that the Roman law identified as *animus donandi* or liberal intent…. The donor must be aware that he will not receive any compensation other that pure moral benefit; he must be willing to grow poorer for the benefit of the donee without receiving any such compensation.[41] [*Italics are in the original.*]

[51] In discussing the concept of donative intent in *Webb*, Justice Bowie stated:

> These cases [*Friedberg* and others] 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 order words, be entirely donative.[42] [*Emphasis added*.]

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37 *Klotz v The Queen*, 2004 TCC 147, ¶22, 25 & 55. See also *Friedberg v The Queen*, [1992] 1 CTC 1, 92 DTC 6031 (FCAD), ¶4 & 9; *Paradis v The Queen*, [1997] 2 CTC 2557 (TCC), ¶38–40; *Doubinin, supra* note 1, ¶18; and *Berg v The Queen*, 2012 TCC 406, ¶28, 30, 32, 39 & 46; *rev'd*, 2014 FCA 25. In *Backman v The Queen*, [2001] 1 SCR 367, 2001 SCC 10, ¶22, the Supreme Court of Canada stated, "This court has repeatedly held that a tax motivation does not derogate from the validity of transactions for tax purposes…;" and in *Cassan et al. v The Queen*, 2017 TCC 174, ¶260, the Tax Court of Canada stated, "the fact that a taxpayer is motivated by tax considerations does not in and of itself vitiate the result under the applicable private law."

38 *Berg*, *supra* note 37, ¶23.

39 *Friedberg*, *supra* note 37, ¶4.

40 *Coombs et al. v The Queen*, 2008 TCC 289, ¶15.

41 *The Queen v Burns*, [1988] 1 CTC 201, 88 DTC 6101, ¶28 (FCTD). See also *Mariano v The Queen*, 2015 TCC 244,¶18.

42 *Webb*, *supra* note 1, ¶16.

In *McPherson*, Justice Little stated:

> There is an element of impoverishment which must be present for a transaction to be characterized as a gift. Whether this is expressed as an *animus donandi*, a charitable intent or an absence of consideration the core element remains the same.[43] [*Italics and underlining are in the original*.]

[52] Concerning donative intent, the Federal Court of Appeal (or its predecessor, the Federal Court of Canada – Appeal Division) has indicated that:

a) A would-be donor must make a voluntary, gratuitous transfer of property "without anticipation or expectation of material benefit."[44]

b) A gift is to be given "in expectation of no return."[45]

c) There is no gift if a would-be donor makes a payment to a charity expecting to receive a significant benefit in return.[46]

d) A would-be donor who does not intend to impoverish himself or herself does not have the requisite donative intent for the purposes of section 118.1 of the *ITA*.[47]

Thus, it is necessary to determine whether Mr. van der Steen had the requisite donative intent, i.e., whether he made the $65,000 payment to CLES intending to impoverish himself to the full extent of that payment, or whether he expected to receive, directly or indirectly, a kickback or other benefit.

[53] In order to determine whether Mr. van der Steen had a donative intent, I must do more than simply consider the oral assertions that he has made about his intent. Concerning the proof of purpose or intention, Justice Iacobucci stated the following in *Symes*:

> As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts

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43 *McPherson*, *supra* note 1, ¶20.

44 *Woolner v The Attorney General of Canada*, [2000] 1 CTC 35, 99 DTC 5722, ¶7; see also *Jensen v The Queen*, 2018 TCC 60, ¶45.

45 *Maréchaux v The Queen*, 2010 FCA 287, ¶12; *aff'g*, 2009 TCC 587, ¶49.

46 *Kossow v The Queen*, 2013 FCA 283, ¶29; in *Kossow*, Justice Near was commenting on the finding of the Federal Court of Appeal in *Maréchaux*.

47 *Berg* (FCA), *supra* note 37, ¶29; see also *Castro v The Queen*, 2015 FCA 225, ¶42.

> will be guided only by a taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances.[48]

[54] In discussing the "dual requirement of a gratuitous transfer of property and of donative intent,"[49] in *Cassan*, Justice Owen stated:

> 270. … for a transfer of property to be a gift, the transferor must have the requisite donative intent….
>
> 271. In order for there to be a gift, the transferor must objectively make a gratuitous transfer and must subjectively intend to make a gratuitous transfer.[50]

[55] The requirement that there be no benefit, in the context of a gift, has been modified by amendments enacted in 2013 (with effect as of December 21, 2002) to the *ITA*, which, in essence, provide that, in certain circumstances, "the existence of an advantage or a benefit will not disqualify a transfer of property from being a gift."[51] Under the rules set out in subsections 248(30) to (32) of the *ITA*, a donor may receive an advantage in respect of a transfer of property, without that advantage disqualifying the transfer from being a gift to a qualified donee, provided that the amount of the advantage does not exceed 80% of the fair market value of the transferred property. This type of situation is sometimes referred to as "split gifting," and could be applicable in the context of Mr. van der Steen, if he received, or intended to receive, the 70%-75% kickback that the Minister assumed. However, neither Party argued that there was a split gift or that subsections 248(30) to (32) applied. The Crown took the position that the assumed kickback vitiated the entire gift, while Mr. van der Steen took the position that he did not receive, nor did he intend to receive, any benefit or advantage, including the assumed kickback. Accordingly, as neither Party has suggested that subsections 248(30) to (32) apply in this Appeal, I will not consider those provisions.

(2) Minister's Assumptions and Taxpayer's Burden of Proof

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48 *Symes v The Queen*, [1993] 4 SCR 695 (SCC) at 736. See also *McPherson*, *supra* note 1, ¶13; *Cassan*, *supra* note 37, ¶262; and *Jensen*, *supra* note 44, ¶52.

49 *Cassan*, *supra* note 37, ¶273.

50 *Ibid.*, ¶270-271.

51 *Castro*, *supra* note 47, ¶17; see also ¶49-51. The Federal Court of Appeal made these statements in respect of subsections 248(30) to (32) of the *ITA*.

[56] When the Minister, as represented by the CRA, assesses or reassesses a taxpayer, the Minister generally makes assumptions of fact, on which the assessment or reassessment is based. The taxpayer has the burden of proving, on a balance of probabilities, such facts as may be required to demolish the Minister's assumptions.[52]

[57] In some situations, it will be clear that the party with the burden of proof has failed to satisfy that burden. In other situations, the evidence might be more evenly balanced, in which case the principle enunciated by the Privy Council in *Robins v National Trust* might be applicable:

> But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter.[53]

[58] At least three of the Minister's assumptions of fact focused on donative intent, as follows:

> ll) if the Appellant [i.e., Mr. van der Steen] paid cash in respect of his participation in Scheme II, any cash outlay was no more than 30% of his so-called donation, but the Appellant claimed a donation tax credit [in respect] of 100% of the so-called donation;…
>
> mm) the Appellant was advised by the Promoters or agents acting on their behalf that the Expected Return [which was defined as including cash, a directed gift, an investment made in a non-resident corporation or the repayment of a loan from Humber] would be no less than 70% of the so-called donations;
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> nn) the Appellant's intention in participating in Scheme II was not to make any charitable gifts but was to obtain donation tax credits in excess of any out-of-pocket amount….[54]

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52 *Hickman Motors Limited v The Queen*, [1997] 2 SCR 336 at 378, ¶92 (SCC); *House v The Queen*, 2011 FCA 234, ¶30; and *Cameco Corporation v The Queen*, 2018 TCC 195, ¶600.

53 *Robins v National Trust Company, Limited et al*., [1927] A.C. 515, [1927] 2 DLR 97, [1927] 1 WWR 692, ¶8 (PC). See also *Cameco*, *supra* note 52, ¶601; *Morrison et al. v The Queen*, 2018 TCC 220, ¶75; and Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada Inc., 2018), p. 97, ¶3.14. The *Appeal Cases* report and the *Cameco* case use the word "such," rather than the word "sure," in the above quotation.

While the above assumptions do not use the phrase "donative intent," they do imply that Mr. van der Steen lacked such intent and that he did not intend to impoverish himself to the full extent of $65,000.

[59] To determine whether Mr. van der Steen has demolished the above-quoted assumptions (in other words, whether he has proven that he had the requisite donative intent), I take guidance from the following statement by Justice Lyons in both *Jensen* and *Goheen*:

> 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.[55]

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[54] Amended Reply, p. 13, ¶21.ll), mm) & nn). In reading the assumptions of fact pleaded in the Amended Reply, I wondered whether some of those assumptions may have been made in the alternative (such as subparagraphs 21.y), z) and cc), each of which uses the word "either" followed by various alternatives, or the definition of "Expected Return," in subparagraph 21.z), which sets out several alternatives) or were inconsistent with one another (such as subparagraph 21.ll), which assumed that Mr. van der Steen may have paid cash to CLES, and subparagraphs 21.oo), pp) and qq), which assumed that Mr. van der Steen may have donated ARCs to CLES), such that the burden of proving those assumed facts may have been shifted to the Crown; see *The Queen v Loewen*, 2004 FCA 146, ¶9; *Elliott v The Queen*, 2013 TCC 57, fn 2; *Merchant v The Queen*, 2010 TCC 467, ¶23-24; *General Motors Acceptance Corporation of Canada Limited v The Queen*, [1999] 4 CTC 2251, 99 DTC 975 (TCC), ¶35-40; *Hall v The Queen*, [1997] 1 CTC 2420 (TCC), fn 3; and *Anderson v MNR*, [1992] 2 CTC 2113, 92 DTC 1778 (TCC), ¶15. However, as counsel for Mr. van der Steen did not suggest that some of the Minister's assumptions of fact were in the alternative or were inconsistent with one another, I will not pursue this question further.

[55] *Jensen*, *supra* note 44, ¶47; and *Goheen v The Queen*, 2018 TCC 62, ¶53.

(3) Observations Concerning Mr. van der Steen's Testimony

[60] During a preliminary discussion at the commencement of the hearing, counsel for Mr. van der Steen voiced a concern about the challenges that he would have in trying to prove a negative, i.e., that Mr. van der Steen did not participate in Scheme II. Counsel indicated that Mr. van der Steen could not do much, other than deny such participation. Accordingly, as the hearing progressed, Mr. van der Steen vigorously denied:

a) having any knowledge in 2004 of Scheme II or any other charitable donation program,

b) having any knowledge of anyone who was promoting such a program,

c) receiving any representations or information from such a promotor in respect of Scheme II or any other charitable donation program, or

d) anticipating or expecting the receipt of any sort of gift, loan or other benefit as a result of his payment to CLES.

[61] In reviewing the circumstances concerning Mr. van der Steen's payment of $65,000 to CLES, a number of factors have caused me to question whether Mr. van der Steen's testimony is sufficient to establish, on a balance of probabilities, that he intended to impoverish himself to the full extent of $65,000:

a) During his testimony, Mr. van der Steen was asked to clarify why, before he ever spoke to Mr. Gomes, he had decided to withdraw money from his RRSP. Mr. van der Steen explained that he had concluded that he would be practicing as a lawyer for his entire life, with the result that he would never have a period in his life when his marginal rate of tax would decrease, such that it made no sense to save money in his RRSP for retirement. Accordingly, in 2004 he determined that it would be advantageous to remove the money from his RRSP before he retired. However, in several years after 2004 (i.e., 2007, 2008, 2009, 2012 and 2014) Mr. van der Steen made contributions to his RRSP, most notably, a $29,908 contribution in 2007 and a $21,909 contribution in 2008.[56]

[56] As indicated in footnote 11 above, the $29,908 contribution in 2007 may have been partially offset by an RRSP withdrawal of $10,091.

b) Mr. van der Steen seemed too quick in some of his denials. For instance, during his cross-examination, he denied knowing that Mr. Reynolds was a representative of Natural Corporation Inc. ("NCI"), until counsel for the Crown pointed out to him that he had actually stated, in paragraph 11 of his Answer (which he appears to have drafted personally in 2013, before engaging counsel), that Mr. Gomes had introduced him to a representative of NCI.[57] I was left with the impression that perhaps Mr. van der Steen had determined, before his cross-examination began, that he would simply deny all adverse assumptions and allegations made by the Minister.

c) Mr. van der Steen's father had been battling cancer since the mid-1990s.[58] However, his charitable contributions to the Canadian Cancer Society were relatively modest. In 2004, the same year in which he paid $65,000 to CLES, he donated $20 to the Canadian Cancer Society.

d) The $65,000 payment made by Mr. van der Steen to CLES in 2004 was not consistent with his prior donation history or his subsequent donation history.[59] It is also significant that Mr. van der Steen had never made a large charitable donation before 2004, nor did he do so between 2005 and 2014.[60]

[62] Mr. van der Steen may well have intended to donate $65,000 to CLES, without any expectation of a kickback or other benefit to be given to him in return. However, being mindful of the Supreme Court's guidance in *Symes*,[61] and having considered the circumstances summarized above, it is my view that Mr. van der Steen has failed to prove on a balance of probabilities that he did not expect to receive a kickback and that he intended to impoverish himself to the full extent of $65,000. I wish to make it clear that I am not suggesting that Mr. van der Steen was knowingly or negligently untruthful in his testimony. I am merely stating that

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57 *Transcript*, March 7, 2016, p. 129, line 19 to p. 133, line 8.

58 Mr. van der Steen's father died of cancer in 2005, the year after the taxation year that is the subject of this Appeal.

59 Inconsistency with a taxpayer's prior donation history was a factor considered by Justice Bowie in *Webb*, *supra* note 1, ¶7; by Justice Hogan in *Vekkal et al. v The Queen*, 2014 TCC 341, ¶15, 26 & 34, and by Justice Favreau in *Khan v The Queen*, 2017 TCC 171, ¶3(j) & 15(a).

60 There was no evidence concerning Mr. van der Steen's charitable donations after 2014. The fact that a taxpayer had never made a large donation before the substantial donations that had been disallowed by the CRA and never again made a significant donation thereafter was a factor considered by Justice Boyle in *Hassan v The Queen*, 2014 TCC 144, ¶6.

61 *Symes*, *supra*, note 48; see paragraph 53 above.

he has failed to meet his burden of proof. Therefore, I have concluded that Mr. van der Steen has not proven that he had the requisite donative intent to support the purported gift of $65,000 to CLES.

B. Official Receipt

[63] Paragraph 118.1(2)(*a*) of the *ITA* provides that an eligible amount of a gift is not to be included in an individual's total charitable gifts unless the making of the gift is evidenced by filing with the Minister a receipt containing prescribed information. Section 3500 of the *ITR* indicates that such a receipt is called an "official receipt." Subsection 3501(1) of the *ITR* sets out the information that is to be shown in an official receipt.

[64] The jurisprudence has established that all of the prescribed information must be present in an official receipt.[62] In particular, in the case of a cash gift (as distinct from a gift in kind), the amount of the cash gift must be stated on the official receipt.[63]

[65] When the Crown filed its Amended Reply, one of the amendments raised a new issue, namely, "whether the charitable gift receipt contains all of the prescribed information."[64] However, the Amended Reply does not set out any assumptions of fact made by the Minister in respect of the contents (or lack thereof) of the official receipt issued by CLES to Mr. van der Steen.

[66] In the written submissions filed by the Crown after the conclusion of the hearing of this Appeal, the only complaint made by the Crown about the contents of the official receipt issued by CLES to Mr. van der Steen was that it did not reflect the correct amount purportedly donated, given that the receipt showed that the amount of the purported donation was $65,000, but, according to the Crown's theory of the case, Mr. van der Steen had anticipated a kickback and had expected that a large portion of the kickback would be invested on his behalf and that he would ultimately get back the invested portion and a return on that investment.[65]

[67] Thus, the resolution of the issue concerning the contents of the official receipt coincides with the resolution of the issue concerning donative intent. As

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62 *Castro*, *supra* note 47, ¶59-65 & 75-85; *Madamidola v The Queen*, 2017 TCC 245, ¶11; and *Guobadia v The Queen*, 2016 TCC 182, ¶27.

63 Subparagraph 3501(1)(h)(i) of the *ITR*.

64 Amended Reply, ¶23.c).

65 Respondent's Written Submissions, ¶129-130.

I have already concluded that Mr. van der Steen has not proven on a balance of probabilities that he had the requisite donative intent, I do not propose to deal further in these Reasons with the issue concerning the contents of the official receipt.

C. Imposition of Penalty after Normal Reassessment Period

[68] In keeping with the approach taken by Justice Campbell in *Bondfield*,[66] as the evidence concerning the requirements of subparagraph 152(4)(*a*)(i) and subsection 163(2) of the *ITA* tends to overlap, I will consider these issues together.

(1) Subparagraph 152(4)(*a*)(i)

[69] Subparagraph 152(4)(*a*)(i) of the *ITA* provides that the Minister may make a reassessment of tax, interest or penalties for a taxation year after a taxpayer's normal reassessment period in respect of the year if the taxpayer has made a misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the tax return for that year. The burden is on the Crown to prove that the taxpayer made a misrepresentation and that the misrepresentation was attributable to neglect, carelessness, wilful default or fraud.[67]

(2) Subsection 163(2)

[70] Subsection 163(2) of the *ITA* provides that a person is liable to a penalty under that provision if the person knowingly, or under circumstances amounting to gross negligence, made a false statement or omission in a return (including a T1 personal income tax return). The Minister bears the burden of establishing the facts necessary to justify the assessment of a penalty under subsection 163(2).[68]

[71] The CRA imposed such a penalty in respect of Mr. van der Steen, on the ground that he made a false statement in his 2004 income tax return by claiming a charitable tax credit in respect of the full amount of the $65,000 payment to CLES, when he allegedly knew, before making the payment, that he would receive a kickback.

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66 *Bondfield Construction Company (1983) Limited v The Queen*, 2005 TCC 78, ¶89.

67 *Yunis v The Queen*, 2015 TCC 272, ¶85; *Dao v The Queen*, 2010 TCC 84, ¶32; and *MNR v Taylor*, [1961] CTC 211 at 214, 61 DTC 1139 at 1141 (Ex.Ct.)

68 Subsection 163(3) of the *ITA*.

[72] The type of conduct by a taxpayer that justifies the reopening of a statute-barred year, under subparagraph 152(4)(*a*)(i) of the *ITA*, does not necessarily justify the imposition of a penalty, under subsection 163(2) of the *ITA*.[69] In this regard, Justice Strayer stated the following in *Venne*:

> It will be noted that for the penalty [under subsection 163(2)] to be applicable there appears to be a higher degree of culpability required, involving either actual knowledge or gross negligence, than is the case under subsection 152(4) for reopening assessments more than four [now three] years old where mere negligence seems to be sufficient.[70]

(3) Assumptions and Burden of Proof

[73] In explaining the Crown's burdens of proof under subparagraph 152(4)(*a*)(i) and subsection 163(2) of the *ITA*, the Federal Court of Appeal stated the following:

> Although the Minister has the benefit of the assumptions of fact underlying the reassessment, he does not enjoy any similar advantage with regard to proving the facts justifying the reassessment beyond the statutory period, or those facts justifying the assessment of a penalty for the taxpayer's misconduct in filing his tax return. The Minster is undeniably required to adduce facts justifying these exceptional measures.[71]

[74] In commenting on the effect of subsection 163(3) of the *ITA*, Justice Proulx stated:

> In effect, subsection 163(3) requires evidence of the intent or gross negligence of the contravenor. This, in my view, should be done in a structured, clear and convincing manner. I do not find that the evidence was adequate in this respect and therefore, the penalties cannot be maintained.[72]

(4) Jurisprudence

[75] In *Melman*, the Federal Court of Appeal stated that the correct legal test for establishing gross negligence is to determine whether there was "neglect beyond a

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69 *Yunis*, *supra* note 67, ¶93; and *Dao*, *supra* note 67, ¶39.

70 *Venne v The Queen*, [1984] CTC 223 at 226, 84 DTC 6247 at 6249, ¶6 (FCTD).

71 *Lacroix v The Queen*, 2008 FCA 241, ¶26.

72 *Boileau v MNR*, [1989] 2 CTC 2001 at 2006, 89 DTC 247 at 250 (TCC).

failure to use reasonable care."[73] Shortly thereafter, in *Wynter*, the Federal Court of Appeal stated:

> 18. Gross negligence … arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer….
>
> 19. Gross negligence requires a higher degree of neglect than a mere failure to take reasonable care. It is a marked or significant departure from what would be expected. It is more than carelessness or misstatements. The point is captured in the decision of this Court in *Zsoldos v. Canada (Attorney General)*, 2004 FCA 338 at para. 21, 2004 D.T.C. 6672:
>
> > In assessing the penalties for gross negligence, the Minister must prove a high degree of negligence, one that is tantamount to intentional acting or an indifference as to whether the law is complied with or not. (see *Venne v R.* (1984), 84 D.T.C. 6247 (Fed.T.D.), at 6256.)[74]

[76] Courts have long recognized the importance of exercising care when interpreting a penal provision in tax legislation. In 1969, Justice Cattanach stated the following in *Udell*:

> I take it to be a clear rule of construction that in the imposition of … a penalty, if there be any fair and reasonable doubt the statute is to be construed so as to give the party sought to be charged the benefit of the doubt.[75]

[77] In *Venne*, Justice Strayer stated:

> … a penal provision … must be interpreted restrictively so that if there is a reasonable interpretation which will avoid the penalty in a particular case that construction should be adopted….
>
> "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….

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73 *Melman v The Queen*, 2017 FCA 83, ¶4. See also *Findlay v The Queen*, [2000] 3 CTC 152, 2000 DTC 6345 (FCA), ¶21-22; and *Venne*, *supra* note 70, ¶37.

74 *Wynter v The Queen*, 2017 FCA 195, ¶18-19.

75 *Udell v MNR*, [1969] CTC 704 at 714, 70 DTC 6019 at 6026, ¶51 (Ex.Ct). The above statement has been quoted in subsequent cases, including *Venne*, *supra* note 70, ¶34; and *Lavoie v The Queen*, 2015 TCC 228, ¶12.

> One must keep in mind, as Cattanach, J. said in the *Udell* case …, that this is a penal provision and it must be construed strictly. The subsection obviously does not seek to impose absolute liability but instead only authorizes penalties where there is a high degree of blameworthiness involving knowing or reckless misconduct…. [H]aving regard to the fact that the onus is on the Minister to prove that the penalty should be applied, I find the evidence ambiguous and therefore conclude that the penalty should not be applied….[76]

[78] In *Lavoie*, Justice Archambault reviewed the principles applicable to the imposition of penalties in these terms, after quoting extensively from *Venne*:

> It should be added that subsection 163(2) of the Act provided for a 25% penalty with respect to the relevant taxation year in *Venne*. If great care is necessary when the courts must interpret a penal provision, as suggested by Judge Cattanach in *Udell*, cited earlier in the passage from *Venne*, this is even more true and important when the penalty is 50%![77]

[79] In *Lavoie*, Justice Archambault also noted that, even where a taxpayer has allegedly participated in a tax-avoidance scheme that is abusive and far-fetched, "it is necessary to carefully apply the principles propounded by the case law, notably *Venne*, to determine whether the penalty is justified," and then stated that a "meticulous analysis of the facts found at the hearing must be carried out in light of these principles."[78]

[80] Justice Hogan has observed that "the courts have set a high standard for the Minister to meet in order to prove that a taxpayer's conduct justifies the imposition of gross negligence penalties with respect to that taxpayer's failure to report income."[79]

[81] The imposition of a penalty for the making, knowingly or under circumstances amounting to gross negligence, of a false statement requires clear

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[76] *Venne*, *supra* note 70, ¶34, 37 & 40. See also *Zsoldos v Canada (Attorney General)*, 2004 FCA 338, ¶21.

[77] *Lavoie*, *supra* note 75, ¶13.

[78] *Ibid.*, ¶15.

[79] *Mady v The Queen*, 2017 TCC 112, ¶145. In that paragraph of his reasons, Justice Hogan was acknowledging certain submissions made by counsel for the Crown in the case before him. He also noted that counsel for the Crown in that case acknowledged that the Crown "must prove, on a balance of probabilities, that the [taxpayer's] conduct amounts to 'indifference tantamount to intentional conduct' or an 'indifference as to whether the law is complied with and is more than simple carelessness or negligence' with respect to this self-reporting obligation."

evidence. In *897366 Ontario Ltd.*, Associate Chief Justice Bowman (as he then was) stated:

> The imposition of penalties … requires a serious and deliberate consideration by the taxing authority of the taxpayer's conduct to determine whether it demonstrates a degree of wilfulness or gross negligence justifying the penalty…. It cannot be overemphasized that penalties may only be imposed … in the clearest of cases, and after an assiduous scrutiny of the evidence.[80]

I question whether the CRA seriously and deliberately considered Mr. van der Steen's conduct when it decided to assess a penalty against him. For instance, in describing the process whereby the CRA decided to assess a penalty against Mr. van der Steen, Ms. Leung stated that the CRA simply treated all 700 donors in the Prime/CLES programs in the same way. The CRA did not consider Mr. van der Steen or his situation specifically when it decided to assess him under subsection 163(2) of the *ITA*.

[82] After Associate Chief Justice Bowman made the above statement in *897366*, he went on to quote a well-known excerpt from his earlier decision in *Farm Business Consultants*, an extract from which reads as follows:

> A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2) [of the *ITA*]…. [T]he routine imposition of penalties by the Minister is to be discouraged…. [A] court must … scrutinize the evidence with great care and look for a higher degree of probability than would be expected where allegations of a less serious nature are sought to be established. Moreover, where a penalty is imposed under subsection 163(2) …, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted.[81] [footnotes omitted]

In footnote 4 of the *Farm Business Consultants* decision, Associate Chief Justice Bowman affirmed:

> … the principle that a penalty may be imposed only where the evidence clearly warrants it. If the evidence is consistent with both the state of mind justifying a

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80 *897366 Ontario Ltd. v The Queen*, [2000] GSTC 13 (TCC), ¶19.

81 *Farm Business Consultants Inc. v The Queen*, [1994] 2 CTC 2450 at 2457, 95 DTC 200, at 205-206 (TCC), ¶28; *aff'd*, 96 DTC 6085 (FCA).

> penalty under subsection 163(2) and the absence thereof … it would mean that the Crown's onus had not been satisfied.[82]

(5) Evidence Relating to the Delayed Assessment of the Penalty

[83] In evaluating the evidence adduced by the Crown in support of the penalty that was assessed, after the normal reassessment period, against Mr. van der Steen under subsection 163(2) of the *ITA*, I have been struck by the paucity of evidence that specifically or expressly refers to him, particularly by name. My observations about the Crown's evidence in support of the delayed assessment of the penalty are:

a) Ms. Leung stated that the CRA acknowledges that Mr. van der Steen paid $65,000 to CLES and that he was issued an official receipt in the same amount.

b) During her direct examination, Ms. Leung testified for approximately two days. During her cross-examination, she was on the witness stand for approximately four days. She was then re-examined for approximately one day by counsel for the Crown. Ms. Leung testified that, during the audit of Prime, CLES and its donors, she gathered thousands of documents from donors, banks, the office of Prime's lawyer and other entities.[83] The documents entered into evidence by the Crown during the examination-in-chief comprised four volumes, with 145 tabs.[84] During Ms. Leung's re-examination, in response to a request by counsel for Mr. van der Steen, a further large binder of documents was produced.[85] Counsel for Mr. van der Steen advised the Court that the Crown's production of documents during the discovery process consisted of approximately 5,000 pages. Thus, it was evident that the CRA had compiled numerous documents in respect of CLES and its donors. However, during her cross-examination, Ms. Leung stated that the only documents that she saw during the audit and that had Mr. van der Steen's name on them were:

    i. the general ledger of CLES, which showed Mr. van der Steen as a donor;

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82 *Ibid.* (TCC), CTC p. 2457, DTC p. 206, fn 4.

83 *Transcript*, March 9, 2016, p. 14, line 21 to p. 16, line 11; and page 51, lines 6-14.

84 Collectively, Exhibit R-1.

85 Exhibit R-8.

ii. the donor list that was maintained by CLES and that showed Mr. van der Steen as a donor; and

iii. the official receipt issued by CLES to Mr. van der Steen.[86]

c) When asked what evidence the CRA had that Mr. van der Steen had participated in Scheme II, Ms. Leung could refer only to the above three documents and to the facts that:

i. Mr. van der Steen communicated with Mr. Reynolds before the $65,000 was paid to CLES;

ii. Mr. Reynolds referred Mr. van der Steen to CLES;

iii. Mr. van der Steen used borrowed money, in part, to make the $65,000 payment;

iv. Mr. van der Steen made his payment in cash (strictly speaking, a bank draft);

v. Mr. van der Steen obtained a receipt from CLES, corresponding dollar for dollar to the amount of his payment;

vi. Mr. van der Steen claimed a donation tax credit in his income tax return;

vii. Mr. van der Steen was listed as a donor on CLES' donor list; and

viii. Mr. van der Steen's donation history was similar to the donation history of the other participants in Scheme II.[87]

She conceded that the CRA does not have any direct documentary evidence showing that Mr. van der Steen expected to receive a kickback.[88]

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86 *Transcript*, October 24, 2016, p. 18, line 7 to p. 21, line 26.

87 *Transcript*, October 24, 2016, p. 53, lines 12-22; p. 54, lines 18-24; p. 55, lines 6-15; p. 57, lines 17-18; p. 72, line 21 to p. 73, line 1; and p. 85, line 17 to p. 87, line 26. As well, Ms. Leung indicated that her conclusion concerning Mr. van der Steen's participation in Scheme II was based on her assumption that Mr. van der Steen was a client of Mr. Reynolds and that all of Mr. Reynolds' clients received a kickback; *ibid.*, p. 54, lines 13-14; p. 80, lines 6-9; and p. 87, line 14.

d) Ms. Leung testified during cross-examination that there were approximately 700 donors who participated in one or more of the three Schemes. The CRA sent proposal letters to the various participants who claimed a tax credit in respect of a donation made by them to CLES. In response to those letters, some of the donors (but not Mr. van der Steen) contacted Ms. Leung or other representatives of the CRA, and told her or her colleagues about the details of their donations and the representations made to them by representatives of CLES. Every donor who spoke with Ms. Leung or another representative of the CRA advised that he or she had been promised a kickback of some nature. Ms. Leung estimates that she and her colleagues at the CRA had discussions with approximately 100 of the 700 donors.[89] Having confirmed that each of the 100 or so donors who spoke with Ms. Leung or another representative of the CRA expected to receive a kickback, the CRA determined that all 700 donors were in the same situation and that all 600 of the remaining donors must have similarly expected to receive a kickback. As she put it, all 700 donors got the same deal and the same tax benefit.[90] Accordingly, penalties were issued against all of the donors, including Mr. van der Steen.

e) Ms. Leung told the Court that one married couple (who will be identified for purposes of these Reasons only as Mr. and Mrs. K) explored various transactions with a representative of CLES, one of which involved withdrawing $65,000 from their RRSP and donating it to CLES. Ms. Leung noted that the amount withdrawn by Mr. and Mrs. K. from their RRSP was approximately the same as the amount withdrawn by Mr. van der Steen from his RRSP. According to Ms. Leung, the fact that Mr. and Mrs. K admitted to having been told that they would receive a kickback in respect of their $65,000 payment to CLES suggests that Mr. van der Steen must also have been told that he would receive a kickback in respect of his $65,000 payment to CLES. Ms. Leung stated that, to her knowledge, Mr. and Mrs. K do not know Mr. van der Steen.[91]

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88 *Transcript*, October 24, 2016, p. 80, lines 2-20; p. 87, lines 13-26; and October 25, 2016, p. 256, lines 2-7; and p. 257, lines 3-15.

89 *Transcript*, October 24, 2016, p. 52, lines 21-26.

90 *Transcript*, October 24, 2016, p. 54, lines 13-14; p. 80, lines 6-9; p. 83, lines 2-11; and p. 87, line 14.

91 *Transcript*, October 24, 2016, p. 167, line 10 to p. 175, line 20; see also Exhibit R-1, Vol. 1, Tabs 12-13.

f) Ms. Leung did not specifically verify whether Mr. van der Steen expected to receive a kickback.[92] She acknowledged that neither she nor any of her colleagues at the CRA spoke with Mr. van der Steen about his situation, nor did they have any documents to show that he received, or was told that he would receive, a kickback.[93]

g) As mentioned above, approximately 600 of the 700 or so individuals who donated money under one of the three Schemes did not contact the CRA in response to the proposal letters. Ms. Leung treated those 600 individuals as an amorphous group, rather than singling out each donor individually. From time to time, Ms. Leung discussed all 700 donors with her team leader, but in doing so, she treated the group as a whole, rather than focussing on any individual donor in particular. During the first day of her cross-examination, Ms. Leung stated that she had prepared a single composite penalty recommendation report, pertaining to all 700 donors, rather than looking at each donor individually.[94] However, on the second day of her cross-examination, Ms. Leung initially said that the penalty recommendation report pertained to everyone who had been audited,[95] but then went on to indicate that there was a separate penalty recommendation report just for Mr. van der Steen, although it was "pretty much the same" as the composite penalty recommendation report prepared collectively for everyone who was a donor in Scheme II.[96] No penalty recommendation report was put into evidence, so I have been unable to ascertain whether there was only a composite report for all alleged participants in Scheme II, or whether there was also a separate report just for Mr. van der Steen.

h) After reviewing the CLES ledger, its list of donors and the official receipt issued to Mr. van der Steen, the next time that Ms. Leung saw Mr. van der Steen's name was when she was advised by a lawyer in the Department of Justice that Mr. van der Steen had commenced court proceedings.[97]

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92 *Transcript*, October 25, 2016, p. 281, line 11 to p. 283, line 20.

93 *Transcript*, October 25, 2016, p. 259, lines 14-15 & 26-28; p. 260, line 1; p. 261, lines 6-18; p. 262, lines 20-25; p. 266, lines 7-10; p. 267, lines 18-22; p. 268, lines 2-13; and p. 371, lines 17-24.

94 *Transcript*, October 24, 2016, p. 43, lines 17-18; and p. 44, lines 1-6.

95 *Transcript*, October 25, 2016, p. 276, lines 23-27.

96 *Ibid.*, p. 277, lines 9-19.

97 *Transcript*, October 24, 2016, p. 21, line 22 to p. 22, line 3.

i) Ms. Leung acknowledged that she had not seen Mr. van der Steen's name on any of the documents pertaining to donors who had set up offshore structures for the purpose of receiving their respective kickbacks.[98]

j) Ms. Leung considered Steve Reynolds to be a very aggressive promoter. Accordingly, she was of the view that any donor who had communicated with Mr. Reynolds must have participated in one of the Schemes. Furthermore, as Ms. Leung put it, Mr. van der Steen was a client of Steve Reynolds, and she was of the view that all of Mr. Reynolds' clients received a kickback.[99]

k) Ms. Leung stated that the Charities Directorate of the CRA had posted a warning on its website to potential donors about donation programs that were questionable. When asked, she acknowledged that the warning did not name CLES specifically.

l) Ms. Leung acknowledged that the CRA does not have any evidence suggesting that Mr. van der Steen participated in any donation program other than the CLES program.

m) Ms. Leung acknowledged that the CRA does not have any documentary evidence confirming that Mr. van der Steen participated in any sort of offshore arrangement by means of which funds flowed through foreign intermediaries to Mr. van der Steen or to an entity owned or controlled by him or with which he was connected.[100] The CRA has not found any cheque payable by CLES, Prime, Gemini or any other entity to Mr. van der Steen.

n) With respect to the assumptions of fact set out in subparagraphs 21(t) through (qq) of the Amended Reply, Ms. Leung confirmed that the CRA does not have direct documentary evidence specifically mentioning Mr. van der Steen.[101]

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98 *Ibid.*, p. 23, lines 18-20.

99 *Ibid.*, p. 54, lines 2-14; p. 80, lines 5-9; p. 83, lines 8-11; p. 84, lines 6-21; and p. 87, lines 5-14; and *Transcript*, June 7, 2017, p. 708, lines 10-25. However, as noted elsewhere, the CRA has no documentary evidence confirming that Mr. van der Steen received, or was told that he would receive, a kickback.

100 *Transcript*, June 7, 2017, p. 718, line 7 to p. 720, line 3.

101 *Transcript*, June 7, 2017, p. 702, line 8 to p. 714, line 17.

o) Ms. Leung stated that the CRA does not have any specific evidence concerning the intention of CLES *vis-à-vis* Mr. van der Steen, other than the official receipt, the donors list and the other specific documents that she had mentioned previously.

p) During her re-examination, Ms. Leung stated that the CRA had identified 203 participants in Scheme II,[102] and that the CRA had found documentary evidence indicating that 103 of those participants were told that they would receive a kickback, in one form or another.[103]

q) During the re-examination of Ms. Leung, the Crown produced an additional trial book of documents that was marked as Exhibit R-8 and that set out copies of documents pertaining to the 103 participants in Scheme II who expected to receive kickbacks. Ms. Leung acknowledged that Exhibit R-8 does not contain any documents that refer to Mr. van der Steen by name. As well, she stated that Exhibit R-8 contains only one document that indirectly refers to Mr. van der Steen, without naming him. That document is the spreadsheet that she prepared and that summarizes Prime's bank statements and that shows a deposit of the $65,000 payment made by Mr. van der Steen.

r) As noted above, it was the view of Ms. Leung that every participant in Scheme II, including Mr. van der Steen, expected to receive a kickback of 70%-75% of the amount of his or her purported donation.[104] However, Mr. Saran's testimony might suggest that the 70%-75% figure was not a constant. Although I found Mr. Saran's testimony to be somewhat confused and difficult to follow, I noted that, at one point, he stated that the amount of the kickback, at least the portion that was to have been invested, was

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102 *Transcript*, June 8, 2017, p. 756, lines 20-26.

103 *Transcript*, June 8, 2017, p. 780, lines 1-10; p. 783, lines 24-26; p. 785, lines 20-21; and p. 851, lines 22-25. There was an element of uncertainty concerning this aspect of Ms. Leung's testimony. Initially, she referred to the 700 participants in all three Schemes collectively, and said that the CRA had obtained documentary evidence in respect of 100 of those participants who expected to receive kickbacks. See *Transcript*, October 24, 2016, p. 165, lines 8-26. Later in her testimony, as mentioned above, she focused on the 203 participants in Scheme II and said that the CRA had obtained documentary evidence showing that 103 of those participants had been told that they would receive a kickback. Thus, there is perhaps some uncertainty as to whether the 100 or 103 participants who were told that they would receive a kickback were participants only in Scheme II or whether they were participants in all three Schemes.

104 See subparagraphs 83.d) and j) and footnotes 85, 88 and 97 above.

"definitely low," and was less than 50% of the amount of his donation.[105] However, elsewhere in his testimony, Mr. Saran gave a couple of examples suggesting that the out-of-pocket expenditure of a participant was 30% of the amount of the donation, after the amount of the donation tax credit and the expected kickback were taken into account,[106] which might be consistent with the 70%-75% figure used by Ms. Leung. On the other hand, near the end of his testimony, Mr. Saran stated that no portion of his payment to CLES had been earmarked for investment; as he put it, "there was nothing earmark[ed], nothing – no percentage shown to us."[107] My comparison of Mr. Saran's testimony with that of Ms. Leung suggests to me that perhaps not all participants were necessarily in the same circumstances.

s) When Ms. Leung was asked to explain how she knew that 70% of the funds donated by some donors were supposedly to be returned to them, in a circuitous manner using hidden offshore arrangements, she began by referring to certain documents pertaining to Crowne Gold,[108] then indicated that Mr. K[109] expected to receive a kickback of 75%,[110] and ultimately stated:

> We went through a few letters. Honestly, I could not have review[ed] every single donor's account….[111]

Thus, it appears that some of the donors, possibly including Mr. van der Steen, may have been assessed penalties without their accounts having been thoroughly reviewed by the CRA.

[84] In a nutshell, insofar as the assessment, after the normal reassessment period, of the penalty under subsection 163(2) of the *ITA* is concerned, the Crown's theory of the case is that, because 103 of the 203 participants in Scheme II were told that they would receive a kickback,[112] the remaining

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105 *Transcript* of the testimony of Lakhwinder Singh Saran, March 8, 2016, p. 11, line 25 to p. 12, line 3.

106 *Ibid.*, p. 15, lines 13-18; p. 52, lines 1-11; and p. 68, line 24 to p. 69, line 3.

107 *Ibid.*, p. 67, lines 25-26.

108 Exhibit R-1, Vol. 2B, Tab 91. See also paragraph 33 above.

109 See subparagraph 83.e) above.

110 *Transcript*, March 10, 2016, p. 163, line 10 to p. 164, line 7.

111 *Ibid.*, p. 164, lines 7-8.

112 As noted above (see footnote 103), at some places in her testimony, Ms. Leung stated that the CRA had obtained information indicating that approximately 100 of the approximately 700 participants in Schemes I, II and III were told that they would receive

100 participants in Scheme II, including Mr. van der Steen, must also have been told that they would each receive a kickback. However, the Crown has not shown that all 203 participants in Scheme II were in the same circumstances. The evidence did establish that the promoters' representation that a kickback would be paid was generally made at a meeting of prospective donors, typically held in a hotel meeting room. However, Mr. van der Steen did not attend such a meeting; therefore, there is a very real possibility that a representation concerning a kickback was not made to him. Given the caution, care and careful consideration that must be exercised by the Court before upholding the assessment of a penalty under subsection 163(2) of the *ITA*, as discussed in the cases referred to in paragraphs 76 to 82 above, it is not sufficient to say that, because slightly more than 50% of the participants in Scheme II were told that they would receive a kickback, it automatically follows that all 100% of the participants were told the same thing.

[85] The evidence adduced by the Crown in support of the issuance by the Minister of the Notice of Reassessment on March 26, 2009, which was after the expiration of Mr. van der Steen's normal reassessment period in respect of 2004, is not sufficient to satisfy the burden which the Crown bears in the context of subparagraph 152(4)(*a*)(i) of the *ITA*. Accordingly, that Notice of Reassessment was statute-barred and the penalty assessed by that Notice of Reassessment cannot stand. If that Notice of Reassessment represented a reassessment, by reason of that reassessment being vacated pursuant to subparagraph 152(4)(*a*)(i), the 2008 Reassessment is reinstated and the disallowance of the charitable tax credit remains in effect. If the Notice of Reassessment dated March 26, 2009 represented an additional assessment, it never did displace or nullify the 2008 Reassessment.

[86] If I am wrong in my conclusion that the Crown did not meet its burden in respect of subparagraph 152(4)(*a*)(i) of the *ITA*, such that the Notice of Reassessment dated March 26, 2009 was valid even though it was issued after the normal reassessment period, I am mindful that a higher degree of culpability is required under subsection 163(2) than under subparagraph 152(4)(*a*)(i).[113] The Crown has not proven on a balance of probabilities that Mr. van der Steen

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a kickback, and elsewhere in her testimony Ms. Leung stated that the CRA had confirmed that 103 of the 203 participants in Scheme II were told that they would receive a kickback. For purposes of the paragraph to which this footnote is attached, I have taken the position that is the most generous to the Crown, i.e., that 103 of 203 participants in Scheme II (rather than approximately 100 of approximately 700 participants in all three Schemes) were told that they would receive a kickback.

113 *Venne*, *supra* note 70; see paragraph 72 above.

displayed the higher degree of culpability required to justify the assessment of the penalty under subsection 163(2). In other words, the Crown has failed to prove that Mr. van der Steen knowingly, or under circumstances amounting to gross negligence, made a false statement in his 2004 income tax return.

V. CONCLUSION

[87] Based on the evidence presented at the hearing, I have been unable to determine whether or not Mr. van der Steen expected to receive a kickback.[114]

[88] In reassessing Mr. van der Steen so as to disallow the federal and provincial tax credits in respect of the $65,000 payment to CLES, the Minister assumed that Mr. van der Steen's cash outlay did not exceed 30% of that payment and that he expected to receive a kickback of at least 70% of that payment. Mr. van der Steen has the burden of disproving, or demolishing, those assumptions. He has failed to prove, on a balance of probabilities, that those assumptions are not true. In other words, he has failed to prove that he had the requisite donative intent.

[89] The Crown has failed to meet its burden of proof in respect of subparagraph 152(4)(*a*)(i) of the *ITA*. Therefore, the delayed assessment of the penalty under subsection 163(2) of the *ITA*, after the normal reassessment period, cannot stand. However, even if the burden under subparagraph 152(4)(*a*)(i) was satisfied, it becomes necessary to consider the burden imposed by subsection 163(3), which provides that the Crown has the burden of proving that Mr. van der Steen, knowingly or under circumstances amounting to gross negligence, made a false statement in his 2004 income tax. As explained above, the Crown has failed to satisfy that burden.

[90] Thus, this is a situation where both Parties have failed to satisfy their respective burdens of proof.[115] To summarize, the Appeal in respect of the 2009

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[114] See paragraph 62 above.

[115] For a further discussion of the respective burdens of proof (on a taxpayer to prove that an assessment of tax is incorrect and on the Crown to prove that a penalty is justified), see *The Queen v Taylor*, [1984] CTC 436, 84 DTC 6459 (FCTD). For examples of other cases where a taxpayer has failed to challenge successfully an assessment of tax, but the Crown has failed to establish the facts to justify the assessment of a penalty, see *Fortis v MNR*, [1986] 2 CTC 2378, 86 DTC 1795 (TCC); *Chopp v MNR*, [1987] 2 CTC 2071, 87 DTC 374 (TCC); *Chabot v The Queen*, 2001 FCA 383; *Benarroch v The Queen*, 2003 TCC 9; *Julian*, *supra* note 1; *Morisset v The Queen*, 2007 TCC 114; and *Rohani v The Queen*, 2009 TCC 88.

Reassessment (or additional assessment) is allowed so as to cancel the penalty assessed under subsection 163(2) of the *ITA* (either because the 2009 Reassessment (or additional assessment) was statute-barred or because the burden under subsection 163(3) was not satisfied), but the Appeal in respect of the 2008 Reassessment is dismissed and the disallowance of the tax credit claimed under subsection 118.1(3) of the *ITA* is upheld.

[91] As success is divided, I am not making any award of costs.

Signed at Ottawa, Canada, this 23rd day of January 2019.

"Don R. Sommerfeldt"

Sommerfeldt J.

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COURT FILE NO.:	2012-4731(IT)G
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APPEARANCES:

Counsel for the Appellant:	Alec McLennan
Counsel for the Respondent:	Nadine Taylor Pickering, Natasha Wallace

COUNSEL OF RECORD:

For the Appellant:

Name:	Alec McLennan
Firm:	McLennan & Associates

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada