Docket: 2017-2555(IT)I

BETWEEN:

GLENDA PHILLIP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 19, 2018 at Toronto, Ontario

Before: The Honourable Justice K.A. Siobhan Monaghan

Appearances:

Counsel for the Appellant:	Jeff Kirshen Boris Livshits (Articling Student)
Counsel for the Respondent:	Pallavi Gotla Idorenyin Udoh-Orok (Articling Student)

JUDGMENT

In accordance with the attached Reasons for Judgment:

1. Ms. Phillip's time to file a Notice of Appeal for the 2003, 2004, 2005, 2006 and 2007 taxation years is extended to November 19, 2018 and her Notice of Appeal is deemed to be valid and timely filed on November 19, 2018;

2. The appeal from reassessments made under the *Income Tax Act* for the Appellant's 2003, 2004, 2005, 2006 and 2007 taxation years is dismissed, without costs.

Signed at Toronto, Ontario, this 13th day of February 2019.

"K.A. Siobhan Monaghan"

Monaghan J.

Citation: 2019 TCC 37
Date: 20190213
Docket: 2017-2555(IT)I

BETWEEN:

GLENDA PHILLIP,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Monaghan J.

I. INTRODUCTION

[1] The Appellant, Glenda Phillip, appeals reassessments issued by the Minister of National Revenue (the "Minister") disallowing childcare expenses and imposing gross negligence penalties for the Appellant's 2003, 2004, 2005, 2006 and 2007 taxation years. The Notices of Reassessment were all dated October 26, 2009. Ms. Phillip objected to the reassessments but they were confirmed by the Minister on March 3, 2017, and Ms. Phillip instituted this appeal.

II. EXTENSION OF TIME

[2] Ms. Phillip filed her Notice of Appeal to this Court on June 14, 2017. Although it was filed more than 90 days after the reassessments were confirmed, the Court may agree to extend the time within which a Notice of Appeal may be filed, provided an application to do so is filed within one year after the expiration of the 90-day period for appeal. Although late filing was not raised by either party, with consent of the Respondent's counsel, I agreed to treat the Notice of Appeal as an application to extend the time to institute an appeal, as well as a Notice of

Appeal, at the time it was filed, and to order that the time for filing Ms. Phillip's appeal be extended to the date of the hearing, and that the Notice of Appeal be considered timely filed.

III. ISSUES IN APPEAL

[3] The parties agree that the Notices of Reassessment for the 2003, 2004 and 2005 taxation years were issued after the normal reassessment period. The Respondent is of the view that the Minister is able to reassess those years because Ms. Phillip made a misrepresentation that is attributable to neglect, carelessness or wilful default. The Appellant does not agree. Accordingly, there are three issues in this appeal:

1. Whether the Minister is entitled to reassess Ms. Phillip beyond the normal reassessment period for her 2003, 2004, and 2005 taxation years.
2. Whether Ms. Phillip incurred childcare expenses, in the taxation years in issue, in the amounts she claimed and so is permitted to deduct them.
3. Whether Ms. Phillips is liable for gross negligence penalties.

IV. 2006 AND 2007 TAXATION YEARS

[4] In 2006 and 2007, Ms. Phillip claimed childcare expenses in the amounts of $4,000 and $1,067, respectively. She claims she paid these amounts to her nephew, Kevin Phillip. Because the 2006 and 2007 taxation years were reassessed within the normal reassessment period, I must accept the facts assumed by the Minister in issuing those reassessments as proven unless Ms. Phillip provides evidence sufficient to contradict those assumed facts.

[5] The Minister assumed that Ms. Phillip did not pay any amount to any person for childcare in 2006 and 2007. Accordingly, to prevail, Ms. Phillip must establish, on a balance of probabilities, both that she incurred childcare expenses and the amount she incurred.

[6] Ms. Phillip was employed as a packer with Georgia Pacific in the 2003 to 2006 taxation years. Each month she worked two weeks on day shift and two weeks on the evening shift. She sometimes worked overtime but, with the exception of overtime, knew her schedule approximately one month in advance.

[7] In January 2006, Ms. Phillip suffered an injury at work. As a result, her duties were changed to light duties for part of 2006 and she had fewer hours. She also had a number of medical appointments and assessments for workers' compensation to attend that year. Later that year, suitable light duties ceased to be available and she was assessed for retraining. In 2007, she attended school and retraining programs with assistance from the workers' compensation program. In 2006, in addition to employment income, she received modest workers' compensation benefits, and in 2007 received both workers' compensation and employment insurance benefits.

[8] Although Ms. Phillip is the mother of five children, only her youngest two children lived with her in the 2003-2007 taxation years. She needed childcare for her youngest child, Matthew, who was 3 years old at the beginning of 2003 and 8 years old at the end of 2007. Her next oldest child, Liana, is 11 years older than Matthew.[1] Ms. Phillip testified that Matthew was in school full days in 2006 and 2007, and half-days in 2003-2005.[2] The school was quite close to their home, a few minutes' walk.

[9] Liana was in high school, had a part-time job at McDonalds after school and, according to Ms. Phillip did not help with her son's care, notwithstanding that the three of them lived together. Another daughter, Michelle, lived only a few minutes away and was employed on a full-time basis. Ms. Phillip's son, Rodney, lived nearby with his wife and children. However, Ms. Phillip stated none of her children assisted with Matthew's care because they had their own responsibilities and were busy "doing their own thing". Liana also testified that she did not have time to help with her younger brother because she was busy with school, her part-time job and dance class.

[10] The *Income Tax Act* provides for filing with the Minister receipts issued by the payee to evidence the childcare expense. It is not clear whether Ms. Phillip filed receipts with her income tax returns. However, she contends that, when the Canada Revenue Agency ("CRA") audited her in respect of the childcare expenses

---

[1] Her other three children are all at least 20 years older than Matthew.

[2] I observe that, as Matthew was born in early 1999, he would have been 6 years old at the start of the 2005-06 school year, which suggests he was in full-time school from September 2005. However, the questions and testimony largely focused on taxation years rather than school years, and that presumably explains Ms. Phillip's responses.

in 2009, she went to Mr. Phillip, as well as her caregiver for the earlier years, and asked them for receipts for what she had paid them in the relevant years so she could give receipts to the CRA. Copies of five handwritten receipts were tendered to the Court. Respondent's counsel objected to the receipts on the basis they are hearsay evidence. Neither caregiver was called to identify them. As this appeal was heard under the informal procedure rules, I am not strictly bound by the rules of evidence and I agreed to consider the receipts.

[11] The receipts with the notations "January 1, 2006-December 31, 2006" and "January 1, 2007-December 31, 2007" are undated and unsigned and were admitted to have been prepared in 2009. They have Kevin Phillip's name on the "Received from" line and identify Ms. Phillip as the care provider.[3] In my view, given the contents of the receipts, and that Mr. Phillip did not identify them, these receipts do not assist Ms. Phillip in establishing her childcare expenses in 2006 and 2007.

[12] The receipt condition is directory not mandatory and the failure to file a receipt is not fatal to a claim for childcare expenses.[4] However, in the absence of a receipt, the Court must determine as a matter of evidence whether a particular taxpayer has incurred specific expenses on account of childcare[5] and the taxpayer must establish with some precision the amount she incurred.[6] In my view, the Appellant has not come close to doing that.

[13] Ms. Phillip has no cheques, bank withdrawal slips or records to substantiate the amounts she claims to have paid the caregivers, who she paid, when she paid them or when or how many hours they worked. She said neither she nor the caregivers wrote down their hours. Neither caregiver testified to corroborate her evidence. Her three older children who testified gave no evidence concerning the amounts paid to the caregivers. The only evidence concerning the amount paid is

---

[3] Receipts for 2003, 2004 and 2005 are in a different form, are dated January 29, 2009, and purport to be signed by Mr. Richards. They are addressed below in the context of those earlier taxation years.

[4] *Senger-Hammond v. The Queen* [1997] 1 C.T.C. 2728 (T.C.C.) (Informal); *Wells v. The Queen* [1997] 3 C.T.C 2581 (T.C.C) (Informal); *Dominiquez v. The Queen* [1998] 4. C.T.C. 2222 (T.C.C.)(Informal).

[5] *Dominiquez, ibid.*

[6] *Senger- Hammond, supra*; *Lachowski v. The Queen* [1997] 3 C.T.C. 2924 (T.C.C.) (Informal) and *Burns v. The Queen* [2001] 3 C.T.C 2737 (T.C.C.) (informal).

Ms. Phillip's testimony, but her evidence with respect to the payment arrangements, receipting, and the calculation of amounts she claims to have paid is simply not credible.

[14] Ms. Phillip testified that in 2006 and 2007, she paid Kevin Phillip to help her with Matthew, because Christian Richards, who had been her babysitter in 2003, 2004 and 2005, had moved back to Brampton. Mr. Phillip was 17 or 18 years old at that time, but was not in school. Mr. Phillip lived close by, a few minutes' walk, and could come whenever she needed him. She said her arrangements with Mr. Phillip were the same as those she had had with Mr. Richards in the prior three years. So what were those arrangements?

[15] According to Ms. Phillip, Mr. Richards was staying in a building very close to where Ms. Phillip lived and was available whenever she needed him. She testified Mr. Richards took Matthew to soccer and other after school activities and, when she was working the day shift, would take Matthew to school in the morning. When asked on cross-examination about the number of hours a week Mr. Richards worked, Ms. Phillip said he would come when she called him. He did not have set hours, his hours changed from month to month, but she needed him more in the summer when there were more activities. Their arrangement was not based on paying him an hourly or weekly amount. Rather, in her words, she paid him cash as she went, paying him more when she had more and less when she had less. As an example, she said that in weeks when she had bills like mortgage payments,[7] she might pay him less. On some occasions she would have money in her purse from Matthew's father, for babysitting or activities, or from her older children who were helping her financially, and then she might pay more. When and the amount she paid depended on how much money she had at the time. Ms. Phillip testified her arrangements with Mr. Phillip were substantially the same, although she said she sometimes would tell Mr. Phillip a day in advance when she needed him the next day.

[16] In 2006, she was not working as much (because of her injury) and Matthew was in school full-time. However, Ms. Phillip said she had a lot of doctor's appointments, assessments for workers' compensation and appointments related to school (retraining) and she needed to be punctual. She said she was busier than when she was working. In 2007, she was at school retraining. As a result, she relied on Mr. Phillip to babysit. She also said that sometimes she just had too much

[7] Ms. Phillip twice said her mortgage payments were weekly, and once said bi-weekly.

pain to take care of Matthew, or she needed to take care of herself, and called on Mr. Phillip to help. There was never a time he was not available.

[17] Ms. Phillip said she did not pay either Mr. Phillip or Mr. Richards by cheque because they did not have bank accounts. She paid them by withdrawing money from the bank or from money she had in her purse, received from Matthew's father or her older children.

[18] Ms. Phillip's evidence concerning receipts for the cash payments was different every time she spoke about them. When first asked if she was given a receipt when she paid the caregivers, she said no. They were people she knew and trusted and so she did not expect a receipt at the time. She said she didn't know she needed a receipt. However, she sought receipts from them in 2009 when the CRA audited her. She said at that time they sat down and calculated what she had paid them in the relevant years. How did they calculate that without records? What was there to calculate – she did not pay an hourly rate and they did not work a fixed number of hours? If they all trusted each other, why didn't they trust her to tell them the amount based on her tax returns and the CRA questions?

[19] When asked how she knew what amount to claim as a childcare expense on her income tax returns, she said that when she gave the caregivers the money they would give her a receipt so she would know, but that she could not find the receipt in 2009. When Respondent's counsel pointed out she had said earlier that she did not get receipts from them, she said they had the receipts but never gave them to her. This does not seem to make a lot of sense. Why would they create a receipt only to keep it for themselves? She then said they would give her one receipt for the whole year: at the end of the year, they would calculate the amount and she would know it was right because she would know how much she paid from her bank account withdrawals. Yet earlier she said she sometimes paid the caregivers from money in her purse, given to her by her children or former husband. If that is so, how would she know the amount on the year-end receipt was right by looking at her bank statement? Moreover, she paid them whatever she could, when she could - varying amounts at irregular times. How would she be able to tie any particular withdrawals from her bank to payments for childcare?

[20] She did not keep records. She said Mr. Richards and Mr. Phillip did not keep records, and frankly I would have been surprised if they had, given the arrangements Ms. Phillip described. Yet somehow they could remember at the end of each year how much she paid them and give her a receipt and she was satisfied, based on her bank records, that the receipt was correct. With respect, no matter

how good one's memory is, it is not credible that a person who paid (or was paid) varying amounts, at irregular intervals over the course of 12 months could, at the end of that 12-month period, without any records, remember how much was paid.

[21] Even her description of the caregiver's hours didn't ring true – if she knew her work schedule a month in advance why would she have to call them to come? Why wouldn't there be a schedule that matched hers, at least in 2003, 2004 and 2005 when she was working full-time and in 2007 when she was in school? Yet Ms. Philip gave an example of calling Mr. Richards and asking him to come because she was busy dressing for work and he would tell her he would be there in a half hour.

[22] Indeed, I find it hard to believe that a teenage daughter living with Ms. Phillip provided no assistance with Matthew, not to mention a daughter and son who lived nearby, notwithstanding their own commitments and schedules. Yet Ms. Philip said none of her children ever helped take care of Matthew. Ms. Phillip would have me believe that two young men would be prepared to give up ten evenings every month, not to mention mornings and afternoons on another ten days a month, for two years in the case of Mr. Phillip, and three years in the case of Mr. Richards, for whatever amounts she could pay them, when she was able to pay them, while a teenage daughter who lived with her, and two of her adult children who lived five minutes away, never helped with childcare because they were too busy. I am sorry, but that is not credible.

[23] The amount Ms. Phillip claimed for childcare fluctuated from year to year, ranging from a high of $5,245 in 2005 to a low of $1,067 in 2007. When asked about that, again her answers did not make a lot of sense in the context of her other evidence. For 2005, she said that although the services Mr. Richards provided were the same as in prior years, as her son got bigger the cost went up. This seems a very odd answer. As her son got older, he would be in school a greater percentage of the time and so presumably less childcare would be needed. Moreover, her description of the arrangements was that the caregivers were willing to take what she was able to pay. If she is to be believed, they would come whenever she called and would accept such amounts at such times as she could pay, more when she had more and less when she had less. There was no negotiation, no agreed fees or rates. If it was true that these young men were prepared to babysit for whatever she was able to pay, I would expect the explanation for the fluctuations in expenses to be that some years she was able to pay more than others.

[24] As to why her costs were so much lower in 2007 (approximately 25% of what she claimed in any of the other four years), she said it was because she was in school retraining and was at home more, but Mr. Phillip would still take her son to his activities after school and to school in the morning because she had to be at school herself by 9 am.

[25] I accept that Ms. Phillip was not working evenings in 2007 and so likely had less demand for childcare. However, there is something troubling about this substantially lower number for 2007. Approximately 95% of Ms. Phillip's income in 2007 was comprised of workers' compensation and employment insurance benefits. A childcare expense deduction is limited to 2/3 of the taxpayer's earned income. Earned income is defined for this purpose and does not include employment insurance benefits.[8] In my view, workers' compensation benefits similarly are not earned income for this purpose.[9] Thus, based on her employment earnings, Ms. Phillip's deduction for childcare expenses in 2007 would be limited to $1,067. This amount matches exactly the amount on the receipt for 2007 purportedly given to her in 2009 by Kevin Phillip after he recalculated what he had been paid in 2007. This appears to me too much of a coincidence – the amount Kevin Phillip calculated in 2009 as the amount he was paid in 2007 exactly matches the maximum amount Ms. Phillip could claim in 2007. I simply do not believe that Ms. Phillip's childcare expense in 2007 exactly matched what she was able to claim, even if she needed less childcare because she was at home more. I find Ms. Phillip's explanation for varying childcare expenses lacking in any credibility.

[26] In my view, Ms. Phillip has been unable, with any precision, clarity or substance, to provide any credible evidence to support her claims for childcare expenses in 2006 or 2007. She herself testified she kept no records, has no bank statements, and has no bank withdrawal slips. Ms. Phillip's testimony was not straightforward, consistent or clear. Her answers concerning receipts appeared to be motivated by giving the most favourable answer to the particular question rather than by any effort to give an honest, straightforward answer.

---

[8] *Bendo* v *R* [1998] 3 C.T.C. 397, 98 D.T.C. 6381, (*sub nom*. Bendo v. Minister of National Revenue) 228 N.R. 132 (F.C.A.), affirming [1997] 2 C.T.C. 2497 (T.C.C.).

[9] Workers' compensation benefits are included in income under subsection 56(1). Although some amounts included in income under subsection 56(1) are expressly included in the definition of earned income for childcare expense purposes (e.g., scholarships, bursaries, certain apprenticeship grants, research grants, and certain government assistance plans), workers' compensation amounts are not.

[27] While that is sufficient to dismiss her appeals for 2006 and 2007, there is a second basis on which the 2006 appeal may be dismissed. "Childcare expense" means an expense incurred for the purpose of providing childcare services for an eligible child if the services are provided to enable the taxpayer, who resided with the child at the time the expense was incurred, to perform the duties of an office or employment or to attend a designated educational institution. In 2006, Ms. Phillip was injured and was working less. She testified that she had medical and workers' compensation assessment appointments to attend and needed Mr. Phillip to take care of Matthew so she could do so. Childcare expenses associated with attending such appointments are not a qualifying childcare expense. Even if I was satisfied that Ms. Phillip had spent a particular amount on childcare in 2006, which I am not, I have no evidence with which to apportion the expenses between those that might qualify as "childcare expenses" and those that do not.

[28] In coming to my conclusion for the 2006 and 2007 taxation years, I did not give any weight to the Minister's assumptions concerning the tax preparer for Ms. Phillip's returns.[10] I do not need to. Even if those assumptions had not been made, my conclusion concerning Ms. Phillip's childcare expenses in 2006 and 2007 would have been the same. In my view, in those years, she did not incur the childcare expenses she claims she did.

V. 2003, 2004 AND 2005 TAXATION YEARS: ASSESSMENTS BEYOND THE NORMAL REASSESSMENT PERIOD

[29] In 2003, 2004 and 2005, Ms. Phillip claimed childcare expenses in the amounts of $4,800, $4,000 and $5,245, respectively. She claims she paid these amounts to Christian Richards, a close friend of her son, Terrance.

[30] The normal reassessment period for each of Ms. Phillip's 2003, 2004 and 2005 taxation years ended before the Notices of Reassessment under appeal were issued. The *Income Tax Act* prevents the Minister from reassessing Ms. Phillip for a particular taxation year more than three years after the original reassessment for

[10] No evidence was tendered by Ms. Phillip in respect of these assumptions, and accordingly I accept them as proven for the 2006 and 2007 taxation years. While I must accept that Ms. Phillip's tax preparer included fraudulent charitable donation claims when preparing tax returns, I do not have any evidence that the false claims included false childcare expenses. That fact was not assumed and no evidence was led by the Respondent to establish that fact. Accordingly, I did not give any weight to this assumption in rendering my decision.

that year was issued to her, except in certain circumstances - this is sometimes referred to as statute-barring. In this case, the Minister alleges Ms. Phillip made a misrepresentation in filing her returns, or in supplying any information under the Act, for these years that is attributable to neglect, carelessness or wilful default, and therefore the reassessments are not statute-barred.

[31] While Ms. Phillip's Notice of Appeal did not challenge the reassessments for 2003, 2004 and 2005 on the ground they were issued after the normal reassessment period, her counsel raised that at the outset of the hearing. The Reply filed by the Respondent asserts that Ms. Philip made a misrepresentation attributable to neglect, carelessness or wilful default and outlines the assumptions made by the Minister in reaching that conclusion. Clearly, the Respondent was prepared to address this issue.

[32] The onus to establish the misrepresentation and the neglect, carelessness or wilful default lies with the Respondent. While the standard is not a high one, the Respondent must present evidence to substantiate the misrepresentation and neglect, carelessness or wilful default. The Respondent cannot rely on the assumptions of fact to do so. As stated by my colleague Justice Graham in the *Amoako-Boatey v. R.*:[11]

> In proving the misrepresentation, the Minister may not rely on her assumptions of fact. In Ms. Amoako-Boatey's case, the misrepresentation that the Minister must prove is that Ms. Amoako-Boatey did not incur childcare expenses or did not incur those expenses in the amount she claimed.
>
> [13] . . . Had the foregoing been the only evidence before me, I would have found that the Minister had not proven that Ms. Amoako-Boatey made a misrepresentation in her 2005 tax return. ***The fact that Ms. Amoako-Boatey could not support her claim for childcare expenses does not necessarily mean that the Minister has proven a misrepresentation.*** If all that were required in order to prove a misrepresentation in respect of a deduction was that a taxpayer be unable to prove an entitlement to the deduction, then the burden would effectively remain on the taxpayer. That would defeat the entire purpose of a year being statute barred. ***The burden is on the Minister to prove that Ms. Amoako-Boatey did not incur the childcare expenses in question. To meet that burden, the Minister needs to do something more than simply point to a lack of evidence from Ms. Amoako-Boatey. At the very least, the Minister needs to be able to convince me that the reason Ms. Amoako-Boatey does not have any evidence of the***

[11] 2016 TCC 282.

> ***childcare expenses is that those expenses were never incurred. To do that, the Minister needs to do something more***.
>
> [Emphasis added.]

[33] In assessing Ms. Phillip beyond the normal reassessment period, the Minister relied on a number of assumptions of fact, but called no witnesses and tendered no evidence, relying on the evidence of Ms. Philip and her witnesses. The Minister's assumption of facts included that:

I. the 2003-2007 tax returns were prepared by tax preparers charged with defrauding the Government of Canada of income tax revenues in excess of $5,000 in respect of charitable donation claims made by them on behalf of their clients and that those tax preparers pleaded guilty to those charges; and

II. the Appellant sought out and retained the tax preparer because of their reputation for getting their clients large refunds.

[34] The Respondent provided no evidence to support these assumptions. The tax returns were not put in evidence. Neither the name of the tax preparer, nor any relevant facts about Ms. Phillip's relationship or financial arrangements with the tax preparer were addressed in evidence. The only evidence regarding her tax return filings related to how the tax preparer knew how much to claim as a childcare expense in each year: she would go to the accountants, tell them and they would prepare her "basic" return. When asked how she met the tax preparer, Ms. Phillip replied it was through a friend. Neither of these, in and of themselves, establishes these two assumed facts, and I find the Respondent has not met the onus to establish them as proven.

[35] The Minister also assumed the childcare expenses were material compared to Ms. Phillip's income and living expenses. Ms. Phillip's childcare expenses in 2003 to 2006 were high as a percentage of her income (ranging from approximately 19% to approximately 28%). Evidence, in the form of the documents Ms. Phillip submitted, and her testimony about her mortgage payments, her car and the cost of Matthew's activities, support this assumption. But, Ms. Phillip had other sources of funds and neither counsel asked her to quantify how much money she received from other sources. I am prepared to accept she did receive some funds from Matthew's father and her older children, although how much is unclear. Thus, although proven, this fact does not assist the Respondent on the statute barring issue.

[36] However, the Respondent does not need to prove those facts in order to succeed. To establish a misrepresentation, the Respondent needs to prove, on a balance of probabilities, that Ms. Phillip did not incur the childcare expenses she claimed in 2003, 2004 and 2005 (the misrepresentation) and that the misrepresentation was due to carelessness, neglect or wilful default. That can be proven through Ms. Phillip's testimony and evidence. In this case, I am satisfied that her testimony gave the Respondent the "something more" described by Justice Graham in *Amoako-Boatey*.

[37] Neither Mr. Richards nor Mr. Phillip were in Court to corroborate Ms. Phillip's evidence regarding the arrangements, how much they babysat, or the payments she claims to have made to them, notwithstanding testimony regarding the close relationships that she and her children enjoy with these individuals. Mr. Richards was a close friend of Terrance. Her nephew was described as being closer to, and growing up more with, Ms. Phillip's family than his own. No explanation was offered as to why the persons best able to testify as to the amounts Ms. Phillip claims to have paid them were not called as witnesses. This suggests to me they would not corroborate her evidence in this respect.

[38] Although the receipts for 2003, 2004 and 2005 that Ms. Phillip said she obtained from Mr. Richards in 2009 had a signature purporting to be that of Christian Richards, he was not in Court to identify them. Moreover, given her testimony, particularly concerning the circumstances in which these receipts were obtained (in 2009, some four to six years after the relevant taxation years, Mr. Richards calculated the amount she had paid him in those years with no records and gave her a receipt), I do not find them to be credible. I give them no weight.

[39] While three of Ms. Phillip's older children testified, only Liana lived with Ms. Phillip in the relevant taxation years and none of the three knew what hours Mr. Richards or Mr. Phillip babysat or how much their mother paid them. So, while their evidence may support her testimony that Mr. Richards and Mr. Phillip assisted with Matthew's care, it falls far short of establishing how much they helped or what amounts, if any, they were paid for doing so.

[40] Ms. Phillip's evidence, and the difficulties I had with it, are summarized above with regard to the 2006 and 2007 taxation years, but that summary is relevant to all five taxation years in issue. As detailed above, Ms. Phillip's testimony was inconsistent and simply not credible. I can only conclude that it was not truthful.

[41] I am satisfied that Ms. Phillip did not pay the amounts for childcare she claimed she paid in 2003, 2004 and 2005 and that she therefore made a misrepresentation in her tax returns. Ms. Phillip described her tax returns as basic; she said the only expense for the tax preparer was the childcare expense. She gave the tax preparer the information regarding the childcare expense. Based on her testimony, I am satisfied the tax returns had the wrong amounts, and that was so because she gave the tax preparer the wrong amounts in those years. Accordingly, in my view, the Respondent has met the onus and the Minister may reassess Ms. Phillip for the 2003, 2004 and 2005 taxation years beyond the normal reassessment period for those years. As Ms. Phillip did not incur the childcare expenses she claimed, and has not been able to establish what, if any, expenses she did incur, Ms. Phillip is not entitled to claim any amount for childcare expenses in 2003, 2004 and 2005.

VI. GROSS NEGLIGENCE PENALTIES

[42] A taxpayer who knowingly, or under circumstances amounting to gross negligence, has made or participated in, assented to or acquiesced in the making of, a false statement or omission in a tax return filed in respect of a taxation year is liable to a penalty, typically referred to as a gross negligence penalty. The Respondent bears the burden of establishing the facts justifying the assessment of the penalty. While there are some similarities between the prerequisites to reassessment beyond the normal reassessment period and the prerequisites to the imposition of gross negligence penalties, the latter is a more difficult test to meet. It requires the Respondent to establish that Ms. Phillip knowingly made a false statement in her return or did so in circumstances amounting to gross negligence.

[43] I am satisfied that the amounts claimed for childcare expense by Ms. Phillip were false and that she participated in the making of the false statement. She told the tax preparer what the expense was. This was not a case where Ms. Phillip made a modest error computing or estimating her childcare expense. She was not paying a fixed amount on a periodic basis and basing a claim on an estimate. Her testimony was that the amounts she claimed were the amounts she paid as calculated by Mr. Richards and Mr. Phillip and verified by her. But her explanations for how she knew the amounts were correct, did not ring true. No one maintained records to substantiate the amounts and I am far from satisfied she had any receipts before 2009. In the circumstances, particularly given her testimony about the payment arrangements, this is at least gross negligence. Accordingly, I am satisfied gross negligence has been established, and therefore Ms. Phillip is liable for the gross negligence penalties assessed by the Minister.

VII. CONCLUSION

[44] I accept that Ms. Phillip needed childcare for Matthew so she could work and go to school. I am even prepared to accept that she may have relied in part on Mr. Phillip and Mr. Richards to provide some of that childcare. However, I am not at all satisfied that they were the only or even primary caregivers, that they provided nearly as much childcare as she claims they did, or that she paid them anything close to the amounts she claimed she did. Accordingly, for the reasons set out above:

2. Ms. Phillip's time to file a Notice of Appeal for the 2003, 2004, 2005, 2006 and 2007 taxation years is extended to November 19, 2018 and her Notice of Appeal is deemed to be valid and timely filed on November 19, 2018;

3. Ms. Phillip's appeal for the 2003, 2004, 2005, 2006, and 2007 is dismissed; and

4. Neither party is awarded costs.

Signed at Toronto, Ontario, this 13th day of February 2019.

"K.A. Siobhan Monaghan"

Monaghan J.

CITATION:	2019 TCC 37
COURT FILE NO.:	2017-2555(IT)I
STYLE OF CAUSE:	GLENDA PHILLIP v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 19, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice K.A. Siobhan Monaghan
DATE OF JUDGMENT:	February 13, 2019

APPEARANCES:

Counsel for the Appellant:	Jeff Kirshen Boris Livshits (Articling Student)
Counsel for the Respondent:	Pallavi Gotla Idorenyin Udoh-Orok (Articling Student)

COUNSEL OF RECORD:

For the Appellant:

Name:	Jeff Kirshen
Firm:	Rosen Kirshen Tax Law Toronto, Ontario
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada