Docket: 2019-4072(IT)I

BETWEEN:

OTONG HENO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on September 23 and 24, 2020, at Ottawa, Canada.

Before: The Honourable Justice Johanne D'Auray

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Jean-Philippe Vinette

JUDGMENT

The appeals for the 2003, 2004 and 2007 taxation years are dismissed on the grounds that, based on the facts, the Minister was entitled to make reassessments after the normal assessment period for the 2003 and 2004 taxation years pursuant to subparagraph 152(4)(a)(i) of the *Income Tax Act* (the Act). The appellant could not claim charitable donations.

The Minister also properly assessed penalties for the 2003, 2004 and 2007 taxation years under subsection 163(2) of the Act.

Signed at Ottawa, Canada, this 1st day of December 2020.

"Johanne D'Auray"

D'Auray J.

Citation: 2020 TCC 127
Date: 20201201
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OTONG HENO,

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and

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REASONS FOR JUDGMENT

D'Auray J.

I. Overview

[1] The Minister of National Revenue (the Minister) reassessed Mr. Heno for the 2003, 2004 and 2007 taxation years.

[2] The reassessments for the 2003 and 2004 taxation years were made after the normal assessment period pursuant to subparagraph 152(4)(a)(i) of the *Income Tax Act* (the Act).

[3] Under these reassessments, the Minister disallowed the charitable tax credits that Mr. Heno had claimed in his income tax returns. The minister also assessed penalties pursuant to subsection 163(2) of the Act.

[4] Mr. Heno argued that he had never made charitable donations. He therefore maintained that the reassessments were ill-founded in fact and in law.

II. Facts

[5] Anna Tran testified for the respondent. She is a Canada Revenue Agency Appeals Officer. She is responsible for processing Mr. Heno's notices of objection regarding the years at issue.

[6] Ms. Tran said Mr. Heno's case was part of a nationwide project involving cases where taxpayers made a misrepresentation with respect to charitable donations and tuition fees for which they claimed tax credits on their income tax returns.

[7] Ms. Tran explained that on January 5, 2009, Marcel Gagné, Special Projects, CRA Audit Division, sent Mr. Heno a letter. Mr. Gagné's letter explained that the CRA had uncovered several schemes involving tuition fees and charitable donations. In particular, Mr. Gagné wrote the following:

> [TRANSLATION]
> The Canada Revenue Agency (CRA) has uncovered several schemes where promoters and/or tax return preparers have sold or provided taxpayers with fictitious or false receipts for tax credits for tuition fees and educational expenses and charitable donations, often for a fee. Taxpayers then used these receipts to file their returns and obtain personal income tax refunds. In response, the CRA will conduct a thorough review of taxpayer returns to ensure that the claims comply with the *Income Tax Act*. If the claims are not valid, they will be disallowed and the returns will be reassessed.
>
> We have received information that you may have profited from such a scheme and claimed one or more deductions on your T1 Income Tax and Benefit Returns for the 2003, 2004, and/or 2007 taxation years that were based on unsupported or forged documents. However, before initiating any examination, we want to give you the opportunity to correct any inaccurate or incomplete information on your return. . . .

[8] In his January 5, 2009, letter, Mr. Gagné also asked Mr. Heno to send him the original receipts for all charitable donations to support the charitable tax credits that he claimed on his income tax returns as well as any other proof that the donations were made. For example, Mr. Heno could provide bank statements, cancelled cheques, debit or credit notes or credit card statements confirming the donations.

[9] On March 1, 2009, a letter bearing Mr. Heno's signature was sent to Mr. Gagné at the CRA. Attached to this letter were receipts made out in Mr. Heno's name for donations of $9,400 for the 2003 taxation year, $3,425 for the 2004 taxation year, and $5,600 for the 2007 taxation year. The amounts were equal to the amounts claimed as charitable donations on Mr. Heno's income tax returns.

[10] Tuition receipts were also attached to the March 1, 2009, letter. Mr. Heno had also claimed tuition tax credits on his 2004 and 2007 income tax returns. However, at the hearing, Mr. Heno indicated that he was no longer challenging the reassessment of tuition fees and that his appeal should be dismissed in this regard.

[11] Ms. Tran explained that, according to the information obtained by the CRA, during the taxation years in question, Mr. Heno hired Mr. Frimpong (the "preparer") to prepare his income tax returns.

[12] According to Ms. Tran, Mr. Frimpong prepared false or fictitious receipts for charitable donations and tuition fees. Mr. Frimpong also provided his services under the names AAA Ashati Accounting Services, AAS Ahsanti Accounting Services, and Nyasco Accounting Services. Mr. Frimpong was indicted under the *Criminal Code*. However, according to Ms. Tran, Mr. Frimpong left the country.

[13] Ms. Tran explained that persons who prepare tax returns for taxpayers must register with the CRA if they wish to file their clients' tax returns electronically. The CRA gives the preparers a filing code. In this case, the code that the CRA assigned to Mr. Frimpong was D6657.

[14] The code on Mr. Heno's 2007 income tax return was D6657, Mr. Frimpong's code. This is how the CRA determined that Mr. Heno was using Mr. Frimpong's services to prepare his tax returns. According to Ms. Tran, Mr. Frimpong also prepared Mr. Heno's 2003 and 2004 tax returns, but they were filed with the CRA on paper.

[15] According to Ms. Tran, for additional fees, the preparer would claim charitable donations for his clients and obtain fictitious receipts. The refunds that the clients received were higher than the fees they paid Mr. Frimpong for obtaining the fictitious receipts.

[16] Mr. Heno testified that he did not know Mr. Frimpong and was not familiar with the company names AAA Ashati Accounting Services, AAS Ahsanti Accounting Services and Nyasco Accounting Services. He testified that he hired Raoul Komlan to prepare his tax returns.

[17] Mr. Heno testified that he did not write the March 1, 2009, letter to the CRA. He claimed that he did not write in English. Furthermore, the signature on the letter was not his.

[18] Mr. Heno also claimed that the mailing address on the March 1, 2009, letter was incorrect. Had he written that letter, he would have written the correct address. Mr. Heno's address on the letter was 130 Meadow Wood Crescent, Hamilton. According to Mr. Heno, he was not living at that address on that date. According to

the computer statement filed by the CRA, Mr. Heno's mailing address in March 2009 was 130 Meadow Wood Crescent, Hamilton, Ontario L8J 3Z8.

[19] On October 13, 2009, the Minister issued notices of reassessment for the 2003, 2004 and 2007 taxation years. In these reassessments, the Minister disallowed the charitable tax credits and tuition tax credits claimed by Mr. Heno.

[20] On December 4, 2009, notices of objection signed by Mr. Heno were filed with respect to the 2003, 2004 and 2007 taxation years. Although I am quoting the Notice of Objection for the 2003 taxation year, the reasons given by Mr. Heno were the same in the notices of objection for the 2004 and 2007 taxation years: [TRANSLATION]

> DEAR SIR:
>
> I HAVE JUST OBJECTED TO MY NOTICE OF REASSESSMENT FOR 2003 FOR THE FOLLOWING REASONS:
>
> THE DONATION RECEIPTS AND OTHER DOCUMENTS PRODUCED ARE VALID. THE CHARITABLE ORGANIZATION'S REGISTRATION NUMBER IS CLEARLY POSTED ON THE CANADA REVENUE AGENCY WEBSITE. THIS IS WHY I AM ASKING THE CHIEF OF APPEALS TO REVIEW MY 2003 NOTICE OF REASSESSMENT.
>
> SINCERELY,
>
> THANK YOU

[21] Mr. Heno testified that he did not file these notices of objection with the CRA. Mr. Heno recognized his signature on the notices of objection. However, according to him, someone imitated his signature on these documents.

[22] Mr. Heno also testified that the address shown on the notices of objection was incorrect. According to him, he never resided at 114 Meadow Wood Crescent, Stoney Creek, Ontario, L8J 3Z8. According to computerized copies of the CRA taxpayer address registry, Mr. Heno's address in December 2009 was 114 Meadow Wood Crescent, Stoney Creek, Ontario, L8J 3Z8.

[23] On December 4, 2009, another letter bearing Mr. Heno's signature was addressed to the CRA. Mr. Heno stated the following in his letter:

> [TRANSLATION]

> Note that I had not received my documents (receipts, etc.). I only received my Notice of Reassessment. They are on file at the Canada Revenue Agency. So, I ask you to refer to my file in your possession to consult my evidence regarding this objection. (*sic*)

[24] Mr. Heno also argued that he was not the author of this letter. He alleged that someone imitated his signature. He also claimed that the address on the December 4, 2009, letter was not his address, because he never lived at 114 Meadow Wood Crescent, Stoney Creek, Ontario, L8J 3Z8.

[25] Mr. Heno testified that he did not know the preparer, Mr. Frimpong. Mr. Heno entered into evidence the business card of Raoul Komlan, the preparer that he said he hired to prepare his tax returns. No other document was entered into evidence to establish that Mr. Heno's tax preparer was in fact Mr. Komlan. Mr. Komlan did not testify at the hearing.

[26] Mr. Heno also indicated that prior to the hearing he had never seen the receipts for his charitable donations filed by the respondent.

[27] Mr. Heno admitted on cross-examination that he did not verify his tax returns before they were filed with the CRA. According to Mr. Heno, the preparer would send his tax returns directly to the CRA without Mr. Heno having read them.

III. Positions of the parties

[28] Mr. Heno argued that he had never made charitable donations. He submitted that it was ridiculous that he had claimed charitable donations of $9,400 in 2003 and $3,425 in 2004 to The Redemption Power International Ministry and $6,090 in 2007 to Revival Time Ministries, while his annual income was $26,168 in 2003, $24,865 in 2004 and $24,712 in 2007. He argued that, logically, he could not afford to make such large donations.

[29] He also argued that he had never claimed charitable tax credits since he started filing income tax returns in 1988.

[30] He also submitted that he was not familiar with The Redemption Power International Ministry and Revival Time Ministries.

[31] According to Mr. Heno, a person allegedly stole his identity and claimed charitable tax credits using his identity. He alleged that there was a conspiracy between the CRA and his tax preparer.

[32] Mr. Heno therefore argued that he did not make any misrepresentation that was attributable to neglect, carelessness or wilful default, nor did he commit any fraud as set out in subparagraph 152(4)(a)(i) of the Act.

[33] For the same reasons, he also argued that the penalty assessed by the Minister pursuant to subsection 163(2) of the Act should be vacated.

[34] The respondent argued that Mr. Heno made a misrepresentation attributable to neglect, carelessness or wilful default by failing to verify his tax returns before they were sent to the CRA.

[35] According to the respondent, Mr. Heno claimed that he had not made any charitable donations. If so, when Mr. Heno was checking his tax returns, he could easily have noted that charitable tax credits had been claimed, and the preparer could easily have made corrections. By failing to verify his income tax returns, Mr. Heno failed to exercise due diligence.

[36] The respondent also argued that had Mr. Heno checked his tax returns, he would have questioned the preparer about the refunds, which were high because of the charitable donations that were reported.

[37] The respondent argued that Mr. Heno was not a credible witness. As part of the national project relating to Mr. Frimpong, Mr. Heno was identified as a client of Mr. Frimpong. Mr. Frimpong issued fictitious charitable donation receipts to several taxpayers.

[38] Furthermore, the respondent argued and provided supporting evidence that Mr. Heno claimed charitable tax credits on his 2003 and 2004 income tax returns. The refunds were deposited directly into Mr. Heno's bank account. The money was then drawn from the account to offset debts that Mr. Heno owed to Immigration Canada. In this regard, the copies of computer statements submitted by the respondent showed that the CRA had sent refunds to Mr. Heno.

[39] The respondent also argued that the Minister properly assessed penalties against Mr. Heno because Mr. Heno knew that he could not claim tax credits for charitable donations he did not make. In addition, he committed gross negligence in not checking his tax returns. A reasonable person in the same situation, i.e. an educated man like Mr. Heno, would have checked his tax returns before they were sent to the CRA.

IV. Issues

[40] Did the Minister establish that Mr. Heno made a misrepresentation attributable to neglect, carelessness or wilful default, or commit a fraud in filing his 2003 and 2004 income tax returns, which entitled him to make reassessments pursuant to subparagraph 152(4)(a)(i) of the Act?

[41] Was the Minister right in disallowing the charitable tax credits that Mr. Heno claimed on his 2007 tax return?

[42] Did the minister properly assess penalties under subsection 163(2) of the Act?

V. Analysis

[43] Under subparagraph 152(4)(a)(i) of the Act, the Minister may at any time make a reassessment after the normal assessment period when the taxpayer, or the person filing the return of income, makes any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud.

[44] Under subparagraph 152(4)(a)(i) of the Act, the onus is on the Minister to demonstrate that:

(a) in filing his income tax return, the taxpayer has made a misrepresentation;

(b) this misrepresentation is attributable to neglect, carelessness, wilful default or fraud.

[45] The landmark decision dealing with what constitutes negligence within the meaning of subparagraph 152(4)(a)(i) of the Act is *Venne v. Canada*.[1] In that decision, Mr. Justice Strayer of the Federal Court of Canada said negligence is established if the taxpayer is shown to have failed to exercise due diligence in filing his tax returns.

[46] In this regard, in *Gebhart v. Canada*,[2] the Federal Court of Appeal confirmed that, for the purposes of subparagraph 152(4)(a)(i) of the Act, Judge Strayer's

[1] *Venne v. Canada*, [1984] F.C.A. No. 314 (QL).
[2] *Gebhart v. Canada*, 2008 FCA 206.

statement in *Venne v. Canada* applies, i.e. that *[r]easonable care is defined as the care that would be expected of a wise and prudent person in the same circumstances.*

[47] In this case, Mr. Heno alleged that the person who prepared his tax returns was negligent. Mr. Heno argued that the preparer used his identity to claim charitable tax credits without his knowledge. He argued that he should not be penalized for acts committed by his tax return preparer.

[48] In *Aridi v. The Queen*,[3] Mr. Justice Hogan analyzed cases where taxpayers claimed to have relied solely on their accountant in preparing their tax returns. He held that the courts did not accept the taxpayer's argument when the facts showed that the taxpayer did not carefully examine or read his tax returns, more particularly when the taxpayer could easily have noticed the misrepresentation. At paragraph 43 of his reasons, Judge Hogan wrote the following:

> . . . For one thing, in each [decision], the court came to the conclusion that the taxpayer had not carefully examined or had simply not read the tax returns before signing them. For another, in a number of these decisions, the court found that the taxpayer could have easily noticed the existence of the misrepresentation if the taxpayer had asked questions or taken the trouble to do a more thorough analysis. Lastly, in some cases, the court held that the taxpayer had to know, given the situation, that there was a misrepresentation.

[49] I am of the opinion that Mr. Heno made a misrepresentation. Mr. Heno testified that he did not read or review his tax returns. The preparer allegedly sent the tax returns to the CRA without Mr. Heno having examined them. In my opinion, had Mr. Heno examined his tax returns, he would easily have found that he had claimed tax credits for charitable donations of $9,400 on his 2003 income tax return and $3,425 on his 2004 income tax return, although he had not made these donations. He was therefore negligent in failing to check his tax returns before they were sent to the CRA.

[50] At any rate, I am of the opinion that Mr. Heno's version of the facts does not stand up to scrutiny. According to Mr. Heno, his tax return preparer, in conjunction with the CRA, claimed charitable tax credits and produced fictitious charitable donation receipts. His preparer allegedly stole his identity unbeknownst to him. I am of the view that the evidence that the respondent filed at the hearing contradicts Mr. Heno's version of the facts.

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[3] *Aridi v. The Queen*, 2013 TCC 74.

[51] According to options C, i.e. the computerized copies of Mr. Heno's income tax returns, it appears that Mr. Heno claimed the amounts of $9,400 in 2003, $3,425 in 2004 and $6,090 in 2007 as charitable donations.

[52] On January 5, 2009, the CRA wrote to Mr. Heno, advising him that it had uncovered several schemes in which promoters or tax preparers had sold or provided taxpayers with false or fictitious receipts, often in exchange for money, that taxpayers used to claim tax credits for tuition fees and charitable donations. The letter stated that, based on the information obtained, Mr. Heno could have profited from such a scheme. The CRA also advised Mr. Heno that he had the opportunity to correct any inaccurate or incomplete information on his tax returns by submitting a T1 Adjustment Request form to the CRA. The CRA decided not to assess penalties if the T1 Adjustment Request form was sent to it within a specified time period. The letter also stated that, if charitable donations had been made, the original charitable donation receipts would have been sent to the CRA along with any other supporting documents.

[53] Following the January 5, 2009, letter from the CRA, a letter dated March 1, 2009, was sent to the CRA. The receipts for charitable donations and tuition fees were attached to this letter. Mr. Heno testified that the signature on this letter was not his. The respondent did not challenge Mr. Heno's allegation. First, the letter was written in English, whereas Mr. Heno always writes his letters in French. Second, although I am not a subject matter expert, it is clear that the signature on the March 1, 2009, letter was not Mr. Heno's. However, as the respondent argued, it was surely Mr. Heno's preparer who sent the letter to the CRA in response to the CRA's January 5 letter asking Mr. Heno to provide the original receipts for the charitable donations and tuition fees.

[54] Be that as it may, under the circumstances, this letter was but a weak link among other pieces of evidence that led me to find that Mr. Heno's version was not true. For example, charitable tax credits were claimed on his tax returns. Also, in his December 4, 2009, notices of objection, Mr. Heno stated that he made charitable donations for the 2003, 2004 and 2007 taxation years. He maintained that the donation receipts and other documents were valid and that the names of the charitable organizations were posted on the CRA website.

[55] Furthermore, Mr. Heno also sent the CRA a letter dated December 4, 2009, in which he indicated that the charitable donation receipts for the relevant years were already on file at the CRA. As a result, he could only be referring to the letter sent

by his preparer dated March 1, 2009, to which the charitable donations were attached.

[56] In light of this evidence, it is difficult for Mr. Heno to argue that he did not claim charitable tax credits on his tax returns for the relevant years.

[57] Also, Mr. Heno received refunds that were largely attributable to the charitable tax credits that were claimed. At the hearing, Mr. Heno did not deny that he obtained refunds and that they were deposited in his bank account by the CRA or were used to pay a debt that Mr. Heno owed Immigration Canada.

[58] If, as Mr. Heno argued, someone had in fact stolen his identity to claim charitable tax credits, two tax returns would have been entered in the CRA computer system, which was not the case. I asked Mr. Heno if he had reported the theft of his identity to the police. He said he had not.

[59] Mr. Heno also maintained that the CRA letters were sent to addresses that were not his. However, I verified the copy of the CRA's computerized address registry to confirm Mr. Heno's address, and the addresses used by the CRA matched the addresses provided or used by Mr. Heno when his income tax returns were filed.

[60] Based on this evidence, I find that Mr. Heno's version of the facts regarding the theft of his identity is not true.

[61] Also, as I have already indicated, if the preparer was the person who claimed charitable tax credits unbeknownst to Mr. Heno—a version I do not agree with—Mr. Heno was negligent in not verifying his income tax returns.

[62] Consequently, the CRA was entitled to make reassessments after the normal assessment period for the 2003 and 2004 taxation years because it determined that Mr. Heno had made a misrepresentation in his tax returns by claiming tax credits for charitable donations that he had not made.

[63] I am of the view that Mr. Heno was negligent in failing to verify his tax returns in which he claimed tax credits for alleged charitable donations that he supported by providing the CRA with fictitious receipts.

[64] With regard to the 2007 taxation year, the reassessment was made within the timeframes required by the Act. In light of my finding in respect of the 2003 and 2004 taxation years, it is clear that Mr. Heno cannot claim a charitable tax credit for

the 2007 taxation year. In any event, Mr. Heno admitted that he did not make any charitable donations for the 2007 taxation year.

[65] I must now determine whether the minister properly assessed penalties under subsection 163(2) of the Act. This subsection reads as follows:

> Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of . . .

[66] Under subsection 163(3) of the Act, the respondent is responsible for establishing, on a balance of probabilities, the facts justifying the assessment of the penalty against the appellant under section 163.2 of the Act.

> Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[67] Therefore, the respondent must establish that:

- Mr. Heno made false statements on his tax returns;
- the appellant did so knowingly or under circumstances amounting to gross negligence.

[68] In *Wynter v. The Queen*,[4] Mr. Justice Rennie stated the following on the meaning to be given to the terms "knowingly" and "gross negligence" used in subsection 163(2) of the Act:

> [11] When Parliament uses alternative terms, it is assumed that it intended them to have different meanings. Put otherwise, Parliament does not repeat itself: see Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016) at 43. Section 163 allows the imposition of penalties where the taxpayer has knowledge *or* in circumstances amounting to gross negligence. The section is not conjunctive, and presumptively, these two terms differ in their meaning and content.
>
> [12] The distinction between gross negligence – determined by an objective assessment of the comportment of the taxpayer – and wilful blindness – determined

[4] *Wynter v. The Queen*, 2017 FCA 195.

> by reference to the taxpayer's subjective state of mind – has a long history. Admittedly, it is, on occasion, a fine distinction and one that is not always clearly drawn. Nonetheless, Parliament is taken to have been cognizant of the distinction.

[69] Furthermore, Judge Rennie explained that a taxpayer meets the "knowingly" requirement, not only when the taxpayer actually intends to make a false statement but also when the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know the truth or wants to studiously avoid the truth. In these circumstances, the doctrine of wilful blindness imputes knowledge to the taxpayer:

> [13] A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: *R. v. Briscoe*, 2010 SCC 13 at paras. 23-24, [2010] 1 S.C.R. 411 (*Briscoe*); *Sansregret* at para. 24. In these circumstances, the doctrine of wilful blindness imputes knowledge to a taxpayer: *Briscoe* at para. 21. Wilful blindness is the doctrine or mechanism by which the knowledge requirement under subsection 163(2) is met.
>
> . . .
>
> [16] In sum, the law will impute knowledge to a taxpayer who, in circumstances that suggest inquiry should be made, chooses not to do so. The knowledge requirement is satisfied through the choice of the taxpayer not to inquire, not through a positive finding of an intention to cheat.
>
> [17] While evidence, for example, of an actual intent to make a false statement would suffice to meet the "knowingly" requirement of subsection 163(2), requiring an intention to cheat to establish wilful blindness is inconsistent with the well-established jurisprudence that wilful blindness pivots on a finding that the taxpayer deliberately chose not to make inquiries in order to avoid verifying that which might be such an inconvenient truth. The essential factual element is a finding of deliberate ignorance, as it "connotes 'an actual process of suppressing a suspicion'": *Briscoe* at para. 24. I would add that, in the context of subsection 163(2), references to "an intention to cheat" are a distraction. The gravamen of the offence under subsection 163(2) is making of a false statement, knowing (actually or constructively, i.e., through wilful blindness) that it is false.

[70] With respect to the gross negligence test, in *Wynter*, Judge Rennie stated that the *[g]ross negligence [test] is distinct from [the] wilful blindness [test]. [Gross negligence] arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer.*

[71] The landmark decision on what constitutes gross negligence within the meaning of subsection 163(2) of the Act is the Federal Court of Appeal decision in *Venne v. The Queen*. In *Venne*, Justice Strayer described what constitutes gross negligence in the following terms:

> "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.

[72] Wilful blindness will be established if the respondent establishes on a balance of probabilities that the taxpayer subjectively knew that the statements in his or her income tax return were false but chose not to make further inquiries because he or she subjectively knew or strongly suspected that the inquiries would provide him or her with the knowledge that the statements were indeed false Since it is a subjective test, the personal attributes of the individual may be considered in determining whether the individual is wilfully blind.

[73] On the other hand, the "gross negligence" standard is an objective test. Gross negligence will be established by taking into account the expected conduct of a reasonable person in the same circumstances. Consequently, the personal attributes of a taxpayer should not be taken into account. This Court has stated that the burden on the Crown is to prove on a balance of probabilities that the conduct of a taxpayer represented a marked and substantial departure from the conduct of a reasonable person in the same circumstances. In *Sidhu v. The Queen*,[5] Justice Hershfield stated as follows:

> . . . The burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes. The burden is to prove on a balance of probability such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense. . . .

[74] In this case, I am of the view that the respondent has established that the Minister properly assessed penalties. Mr. Heno knew that he could not claim charitable tax credits for donations that he had not made. Mr. Heno is a substitute teacher. He is an educated person. He has been filing income tax returns since 1988. In addition, the charitable donations were high as a percentage of Mr. Heno's income. It seems to me that the refunds obtained for the relevant years should have raised doubts and prompted Mr. Heno to ask his tax return preparer why he was

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[5] *Sidhu v. The Queen*, 2004 TCC 174.

entitled to such refunds. Mr. Heno preferred to collect the refunds and not ask questions.

[75] Furthermore, Mr. Heno's conduct in this appeal fell well short of the conduct to be expected of a reasonable taxpayer in a comparable situation. Mr. Heno did not read his tax returns before they were filed with the CRA. By claiming tax credits for charitable donations that he had not made, Mr. Heno demonstrated an indifference as to whether he complied with the Act. Therefore, Mr. Heno committed gross negligence within the meaning of subsection 163(2) of the Act.

[76] In light of these facts, Mr. Heno's appeal is dismissed without costs.

Signed at Ottawa, Canada, this 1st day of December 2020.

"Johanne D'Auray"

D'Auray J.

CITATION:	2020 TCC 127
DOCKET:	2019-4072(IT)I
STYLE OF CAUSE:	OTONG HENO AND HER MAJESTY THE QUEEN
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	December 1, 2020

APPEARANCES:

For the appellant	The appellant himself
Counsel for the respondent:	Jean-Philippe Vinette

COUNSEL OF RECORD:

For :

Name:

Firm:

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