Docket: 2018-394(IT)I

BETWEEN:

PRINCE KYEI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 14, 2020 at Toronto, Ontario

Before: The Honourable Justice B. Russell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Rebecca L. Louis

JUDGMENT

The appeal of three reassessments raised November 17, 2009 under the federal *Income Tax Act* for the Appellant's respective 2004, 2005 and 2006 taxation years is dismissed, without costs.

Signed at Halifax, Nova Scotia this 17th day of February 2021.

"B. Russell"

Russell J.

Citation: 2021 TCC 10
Date: 20210217
Docket: 2018-394(IT)I

BETWEEN:

PRINCE KYEI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Russell J.

[1] The Appellant appeals three reassessments raised November 17, 2009 under the federal *Income Tax Act* (Act) regarding his respective 2004, 2005 and 2006 taxation years. Each reassessment denies a charitable donation tax credit claimed per subsection 118.1(2) of the Act. Except as otherwise noted, statutory references herein are provisions of the Act.

[2] The 2004 and 2005 taxation year reassessments are, as commonly termed, "statute-barred". That is, each was raised beyond its limitation period, being the applicable "normal reassessment period" defined at paragraph 152(3.1)(b). That definition, in the case of these two statute–barred reassessments, provides for a normal reassessment period of three years from date of initial assessment for the particular taxation year. Statute-barred reassessments are invalid, unless an exception as provided in subsection 154(4) applies. In this regard, the Respondent (Crown) relies upon subparagraph 152(4)(a)(i) to establish procedural validity of these two statute-barred reassessments. The reference to procedural validity is to distinguish from a procedurally validly raised reassessment that nevertheless on its merits may be erroneous.

[3] Subparagraph 152(4)(a)(i) procedurally perfects a statute-barred reassessment where, ". . . the taxpayer or person filing the return has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, . . ."

[4] The Respondent bears the civil onus of proving on a balance of probabilities its assertion that subparagraph 152(4)(a)(i) applies. In satisfying this onus, the presumption of correctness of pleaded assumptions of fact made by the Minister of National Revenue (Minister) in raising a reassessment does not operate. That presumption favouring the Respondent only operates in considering the substantive merits of a procedurally valid reassessment.

[5] I now address whether subparagraph 152(4)(a)(i) applies so as to procedurally validate either or both of the appealed statute-barred 2004 and 2005 taxation year reassessments.

[6] At the hearing a Canada Revenue Agency (CRA) litigation officer's affidavit was entered in evidence per subsection 244(9). It reflects that the Appellant reported annual income in the $40,000 to $47,000 range for his 2004, 2005 and 2006 taxation years. It shows also that he claimed charitable deductions for taxation years 2003 through 2010, of which the 2003 claim for $2,207 was partially denied, the 2004 through 2008 claims were wholly denied and the more modest 2009 ($300) and 2010 ($920) claims were wholly accepted.

[7] The Appellant, called as the Respondent's sole witness, testified that he made charitable donations in the 2004, 2005 and 2006 taxation years of $5,125, $7,009 and $5,119 respectively. He testified he did not make the donations directly but rather through his tax return preparer, one Raymond Frempong (RF), a "tax preparer" with Orbit Financial Services Ltd. (Orbit).

[8] The Appellant testified that RF told him that he (RF) would convey the said donations to a particular church charity that RF identified and recommended, although unknown to the Appellant; and also that RF would obtain and keep the required donation receipts, in case CRA should come calling. The Appellant testified he was agreeable to the three donations for the three years going to this charity, because this charitable institution was a church.

[9] The Appellant stated that he trusted RF, and so felt no need to contact RF each year to ensure RF had actually made that year's agreed upon donation. The Appellant had engaged RF annually since 2000 to prepare and file his returns, so by 2004 a

basis for him knowing and trusting RF had been established. He had become aware of RF through a friend. The Appellant responded in the negative to Respondent's counsel's assertion that his referring friend had told the Appellant he would obtain larger refunds through RF. (The Respondent called no evidence substantiating this denied assertion.) The Appellant further testified that he paid the particular donation amount for each year to RF in cash. He said also that each year RF would review the prepared income tax return with him before RF filed same.

[10] The Appellant testified that he had never seen the charitable donation receipt for $5,119, produced by the Respondent as part of the 2006 return, which was paper-filed. The 2004 and 2005 returns were each e-filed.

[11] The Appellant had no records, including such as bank account statements, corroborating that he had made cash payments of the donated amounts in 2004, 2005 and 2006, to enable RF to make the actual donation on the Appellant's behalf. The Appellant further testified that he had neither sought nor obtained any advantage in return for making these charitable donations.

[12] The Appellant was asked why in his Notice of Appeal he referred to " . . . the charitable donations I purchased." He had no specific, clarifying answer.

[13] RF's associate at Orbit, to whom I refer by the initials, "IA", and Orbit itself, were charged with defrauding the federal government of income tax revenue, in respect of operating a fraudulent charitable donation scheme. A transcript of the 2011 Ontario Superior Court proceedings respecting IA's guilty pleas personally and for Orbit, and subsequent sentencing (admissible per section 28 of the federal *Evidence Act*) reflects that, whether or not knowingly, many Orbit clients had participated in an extensive false charitable donation scheme.

[14] The scheme was described at IA's sentencing hearing of June 16, 2011 in an Agreed Statement of Facts, which read in part (transcript, pp. 9-10):

> The scheme operated as follows: [IA] would offer his clients the opportunity to give him money for charitable donations in order either to receive a larger tax refund from the CRA or to pay reduced taxes. [He] would tell his clients that the money was going to be donated to an African Church or to a charity in Africa. Clients advised the CRA that [IA] prepared the tax returns for a fee ranging from 40 to 60 dollars. [IA] would then charge them an additional fee of approximately 10 percent of the charitable donation amount claimed on their behalf. For example, [IA] would charge his client $400 and report a charitable donation amount of $4,000 on the client's personal tax return. If a client did not have the money to pay

> [IA] immediately for a donation, [IA] would make an arrangement with the client to be paid after the client received their tax refund.
>
> A charitable donation receipt was usually produced by [IA] only when it was requested by the CRA. Clients advised that when [IA] prepared the tax return to be e-filed, he provided them only with a one-page income tax summary which did not show the extent of the charitable donation being claimed. Clients also advised that when a paper copy of their tax return was filed, [IA] showed them the last page only, which they signed. As a result of being contacted by the CRA with questions about their donations, some of [IA's] clients returned to Orbit's office only to be told that [IA] was out of the country and that there was nothing anyone at Orbit could do for them other than to suggest that the client file an appeal with the CRA.
>
> Those are the Agreed Statement of Facts, Your Honour.

[15] The transcript shows also that the Crown prosecutor (transcript, p. 26) told the Court that this scheme had been developed by RF, who subsequently had hired IA to work with him at Orbit, as a "tax preparer". Further, apparently RF also had been charged, like IA, although not tried or convicted. The transcript notes (p. 26) the Crown prosecutor's statement that, "[RF] absconded upon posting bail and is believed to be in Ghana."

[16] The Appellant testified that when CRA first contacted him questioning the claimed charitable deductions he went to RF's office to have RF produce to CRA his charitable deduction receipts. But RF was no longer there and CRA had seized the records kept at that office. The Appellant now considers that his trust in RF had been misplaced.

[17] The said transcript says nothing about the Appellant himself.

[18] At paragraph 10 of the Respondent's Reply there are pleaded various assumptions of fact said to have been made by the Minister in reassessing for the 2004, 2005 and 2006 taxation years. These assumptions are set out below. But as already stated, for the statute-barred 2004 and 2005 taxation year reassessments these ministerial assumptions carry no presumptive weight in determining whether per subparagraph 152(4)(a)(i) any misrepresentations attributable to neglect, carelessness or wilful default had been made.

[19] At paragraph 11 of the Respondent's Reply is pleaded that in deciding for the 2004 and 2005 taxation year reassessments that the Appellant had made a misrepresentation attributable to neglect, carelessness or wilful default, the Minister

relied on "additional facts" as therein pleaded. Those assertions of fact also carry no presumptive weight in considering the applicability of subparagraph 152(4)(a)(i).

[20] The Respondent submitted respecting subparagraph 152(4)(a)(i) that the misrepresentation made in each of the Appellant's 2004 and 2005 returns was that charitable donations of $5,125 and $7,009 respectively had been made. I concur that these statements in each case constitute a misrepresentation. That is, I accept from the foregoing evidence adduced at the hearing that it is more likely than not that these claimed charitable donations were not made. In short, this is because of the uncontested evidence that RF and his associate IA and the firm Orbit had run an extensive false charitable donation scheme for several years including 2004, 2005 and 2006, and the lack of any evidence corroborating the Appellant's assertion that these claimed charitable donations had been made.

[21] Having found there was a misrepresentation for each of the 2004 and 2005 taxation year reassessments, the next question is whether per subparagraph 152(4)(a)(i) the evidence establishes that those misrepresentations were attributable to neglect, carelessness or wilful default of the Appellant. The law with respect to "neglect" in this context requires consideration as to whether the taxpayer had exercised reasonable care (*Venne v. The Queen*, 84 DTC 6247 (FCTD) at 6251). The Respondent points to the complete lack of books or records of the Appellant corroborating that he paid the claimed sums in cash to the RF, and also that the Appellant had not followed up with RF to ensure that the cash amounts indeed had been paid over to the selected charity.

[22] As well I again note the Appellant's Notice of Appeal reference to his having "purchased" the donations. I also have in mind that each of the actual claimed donation amounts constitutes a notable percentage of the Appellant's $40,000 to $47,000 annual income for these years. This lessens the likelihood that those claimed amounts, as opposed to a much lesser "fee", had been paid by the Appellant to RF in cash. I note also that the Appellant was content to have RF specify the actual charity that would receive the donation – a charity unknown to the Appellant. That to me is unlikely, particularly if the claimed amounts were wholly paid to RF by the Appellant, as opposed to a "fee". For these reasons I conclude that the identified misrepresentation for each of the 2004 and 2005 taxation years was attributable to, at the least, neglect or carelessness on the part of the Appellant.

[23] I observe that subparagraph 152(4)(a)(i) applies in respect of, "the taxpayer or person filing the return". Here the "person filing the return" may have been RF as distinguished from the Appellant qua taxpayer. But regardless, when

subparagraph 152(4)(a)(i) is found to apply, as it has here, it operates so as to validate procedurally the taxpayer's statute-barred reassessment - not anyone else's reassessment.

[24] Having found the 2004 and 2005 taxation year statute-barred reassessments to have been procedurally valid per subparagraph 152(4)(a)(i), the question arises whether either or both are substantively invalid – *i.e.*, invalid on their merits. The civil onus in proving this is upon the Appellant. This has not been accomplished. I have already determined on a balance of probabilities that it was a misrepresentation, i.e. an untrue statement, in the Appellant's 2004 and 2005 taxation year returns that the claimed charitable donations for the said two taxation years had been made. Thus I have determined that they were not made. Accordingly, without more being required, the appealed reassessments for the 2004 and 2005 taxation years, each denying the pertinent charitable donation claimed, are valid – each on its respective merits. In these circumstances I find it unnecessary and potentially redundant to go further and reference the Minister's pleaded assumptions in deciding as to the substantive merits of the 2004 and 2005 taxation year reassessments. That I have found the claimed charitable donations were not made is sufficient to conclude the issue for each of the two taxation years. Thus this appeal, at least insofar as pertaining to the 2004 and 2005 taxation year reassessments, will be dismissed.

[25] I turn now to the appealed reassessment respecting the Appellant's 2006 taxation year. Not being statute-barred, there is no requirement to consider this reassessment through the lens of subparagraph 152(4)(a)(i). We can move directly to its challenged substantive merits.

[26] As always it is the Appellant qua taxpayer that bears the onus or burden of establishing, on a civil standard of proof (balance of probabilities), the substantive invalidity of the appealed assessment or reassessment. For that purpose, the Minister's pleaded assumptions of fact underpinning that reassessment are presumed correct unless and to the extent the evidence, on a balance of probabilities, shows otherwise. Here these ministerially assumed facts, pleaded in paragraph 10 of the Respondent's Reply, are:

> a) the Appellant did not make any donations, either by cash or cheque or gifts in kind, to any registered charity, during the . . . 2006 taxation [year];
>
> b) in particular, the Appellant did not voluntarily transfer any property that he owned (cash or non-cash) to any registered charity at any time during the . . . 2006 taxation [year];

c) the Appellant did not obtain or provide proof of any transfers of property that he may have made to a registered charity in . . . 2006 in the form of a validly issued official and non-deficient donation receipt;

d) [RF] and [IA] were both Directors of Orbit where they worked together as tax preparers;

e) [RF], [IA] or Orbit prepared and filed the Appellant's returns;

f) [IA] and Orbit were charged with defrauding the Government of Canada of income tax revenue in excess of $5,000, pursuant to section 380(1)(a) of the Criminal Code of Canada, in respect of fraudulent charitable donation claims made by them on behalf of their clients for the 2004 through 2006 tax taxation years, as applicable (the "scheme");

g) [IA] and Orbit pled guilty to the charges on June 16, 2011;

h) [RF] was involved with the scheme before 2004 and during the 2004 to 2006 period to which [IA] and Orbit's guilty pleas applied.

[27] Based on consideration of the evidence as a whole, I do not find that any of these pleaded assumptions has been disproved. I conclude based on these pleaded assumptions, presumed to be more likely true than not, and ultimately on the evidence as a whole, that the claimed charitable donation of $5,119 for the 2006 taxation year was not made.

[28] The Appellant may have been duped into believing that the claimed charitable donation payments for these three taxation years had been appropriately made, when in fact they had not. But that does not alter the correctness of the three appealed reassessments in denying the Appellant's claim for charitable donation tax credits in connection therewith.

[29] Having listened to and observed the Appellant, Mr. Kyei, in Court, I am left with the impression he was taken in by RF. I note the Minister did not assess him any gross negligence penalty. Should indeed the Minister not have reason to differ with my impression, I respectfully invite her to favourably consider any application by the Appellant for interest cancellation per subsection 220(3.1).

[30] This appeal of the reassessments for the Appellant's 2004, 2005 and 2006 taxation years respectively will be dismissed, albeit without costs.

Signed at Halifax, Nova Scotia this 17th day of February 2021.

"B. Russell"

Russell J.

CITATION:	2021 TCC 10
COURT FILE NO.:	2018-394(IT)I
STYLE OF CAUSE:	PRINCE KYEI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 14, 2020
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Russell
DATE OF JUDGMENT:	February 17, 2021

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Rebecca L. Louis

COUNSEL OF RECORD:

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Name:	
Firm:	

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