Docket: 2018-3844(IT)I

BETWEEN:

CLEMENT NYEMBWE TSHIBUNGU,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on November 18, 19 and 26, 2024 and February 5, 2025, at Toronto, Ontario

Before: The Honourable Justice Michael U. Ezri

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Helli Raptis H.-M. Cap-Dorcelly Gabriel Caron

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JUDGMENT

The 2003 and 2004 appeals are dismissed.

The 2005 appeal is allowed and referred back to the minister to delete the 163(2) penalty on rental losses denied.

The 2006 appeal is allowed and referred back to the minister to delete the 163(2) penalty in respect of the denied employment expenses.

The 2007 appeal is allowed and referred back to the minister to delete the 163(2) penalty in respect of the denied employment expenses.

No costs are awarded.

Signed at Toronto, Ontario, this 15th day of May 2025.

"Michael Ezri"

Ezri J.

Citation: 2025 TCC 74
Date: 20250514
Docket: 2018-3844(IT)I

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REASONS FOR JUDGMENT

Ezri J.

I. INTRODUCTION

[1] The appellant alleges that he donated over $100,000 to registered charities by withdrawing cash amounts from various accounts and handing them over to two guys named Charles and Andrew (or was it Edward? See below) over a five-year period. The Canada Revenue Agency (CRA) didn't believe him and so they assessed him to deny the donation tax credits and to impose penalties for making false statements in his tax returns. I also don't find the donation claim to be supported by the evidence.

[2] A secondary issue related to employment expenses was also assessed. Those assessments are correct, but I don't think that penalties were warranted in respect of those adjustments for both of the assessed years.

[3] There was a third issue raised with respect to rental losses in 2005. The claim for the rental losses was conceded by the appellant but not the penalty which remains in dispute.

[4] There was a fourth issue with respect to education expenses claimed in 2004 but the Crown explained that in fact those expenses had been allowed on reassessment.

A. Brief Background

[5] The appellant is an individual who has a master's degree in computer science and works in that field.

[6] The appellant has several appeals pending before this Court. The current appeal contests reassessments issued for his 2003 to 2007 tax years. For each year, the main issue is the appeal by the appellant of CRA's decision to disallow charitable donation credits. The amounts ostensibly donated in each year are:

2003: $34,000

2004: $27,950

2005: $11,090

2006: $15,330

2007: $16,500

[7] The appellant through his testimony explained that during the years in issue he funded a series of cash donations by withdrawing money in cash from his bank or by borrowing money from payday lenders. He would then take this money to a brokerage service where he would hand it over to Charles and Andrew/Edward. In any event, Charles and Andrew/Edward would ostensibly deliver the money to various charities. This happened many times during the periods under appeal, sometimes multiple times a day. The brokers would then provide tax receipts which were claimed by the appellant's tax preparer in preparing his tax returns.

[8] The appellant produced receipts only for his 2006 and 2007 taxation years. The receipts were problematic. The various charities either denied issuing the receipts or had no records of such receipts having been issued. The evidence at trial included the CRA Appeal's officer's notes of his conversations with two of the charities as well as the evidence of the executive director of one of the charities.

[9] Unfortunately, Mr. Tshibungu's tax preparer, a Mr. Frempong along with two associates were implicated in an attempt to claim false donations for clients using fake receipts. Apparently, the associates were convicted and Mr. Frempong opted to take a one way vacation out of Canada. The use of Mr. Frempong's tax filing service brought Mr. Tshibungu to the attention of the CRA.

[10] In 2009 the CRA audited the appellant and sought receipts and other documentation to support the charitable donations. They were provided with some documents such as bank statements showing the withdrawal of funds from bank accounts and payday loan advances but no documents tying the funds to the charities were provided and so the CRA reassessed to deny the charitable donations.

[11] The CRA also denied automobile expenses of, $7450 in 2006 and $8700 in 2007 as well as a rental loss of $8,018 in 2005.

[12] Subsection 163(2) penalties were imposed in respect of all the adjustments that are before the Court.

[13] The appellant objected to the assessments, but the CRA did not process the assessments for six years as their investigation into Frempong and his associates advanced towards a criminal trial. Only in late 2016 did CRA Appeals seek additional documents to support the appellant's various claims for deductions and tax credits. No information was furnished. However, the appellant contends that much of that information was stolen out of his briefcase while he was visiting France in the summer of 2017. The CRA eventually confirmed the reassessments except for the education tax credit which was allowed.

B. The Past Recollection Recorded Evidence Issue

[14] Both the appellant and the respondent tendered evidence which I admitted as past recollection recorded. It is useful to explain why I admitted the documents into evidence.

[15] Mr. Tanner Matschke was the CRA appeals officer who was first assigned the appellant's objections to the reassessments of his 2003 to 2007 tax years. He maintained a communications diary (often called a T2020) detailing conversations that he had with certain charities in 2016 with respect to certain donation receipts proffered by Mr. Tshibungu. Mr. Matschke's recollection of his work on the file was largely dependent on his diary. He could not remember the particulars of the matters referenced therein.

[16] Mr. Tshibungu offered into evidence a series of bank statements, which are not past recollection recorded, but he also tendered a list ("the List") that he prepared showing which bank statement transactions represented cash withdrawals that he handed over as cash donations. The List covers the years 2003 to 2007. He testified in a voir-dire that he had prepared the List in response to CRA's audit letter from

2009. He testified that he had no independent recollection of the transactions themselves.

[17] In my opinion, both Mr. Matschke's diary and Mr. Tshibungu's List rather than their testimony, are the evidence in respect of the matters detailed in those documents because neither of them could provide independent evidence of the matters referenced in those documents. They are documents that record the past recollections of the witnesses.

[18] The past recollection recorded rule was recently reviewed in an article in, The Advocates' Journal. I summarize the main points as follows:

a) In civil litigation the volume of material produced combined with the length of time needed to bring a case to trial means that witness memories often fade;

b) The past recollection recorded rule is often considered together with the "present memory refreshed rule". This latter rule provides that where a witness has memory of an event but requires some assistance, they may be permitted to refer to notes, emails or other documents to refresh their memory. However, the evidence consists of the witness's oral testimony and not the document used to refresh the witnesses' memory;

c) Sometimes a witness simply does not have a recollection of the events in issue independent of a document that records the information. It is not necessary that the witness has no memory at all of the events; only that there are gaps in the witnesses' memory. In that case, the document itself will be admitted into evidence to fill those gaps. This is the "Past recollection recorded rule". The requirements to admit such a document are these:

    i. The document to be admitted must have been personally prepared or reviewed by the witness;

    ii. The original record must be used if available;

    iii. The record must have been made or reviewed within a reasonable time while the event was sufficiently fresh to be vivid and accurate; and

iv. The witness must vouch for the accuracy of the record.[1]

[19] In the case of Mr. Matschke:

a) Mr. Matschke has gaps in his memory. His evidence ***is*** the diary that he kept;[2]

b) Mr. Matschke made the entries in the T2020 diary;

c) The T2020 diary entries were made electronically so there is no issue of original versus copy;

d) The diary entries were made as he communicated with the persons referenced therein;

e) Mr. Matschke vouched for the accuracy of the T2020 testifying that his actions as an appeals officer were fully contained in the file; and

f) Although not strictly necessary to ground admissibility, Mr. Matschke's notes were reviewed by Robert Malouf when he took over as the appeals officer and Mr. Malouf raised no issues with the T2020 at the time or in his evidence at trial.

[20] The conditions to admit Mr. Matschke's T2020 diary entries as past recollection recorded were met and they were so admitted. Strictly speaking, only the parts needed to supplement Mr. Matschke's evidence are supposed to be admitted but given the difficulty of teasing out which parts of the relatively short document refresh rather than record memory, I have admitted the entire document. I might add that, The Advocates' Journal article referenced above, proposes, as the principal reform to the past recollection recorded doctrine that,

> the doctrine of past recollection recorded be reformed to remove the distinction between witnesses who have no memory of an event and those who have some memory of an event. In other words, whether a document is used to fill in gaps or to refresh a witness's memory, the entire document should be admissible as a past recollection recorded regardless of whether the witness's memory overlaps with some

[1] M. Jilesen, J. Kras, "Rethinking the Rules of Civil Evidence: In Need of a Refresh? The Doctrines of Past Recollection Recorded and Present Memory Refreshed", 40 Adv J No. 4, 27-31, Spring 2022, para 8.
[2] *Ibid*, para 26 reproducing a 1927 article that well describes the issue. That 1927 article states in part, "It is not uncommon to hear a witness testify that a memorandum actually refreshes his recollection when it is apparent that he is merely accepting the contents of the writing, and would be entirely helpless without it, even after having consulted it". Mr. Matschke candidly admitted as much in his testimony.

> aspects of the document, provided the document meets the other criteria of reliability, contemporaneity, and voucher as to accuracy.[3]

C. Mr. Tshibungu

[21] In the case of Mr. Tshibungu:

a) Mr. Tshibungu has no memory of the transactions in the List, but many of the transactions correspond to bank statements provided by him and letters prepared by Money Mart and Cash Money with lists of transactions. Again, the List is the evidence;

b) Mr. Tshibungu prepared the List;

c) The List was made electronically and printed. I am not aware that there is a more authentic version than the copies that were put into evidence; but

d) the list was **not** made contemporaneously with the events that it records. Even the most recent transactions in the list occurred two years prior to the list being compiled with a very substantial number of the transactions being five or six years old at the point in time where Mr. Tshibungu plucked them out of the underlying bank or transaction statements and listed them as donations.

[22] The case for admitting the List of transactions was very weak. Frankly on a formal, "past recollection recorded" test it fails because of the lack of contemporaneity. However, two factors militated in favour of admission:

a) The *Tax Court of Canada Act* provides for a relaxation of the rules of evidence when cases are heard under this Court's Informal Procedure. Specifically subsection 18.15(3) provides that:

> (3) Notwithstanding the provisions of the Act under which the appeal arises, the Court is not bound by any legal or technical rules of evidence in conducting a hearing and the appeal shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit.

and

b) I am mindful that the CRA took eight years to process the appellant's notice of objection. Issues arising out of the List could have more easily been

[3] *Ibid*, para 30 [emphasis added].

addressed, at least for the later years, had the CRA been more diligent in completing its objection review.

[23] The List was therefore admitted into evidence as past recollection recorded with weight to be determined.

[24] I turn then to the issues in dispute.

D. The Donation expenses

(1) Quantum of Donations

[25] The appellant claimed substantial donation expenses in each of the tax years in issue. If we take Mr. Tshibungu's tax filings and his testimony at face value, in 2003, he had $49,415 in net employment income on hand after source deductions and he donated $34,000 of that to charity, leaving only $15,000 to pay rent in Toronto, buy food, and meet his other daily expenses. 2004 was worse, with only $13,273 in cash to meet expenses, excluding of course his 2003 tax refund. The results are less pronounced in subsequent years, but the bank statements entered in evidence showed that as late as 2006 Mr. Tshibungu was frequently in overdraft and that there were numerous fees for presentment charges, stop payments and NSF items, suggesting that Mr. Tshibungu was routinely exceeding the limit of his overdraft protection. The only reasonable finding on the evidence is that no reasonable person would behave the way that the appellant did with such a substantial portion of their income.

(2) Manner of Donations

[26] For all years, donations were made in cash. According to the appellant, he would regularly withdraw cash and deliver it to two "brokers". He testified that they were named, Charles and Andrew, but he could not recall their last names. No details were provided on where these transactions took place, the reasons as to why particular amounts were given at particular times, or why the amounts were paid in cash.

[27] Or did Mr. Tshibungu testify that the "brokers" were named Charles and Edward? I could have sworn that Mr. Tshibungu switched from Charles and Andrew to Charles and Edward in his evidence, and indeed, the transcripts bear that out:

Nov. 18, 2024 transcript (pp. 21–22)	Nov. 26, 2024 (pp. 40 to 42)
[TRANSLATION] JUDGE: The names of these brokers? The names of these brokers, what were their names? MR. TSHIBUNGU: Your Honour, we will be touching on another sensitive aspect. I can tell you a first name—I can tell you two first names, but I don't remember the exact name of this organization—this company. JUDGE: You have forgotten? MR. TSHIBUNGU: Yes, Your Honour, it has been too long. And I think I'm going to have to raise the point that I have been holding in reserve, even if it will break the flow of my reasoning a little bit. JUDGE: Do you remember their first name? MR. TSHIBUNGU: Yes, I remember the two people I worked with. One of them was called Andrew—the second person was called Andrew, but the main person, Andrew—the main person was called Charles.	[TRANSLATION] Q So you didn't check to make sure that he had sent them to the Cancer Recovery Foundation of Canada? A I remember checking. I remember checking. To start, a) the first thing I do—and I believe I said this, I said this on the first day of my—of my testimony, when I engage with a—a charitable organization, I check to see if the broker representing that charity is known. This is why I asked Ms. Kroon for her list of brokers, because I wanted to see if the—the company behind Mr. Charles and Mr. Edward was—because since I checked, do you know the organization that is doing fundraising for you, yes, for me, that's enough. … JUDGE: You asked the Cancer Foundation if they knew x, y—Edward Charles?

JUDGE: Andrew and Charles. MR. TSHIBUNGU: Charles and Andrew, Your Honour, if I may.	A Yes, before I started giving to them for the CRFC. JUDGE: And did you use the name of their company? Because I—until now, I didn't know that there was a company behind Edward Charles, because you gave the name "Edward Charles." A Okay. Thank you, Your Honour. Actually, when I said—I said that the company doing the fundraising, the broker, I've forgotten the name. They were individuals but they worked for a company, or an organization.

[28] It could of course simply have been a slip of the tongue on the part of Mr. Tshibungu, but I also admit to being struck by the coincidence of the three names, Charles, Andrew and Edward with the given names of the three brothers of the British Royal Family. In the end, the inconsistency nags at me because it makes me think that the names were all just made up by the appellant based on Royal Family given names.

[29] I should add that no evidence was provided to show any connection between persons named Charles and Andrew/Edward and any charity in issue.

[30] The appellant provided the aforementioned List of cash withdrawals from various sources along with supporting bank statements. For 2003 to 2005 the List does not show for whom the money was withdrawn or to whom it was given. For 2006 the heading for the transactions is "Cancer Recovery Foundation of Canada". For 2007, the list is divided into two headings, one for Breast Cancer Foundation and one for Salvation Army. The list itself has no supporting documentation to show that the money actually went to these organizations.

[31] The pattern of the withdrawal transactions is surprising for a number of reasons:

a) The volume of transactions was high. Over the five years in issue, Mr. Tshibungu allegedly made over 260 individual donations by either withdrawing money from his bank accounts or borrowing the money by way of payday loans from Money Mart or Cash Money;

b) There was no consistency in the manner of the withdrawals between or within tax years. In 2003, the appellant had approximately[4] 136 separate cash donation withdrawals. That number declined to approximately 71 in 2004 and then to approximately 13 withdrawals in 2005, 18 withdrawals in 2006 and 21 withdrawals in 2007;

c) There was no rhyme or reason to the frequency of withdrawals, particularly in 2003 and 2004. There were numerous instances of multiple withdrawals on the same day. For example, on April 14, 2003, the appellant lists four withdrawals from his CIBC bank account. On October 27, 2003, he had four transactions, from three different financial institutions, the largest being a $400 payday advance from Money Mart. There were also quite a few "triples" with three withdrawals in a day and most of the remaining transactions were doubles with two transactions per day sometimes from the same financial institution and sometimes not. The frequency of double or triple transaction days declined in 2004, but days like January 15, 2004, stand out. On that day, Mr. Tshibungu apparently borrowed and donated $720 from Cash Money and then withdrew $480 from his CIBC account to make a second donation.

d) No explanation was given as to why Mr. Tshibungu had to make two, three or even four cash donations in a single day.

[32] Earlier I explained why I was admitting the List into evidence. However, there is a difference between admitting documents and relying on them i.e. giving them weight. I don't find that the List is at all probative in proving that the transactions were actual donations to a charity. The basic problems with the List are these:

a) I don't believe Mr. Tshibungu's testimony that he handed over cash, as often as three or four times a day to two guys named Charles and Andrew/Edward

[4] I use the word "approximately" throughout because the List was not numbered so the transactions have to be counted one at a time which can lead to errors in the count.

in order that they might donate the amounts to charity. That evidence defies common sense;

b) I don't believe that Charles and Andrew/Edward really existed or if they did, that the names given to me were their real names;

c) I don't believe that any of the money from the List ever ended up in the hands of a charity. I heard cogent evidence to the effect that the charities in question did not receive any money from Mr. Tshibungu.

(3) The 2003 to 2005 donations

[33] The appellant in his testimony did not specify to whom he donated in 2003 to 2005 and there were no receipts provided. The appellant did testify to having personal reasons for supporting cancer related charities. He also testified that had some receipts for these years but that he did not know to keep them and so he left them with his accountant and tax preparer Mr. Frempong. He testified that his accountant's documents were seized by the CRA. This corresponds to testimony, from Mr. Matschke, the CRA appeals officer to the effect that the accountant, was implicated in a scheme to issue fraudulent tax receipts.

[34] The appellant in cross-examination and in his closing argument went to great lengths to show that he was never specifically linked to any such scheme. I agree. Absent specific evidence of the appellant's complicity in a broader scheme to defraud, and no such evidence was adduced, the correctness of his reassessments must turn on what Mr. Tshibungu did or did not do, rather than on who he did or did not know.

(4) The 2006 donations

[35] For the 2006 tax year, the appellant produced two similar receipts that purported to be tax receipts for a donation of $15,330 to the Cancer Recovery Foundation of Canada ("Recovery"). Each receipt was for the entire calendar year. The following differences are noted between the two receipts:

a) The pledge number on the first receipt was F0004258. On the second receipt it was F0004238;

b) The "thank you" in each receipt was slightly different. The first was "Thank you for your generous gift and supporting Cancer Recovery Foundation of Canada." The second receipt read: "Thank you for your generous gift"; and

c) The formatting of the receipts differed slightly.

(5) The Kroon Evidence for the 2006 Receipts

[36] Shannon Kroon, the Executive Director of "Shine Through the Rain Foundation" ("Rain"), testified for the respondent with respect to the 2006 donations. Ms. Kroon has worked for Rain and Recovery since 2010.

[37] Ms. Kroon explained that Recovery changed its name to Rain in 2016. When pressed on the point in cross-examination she produced a certificate of amendment and articles of amendment under the *Canada Not-for-profit Corporations Act* corroborating the name change.

[38] Ms. Kroon's testimony was damaging to the appellant. Ms. Kroon testified that Rain has records regarding donations dating back to 2003. She conducted extensive searches but could not find any record of a donation by the appellant. Ms. Kroon found no evidence that Rain/Recovery had ever issued a tax receipt to the appellant.

[39] The respondent introduced into evidence a report generated by Ms. Kroon showing that for December 31, 2006 there was a list of 171 donors, who made donations on that day. The appellant's name was not on the list. Ms. Kroon also explained that during the years in issue it was not the practice of Recovery to issue a single donation receipt for the entire calendar year. Receipts were issued daily or monthly.

[40] Ms. Kroon described a number of anomalies with respect to the appellant's $15,000 donation, notably:

a) The largest donation ever received by Rain/Recovery was only $10,000 and that was given as a bequest in a will;

b) Donations in cash are rare; she could recall receiving $20 in cash on two occasions. Donations are usually made online, through the internet or through telemarketing firms retained by Rain/Recovery to solicit donations; and

c) Large donors do not normally show up out of nowhere. They usually have a history of donations to Rain/Recovery.

[41] Ms. Kroon noted the following problems with the receipts that I referred to earlier:

a) Both are signed by, "Brian Meloche, National Development Director." Ms. Kroon testified that there was no such person employed by Rain/Recovery. She testified that she looked at payroll records and board minutes in order to ascertain whether a person by that name had ever worked for Rain/Recovery. She found no such person in the records;

b) There was no position of National Development Director within Rain/Recovery. All receipts were signed by the Greg Anderson, who founded Recovery;

c) Rain/Recovery does not issue letter receipts. Its receipts state that they are official receipts. They are issued with tax receipt numbers;

d) Receipts do not have pledge numbers on them. Pledge numbers are used for telemarketing purposes only;

e) The formatting issues referred to earlier were referenced by Ms. Kroon; and

f) Ms. Kroon was first made aware of the appellant's receipts four years ago. At the time, she attempted to call the phone number at the bottom of the receipt; it went to the voicemail of the Volunteer Fire Fighters Alliance.

[42] In cross-examination Ms. Kroon added the following to her testimony:

a) The 1-800 number used by Rain ends in 4251 and not in 7371, the number shown on the receipts; and

b) Shortly before trial, she was contacted by the appellant who was requesting information related to the tax receipts in issue. In order to try and answer his question she repeatedly asked him for more details such as how he made the donations, and who he gave the money to, but he did not respond to her questions.

[43] Mr. Tshibungu in his closing argument took issue with Ms. Kroon's reliability, principally because she had told him shortly before trial that she had been subpoenaed by the respondent and so could not assist him further.

[44] I would think that all non-party witnesses should do everything that they can do to assist parties to litigation without regard for which side reaches out to them. Having said that I am satisfied that Ms. Kroon made strenuous efforts to help Mr. Tshibungu. Numerous emails were put into evidence of their communications, and it was clear from those emails that Ms. Kroon was quite concerned about the suggestion that Mr. Tshibungu had made a large donation to Recovery/Rain.

[45] In light of Ms. Kroon's testimony, I conclude that the 2006 Recovery donation receipts are fake. Ms. Kroon's testimony also undermines the reliability and the credibility of the appellant.

(6) 2007 Receipts

[46] The appellant produced two tax receipts for donations in 2007:

a) The first receipt, dated December 31, 2007, is for $8000. The Receipt takes the form of a letter from the Canadian Breast Cancer Foundation ("CBCF") thanking the appellant for, "Your gift today". The letter contains a mistake on its face in that it refers to the Canada Revenue Agency as the "Canada Customs and Revenue Agency" in one line and as the Canada Revenue Agency in another. The "Canada Customs and Revenue Agency" is not the correct name. It was only used as the name of the CRA until 1999 when legislation was passed renaming it to "Canada Revenue Agency";[5]

b) The second donation receipt was purportedly issued by the Salvation Army ("Army") on December 31, 2007 in an amount of $8500.

[47] According to Mr. Matschke's T2020, he attempted to contact both CBCF and Army. CBCF returned Mr. Matschke's call and advised that they had not issued a receipt for $8000 but that they had issued a tax receipt with the matching tax receipt number in the amount of $35.00.

[48] Army advised Mr. Matschke that they could not locate a receipt for the appellant and that, per their records, Army did not issue the receipt in this case.

[49] The information in Mr. Matschke's notes is not only past recollection recorded, it is also hearsay. The Crown asked that it be admitted as necessary and reliable. I so admitted it. The inquiries were made by Mr. Matschke eight years ago.

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[5] *Canada Revenue Agency Act*, SC 1999, c. 17, ss. 4(1).

Even if someone could be found to testify, there is no reason to believe that their evidence would add to what is contained in Mr. Matschke's notes.

[50] Earlier I explained why I gave no weight to Tshibungu's List. I now explain why I do give weight to Mr. Matschke's T2020 diary:

a) The evidence of CBCF was not a general statement about what was in their records. CBCF apparently had specific records showing a receipt had been issued but for only $35 and not to the appellant;

b) The evidence of Army was not quite as strong. It was more in the nature of an absence of records, but they did say that they had not issued the receipt proffered by Mr. Tshibungu;

c) The amounts allegedly shown in each receipt militates in favour of giving weight to the evidence in Matschke's notes. These charities ostensibly received over $8000 each. If the appellant had really donated those sums, they would have remembered him; and

d) The evidence of Ms. Kroon for the Recovery receipts provides a degree of support for the evidence that the CBCF and Army receipts were not genuine. One charity asserting a problem with a particular taxpayer's receipt could be an error, but three such problems are a pattern.

(7) The Hearsay Nature of the Receipts

[51] Like the T2020 information, Mr. Tshibungu's donation receipts are also hearsay. They are out of court documents. They were not prepared by the appellant but rather by persons unknown and the appellant asks me to admit them and to give them weight. They could be admitted as official tax receipts, if they are real, but that is disputed. They could also have been admitted as business records if the appellant had obtained a business records affidavit from the issuing charities under the *Canada Evidence Act*,[6] but he did not do that. Further, there is no provenance for the receipts other than the appellant's testimony on cross-examination that the "brokers", presumably Charles or Andrew/Edward, gave them to him. There was no explanation as to how they were delivered to him. In the end the receipts were admitted on consent, but I give them no weight at all.

[6] *Canada Evidence Act*, RSC 1985 c. C-5, s. 30.

[52] I also admitted into evidence the appellant's hearsay oral evidence (though not his written notes) that he had spoken to someone named Jessica at a Salvation Army thrift store on October 30, 2024, who said that records were no longer available.

[53] I prefer the hearsay evidence furnished through Mr. Matschke to the hearsay receipts furnished through the appellant. I also prefer Mr. Matschke's evidence of conversations with CBCF and Army over the hearsay evidence of the appellant's communication with Jessica at Salvation Army. There was insufficient detail provided about how someone working at the Salvation Army Thrift Store might be in a position to respond effectively to the appellant's inquiries. In any event his inquiries were made eight years after those of Mr. Matschke, so I am not prepared to infer that the absence of information in October 2024 means that there was no information available to Mr. Matschke in 2016.

[54] I noted earlier that Robert Malouf also testified for the respondent with respect to the receipts and related issues. He was also an appeals officer with the CRA. He was assigned to assist with appellant's objections because the appellant requested that the CRA deal with him in French and Mr. Matschke could not do that. Mr. Malouf did not do any additional investigative work and so his evidence, while given in a straightforward way, does not add anything to my analysis, other than to support the admissibility of Mr. Matschke's T2020 diary as past recollection recorded.

[55] In light of the evidence described above, I find that the CBCF and Army receipts are fake.

(8) Requirements for a Valid Receipt

[56] I turn briefly to an issue arising out of the legal requirements for a valid donation. Paragraph 118.1(2)(a) of the *Income Tax Act* provides that a gift is not to be included in the total charitable gifts unless the making of the gift is evidenced by, "a receipt for the gift that contains prescribed information".

[57] The prescribed requirements include:

a) Every official receipt must state that it is a valid official receipt for income tax purposes.[7] The appellant's receipts do not say that;

[7] *Income Tax Regulations*, CRC c. 945, ss. 3501(1).

b) Every receipt needs a serial number.[8] The use of folio numbers (Recovery 2006 receipt) or fake numbers do not satisfy that requirement; and

c) A receipt form is deemed to be spoiled if the date on which the gift is received is wrong or if the amount of the gift, in the case of a cash gift is wrong.[9]

[58] The documents tendered by the appellant as the Recovery, CBCF and Army receipts are not charitable tax receipts at all but merely spoiled receipt forms by virtue of the alterations made to them.

(9) Conclusion on Donation issue

[59] I do not believe that the withdrawals listed by the appellant were carried out for the purpose of making donations to charity. No reasonable person acting in good faith would make 136 separate cash withdrawals totalling $34,000 in a single year and over 250 such withdrawals over five years, and hand the cash over to a couple of guys named Charles and Andrew/Edward and then have no idea what the last name of those persons were. To be clear:

a) I don't accept that all, or even any, of the withdrawals went to Charles and Andrew/Edward. As already stated, I don't even believe that they existed or that the names given to me were their real names. The List of cash withdrawals only strengthens my view of how peculiar the appellant's alleged donations were in form and character;

b) I don't find that any of the cash withdrawn made their way to any charity in respect of which a tax deduction was claimed;

c) These findings apply to all the years under appeal, 2003, 2004, 2005, 2006, and 2007; and

d) For the years in which charitable receipts were provided, 2006 and 2007, those receipts were doctored and fake.

(10) The 163(2) Penalty on the donation claims

[60] Subsection 163(2) of the ITA imposes a penalty where a person knowingly or under circumstances amounting to gross negligence, makes, participates in, or

[8] *Ibid*, para 3501(1)(c).
[9] *Ibid*, ss 3501(6).

acquiesces in the making of a false statement or omissions in a return. In a tax appeal, the burden of establishing the facts to support the assessment of the penalty is on the Minister.[10]

E. False Statement

[61] Given my findings above, it is clear that the claims in the appellant's tax returns that he donated the amounts reported, are false statements. The issue is whether they were made knowingly or under circumstances amounting to gross negligence.

(1) Knowingly

[62] It is often difficult to prove that a taxpayer knowingly made a false statement. Rather, most cases rely on showing that a taxpayer was wilfully blind in making the false statement and that wilful blindness is tantamount to knowing. The protagonist's choice in the movie, The Matrix, to take the red pill and learn the truth of his reality or take the blue pill and live in blissful ignorance has entered pop culture as a metaphor for wilful blindness. Legally, wilful blindness is the thinnest veneer of deniability in the face of allegations of active participation, or passive complicity, in misconduct.

[63] In *Wynter* the Federal Court of Appeal held that an actual intent to cheat is not required to establish wilful blindness and that so requiring is inconsistent with,

> the well-established jurisprudence that wilful blindness pivots on a finding that a taxpayer deliberately chose not to make inquiries in order to avoid verifying that which might be such an inconvenient truth[11]

[64] This Court also emphasizes the need to be cautious in upholding penalties and encourages giving the taxpayer the benefit of the doubt where the facts are evenly divided for and against the imposition of penalties.[12]

[65] In this case, because I find that the appellant made up the names of the brokers, I think that he knowingly participated in a donation scheme that he knew to be false.

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[10] *ITA*, ss. 163(3).
[11] *Wynter v R*, 2017 FCA 195, para. 17.
[12] *Farm Business Consultants v R.* [1994] 2 CTC 2450 (TCC), para 26

However, even if I am wrong about that, the appellant meets the knowingly requirement because he acted with wilful blindness. In particular:

a) His pattern of conduct in apparently donating money through over 250 cash transactions was extraordinary and contrary to the way any reasonable person would behave;

b) His apparent willingness to hand the money over with no questions asked to Charles and Andrew/Edward defies logic and common sense; and

c) The amounts that he gave were not just material, they were huge having regards to his financial position.

[66] The appellant spent an inordinate amount of time during his examination-in-chief attributing his lack of supporting evidence to the theft of his briefcase in France in 2017. I don't accept that explanation for his lack of evidence. The Crown's evidence showed that he was asked to provide supporting documents at the audit stage in 2009 and that he did not do so. I do accept that the CRA's delay in processing his objection[13] was not helpful to the appellant. On the other hand, when the CRA did process the objection, they moved swiftly to make the inquiries that I described earlier. The respondent moved equally fast in reaching out to Ms. Kroon in 2018, when the appellant filed his notice of appeal. By contrast, the appellant waited until a month before trial to start making his inquiries and then left Ms. Kroon in the dark on important details that she needed to respond to his queries. His efforts were too little too late. I also note that the briefcase in issue was stolen in July 2017, eight months after the CRA appeals officers had written to the appellant asking for his supporting documents. In those eight months the appellant never once communicated with the CRA to say that he had documents, that he was looking for documents or that he would provide documents. If the appellant had documents to provide to the CRA he would have done so by July 2017.

[67] The appellant says that he did make inquiries to ensure that the charitable organizations were legitimate by looking them up online. On the third day of this hearing, during the voir-dire on Mr. Tshibungu's list of donations, he added that he had called the organizations to ask if they had heard of the brokers to whom he was giving money. Apparently, they responded that they did not know of the brokers. Mr. Tshibungu for the first time stated that the brokers worked for a company, and that he had inquired about the particular company for whom the brokers worked. Mr.

[13] The CRA seems to have waited some six years for the conclusion of proceedings against the associates of the appellant's accountant before responding to the appellant's notice of objection.

Tshibungu provided no proof of any communications. I find it difficult to believe that Mr. Tshibungu gave money hundreds of times to two individuals and can't recall the name of the company for whom they worked. I give no weight to his testimony that he made any inquiries with the CBCF or anyone else contemporaneously with the tax years in issue.

[68] The appellant was hopelessly vague in answering the most basic questions put to him not only by the Crown in cross-examination, but also by Ms. Kroon when he made inquiries of her in October 2024 regarding this matter and also of course, in responding to the CRA.

[69] I found that the appellant's demeanour in court and in his personal affairs are a study in contrast. When answering questions in cross-examination he was unable to provide even the slightest degree of precision in explaining how he handed over the money, what his day-to-day expenses were like and even how he incurred employment travel expenses when he had no car. His testimony on that matter is dealt with further on, but his inability to provide a basic breakdown of his auto expenses, both in Court but also as far back as 2009 when the CRA asked for them is remarkable. I might also add that it came out in the appellant's cross-examination that he also "missed" reporting $32,000 in T4 income in 2007.

[70] When the appellant was not answering questions evasively, refusing to recognize his own tax returns with his signature on them, or failing to respond to inquiries from CRA, I found him to be an intelligent, organized and detail-oriented person. He is a professional man with a master's degree in computer science. He had a responsible job dealing with computer technology and software. His work required him to interact with clients, travel unsupervised and work autonomously. By 2007 he was making a six-figure salary. He was not an unsophisticated individual.

[71] My impression of Mr. Tshibungu as capable and detail-oriented was reinforced when he cross-examined witnesses at trial. Allowing for mistakes made as a result of inexperience with the judicial process, he displayed a good memory for the in-chief evidence of the witnesses; he was systematic in asking questions; he was persistent in getting the answers that he wanted. Just by way of example, he did an excellent job in extracting from the CRA witnesses' admissions regarding the paucity of evidence linking him to the misconduct alleged against Mr. Frempong and his associates.

[72] I simply cannot reconcile the vague and indifferent man who filed tax returns without the slightest degree of care, and who gave answers in court that were

manifestly unreliable with the competent and careful computer scientist and skillful cross-examiner. I must conclude that if Mr. Tshibungu was unaware of falsity of his donation claims, it was because he chose to be so unaware.

[73] The Crown has proven on a balance of probabilities that the appellant acted knowingly by establishing that he knew or acted with wilful indifference in claiming that he donated money to various charities.

(2) Grossly Negligent

[74] Given my finding of wilful blindness, it is not strictly speaking necessary to determine whether the appellant's conduct amounted to gross negligence, but if it were necessary I would so find.

[75] The meaning of "gross negligence" is well established in this Court's jurisprudence. It is the first cousin to wilful misconduct. Most cases in this Court continue to cite to the Federal Court decision in *Venne*.[14] The Court in that case explained that:

> "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.

[76] In *Wynter* the Federal Court of Appeal nicely summed up the distinction between wilful blindness and gross negligence by explaining that:

> Simply put, if the wilfully blind taxpayer knew better, the grossly negligent taxpayer ought to have known better.[15]

[77] The facts that lead to a finding of wilful blindness apply equally to the gross negligence test. That said, if the only problem in this case had been that the appellant made no inquiries with respect to the background of the persons with whom he was dealt, that omission, could have been characterized as simple neglect rather than gross negligence. However, it is the use of multiple cash transactions over years, combined with the materiality of the amounts donated that take the appellant's actions from mere neglect to "indifference as to whether the law is complied with or not".

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[14] *Venne v R*, [1984] 2 CTC 223 (FCTD), para 28.
[15] *Wynter*, supra note 11, para 18.

[78] In *DeCosta*, Chief Justice Bowman considered three factors as relevant to delineating gross negligence from ordinary negligence. I lay them out in a table with my comments on each noted:

DeCosta Factors[16]	**Facts of this Case**
the magnitude of the omission in relation to the income declared,	The magnitude was very high having regard to the amounts donated and the amounts of income reported, and tax not paid.
the opportunity the taxpayer had to detect the error	Appellant had at least five years to detect the error. He chose not to inquire.
the taxpayer's education and apparent intelligence	Both were high. The Appellant was well educated and manifestly intelligent.

[79] The appellant fails all three of the *De Costa* criteria.

[80] I did consider whether perhaps for the 2003 tax year, the appellant did not have sufficient time to determine whether his tax returns were in order, but I am not prepared to so find for two reasons:

a) The amounts of the donations and the patterns of numerous cash withdrawals in 2003, immediately cried out for a much more robust approach to the appellant's treatment of his tax affairs; and

b) As noted by the appellant, he also had a large donation in 2002. While the facts related to that donation are not before me, I am satisfied that the appellant had ample time to detect any issues and to make genuine efforts to comply with the ITA. He did not do so.

[81] During the hearing, the appellant pressed the CRA witnesses to identify whether the assessment was based on a finding that the appellant knew of the false statement or was grossly negligent. The answers given were not the best. Mr. Matschke, for example, replied only that the appellant's statements were false. However, Tax Court cases are not judicial reviews. The Minister imposed the penalty and if the Crown discharges the onus of proving the requisite degree of misconduct, then the penalty stands even if it is upheld by reference to a different part of the penalty provision than the one referenced by the Minister. That same is true even if the Minister did not specifically turn his mind to which part of the

[16] *DeCosta v R*, 2005 TCC 545.

penalty test was most applicable: the wilful knowing/wilful blindness or the gross negligence.

F. The Statute Barred issue

[82] For the 2003 and 2004 years, the Minister was required to reassess within three years after issuing the initial assessments of the appellant's tax returns. That did not happen. However, under subsection 152(4) of the ITA, the Minister can re-open a statute barred year where the taxpayer has made, "any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed fraud in filing the return or in supplying information under the…" ITA. This Court has long held that the test under this provision is less stringent than the test for imposing a gross negligence penalty.[17] Simple neglect can suffice to open up a statute barred year. Where, as here, a taxpayer's conduct would suffice to impose a gross negligence penalty, that conduct is sufficient to also permit the reassessment of the statute barred year.

[83] Again, the appellant quibbled with the CRA witnesses as to which part of subsection 152(4) described his actions in filing the tax returns. While the CRA witness could not really answer the question, in the end what matters is whether the evidence presented in court supports opening up the statute barred years, and that evidence does support the application of subsection 152(4) for 2003 and 2004.

G. The Employment Expenses

[84] The secondary issue under appeal in this case was the claim by the appellant for employment expenses in 2006 and 2007. The amounts claimed were $7450 in 2006 and $8700 in 2007.

[85] The appellant testified that his employment required him to attend at the offices of the employer's customers and that for that purpose he incurred travel expenses. He did not own a car but in his testimony and on cross-examination, he referred to either renting vehicles or using the cars of his friends.

[86] That claim was supported by two T2200 forms completed by his employer in 2009 and attached to his notice of objection. The appellant called as a witness in support of the introduction of the documents, Mr. Todd Smith. Mr. Smith works for a company, Owl Time Clock ("Owl") that, after the tax years in issue, purchased the

[17] *R v Paletta Estate*, 2022 FCA 86, para 68.

company for whom the appellant had worked. Unfortunately, Mr. Smith was not acquainted with the person who had signed the T2200's and had not been able to locate any records related to the appellant's T2200's.

[87] The Respondent contested the introduction into evidence of the T2200 forms because they contained the phone number of Owl rather than of the appellant's employer. However, Mr. Smith explained that Owl would have simply taken over the phone number of the appellant's employer, thus the number could have been that of the original employer before being taken over. I agreed with Mr. Smith's explanation of the circumstances and as that was the primary anomaly with the T2200's, I permitted the T2200's to be adduced into evidence. The T2200's confirmed that he was required to travel up to 20 times a year for work and that he received payments from his employer in each year in respect of those expenses.

[88] With respect to the substance of the claimed expenses, the appellant's evidence was non-existent. The appellant was asked in 2009 by the CRA to provide a form T777 to breakdown the particular expenses claimed. He never did so. When asked if he kept a mileage log, the appellant advised that he filled out some information for his employer but that the form, belonged to, and was retained by, the employer.

[89] My basic issues with the appellant's evidence are as follows:

a) His explanation as to why he has no supporting documents makes no sense. Even if he had to fill out a form for his employer, he still would have had to have his own documents, such as repair costs, fuel etc. in order to prepare both that form and his income tax returns. It certainly can't be the case that the employer kept the appellant's own documents;

b) I can't tell whether the appellant's expenses exceeded payments received by the appellant from his employer; and

c) the fact that the appellant did not own a vehicle makes the amounts of the expenses claimed seem extraordinarily high. For example, if the appellant travelled 20 times a year for one day and rented a car each time, he would have paid $400 for each trip, an amount that seems unreasonable. The rentals could of course have been for longer periods, but again I have no evidence in the form of rental agreements or anything else upon which to base a finding of fact.

[90] Absent any evidence at all and given my view that the appellant is not a reliable witness with respect to his tax affairs, I am not prepared to allow the claimed amounts. The appellant may have incurred travel expenses, but I have no reason to believe that they exceeded the amounts for which he received a travel allowance from his employer.

H. 163(2) Penalty on the employment expenses

[91] The CRA imposed ss. 163(2) penalties on the disallowed travel expenses for both 2006 and 2007. The respondent introduced no evidence to support the penalty relying instead upon the appellant's failure to provide documentary support for the amounts claimed.

[92] For 2006, I find that the penalty requirements have not been made out. 2006 was the first year that the appellant claimed travel expenses and, while his indifference to the documentary requirements needed to support the claim is damaging, it does not rise to the level of misconduct contemplated by subsection 163(2) of the ITA.

[93] For 2007, the issue is much more closely contested. There is a limit as to the number of times that a taxpayer can act with studied indifference to his own tax affairs. A compelling argument can be made that the appellant avoided a gross negligence penalty in 2006 but should not get a free pass in 2007. While I agree with such an approach, I think that 2007 is right on the line of gross negligence because the amount is less material in relation to the income reported which is almost twice as high as in the prior year and unlike the donation expenses, the appellant did in fact travel for his work. I prefer to give the benefit of the doubt to the appellant one last time and not uphold the 2007 penalty under subsection 163(2) of the ITA.

I. 163(2) Penalty on rental loss

[94] At the start of the hearing the appellant conceded that one of the adjustments in issue, a 2005 rental loss, had not been properly claimed. That adjustment had been subject to a subsection 163(2) penalty. During argument, I inquired of both parties whether the penalty remained contested, and it transpired that it remained so contested. The appellant concedes the rental loss only and not the penalty and the respondent asserts that the penalty should apply.

[95] During his evidence the appellant explained that he had claimed the loss because he had thought that he was claiming an amount in respect of rent that he had

paid. His evidence on that point was not contradicted and the respondent led no other evidence in respect of the issue. The rental loss was not claimed in any of the other years under appeal. I am satisfied that the claim for that deduction was a simple mistake and that it does not meet the test for the imposition of a gross negligence penalty.

J. Costs

[96] In its closing argument the Crown sought costs of this appeal on the basis that where an appeal is wholly devoid of merit, costs can be awarded per the Informal Procedure Rules of this Court[18] as well as pursuant to this Court's decision in *Hassan*.[19] Assuming, without deciding, that costs can be awarded based on the merits of an Informal Procedure appeal, rather than on the actions of the appellant in conducting the appeal, I decline to do so in this case for four reasons:

a) The appellant did achieve a measure of success in this appeal;

b) The respondent had the burden of proof both with respect to re-opening statute barred years, and imposing gross negligence penalties. It would be rare indeed for an appellant's informal procedure appeal to be frivolous simply because they put the Minister to his obligation of discharging his burden of proof in respect of a statute barred year or a gross negligence penalty;

c) As a related matter it was not wholly unreasonable for the appellant to believe that the penalties in respect of the rental loss and the employment expenses were based on different facts and might not be sustained; and

d) The CRA made an error in not clearly indicating that it had allowed the education tax credit in 2004. The respondent himself thought that the education tax credit had been denied and pleaded as much in its reply to the notice of appeal. It was not unreasonable therefore to appeal that year. That issue was only identified as having been resolved in the appellant's favour at the hearing of this matter.

II. **CONCLUSION**

[97] The 2003 and 2004 appeals are dismissed.

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[18] *Tax Court of Canada Rules (Informal Procedure)*, SOR 90/688b, ss. 10(2).
[19] *Hassan v R*, 2014 TCC 144, para 14.

[98] The 2005 appeal is allowed and referred back to the minister to delete the 163(2) penalty on rental losses denied.

[99] The 2006 appeal is allowed and referred back to the minister to delete the 163(2) penalty in respect of the denied employment expenses.

[100] The 2007 appeal is allowed and referred back to the minister to delete the 163(2) penalty in respect of the denied employment expenses.

[101] No costs are awarded.

Signed at Toronto, Ontario, this 15th day of May 2025.

"Michael Ezri"

Ezri J.

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APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Helli Raptis H.-M. Cap-Dorcelly Gabriel Caron

COUNSEL OF RECORD:

For the Appellant:	The Appellant himself
For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada