Docket: 2010-366(IT)G

BETWEEN:

VINCENZINA MATTACCHIONE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

ROBERTO MATTACCHIONE,

Third Party.

Appeals heard on common evidence with the Appeals of
Roberto Mattacchione (2011-419(IT)G)
on September 28, 29 and 30 and October 1, 2, 5 and 7, 2015,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Joseph G. LoPresti, Brandon Rooney
Counsel for the Respondent:	Martin Gentile, Christopher M. Bartlett
For the Third Party:	The Third Party himself

AMENDED JUDGMENT

The Appeal from the reassessment made under the *Income Tax Act* with respect to the 2003 taxation year **is** dismissed.

The Appeal from the reassessment made under the *Income Tax Act* with respect to the 2004 taxation year is allowed and referred back to the Minister of National Revenue for reconsideration on the basis the taxable capital gain is to be reduced by $4,594,687.

The Respondent shall provide written submissions with respect to costs by December 7, 2015 and the Appellant and Third Party shall have until December 31, 2015 to respond in writing.

This Amended Judgment is issued in substitution of the Judgment dated November 13, 2015.

Signed at Ottawa, Canada, this **4**th day of **January** 201**6**.

"Campbell J. Miller"

C. Miller J.

Docket: 2011-419(IT)G

BETWEEN:

ROBERTO MATTACCHIONE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the Appeals of *Vincenzina Mattacchione (2010-366(IT)G)* on September 28, 29 and 30 and October 1, 2, 5 and 7, 2015, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Martin Gentile, Christopher M. Bartlett

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JUDGMENT

The Appeals from the reassessments made under the *Income Tax Act* with respect to the 2003, 2004 and 2005 taxation year are dismissed.

The Respondent shall provide written submissions with respect to costs by December 7, 2015 and the Appellant shall have until December 31, 2015 to respond in writing.

Signed at Ottawa, Canada, this 13th day of November 2015.

"Campbell J. Miller"

C. Miller J.

Citation: 2015 TCC 283
Date: **20160104**
Docket: 2010-366(IT)G

BETWEEN:

VINCENZINA MATTACCHIONE,

Appellant,

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HER MAJESTY THE QUEEN,

Respondent,

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ROBERTO MATTACCHIONE,

Third Party,

Docket: 2011-419(IT)G

BETWEEN:

ROBERTO MATTACCHIONE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

C. Miller J.

Introduction

[1] Roberto Mattacchione ("Roberto") and Vincenzina Mattacchione ("Vincenzina") (now remarried as Vincenzina Palenchuk) were childhood sweethearts, married young. Roberto was a self-described entrepreneur, clearly smart and enterprising. Vincenzina was, during the years in issue, a devoted, loving wife employed in administrative roles in Roberto's commercial activities, some of which pertained to charitable donation arrangements, in which product acquired by a company would ultimately, through a series of transactions, be

donated at a considerably higher value to a charity. Two companies involved in this buy low – donate high program were Riel 1 and Riel 2. Riel 1 was incorporated on May 15, 2002 as 2011363 Ontario Corp. changing its name to Riel Enterprises Ltd. in September 2004 and again changing to ICC Riel International Inc. in August 2005. Riel 2 was incorporated on October 29, 2003 as 2034931 Ontario Corp., changing its name to Riel International Ltd. in September 2004.

[2] Vincenzina was the sole shareholder of Riel 1 and Riel 2. In 2003 and 2004, Vincenzina reported $4.5 million and $4.4 million respectively as bonuses from Riel 1 and Riel 2. She also reported salary of $150,000 in 2004 from Riel 2. Vincenzina also claimed tax credits based on charitable donations in 2003 of hockey sticks and medical supplies to the All Saints Greek Orthodox Church in the amount of $7,900,000 which she acquired at a cost of $115,000 for the hockey sticks and $110,812 for the medical supplies. The Minister of National Revenue (the "Minister") denied the credits.

[3] Similarly, Roberto claimed tax credits for 2003, 2004 and 2005 based on charitable donations he claims he made in 2003 of medical supplies valued at $1,515,100 which he acquired for $31,581. The Minister denied the credits.

[4] Both Roberto and Vincenzina appealed the Minister's reassessments. Roberto was added as a Third Party to Vincenzina's tax appeal for purposes of determining a question pursuant to section 174 of the *Income Tax Act* (the "*Act*") of whether the amounts of $4,500,000 and $4,550,000, as reported by Vincenzina in her 2003 and 2004 taxation years, were received by her, and whether they were her income or whether Roberto was required to include those amounts in his 2003 and 2004 income tax returns.

[5] It was determined this question was best answered in the context of the two Appeals being heard on common evidence. Vincenzina's counsel advised that if I determined the approximate $9,000,000 of bonus was received by Vincenzina and properly reported by her, then she would not be pursuing the position that her charitable donations were valued at anything more than what she paid for them. This put Roberto in the awkward position of having to argue that the donation of hockey sticks and medical supplies by Vincenzina were properly valued, just in case I found that the bonuses were his income and the donations were his donations.

[6] It is not my habit to provide my decision before providing reasons, but in this case it will make the balance of the judgment more readily comprehensible if I do so.

[7] With respect to the determination of the question pursuant to section 174 of the *Act*, I find that the approximate $9,000,000 of bonus and salary income reported by Vincenzina was received by her and properly brought into her income for tax purposes. Given the concession she made with respect to the charitable donations, the only other issue to be determined with respect to Vincenzina's Appeal is the question of penalties, which I find have been correctly assessed. With respect to Roberto's Appeal, I find the charitable donation tax credits he claimed are not supportable due to lack of donative intent. Likewise, I find the penalties have been correctly assessed.

Facts

[8] Vincenzina and Roberto knew each other in school, fell in love and married in 1989 when Vincenzina was 21 years old. She had finished high school and completed a six month legal secretary course before getting a job as a receptionist and part-time administrator with a sole legal practitioner. Subsequently, she worked with Royal Lepage. After that, she worked in an administrative capacity for a couple of other companies until the couple decided to have children. They had one child born in 1994. When the child was kindergarten-age, Vincenzina went to work for Afra Corp., a company run by an individual by the name of Shahir. She started as a receptionist. Part of her duties was to verify invoices.

[9] Roberto and his father were in the construction business with a company known as AMRM Construction and, in fact, built Shahir's home. Part of what Shahir did was invest people's money. Both Vincenzina's and Roberto's family did invest approximately $1,400,000 with Afra Corp., partly based on the confidence in Vincenzina working with Shahir, as well as given Roberto's grasp of the investment possibility.

[10] Throughout this time, Vincenzina was struggling with an illness which initially was believed to be leukemia, but was eventually diagnosed as a blood disorder that required some diligent attention.

[11] In 2000, there was concern that the family's investment was going sideways and a plan was suggested by Shahir to recoup the family's investment. Roberto worked with Shahir to sort out how to save the family's investment, which

involved Roberto getting a company owned by Vincenzina's brother-in-law, 818437 Ontario Ltd., to acquire comics from one of Shahir's companies, and through a donation "deal" with an organization known as Canadian Literary Initiative ("CLI"), recouped $500,000 of the family's investment by the end of 2001. There was some uncertainty as to whether the balance of the family money was recouped with the CLI program in 2002. The CLI program finished by the end of September 2002.

[12] It was through this program, however, that Vincenzina and Roberto met a number of players familiar with the buy low – donate high program, including a Mr. MacGregor, a Mr. Black, a Mr. Taube and a Mr. Schneiderman. Mr. Taube, who testified, was an accountant with experience in tax assisted shelters. He had investigated the possibility of a donation program using Shahir's comics as the product to be donated and was satisfied that it would work. This was Vincenzina's and Roberto's first introduction to such a program, and the individuals they met remained involved in the evolution of a similar program developed by Roberto.

[13] While there was considerable testimony from Vincenzina and Roberto, Mr. Taube, Mr. Wood and Mr. Babiolakis with respect to this first endeavour, the relevant facts are that Roberto became familiar with the program and connected with those individuals who might assist him develop a similar program in the future. Both Vincenzina and Roberto were interested in the recouping of the investment and both met players involved in the buy low – donate high program.

[14] From exposure to this first donation deal involving comic books as the product, it was clear to Roberto that many of the key ingredients for future buy low – donate high programs were already in place. Those ingredients were a willing charity with needs to use product, product that could be acquired for considerably less than fair market value, a supply chain and delivery chain, a marketing arm to attract agents and donors and the administrative capacity to put it all together.

[15] Vincenzina and Roberto had been introduced to Mr. Babiolakis, a director of the All Saints Greek Orthodox Church, which appeared willing to consider product for purposes of philanthropic use. As well as being on the board of the Church, informally and then formally, Mr. Babiolakis had been in the international trading business for many years – a good combination for this type of program. Vincenzina and Roberto also met Mr. Taube whose background was in tax assisted shelters and who was prepared to market a buy low – donate high program given the many connections he had with sales agents across the country. He was also able to put Roberto in touch with suppliers of product.

[16] Roberto also met Mr. Schneiderman, a lawyer and Mr. Wood, a chartered accountant, who were both familiar with the buy low – donate high program. Mr. Schneiderman's firm was prepared to act as an escrow agent. Vincenzina and Roberto had also been exposed to CLI, what I would call the facilitator of the program, that involved several other individuals including Mr. Black, Mr. MacGregor and Mr. Taube.

[17] Before getting into a great deal of detail as to who did what in programs involving Vincenzina and Roberto in 2002 and 2003, it is helpful to outline in general terms the structure of the buy low – donate high program in 2002 and 2003 in which the Mattacchione family was involved.

[18] There were two programs in 2002 and 2003 in which the Mattacchiones were involved, the first was an unregistered donation program of Initiatives Canada Corporation ("ICC") and the second was a registered program given that the tax law had changed to require registration, which was considered the ICC 2003 tax shelter donation program. It ran from February 18, 2003 to December 5, 2003. Effective December 5, 2003, legislative changes were made to the *Act* effectively curtailing tax shelter donation programs (the "Legislative Changes") thus deeming a charitable receipt to be the lesser of fair market value or cost in certain circumstances (see subsection 248(35) of the *Act*).

[19] The charity involved in the ICC programs was the All Saints Greek Orthodox Church, a small parish in Toronto. Mr. Babiolakis described himself as being informally on the board for several years before formally becoming a member, serving as the right hand advisor to the church's pastor, Father John Koulouras. Mr. Babiolakis testified that board meetings were rather informal affairs but that at one such meeting it was agreed that the church would participate in the program, provided the product donated could appropriately be used in the church's philanthropic endeavours. Mr. Babiolakis suggested he had undergone several months of due diligence to ensure that such a program could be properly structured. He wanted to ensure the church would have an opportunity to inspect any product that was the subject of the donation. He also stated that there was no need for any further approval from the board after the one meeting and after that point it was his decision what product would be acceptable to the church. It was also Mr. Babiolakis who signed the charitable receipts on behalf of the church once the several steps of the program were in place. He looked after the shipping of the product as well on behalf of the church, ensuring product was shipped to its ultimate destination.

[20] ICC was the quarterbacking arm of the program. It was never entirely clear to me who owned ICC, but as Mr. Taube, the national sales manager for the program put it, Roberto was highly involved and Mr. Taube took his instructions from Roberto, who he described as a driving force. He also described the hierarchy in the buy low – donate high program as Roberto at the top followed by Mr. Schneiderman, the escrow agent, Mr. Wood, the financial head or CFO of ICC and then himself. He testified that he had 40 or 50 agents reporting to him and those agents would have had sub-agents. Mr. Taube was involved in lots of seminars marketing the buy low – donate high program, such seminars being offered both to agents and to the public. 80% of donations were derived from such seminars. Mr. Taube recalled that Roberto joined him on some of the seminars, while Roberto suggested he did not go on that many.

[21] Mr. Taube had a Joint Venture Agreement with Riel 2 in which he and Riel 2 agreed to procure product to be used in the buy low – donate high program. He negotiated this with Roberto, but Vincenzina signed off on the agreement as the representative of Riel. It was clear Mr. Taube dealt primarily with Roberto. He indicated he did not feel Vincenzina fully understood the program in the early stages.

[22] Donors could sign up at the seminars or agents would follow up to enlist donors. The ICC offices would put packages together, Mr. Wood in particular ensuring that all documents were properly arranged. He acted as director of operations for the ICC 2003 tax shelter. Until February 2003 the programs did not require registration as tax shelters but did thereafter.

[23] Mr. Wood testified that he did not act for Riel 1 or Riel 2 though acknowledged receiving approximately $80,000 as compensation for holding off competitors in similar such programs by incorporating their name. This struck me as unusual.

[24] On the procurement side it was Riel 1 and Riel 2, the two companies incorporated by Vincenzina, owned by her and for whom she was the sole director whose role it was to procure product. Riel 1 also engaged in non-donation program sales in 2002, accounting though for less than 4% of all sales, the vast majority of procurements being with respect to the donation program.

[25] Before carrying on with the review of the procurement of supply side of the donation program, I want to expand on the incorporation and workings of Riel 1 and Riel 2. Both companies were incorporated with Vincenzina as the shareholder

and director. She testified that it was Mr. Wood who would have done all the paperwork, though resolutions dated coincidentally with the incorporations she indicated she did not in fact sign until sometime in 2005. The resolution stipulated that Vincenzina paid $100 for 100 shares though she stated she did not recall paying anything for shares. She emphasized that Roberto made decisions for both companies. She would simply sign whatever she was asked to sign, trusting Roberto had affairs in hand. When asked what she understood being a director meant, she replied it showed that she was the owner. The corporate resolutions signed by her stipulated a year end which again she said was determined by Mr. Wood and Roberto.

[26] The product that the Riel companies had to obtain was meant to be a product the All Saints Greek Orthodox Church could use, it had to be a product that was obtainable at a price significantly less than an appraised value and a product that was readily shippable in bulk to keep shipping costs down. Roberto devoted a good deal of his time and energy in 2003 finding acceptable product for the buy low – donate high program, importing it, ensuring the church got a description of the goods, approving the product and then negotiating an acceptable price. While he continued to work in his and his father’s construction business throughout 2002, by the end of 2003 his concentration had shifted almost entirely to the donation program. He would rely on contacts that both Mr. Babiolakis or Mr. Taube or others may have had to acquire product.

[27] Suppliers included Mondo, a Spanish company with whom Mr. Babiolakis had a long-standing connection.

[28] Once product was approved by the church, the Riel companies would buy it for the low negotiated price and then sell it on to either Silver City Trading Corporation (in connection with the unregistered donation program up to February 18, 2003) or to ICC, primarily in connection with the ICC 2003 tax shelter donation program after February 18, 2003. Roberto had signing authority with Silver City Trading and ICC. The product would be considerably marked up from the low purchase price. It was indeed that upcharge that created profit in Riel. Mr. Wood would monitor that Riel profit to ensure others in the ICC program received their fair share of profits. One example given at trial was a purchase of comic books by Riel for $440,000 with sales on to Silver City for $2,650,000 who in turn sold onto donors at some further markup, with appraised value of the comics close to $19,000,000, upon donation. When Vincenzina was asked, in reviewing a spreadsheet prepared by Mr. Wood, as to how product acquired from Mondo at $440,000 could then be invoiced onto Silver City for $2,600,000 she replied that

that would have been Roberto's, Mr. Wood's and Mr. Babiolakis' decision. Mr. Wood testified that he certainly considered Roberto to be one of the decision makers, along with Mr. Schneiderman in the donation program generally.

[29] Donors would make their cheques payable to the escrow agent, Mr. Schneiderman's company. The donors would be provided with deeds of gift. The donors would know at the time a cheque was written that the goods were being acquired at an amount several times less than an appraised value at which they would be donated. Money would be released from escrow once it was clear the All Saints Greek Orthodox Church would take the product. It seems it was strictly a mechanical process once all pieces were in place. Mr. Babiolakis would arrange for the shipping though the costs would be covered by ICC. The goods would go to recipients designated by Mr. Babiolakis on behalf of the All Saints Greek Orthodox Church. Money from escrow would go to ICC to cover costs including the payment to Riel, appraisal costs etc. Roberto had signing authority on cheques for both ICC and Silver City.

[30] Before these structures involving Vincenzina and Roberto were put in place, Roberto explained to Vincenzina that given her involvement in the future it would be appropriate to transfer the matrimonial home from their joint names into his name alone, which was done in late 2001. Vincenzina received some legal advice from Roberto's lawyer in this regard. As well, in early 2002 she was removed as a joint holder of the couple's bank accounts, leaving accounts in Roberto's name only, although she continued to have signing authority. She did not get her own account until the couple formally separated in 2008.

[31] So what were Vincenzina's and Roberto's respective roles in these commercial affairs? Vincenzina portrayed Roberto as the moving force, having gained experience in seeing how the comic book donations program that was run through the family company had recouped their investment. She too had experience in that arrangement, as the deal was entered into to recoup the Mattacchione family's investment with Shahir. It was clear that she was concerned about her family getting their money back so did attend meetings in that regard with the players involved to ensure that happened. Roberto remained the quarterback, I have no doubt, in organizing that initial arrangement. Notwithstanding creditor proofing arrangements, such as being taken off the bank accounts, it was clear that Vincenzina still had access to these accounts. Also, the couple would discuss any major purchases. Vincenzina later actually also obtained a power of attorney with respect to the TD Waterhouse Investment account. I conclude her access to the family finances was not restricted.

[32] With respect to the Riel companies, operating in 2002 and 2003 in connection with the buy low – donate high programs, Vincenzina was not just shown as sole shareholder and director, she did take an active role in the administration, albeit not on a full-time basis given her health issues. Her cell number was on invoices. Her and Roberto's home address was shown as Riel's office. She signed agreements on behalf Riel, for example an agreement between Riel and Krishna dated June 22, 2002 for a contract to provide certain inventory accounting and valuation assignments to assist with sales to Silver City Trading Corp. Vincenzina did testify that she had no involvement with Silver City, as that was Roberto's concern, though she also signed an agreement in 2003 between Riel and Silver City whereby Silver City assumed Riel's debt to Krishna's company. She also did data entry for Riel, noting the company used the MYOB (Mind Your Own Business) software which would allow, according to Vincenzina, Mr. Wood to make adjusting entries without the program indicating when they were made. Vincenzina also signed the corporate tax returns, which were prepared by her sister, a bookkeeper, based on materials provided by Mr. Wood.

[33] Vincenzina also prepared the invoices for the products sold by the Riel companies to Silver City or ICC. She did so based on Mr. Woods instructions. She claimed she was not involved however in the acquisition of product or inventory as that was very much Roberto's or Mr. Babiolakis' domain.

[34] Riel 2's only customer was ICC. In its 2004 taxation year it recorded gross profits of approximately $4,300,000.

[35] Riel 1's income for the year end October 31, 2003 was approximately $11,000,000, showing a gross profit of approximately $4,800,000. It declared a management bonus of $4,500,000 to Vincenzina. This was supported by a director's resolution signed by Vincenzina, stipulating the bonus was to be paid by April 28, 2004. In fact, on October 31, 2003 the accrued bonus was charged to Vincenzina's shareholder loan account with Riel. The amount was not withdrawn from Riel until April 2004 when the funds appear to have left Riel only to be immediately lent back to the company. In November 2005, a PPSA Financing Charge Statement was filed with Ontario Consumer and Business Services evidencing a security in Roberto's name for the amount of $4,500,000.

[36] With respect to the bonuses Mr. Wood testified that while he did not personally prepare them he likely instructed Vincenzina or another staff to do so. He acknowledged Roberto and Vincenzina asked him about the bonuses and he advised them "how it works".

[37] Riel 2's income for the year end September 30, 2004 was approximately $7,400,000, with gross profits of $4,300,000. It declared a bonus of $4,400,000 to Vincenzina, as well as salary of $150,000. This too was supported by a director's resolution signed by Vincenzina stipulating the bonus was to be paid out by February 2005. Again, the Vincenzina shareholder loan account was charged with the $4,400,000 resulting in the account going from an amount of $67,653 shown to be owed by Vincenzina to Riel, to Riel owing Vincenzina $4,330,000. This amount was paid out on April 14, 2005 into a Toronto-Dominion trust account 6234342, and shortly thereafter, $4,400,000 moved into a separate account, 6259401. Both accounts were in Roberto's name. A cheque was written on the account to a TD Waterhouse account in Roberto's name, an account over which Vincenzina had power of attorney. The funds were used for investment purposes.

[38] While Vincenzina acknowledged signing the director bonus resolutions dated October 31, 2003 and September 30, 2004 she does not recall doing so until sometime in 2005. She presumed Mr. Wood prepared those resolutions, which he denied, though he did admit he may have instructed Vincenzina or another staff member to prepare them as he would have known such bonus resolutions were necessary. He recalls Vincenzina and Roberto asked him about the bonuses and he advised "how it works", though again denying that he ever actually worked for Riel. Mr. Wood confirmed that while Vincenzina did not have her own account, she had control of all the Mattacchiones' accounts.

[39] Vincenzina appears to also have had control over Riel's accounts. She bought a $70,000 car for Roberto for a Christmas present using Riel's funds, running it through her shareholder loan account. She initially testified that the amount related to a car for Roberto and not until cross-examination did it become clear that she actually handled the car deal as a present.

[40] Vincenzina's sister, Ms. Rosa, prepared Vincenzina's income tax returns for 2003 and 2004, advising her how much she owed to the Canada Revenue Agency (the "CRA"), being approximately $506,000. A cheque was paid to the CRA for that amount from Riel 1 on April 30, 2004. The 2003 return was the first time Vincenzina testified that she knew the actual amounts involved by way of income ($4,500,000) and charitable donations ($7,900,000), part of which she carried forward into 2004, though she was aware she would be reporting substantial income and using charitable donations as that was the structure Roberto had devised. She did not question the income being hers, nor question the nature of the donations or their amounts. She believed Roberto had appropriate appraisals and this was all just part of the arrangement. She really was not concerned with what

was being donated, believing it involved hockey sticks. After obtaining professional advice in 2008, she felt the income was not really hers. She believed, however, that she had to report the income as she was recorded as the owner of Riel 1 and Riel 2. She sought no other advice, again presuming Roberto was handling everything properly.

[41] In late 2005, the marriage began to crumble. In early 2006, Vincenzina handed over directorship of Riel to Roberto. In 2008, she gave up the power of attorney. To this point, the couple had been devoted to one another. A number of witnesses testified that they saw Vincenzina and Roberto as a team. Ms. Rosa put it most succinctly that she thought of the two of them as one.

[42] I turn now to the circumstances surrounding the particular donations at issue. To be clear, these were not part of the program to which thousands of donors subscribed. The donations before me were individual donations by Vincenzina and Roberto outside that program, but with the same cast of characters involved and with the similar basic premise of buy low and donate high.

[43] In her 2003 tax return, Vincenzina sought to include as charitable donations, $4,100,000 based on the fair market value of hockey sticks donated to All Saints Greek Orthodox Church and $3,800,025 based on the fair market value of medical supplies, again donated to the All Saints Greek Orthodox Church. She could not use all of the charitable donation in 2003 so carried it forward to her 2004 return.

[44] In his 2003 return, Roberto sought to include a charitable donation of $1,590,100 based on fair market value of medical supplies of $1,515,100 and a $75,000 cash donation to All Saints Greek Orthodox Church. He could not use all of the charitable donation in 2003 so he carried it to 2004 and 2005.

[45] Turning first to the hockey sticks, Mr. Babiolakis had a close connection with the Spanish company, Mondo, in the international trading world and acted on their behalf in negotiating the hockey stick deal. He could not recall how he first became aware of the wooden sticks being sold at a low price from Jura, a Canadian company owned by Mr. Kligerman. He felt the church could use these sticks for children's recreation programs overseas. Mr. Babiolakis indicated that he showed a couple of sticks to Vincenzina and Roberto but did not talk value with them telling them to do their own due diligence.

[46] Mr. Kligerman testified that he made contact with Mr. Babiolakis through his accountant, who understood that Mr. Babiolakis was looking to buy bulk items.

In the summer of 2003, Mr. Kligerman advised Mr. Babiolakis he had an old stock of sticks and would make him a package deal provided the sticks could not be resold in North America. Mr. Kligerman's business was supplying sticks for brand names such as Bauer and Sherwood and often would manufacture more than ultimately required. He was restricted to selling the sticks just to the company whose brand was on the stick, consequently the requirement to Mr. Babiolakis the sticks could not be sold in North America.

[47] Mr. Kligerman and Mr. Babiolakis struck a deal in mid-2003 though Mr. Kligerman indicated some of the inventory was still in component parts and had to be prepared.

[48] Not until March 12, 2004 did Jura receive $60,000 from Mondo for the purchase of hockey sticks. There was an invoice dated May 31, 2004 for 6000 sticks at $15 a stick for a total of $90,000, the invoice indicating a credit of $60,000 with a balance of $30,000 owing. Oddly, there was a second invoice dated June 16, 2004 likewise for 6000 sticks, again showing the $60,000 deposit. Mr. Kligerman could not explain why there were two invoices. There was also a bill of lading dated June 16, 2004 for the shipment of an undisclosed number of sticks.

[49] Mr. Kligerman advised the CRA that there were two orders for sticks from Mr. Babiolakis, the first for 6000 and the second for 18,950. He acknowledged the second group would have been after May 2004. There were no documents provided to substantiate the sale of the additional 18,950 sticks. Mr. Kligerman also stated he would not have shipped sticks without being paid.

[50] Mr. Kligerman testified that his sticks retailed at that time for between $15 and $30. He also indicated that this was a time of transition from sticks going from wood to carbon composite, fiberglass or aluminum. He described the value of his inventory of wooden sticks at that time as decreasing monthly.

[51] An invoice of Mondo addressed to Vincenzina is dated August 20, 2003. It shows a purchase of "18725 pieces of hockey sticks" for $115,000. A wire transfer dated December 1, 2003 shows a payment of $115,000 from Vincenzina to Mondo.

[52] Twelve deeds of gift dated either November 24 or 30, 2003 were introduced in evidence, stipulating the gifts by Vincenzina of 24,950 sticks in tranches of 1900, 2000, 1850, 1950, 2000, 2000, 800, 1500, 2500, 2325, 3200 and 3025 with a total value of $4,100,000.

[53] Roberto produced an appraisal report from Canam Appraiz Inc. to the All Saints Greek Orthodox Church showing the value of the sticks at $200, $150 or $110 each. The appraiser did not appear as a witness. The report stated the fair market value was based on obtaining retail prices prevailing in the marketplace. The report does not disclose where such retails prices were obtained or define the marketplace.

[54] With respect to medical supplies, Mr. Geoff Reid testified. He was the Vice-President of finance of the medical supply company known in 2003 as Dumex. He described how the company, which normally supplied in bulk to hospitals or clinics, attempted to enter the retail market with new products using the internet as its marketing tool. This did not prove successful and the company looked to dispose of unsold but not yet expired inventory to a discount buyer. If they could not sell, they would have simply donated the supplies.

[55] Dumex had previously donated to the All Saints Greek Orthodox Church and made that connection again, though Mr. Reid could not recall if it was Mr. Babiolakis or a Mr. Lucyk.

[56] Dumex struck a deal with the Trinity Group to sell the listed medical supplies for $150,000, though that price was subsequently decreased to $99,000. In a letter dated November 5, 2003 (though signed by Mr. Lucyk for Trinity on November 7, 2003 and by Mr. Goodwin for Dumex on November 6, 2003) it was represented by the company that this was 4.648 percent of the aggregate retail value. I understand this was based on each individual unit priced individually rather than on a bulk basis. As Mr. Reid explained this was as much as the company could get. It was clear the product could not be resold cheap in the North American market. In an attached letter, the company stipulated that it made no representations with respect to the current fair market value. As Mr. Reid testified, who knows the true value?

[57] The amount suggested by the appraiser Canam Appraiz, for a value, ($6,000,000) was simply the retail list price of the supplies on an individual per unit basis. Again, the appraiser did not testify.

[58] Dumex sold the medical supplies to Trinity Group of Mississauga who sold onto Mondo, who sold onto Vincenzina and Roberto for $110,812 and $31,581 respectively. The timing of these transactions is uncertain. A wire payment indicates Vincenzina transferred $110,812 to Mondo on December 18, 2003. There are several invoices from Dumex to Trinity for the medical supplies dated between

December 4, 2003 and December 31, 2003. There are bills of lading for gauze bandages dated between November 20, 2003 and January 13, 2004.

[59] Vincenzina provided several Deeds of Gift dated between November 14, 2003 and November 24, 2003 to All Saints Greek Orthodox Church for the medical supplies in amounts setting values at between $238,000 and $378,000, totalling a value of approximately $3.8 million.

[60] Interestingly, there was also a letter dated November 13, 2003 from Mr. Babiolakis on behalf of the Church thanking Mr. Goodwin of Dumex for the donation.

First issue: determination of question

[61] As set out in the Introduction, the first issue is the determination of the question pursuant to section 174 of the *Act*; that is, whether Vincenzina received and correctly reported the income of $4,500,000 and $4,550,000 for the 2003 and 2004 taxation years. I find she did for the following reasons.

[62] Vincenzina's counsel raised three arguments as to why effectively the income was not Vincenzina's for tax purposes:

1. The structure was a sham and the reality was Roberto earned the income from the buy low – donate high program;
2. Subsection 56(2) of the *Act* applies to deem the income to be Roberto's;
3. Roberto was the beneficial owner of either the Riel companies or the bonuses declared.

[63] These arguments are all premised on the view that Vincenzina simply followed direction from Roberto or Mr. Wood with little if any thought of her own and with no informed consent. The Appellant would have me view Vincenzina as an unquestioning participant in her husband's business arrangement, leaving every decision to Roberto; in effect, a wife only and not a business partner. From the incorporation of the two Riel companies, the filing of returns, the determination of bonuses and claims for charitable donations they were, she suggested, all directed by Roberto and she simply went along with it. The companies were really Roberto's companies, the bonuses were his as were the donations. I do not see it that way.

[64] I will briefly address the issue of credibility as Appellant's counsel argued I should find Roberto's evidence not as credible as Vincenzina's. He points to discrepancies between Roberto's and Mr. Taube's evidence with respect to seminars as an example of Roberto shading the truth. I find neither Roberto's or Vincenzina's evidence so lacking in credibility that I discount their testimony. Yes, there were some differences in testimony, but Roberto was not alone in that regard. I found Vincenzina's explanation of the car purchase on examination in chief hardly forthcoming, as it came out in cross examination that she, not Roberto, actually bought the car. This is significant given Vincenzina's claim that she simply wrote checks at the direction of Roberto and Mr. Wood. Not so, I find.

[65] The factual determination to be made is not hampered by any issues with respect to credibility. And that determination is what was Vincenzina's role in the organization of the buy low – donate high program, specifically in connection with the Riel companies. In that regard, Roberto's and Vincenzina's testimony is not as divergent as counsel would have me believe.

[66] I find Roberto was involved in a much greater decision making role in the buy low – donate high program than Vincenzina. He never denied this. He actively procured product, he had Mr. Taube, head of sales, reporting to him, he worked closely with Mr. Babiolakis – he was an essential cog in the program's wheel. I also conclude he determined to run the Mattacchione family's profits through companies, the Riel companies. Appellant's counsel argues Roberto set Vincenzina up as a front, without her providing any informed consent. I find, however, that both Roberto and Vincenzina knew the advantages of the buy low – donate high program.

[67] So where was Vincenzina lacking informed consent? Indeed, consent to what? To being involved in the buy low – donate high program generally, to accepting significant future bonuses, to claiming multi-million donations, to being Riel 1's and Riel 2's sole shareholder and director? I find Vincenzina was not unknowledgeable or naïve on these matters as she liked to portray herself. I conclude that she was not simply part of a husband and wife team, but also part of a business team. In saying that, I recognize one team player was more dominant. Roberto was the brains behind the buy low – donate high program and he maneuvered the many pieces of the puzzle to ensure the program's success and the considerable profits flowing to the Mattacchione family. But Vincenzina was not an innocent dupe simply going along for the ride. She agreed to "creditor proofing" arrangements, knowing she would have no less access to the family's financial partnership. She even got a Power of Attorney on the TD Waterhouse investment

account. She claims that only Roberto made financial decisions yet she arranged the purchase of a car for a Christmas present for Roberto using Riel funds. She handled administrative work first from the couple's home office and later in a separate business office. She knew the players involved, who viewed her as part of the Mattacchione team. She had office experience, she wrote cheques, prepared invoices, maintained authority over family finances, consulting only when necessary with Roberto on major purchases, signed returns, signed financial statements, discussed matters not just with Roberto but also with Mr. Wood and she signed authorizing resolutions. These are not the actions of what her counsel described as a wife taking lunch to her husband. She was very much involved.

[68] In summary, Vincenzina knew what she was doing and was happy to go along with the structure that yielded millions of dollars in a short period. Roberto was undoubtedly the mastermind but I find he did not control each and every one of his wife's actions. She had business experience and although might express some confusion between the role of a shareholder and that of a director, I find she knew the Riel companies were her companies. She accepted the bonuses were her bonuses until the marriage collapsed.

[69] So with those findings of fact, I turn to the legal arguments raised by Vincenzina's counsel.

A. Sham

[70] In the Federal Court of Appeal decision in *Faraggi v R.*,[1] Justice Noël relied on comments by Justice Estey in the *Stubart Investments Ltd. v R.*[2] decision describing sham as follows:

> 57. However, courts have always felt authorized to intervene when confronted with what can properly be labelled as a sham. The classic definition of "sham" is that formulated by Lord Diplock in Snook, supra, and reiterated by the Supreme Court on a number of occasions since. In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, Estey J. said the following (page 545):
>
> …This expression comes to us from decisions in the United Kingdom, and it has been generally taken to mean (but not without

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1 2008 FCA 398.

2 [1984] 1 S.C.R. 536 (S.C.C.).

> ambiguity) a transaction conducted with an element of deceit so as to create an illusion calculated to lead the tax collector away from the taxpayer or the true nature of the transaction; or, simple deception whereby the taxpayer creates a facade of reality quite different from the disguised reality.

…

> 58. In Cameron, supra, the Supreme Court adopted the following passage from Snook, supra, to define "sham" in Canadian law (page 1068):
>
> …[I]t means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

…

> 59. It follows from the above definitions that the existence of a sham under Canadian law requires an element of deceit which generally manifests itself by a misrepresentation by the parties of the actual transaction taking place between them. When confronted with this situation, courts will consider the real transaction and disregard the one that was represented as being the real one.

[71] Justice Valerie Miller in an order in the case of *Coast Capital Savings Credit Union v R.*,[3] interpreted these provisions to apply in a tax case as follows:

> 24. To my mind, in a tax case, if it is the Minister who must be deceived, it is only the Minister who can plead "sham" and rely on the "sham" argument to have the courts disregard a transaction. My opinion is supported by the decision of the Federal Court of Appeal in *Bonavia v The Queen*, 2010 FCA 129.

[72] In the case before me it is not the Minister relying on the sham doctrine, as indeed the Minister claims not to have been deceived. A deception of the Minister implies a deception causing ultimately less tax than would have been payable without the deception – why else a deception? Here, there is nothing hidden or deceptive about the amount of revenue in the Riel companies or that bonuses were paid out to an individual. Had that individual been Roberto and not Vincenzina it would have made little difference in tax owing. How is the Minister deceived?

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[3] 2015 TCC 195.

[73] Further, I find there was no intention on the part of the taxpayer, Vincenzina, to deceive the Minister. She believed she was the recipient of the bonus income, she signed a resolution to that effect and signed her returns recording that income. I am also satisfied Roberto did not intend to deceive the Minister. Why would he? The legal structure was in place, in his view, to flow funds from companies owned by his wife into her hands as bonuses. I find no intent to deceive.

[74] As was pointed out by the Federal Court of Appeal in the case of *Antle v R.*,[4] the intention to deceive is not a *mens rea* intent but "it suffices that parties to a transaction presented as being different from what they know it to be". I have not been satisfied either Vincenzina or Roberto, at the time, knew this arrangement to be any different than it was. The doctrine of sham is not applicable in these circumstances.

B. Subsection 56(2) of the *Act*

[75] Subsection 56(2) of the *Act* reads:

> A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to another person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person (other than by an assignment of any portion of a retirement pension under section 65.1 of the Canada Pension Plan or a comparable provision of a provincial pension plan as defined in section 3 of that Act) shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.

[76] The Appellant argues that subsection 56(2) of the *Act* might come into play either by Roberto directing payments into the Riel companies or directing the bonuses out of the Riel companies by crediting Vincenzina's shareholder loan account. The former would require a finding of sham which I have not made so I will deal only with the latter.

[77] The Appellant argues four requirements need to be met for subsection 56(2) of the *Act* to shift the bonus income from Vincenzina to Roberto:

i. The payment must have been to a person other than the taxpayer;

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[4] 2010 FCA 280.

ii. The payment must have been at the direction or with the concurrence of Roberto;

iii. The payment must be for Roberto's own benefit or for the benefit of some other person on whom Roberto desired to have the benefit conferred; and

iv. The payment would have been includable in computing Roberto's income if it had been received by Roberto instead of the other person.

[78] I will first address the fourth condition. In the Supreme Court of Canada decision of *Neuman v M.N.R.*,[5] the Court commented on the *McClurg v M.N.R.*[6] decision as follows:

> 46 This Court concluded that, as a general rule. s. 56(2) does not apply to dividend income since, until a dividend is declared, the profits belong to the corporation as retained earnings. The declaration of a dividend cannot be said, therefore, to be a diversion of a benefit which the taxpayer would have otherwise received (at p. 1052). Dickson C.J. explained the ruling as follows (at p. 1052):
>
> While it is always open to the courts to "pierce the corporate veil" in order to prevent parties from benefitting from increasingly complex and intricate tax avoidance techniques, in my view a dividend payment does not fall within the scope of s. 56(2). The purpose of s. 56(2) is to ensure that payments which otherwise would have been received by the taxpayer are not diverted to a third party as an anti-avoidance technique. This purpose is not frustrated because, in the corporate law context, until a dividend is declared, the profits belong to a corporation as a juridical person : [B. Welling, Corporate Law in Canada (1984), at pp. 609-10]. Had a dividend not been declared and paid to a third party, it would not otherwise have been received by the taxpayer. Rather, the amount simply would have been retained as earnings by the company. Consequently, as a general rule, a dividend payment cannot reasonably be considered a benefit diverted from a taxpayer to a third party within the contemplation of s. 56(2) . [Emphasis added.]
>
> …

[5] 1998 CarswellNat 685.

[6] [1990] 3. S.C.R. 1020 (S.C.C.).

48 An entitlement requirement in the sense I have described is consistent with the stated purpose of s. 56(2), which is to capture and attribute to the reassessed taxpayer "receipts which he or she otherwise would have obtained" (McClurg , at p. 1051). Dividend income cannot pass the fourth test because the dividend, if not paid to a shareholder, remains with the corporation as retained earnings; the reassessed taxpayer, as either director or shareholder of the corporation, has no entitlement to the money.

49 This is the only interpretation which makes sense and which avoids absurdity in the application of s. 56(2), as noted by Dickson C.J. (alp. 1053):

> ...but for the declaration (and allocation), the dividend would remain part of the retained earnings of the company. That cannot legitimately be considered as within the parameters of the legislative intent of s. 56(2). If this Court were to find otherwise, corporate directors potentially could be found liable for the tax consequences of any declaration of dividends made to a third party....this would be an unrealistic interpretation of the subsection consistent with neither its object nor its spirit. It would violate fundamental principles of corporate law and the realities of commercial practice and would "overshoot" the legislative purpose of the section.

[79] While the case before me does not relate to dividend income, the rationale is the same where corporate income is distributed as bonus to the sole shareholder. If the bonus had not been declared to Vincenzina, it does not follow it would have been declared to Roberto. The funds would have remained in the retained earnings of the companies.

[80] I also conclude that condition (ii.) has not been met. The Appellant argues that the bonus decision was in fact Roberto's decision claiming that he controlled the decision making process generally. This ignores the legal reality that Vincenzina owned the company and was its sole director. It also ignores the evidence that Mr. Wood discussed the bonuses with both Roberto and Vincenzina. Only Vincenzina could legally declare the bonus. I conclude that she did not act only on the direction of Roberto with no input, in effect simply signing what was put in front of her. I find that bonuses were discussed between her and Roberto and she, as sole director, ultimately directed their payment. There is no doubt Roberto played a role in this, but not to the point that he usurped Vincenzina's legal responsibility. It is not open to her to now rely on an anti-avoidance provision of

the *Act*, normally serving as an arrow in the Minister's quiver, to shift that income from her to her former husband. I find subsection 56(2) of the *Act* does not apply.

C. Beneficial ownership

[81] Finally, Vincenzina argues that Roberto was the beneficial owner of the Riel companies or the bonuses flowing from those companies. Counsel referred me to the Dictionary of Canadian Law definition of "beneficial owner" and "beneficial ownership":

> BENEFICIAL OWNER. …[T]he real owner of property even though it is in someone else's name. *Csak v Aumon* (1990), 69 D.L.R. (4th) 567 at 570 (On. H.C.), Lane J.
>
> BENEFICIAL OWNERSHIP. Includes ownership through a trustee, legal representative, agent or other intermediary.

[82] While recognizing some difficulties with finding a trust or agency relationship, Vincenzina's counsel argued I could rely on ownership through an intermediary. Relying on the Tax Court of Canada decision by Justice Hogan in *Fourney v R.*,[7] counsel argued that property is beneficially owned when a person possesses the three attributes of ownership (*usus*, *fructus*, *obusus* – right to use, right to produce and risk). So, notwithstanding the property (either shares in the Riel companies or the bonuses credited to her shareholder loan account) was in Vincenzina's name, did the attributes of ownership rest with Roberto on the basis that Vincenzina served solely as some type of intermediary, one presumably without the attributes of ownership. This is a novel and intriguing argument, akin to the corporate concept of stripping away the corporate veil to determine ownership. As I have found, however, Vincenzina was not an intermediary. It was Vincenzina that bore the risk of ownership by being as involved in Riel's affairs as she was, not only as shareholder and director but as hands on officer. She simply was not a puppet. She did not suggest *non est factum*. She did not have all decision making authority stripped from her. I agree she was not the mastermind of the buy low – donate high program but she was a willing and critical component of it and not just an intermediary bearing no risk.

[83] With respect to the elements of use and produce, it was Vincenzina's shareholder loan account that was credited notwithstanding the funds subsequently

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[7] 2011 CarswellNat 4734.

went into what I consider the family coffers. I do not accept that she never had use of the funds.

[84] Although in a different context from the case before me, Vincenzina's counsel referred me to comments from Former Chief Justice Bowman in the case of *Savoie v R.*:[8]

> 12. The situation here differs from that of spouses who, with a full appreciation of the legal consequences of what they are doing, choose that property be held jointly, or solely by one spouse or in any other of the variety of ways in which property can be owned. Such deliberate choices must be respected because the legal form is consistent with the economic reality and the informed intentions of the parties.

[85] While Vincenzina's counsel argues that the legal form is inconsistent with economic reality and that Vincenzina did not provide informed consent, I find otherwise. The economic reality is that the Riel companies made a considerable amount of money in a very short period of time, and a structure was set up to flow income into the hands of the Mattacchione family through corporations solely owned by Vincenzina. Counsel argues that these significant amounts do not reflect her real earnings as it was Roberto who did most of the work in producing such earnings in the Riel companies. If CRA are not arguing that the payment of the bonuses to Vincenzina is unreasonable and should properly be allocated some other way, then I am not prepared to allow the sole shareholder and director, after an acrimonious separation with her husband, to dictate to the CRA how a deliberate planned structure should now be ignored for tax purposes.

[86] Vincenzina's three arguments are intertwined as they are all based on a conclusion that what you see is not what you get. And, very simply, I disagree with that conclusion. I find the Mattacchiones, as a happily married couple, deliberately and jointly organized their affairs to suit their purposes. This meant Vincenzina was shareholder and director of the Riel companies and she would receive and report the bonuses and claim the charitable donation tax credit. I have not been convinced on balance that this is not what on its face it purports to be. It is as simple as that.

[87] I therefore answer yes to the question as to whether Vincenzina received $4,500,000 and $4,550,000 as reported by her for 2003 and 2004 as income.

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[8] 1993 CarswellNat 1015.

[88] Given representations by Vincenzina's counsel that no dispute is taken with respect to the charitable donation issue, and that Vincenzina accepts the donation is limited to her cost of the product donated, that puts an end to Vincenzina's Appeal **other than to reduce the taxable capital gain assessed by $4,594,687 as no gain arises**.

[89] That leaves only a determination of whether Roberto is entitled to charitable donation tax credits based on the value he attributes to the medical supplies being greater than his cost of those medical supplies. The Respondent argues Roberto is not entitled for three reasons:

i. He had no donative intent;

ii. The purported donation was made in 2004, subsequent to the legislative change; and

iii. The fair market value of the medical supplies was no greater than Roberto's cost.

[90] Notwithstanding the recent decision of the Federal Court of Appeal in *Castro v R.*,[9] in which the court commented in obiter on the issue of donative intent, the law remains somewhat unsettled as to whether or not a charitable donation tax receipt can constitute a benefit for the purposes of vitiating a gift. Justice Scott summarized Justice Woods' decision at the Tax Court as follows:

> 23. The Judge surveyed the most recent jurisprudence including this Court's decision in *Canada v. Berg*, 2014 FCA 25, [2014] 3 C.T.C. 1 [*Berg*]. She found that it did not clarify the issue as to whether an inflated tax receipt constitutes a benefit. The Judge relied on the pronouncement of Sexton J.A. in *Canada v. Doubinin*, 2005 FCA 298, [2005] D.T.C. 5624 [*Doubinin*], at paragraphs 14 to 17, to conclude that the issuance of an inflated tax receipt should not usually be considered as a benefit that negates a gift.
>
> …
>
> 37. The basis for the Judge's conclusion that the respondents did not receive a benefit that negates the gifts they made to CanAfrica was threefold. Firstly, the Judge relied on the respondents' testimonies concerning the sum they each donated to CanAfrica and on this Court's finding in *Doubinin*, at paragraphs 14 to 17. The Judge also refused to hear a new

[9] 2015 FCA 225.

> argument presented by the Minister to the effect that the respondents lacked donative intent because that issue was not clearly identified in the Minister's reply to the notice of appeal. This last argument was reargued before us. It must fail again.

[91] The question of what constitutes a benefit is particularly tricky when dealing with donations of goods, as opposed to money. For example, has a taxpayer who acquired goods for $10 and donated such goods intending to obtain, and in fact obtaining, a $400 charitable donation tax receipt, received a benefit such that there was never any intent to impoverish himself and therefore no gift. I can readily imagine a situation of a sports collector obtaining a Gretzky rookie card 30 years ago for $10 and donating it to the Hockey Hall of Fame for a charitable receipt of $400. I would not consider such a donation offside because of the tax receipt. This has effectively been addressed by the Legislative Changes. This appears to be the approach of the Federal Court of Appeal, again quoting Justice Scott's comments in *Castro*:

> 47. The Judge was correct to find that *Berg* did not resolve the question before her, as the Court did not rule that the inflated tax receipt by itself constituted a benefit. …

[92] The Federal Court of Appeal confirms that, with nothing more, an inflated tax receipt by itself is not a benefit that will vitiate a gift. So, what then is the something more beyond the receipt itself that a court can look to in determining whether or not there is a benefit returning to the donor that will therefore deny the gift? In the Federal Court of Appeal decision in *Berg* it was what the court called pretence documents. In the decision of *Webb v The Queen*,[10] it was kickbacks.

[93] In the case before me what I find Roberto received as part of the acquisition and donation of the medical supplies was an appraisal at a significantly higher amount. It is clear, based on his business of buy low – donate high, and there is no doubt that was a business enterprise, that without the appraisal of medical supplies Roberto would not have been interested in donating those medical supplies. But this becomes somewhat circuitous and leads me back to the Gretzky rookie card. If the collector had the card appraised and based on that appraisal decided to donate the card, with the full intent of benefiting from the charitable donation tax credit, is he any different than Roberto? As with so many concepts in law – it depends on the circumstances. And the circumstances here, I suggest, are the nature of the deal

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[10] 2004 TCC 619.

generally, the timing of the acquisition and donation and the legitimacy of the appraisal.

[94] What was the nature of the deal surrounding the acquisition and disposition of the medical supplies? According to Mr. Reid, they were indeed being disposed of at considerably less than what they were listed at on a per unit basis on the internet. The simple reason, however, was because they could not sell them. They were not marketable. Dumex would have simply donated them itself if not for the arrival on scene of Mr. Babiolakis or his associate at Trinity. Even in Dumex's letter to the Trinity Group, while recognizing the retail price of $3,200,000 it goes on to stipulate:

> We make no representation, and render no opinion, relative to the current fair market value of the foregoing inventory.

[95] With respect to timing, this was not a matter of goods being held for some period of time, while their value perhaps increased, this was a matter of an immediate acquisition and disposition, the disposition not being in the marketplace for which the goods were intended, but directly into a charity. The concerns for determining fair market value in such circumstances should have been evident.

[96] Finally, Roberto points to the Canam Appraiz appraisal maintaining his reliance on it was not misplaced. The appraisal from Canam Appraiz stated:

> The fair market value was based on obtaining the retail prices from the Dumex price list and comparing it to prices prevailing in the marketplace.

The appraisal does not provide any information with respect to the purported comparisons. The report also makes no mention that the Mattacchiones acquired the medical supplies at a cost that appears to be approximately 1/50th of the appraised value. It makes no mention of Dumex's reservation regarding value. It is dated November 6, one day after the document evidencing the purchase of the medical supplies by Trinity for $150,000. This type of appraisal was an integral part of the overall buy low – donate high program. It is easy to be critical of such appraisals in hindsight but from the surrounding circumstances at the time, I conclude, this appraisal accommodated the Mattacchiones rather than present a true picture of fair market value. In so concluding, I am not slamming the door on the possibility that goods may be acquired in distress situations that could very well be marketed at a higher amount. I have not been convinced, however, that the medical supplies in issue fit that category. I am also satisfied that Roberto's reliance on the appraisal was unreasonable in the circumstances.

[97] To come full circle then, is the tax receipt, inflated 50 fold from Roberto’s cost, a benefit vitiating Roberto’s gift to the charity? It is, only because it does not stand alone but is part of a coincidental transaction that included the provision of a questionable appraisal in circumstances demanding greater scrutiny. I am satisfied there was no intention on Roberto’s part to impoverish himself in any way by transferring these medical supplies to the charity. He was in the business of profiting from buy low – donate high programs and this particular transaction was more in keeping with that profit motive than a charitable donation motive. I conclude he had no donative intent.

[98] Having reached this conclusion, there is no need for me to address the Respondent’s other arguments concerning the timing of the donation of the medical supplies or their fair market value. I, however, would like to comment briefly.

[99] The evidence regarding the timing is unclear. There are invoices and bills of lading later in December, indeed as late as December 31, 2003 addressed to Trinity, not to the Mattacchiones. How then does Roberto claim to have acquired and donated the goods prior to December 5? I am not satisfied on balance he did.

[100] With respect to the fair market value, as is no doubt clear from my earlier comments, if I had to base my decision on the question of the value of the medical supplies, again, on balance, I find the appraisal is of little assistance and Roberto has not proven to me the medical supplies were valued at an amount any greater than what he paid for them.

[101] I would make similar comments with respect to the donation of hockey sticks vis-à-vis the timing and the value issues, though it is unnecessary to do so in the circumstances.

<u>Penalties</u>

[102] Subsection 163(2) of the *Act* reads as follows:

> 163(2) 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

…

[103] The false statements in issue are the claims by the Appellants they made charitable donations for approximately $7,900,000 in Vincenzina's case and $1,500,000 in Roberto's case. At the time they made these claims if they either knew they were false or made them in circumstances amounting to gross negligence, then they are liable for the penalties.

[104] With Vincenzina, by her concession in this litigation that the value of the hockey sticks and medical supplies equalled her cost, she is confirming that she now knows the claims were false. Can I extend that knowledge back to the time she made the claims? Yes. At the time she filed her returns, Vincenzina knew very well what she paid for the hockey sticks and the medical supplies and she knew very well that the claim was for a value many many times greater than that cost. She presumed, given her familiarity with the buy low – donate high program, this claim would simply meet the required objective of a significant tax credit, with no regard for any further inquiry. I conclude she knew the claim was unrealistically high. Even if I did not find an actual knowledge, I would readily find a willful blindness in the circumstances constitutes gross negligence.

[105] With respect to Roberto, while I come to the same conclusion it is for slightly different reasons that flow from my earlier finding that Roberto had no donative intent. He knew he was not making a gift: his claim was a misrepresentation. If not on this basis, then I would indeed find on a similar basis to my reasons given for Vincenzina, and that is that he knew the value was not many many times greater than his cost.

[106] **Mr. Roberto Mattacchione's Appeals are dismissed. Ms. Vincenzina Mattacchione's 2003 Appeal is dismissed and her 2004 Appeal is referred back to the Minister for reassessment on the basis the taxable capital gain is reduced by $4,594,687.**

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated November 13, 2015.

Signed at Ottawa, Canada, this **4**th day of **January** 201**6**.

"Campbell J. Miller"

C. Miller J.

CITATION:	2015 TCC 283
COURT FILE NO.:	2010-366(IT)G, 2011-419(IT)G
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PLACE OF HEARING:	Toronto, Ontario
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DATE OF **AMENDED** JUDGMENT:	**January 4**, 201**6**

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