

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20220511**

**Dockets: A-225-20**

**A-226-20**

**A-227-20**

**Citation: 2022 FCA 78**

**CORAM: RIVOALEN J.A.  
LOCKE J.A.  
MONAGHAN J.A.**

**BETWEEN:**

**COASTRIDGE ENTERPRISES LTD.,  
STUART XUE AND STEPHANIE XUE**

**Appellants**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Vancouver, British Columbia, on May 11, 2022.

Judgment delivered from the Bench at Vancouver, British Columbia, on May 11, 2022.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**MONAGHAN J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220511

Dockets: A-225-20

A-226-20

A-227-20

Citation: 2022 FCA 78

CORAM: RIVOALEN J.A.  
LOCKE J.A.  
MONAGHAN J.A.

BETWEEN:

COASTRIDGE ENTERPRISES LTD.,  
STUART XUE AND STEPHANIE XUE

Appellants

and

HER MAJESTY THE QUEEN

Respondent

**REASONS FOR JUDGMENT OF THE COURT**

(Delivered from the Bench at Vancouver, British Columbia, on May 11, 2022).

**MONAGHAN J.A.**

[1] Stuart Xue and Stephanie Xue are shareholders of Coastridge Enterprises Ltd. (Coastridge). In 2006, Coastridge purchased a restaurant and employed an electronic point of sale (POS) record keeping system to record sales. However, the records produced by the POS system were not used by Coastridge to prepare its income tax returns or GST/HST returns.

Rather, Stuart Xue prepared excel spreadsheets summarizing sales and provided those to the accountant for purposes of preparing the returns.

[2] The Minister of National Revenue (Minister) determined that Coastridge had unreported sales in its 2007 to 2010 taxation years inclusive, asserting that transactions were deleted from its POS system and that not all sales recorded in the POS system were reported. The Minister assumed the Xues appropriated Coastridge's unreported income for their personal use. Accordingly, the Minister assessed Coastridge for unremitted GST/HST and each of the Xues for unreported income in their 2007 to 2010 taxation years. The Minister also imposed gross negligence penalties on the Xues.

[3] The assessments were appealed to the Tax Court of Canada and heard on common evidence. The Tax Court (*per* MacPhee J.) largely agreed with the Minister's assessments, for reasons reported at *Xue v. The Queen*, 2020 TCC 72, 2020 D.T.C. 1052. However, it allowed the appeals because it determined that the Minister had overestimated the portion of the deleted sales in the POS system that represented income.

[4] Before the Tax Court, the appellants asked that an adverse inference be drawn because the respondent did not call Terry Condia, an auditor from the Canada Revenue Agency (CRA), as a witness. However, the Tax Court declined to do so.

[5] On appeal to this Court, the appellants assert that the Tax Court erred in failing to draw the adverse inference they requested, and having done so, failed to properly assess the evidence.

[6] The parties submit, and we agree, that the appellate standard of review applies. Thus, the applicable standard for questions of fact and questions of mixed fact and law is palpable and overriding error; for questions of law the applicable standard is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*].

[7] We are of the view that this appeal must be dismissed.

[8] The decision whether to draw an adverse inference is a discretionary matter for the trial judge. Whether “an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts”: *Toronto Real Estate Board v. Commissioner of Competition*, 2017 FCA 236 at para. 107, quoting from *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at para. 73. Therefore, absent an extricable error of law, the standard of review is palpable and overriding error.

[9] Mr. Condia had gone to the restaurant and downloaded the POS system information. The CRA relied on the downloaded data in assessing the appellants. The Tax Court’s explanation for its decision not to draw an adverse inference from the respondent’s failure to call Mr. Condia included:

1. Nothing in the appellants’ pleadings would lead the respondent to anticipate that Mr. Condia’s involvement in the audit or retrieval of the data from the POS system was an issue.
2. The appellants did not subpoena Mr. Condia nor provide any evidence of attempts to have the respondent bring him to trial.

3. The respondent has no obligation to call any evidence to support the assumptions the Minister made in assessing the appellants unless they (that is, the appellants) successfully demolish those assumptions with their evidence. The appellants failed to do so.
4. The Tax Court found no prejudice to the appellants from the failure of Mr. Condia to attend.

In our view, the Tax Court had ample justification for its decision and we see no reason to interfere.

[10] The Tax Court had significant reservations about the evidence of the Xues as it described in paragraphs 35(a) to (r) of its reasons. It described their evidence as “viva voce self-serving evidence, without corroboration” that “was often contradicted by the various business records that were before the Court” containing “numerous inconsistencies and often an overall lack of logic” and no “air of reality.” The Tax Court concluded, based on the evidence, that the appellants did not meet their onus to establish on a balance of probabilities that the Minister’s assumptions were wrong.

[11] As this Court has said many times, the Tax Court is in the best position to review and assess the evidence, including the documents and the testimony. Moreover, “where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge... must be acknowledged”: *Housen* at para. 24.

[12] The appellants asked this Court to accept that because the Minister's assumptions were based on Mr. Condia's analysis of data he obtained from the appellant's POS system, the onus to prove that the analysis supported the assumptions shifted to the respondent. We decline to do so.

[13] The appellants have not established any error of law or palpable and overriding error of fact in the Tax Court's decision and therefore the appeal will be dismissed with costs.

"K.A. Siobhan Monaghan"

---

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE HONOURABLE RONALD MACPHEE  
DATED JULY 27, 2020, DOCKET NO. 2015-5443(GST)G.**

**DOCKETS:** A-225-20; A-226-20; A-227-20

**STYLE OF CAUSE:** COASTRIDGE ENTERPRISES  
LTD., STUART XUE AND  
STEPHANIE XUE v. HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** MAY 11, 2022

**REASONS FOR JUDGMENT OF THE COURT  
BY:** RIVOALEN J.A.  
LOCKE J.A.  
MONAGHAN J.A.

**DELIVERED FROM THE BENCH BY:** MONAGHAN J.A.

**APPEARANCES:**

George Douvelos FOR THE APPELLANTS

Ron D.F. Wilhelm FOR THE RESPONDENT  
Rob Whittaker  
Geraldine Chen

**SOLICITORS OF RECORD:**

George Douvelos Law Corporation FOR THE APPELLANTS  
c/o DG Barristers  
Vancouver, British Columbia

A. François Daigle FOR THE RESPONDENT  
Deputy Attorney General of Canada