

**Date: 20061026**

**Docket: A-45-06**

**Citation: 2006 FCA 353**

**CORAM: NOËL J.A.  
EVANS J.A.  
MALONE J.A.**

**BETWEEN:**

**JEROME DOWNEY**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Vancouver, British Columbia, on October 26, 2006.

Judgment delivered from the Bench at Vancouver, British Columbia, on October 26, 2006.

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

**EVANS J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Vancouver, British Columbia, on October 26, 2006)**

**EVANS J.A.**

[1] This is an appeal by Jerome Brian Downey from a decision of the Tax Court of Canada, in which the Judge allowed in part Mr Downey's appeal from the Minister's reassessment of his tax liability for the taxation year 2001. The decision is reported as *Downey v. The Queen*, 2005 TCC 810.

[2] The Minister's reassessment assumed that the sale of land by Mr Downey to a company, in which he and two others were equal shareholders, was not in fact at arm's length, and that the fair

market value of the land was only \$150,000, not the \$420,000 for which Mr Downey had agreed to sell it to the company. The Minister treated the difference between these two sums, \$270,000, as a benefit conferred by the company on Mr Downey, and included it in his income for 2001, pursuant to subsection 15(1) of the *Income Tax Act*, R.S.C. 1985 (5<sup>th</sup> Supp.), c. 1.

[3] The Tax Court Judge agreed that the fair market value of the land was not \$420,000, but concluded, on the basis of the appraisal evidence, that it was \$259,000. Accordingly, the Judge allowed the appeal, but only to extent of reducing from \$270,000 to \$161,000 the amount of the benefit to be included in Mr Downey's income for 2001.

[4] The basis of Mr Downey's appeal to this Court is that the sale of the land was an arm's length transaction and that, accordingly, its value was the price in fact paid for it by the company as a willing purchaser, that is, \$420,000. Hence, he says, the company conferred no benefit on him which formed part of his income in 2001. Mr Downey does not otherwise dispute the Judge's finding of the fair market value of the land, or the appropriateness of the penalty imposed on him by the Minister.

[5] Unfortunately, the Judge made no express finding in his reasons on whether the transaction was arm's length, even though this had been the subject of evidence and submissions by the parties before him, and was an issue to which he was clearly alert during the hearing.

[6] In our opinion, it was an error of law for the Judge to have failed to make a finding on this critical question of mixed fact and law. The appraisal evidence of fair market value was only relevant if the transaction was not at arm's length. If it was an arm's length sale, the purchase price of \$420,000 must stand as the value of the land.

[7] Despite the absence of an express finding by the Tax Court Judge, we are satisfied that, on the evidence before him, the Judge could not reasonably have found that Mr Downey had discharged his burden of rebutting the Minister's assumption that the transaction was not at arm's length.

[8] In our view, such a conclusion was not reasonably open to the Judge on the record, particularly in view of Mr. Downey's failure to call as a witness, Kane Desmond, the only other shareholder actively engaged in the business, with whom Mr Downey said that he had negotiated the sale of the land and the purchase price. Mr Desmond's evidence on the circumstances in which the sale price was agreed was critical to a determination of whether the transaction was at arm's length.

[1] For these reasons, the appeal will be dismissed.

“John M. Evans”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-45-06

**STYLE OF CAUSE:** Jerome Downey v. Her Majesty  
The Queen

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

**DATE OF HEARING:** October 26, 2006

**REASONS FOR JUDGMENT OF THE COURT:** Noël J.A.  
Evans J.A.  
Malone J.A.

**DELIVERY FROM THE BENCH BY:** Evans J.A.

**APPEARANCES:**

Jerome Downey APPELLANT ON HIS OWN BEHALF

Carl Januszczak  
Victor Caux FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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Deputy Attorney General of Canada FOR THE RESPONDENT