REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

FIRST DIVISION

MR. URBANO L. VELASCO,
Petitioner,

- versus -

BUREAU OF INTERNAL REVENUE (REVENUE REGION NO. 8, RDO 047, MAKATI CITY),
Respondent.

CTA CASE NO. 8497

Members:

DEL ROSARIO, *Chairperson,*
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:
MAY 17 2016 ; 2:14 p.m.

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DECISION

***DEL ROSARIO, P.J.*:**

This is a Petition for Review filed by petitioner Mr. Urbano L. Velasco assailing the Warrant of Distraint and/or Levy, Preliminary Collection Letter, and Formal Assessment Notice issued by the Bureau of Internal Revenue (BIR) demanding payment of the alleged deficiency donor's tax in the amount of Twenty-Three Million Sixty-Seven Thousand Seven and 72/100 Pesos (P23,067,007.72), inclusive of surcharges and interest for taxable year 2008.

THE PARTIES

Petitioner, Mr. Urbano L. Velasco is a Filipino, of legal age with address at No. 20 San Felipe St., Magallanes Village, Makati City.[1]

Respondent is the duly appointed Commissioner of Internal Revenue, with office address at BIR National Office Building, Diliman, Quezon City. She is mandated by law to decide disputed assessment

[1] Facts admitted, Pre-Trial Order, CTA Docket, p.166.

and to enforce the provisions of the National Internal Revenue Code (NIRC) of 1997, as amended, and other tax laws.[2]

THE FACTS

On September 12, 2008, petitioner sold to Gervel Inc. (Gervel) and Metropolitan Management Corporation (MMC) a total of 532,180 shares of stocks for a total consideration of Eighty Six Million Four Hundred Twenty Eight Thousand Five Hundred Fourteen and 7/100 (P86,428,514.07).[3]

Relative to the processing of petitioner's application for the issuance of Certificate Authorizing Registration (CAR) involving the aforesaid transfer of shares of stocks, Atty. Mahinardo G. Mailing, Revenue District Officer of Revenue District Office (RDO) No. 47, Revenue Region No. 8 of the BIR wrote a letter dated October 28, 2008,[4] which petitioner received on November 11, 2008,[5] finding against petitioner an alleged total donor's tax due of P9,473,081.25, and demanding collection of said tax as a requisite for the processing and issuance of the CAR.[6]

The BIR treated as deemed gift subject to donor's tax under Section 100 of the NIRC of 1997, as amended, the difference between the book value (P122,739,627.27) and selling price (P86,428,514.07) of the said 532,180 shares.[7]

On November 14, 2008, petitioner filed a protest letter[8] on the aforesaid findings of the RDO stating that the sale of stocks were made without donative intent and it was an arms length transaction; thus, it is not subject to donor's tax. Petitioner requested that the assessment should wait the ruling of the Chief Law Division of the BIR relative to the position earlier made by SGV for and in behalf of Gervel and MMC in a letter dated November 10, 2008,[9] which was attached to petitioner's protest letter, seeking confirmation of the

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[2] Facts admitted, Pre-Trial Order, CTA Docket, p.167.
[3] Facts admitted, Pre-trial Order, CTA Docket, p.168.
[4] BIR Records, p. 306.
[5] BIR Records, p. 340.
[6] BIR Records, p. 306-307.
[7] Facts admitted, Pre-trial Order, CTA Docket, p.168-169.
[8] Facts admitted, Pre-trial Order, CTA Docket, p. 167 and Annex "C", CTA Docket, p. 467-468.
[9] BIR Records, pp. 332-338.

opinion that the sale by petitioner of his shares back to Gervel and MMC at a price lower than the book value is not subject to donor's tax.

On August 18, 2009, petitioner received a letter from RDO No. 47, Revenue Region No. 8 dated August 14, 2009 stating that the case of petitioner was recommended for the issuance of Preliminary Assessment Notice but was returned to the Assessment Division of Revenue Region No. 8 for the issuance of Post Reporting Notice to incorporate the additional basic deficiency donor's tax as a consequence of the non-submission of the Compromise Agreement in the separation of property filed in the Annulment Proceedings of Sps. Urbano and Ramona Velasco. Attached to the letter is the "Amended Post Reporting Notice" containing the increased deficiency basic donor's tax of P10,893,333.96.[10]

On August 28, 2009, petitioner filed a protest/reply[11] on the aforesaid increased deficiency donor's tax maintaining his position that the sale of stock is not subject to donor's tax. In the same protest/reply, petitioner explained that all the shares mentioned in the Compromise Agreement between Spouses Urbano and Ramona Velasco were already transferred and there is no need for any assessment considering that the CAR has been issued. He also reiterated his request that pending the ruling of the Law Division on the matter, the assessment and demand for payment should be suspended.

On October 6, 2009, petitioner received a Preliminary Assessment Notice (PAN) finding petitioner liable for deficiency donor's tax due against petitioner in the total amount of P18,589,474.40,[12] computed as follows:

Total Book Value of shares of stocks sold		P122,739,627.27
Less: Amount of consideration received		86,428,514.07
Value of shares of stocks deemed donated		P 36,311,113.20
Multiply by: Donor's tax rate		30%
Basic donor's tax due		P 10,893,333.96
Add: 50% Surcharge	P5,446,666.98	
Interest (10-13-2008 to 10-26-2009) (.2065)	2,249,473.46	7,696,140.44
Total amount due		**P 18,589,474.40**

[10] Exhibit "D"; BIR Records, pp. 411-412.
[11] BIR Rcords, p. 413.
[12] Facts admitted, Pre-trial Order, CTA Docket, p. 167; Exhibit "7", BIR Records, p. 423.

On October 20, 2009, petitioner filed a protest dated October 13, 2009 on the PAN reiterating its previous position that the transaction was made without donative intent, and is an arms length transaction, not subject to donor's tax; that the alleged donor's tax arising from compromise agreement in the separation of property has already been paid in full and the CAR had already been issued.[13]

In a letter dated October 26, 2009,[14] the Regional Director, Alfredo Misajon, replied to petitioner's protest on the PAN informing the petitioner that the "entire docket of the case together with the protest letter was referred to the Chief Legal Division."[15]

On October 14, 2011, a Formal Assessment Notice (FAN) was received by petitioner.[16] In the said FAN, petitioner was assessed of deficiency donor's tax in the amount of P23,067,007.72, computed as follows:[17]

DONOR'S TAX		
Total Book Value of Shares of stock sold		P122,739,627.27
Less: Amount of consideration received		86,428,514.07
Value of shares of stocks deemed donated		P 36,311,113.20
Multiply by: Donor's tax rate		30%
Basic donor's tax due		P 10,893,333.96
Add: 50% surcharge	5,446,666.98	
Interest 10/13/2008 to 11/14/2011	6,727,006.78	12,173,673.76
Total donor's tax due		**P 23,067,007.72**

Subsequently, petitioner filed on November 11, 2011,[18] a protest letter dated October 24, 2011[19] in reply to the FAN stating that a formal assessment is premature pending the ruling of the Legal Department of the BIR on the issue of whether that transaction should be subjected to donor's tax, which issue was referred to the BIR since October 26, 2009. Petitioner further argued that the three (3) year prescriptive period for assessment provided under Section 203 of the NIRC of 1997, as amended, is applicable in his case as there was a return filed, and that the ten (10) year prescriptive period for assessment only applies to the non-filing or filing of a fraudulent

[13] Facts admitted, Pre-trial Order, CTA Docket, p. 168; BIR Records, p. 448-449.
[14] Annex "J", CTA Docket, p. 51.
[15] Facts admitted, Pre-trial Order, CTA Docket, p. 168.
[16] Facts admitted, Pre-trial Order, CTA Docket, p. 168; Exhibit "8", BIR Records, p. 478.
[17] Exhibit "8", BIR Records, p. 478.
[18] CTA Docket, p. 50.
[19] Facts Admitted, Pre-trial Order, CTA Docket, p. 168; Par. 15 of the Petition and par. 1 of the Answer, CTA Docket, pp. 13, 76; and Annex "I", CTA Docket, p. 50.

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return. Petitioner concluded that since in his case there was a return filed, an assessment beyond the three (3) year prescriptive period is violative of his right to due process and equal protection.

On December 19, 2011, petitioner received a Preliminary Collection letter dated December 2, 2011[20] demanding payment from petitioner of deficiency donor's tax, surcharges and interest in the total amount of P23,067,007.72 within ten (10) days from receipt thereof to avoid accumulation of interest and surcharges; otherwise, the BIR shall be constrained to enforce collection thereof through administrative summary remedies.

Petitioner filed a protest letter[21] dated December 20, 2011 in reply to the Collection letter of the BIR reiterating his position that the period of limitation for assessment under Section 203 of the NIRC of 1997, as amended, is applicable and therefore, payment can no longer be demanded.

On May 23, 2012 petitioner received a copy of a Warrant of Distraint and/or Levy[22] against his property for failure to pay the alleged deficiency donor's tax in the total amount P23,067.007.72, plus increments incident to delinquency.[23]

On June 6, 2012, petitioner filed his Appeal *via* Petition for Review[24] praying for the following reliefs from this Court:

1. Issuance of a Tax Clearance Certificate on the transaction;

2. Cancellation of the assessment and the Warrant of Distraint and/or Levy;

3. Issuance of a writ of injunction to prevent the implementation of the Warrant of Distraint and/or Levy pending resolution of his petition; and

4. Refund of legal and filing fees.[25]

[20] Facts Admitted, Pre-trial Order, CTA Docket, p. 168; BIR Records, p. 487.
[21] Facts Admitted, Pre-trial Order, CTA Docket, p. 168; Par. 18 of the Petition and Par. 1 of the Answer, CTA Docket, pp. 14, 76, and Annex "L", CTA Docket, p. 53.
[22] Facts Admitted, Pre-trial Oder, CTA Docket, p. 167.
[23] BIR Records, p. 492.
[24] CTA Docket, pp. 10-53.

In her Answer,[26] respondent interposed the following Special and Affirmative Defenses:

> "6. The assessments in question were made and issued in accordance with law, rules and regulations;
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> 7. Section 99(B) of the Tax Code imposes a 30% donor's on gifts made to a stranger including a corporation. The tax is payable on gratuitous transfers with insufficient consideration. Relative thereto, Section 100 of the Tax Code provides that:
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>> 'SEC. 100. Transfer for Less Than Adequate and full Consideration. - Where property, other than real property referred to in Section 24(D), is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this Chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.'
>
> Based on the above, where property is transferred for less than an adequate and full consideration in money or money's worth, the amount by which the fair market value of the property exceeded the value of the consideration shall be considered a gift subject to donor's tax.
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> Section 100 of the Tax Code is implemented by Revenue Regulations (RR) No. 6-2008 insofar as the property involved are shares of stocks. Section 7 (c) (c.1) (c.1.4) of the Regulations provides as follows:
>
>> '(c) Determination of Amount and Recognition of Gain or Loss. –
>>
>>> (c.1) In case of cash sale, the selling price shall be the consideration per deed of sale.
>>>
>>> xxx xxx xxx
>>>
>>> (c.1.4) In case the fair market value of the shares of stock sold, bartered, or exchanged is greater than the amount of money and/or fair market value of the property received, the excess of the fair market value of the shares of stock sold, bartered, or exchanged over the amount of money and the fair market value of the property, if any, received as

[25] CTA Docket, p. 19.
[26] CTA Docket, pp. 76-79.

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> consideration shall be deemed a gift subject to the donor's tax under Section 100 of the Tax Code, as amended.'

Further, Section 7 (c.2) (c.2.2) of the same Regulations provides that:

> '(c.2) Definition of "fair market value" of the Shares of Stock. –
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> For purposes of this Section, "fair market value" of the share of stock sold shall be:
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> xxx xxx xxx
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> (c.2.2) In the case of shares of stock not listed and traded in the local stock exchange, the book value of the shares of stock as shown in the financial statements duly certified by an independent certified public accountant nearest to the date of sale shall be the fair market value.'

Based on the above provisions, in case the consideration of the sale of shares of stock not listed and traded through the local stock exchange is lower than the fair market value (FMV)/book value of the shares, the difference between the book value and the selling price of the shares is considered as a gift subject to donor's tax under Section 100 of the Tax Code.

The legislative intent of the deemed gift provision under Section 100 of the Tax Code is to discourage the parties to a sale from manipulating their selling price in order to save on income taxes. This is because under the Tax Code, the measurement of gain from a disposition of property merely considers the amount realized from the sale, which is the selling price minus the basis of the property sold. Hence, if the parties would declare a lower selling price per document of sale than the actual amount of money which changed hands, there is foregone revenue and the government is placed at a disadvantageous position. In order to plug this tax leakage, Section 100 automatically treats the disparity between the FMV and selling price of the property as gift subject to donor's tax. In short, the deemed gift provision compliments the income tax rule on the measurement of gain and, thus, works to avoid the recurrence of under-declaration of the selling price.

8. In contesting that he is not liable to the subject deficiency donor's tax assessment, petitioner in effect is claiming that the transaction is exempt from donor's tax.

9. Tax exemption cannot arise from vague inference. Tax exemptions must be clear and unequivocal. A taxpayer claiming

> a tax exemption must point to a specific provision of law conferring on the taxpayer, in clear and plain terms, exemption from a common burden. Any doubt whether a tax exemption exists is resolved against the taxpayer.
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> 10. All presumptions are in favor of the correctness of the tax assessment (Interprovincial Autobus vs. Collector of Internal Revenue, 98 Phil. 290))."

Petitioner's Pre-trial Brief[27] was filed on November 21, 2012 and respondent's Pre-Trial Brief[28] was filed on January 8, 2013. While the parties have not filed their Joint Stipulation of Facts,[29] they, however, admitted certain facts during the Pre-Trial Conference.[30] The Pre-Trial Conference was terminated with the Court's promulgation of the Pre-Trial Order on May 2, 2013.[31]

On July 2, 2013, the case was initially dismissed for petitioner's consecutive absences upon respondent's motion to dismiss the case on the ground that petitioner was given several opportunity to present his case and the resetting during the hearing held on June 4, 2013 was for the last time.[32]

On June 27, 2013, petitioner filed a Motion to Lift the Implementation of Warrant of Distraint and/or Levy[33] which was rendered moot in the Resolution dated July 17, 2013[34] considering that the case was already dismissed pursuant to the Resolution of the Court promulgated on July 2, 2013.

On July 30, 2013, petitioner filed a Motion for Reconsideration (Re: Resolution dated July 2, 2013)[35] praying for the Court to recall and set aside its Resolution dated July 2, 2013 dismissing the case. In a Resolution dated February 24, 2014,[36] the Court granted petitioner's motion and set the case for the presentation of petitioner's evidence.

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[27] CTA Docket, pp. 88-95.
[28] CTA Docket, pp. 101-104.
[29] CTA Docket, p. 161
[30] Pre-Trial Order, CTA Docket, pp.166-174.
[31] Id.
[32] CTA Docket, pp. 191-192.
[33] CTA Docket, pp. 195-239.
[34] CTA Docket, p. 242.
[35] CTA Docket, pp. 244-252.
[36] CTA Docket, pp. 329-332.

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Petitioner himself was presented as witness during the hearing held on April 1, 2014.[37]

On June 3, 2014, petitioner filed his Formal Offer of Exhibits as Evidences consisting of Exhibits "A" to "L",[38] which the Court denied admission in evidence for petitioner's failure to submit the duly-marked exhibits in the Resolution dated October 14, 2014.[39] In the same Resolution, the Court denied petitioner's Motion to Lift the Implementation of Warrant of Distraint and/or Levy which was filed on June 16, 2014 for failing to prove that petitioner's interest will be jeopardized in the collection of his tax liability.

The subsequent motion for reconsideration of the October 14, 2014 Resolution filed by petitioner on November 4, 2014[40] was denied in the Court's Resolution dated February 23, 2015[41] and September 17, 2015.[42]

When the case was called for initial presentation of respondent's evidence, respondent's counsel manifested that respondent will no longer be presenting evidence in view of the stipulations under paragraphs, 9, 11, 17 and 18 of the Pre-Trial Order dated March 2, 2013.[43]

With the filing of petitioner's memorandum on December 29, 2015 and respondent's failure to file her memorandum as per records Verification dated January 4, 2016, the case was submitted for decision on January 14, 2016.[44]

THE ISSUES

The parties raised the following issues[45] for this Court's resolution:

1) Whether the difference between the book value and the selling price of the 532,180 shares sold is

[37] CTA Docket, p. 333-337.
[38] CTA Docket, pp. 369-374.
[39] CTA Docket, pp. 411-413.
[40] CTA Docket, pp. 415-418.
[41] CTA Docket, pp. 440-442.
[42] CTA Docket, pp. 513-514.
[43] Resolution dated October 29, 2015.
[44] Resolution dated January 14, 2016.
[45] Pre-Trial Order, Court Docket, p. 169.

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considered as a gift subject to donor's tax under Section 100 of the NIRC of 1997, as amended; and

2) Whether petitioner is entitled to the issuance of a Tax Clearance Certificate on the transaction and the cancellation of Assessment and Warrant of Distraint/Levy.

PARTIES' ARGUMENTS

Petitioner asserts that its sale of shares to Gervel and MMC for less that the book value per share is not subject to donor's tax under Section 100 of the NIRC of 1997, as amended, due to the following grounds, namely: (1) there was no donative intent, (2) the transfer was conducted at arm's length, and (3) it was done in the ordinary course of business.

In contextualizing the consummated sale of his shares in Gervel and MMC, petitioner alleges that his relationship with Gervel and MMC turned sour when he began to represent interests antagonistic to the interest of Gervel, MMC and their affiliates. Petitioner recalls that he filed a case against Gervel Inc., MMC, Geromino F. Velasco, Jr. and Maria Paz V. Laperal as stockholders, and Mario T. Meneses, Jr., as Corporate Secretary of said corporations before the Regional Trial Court of Makati City on April 10, 2008 for injunction and declaration of nullity of some minutes of the corporation's meetings; that while petitioner subsequently withdrew the said case, he shifted the forum of his attacks by filing a case before the National Bureau of Investigation against Geromino F. Velasco, Jr. and Maria Paz V. Laperal; that in order to prevent the situation from turning into a full-blown intra-corporate dispute, the parties agreed to negotiate the divestment by petitioner of his Gervel and MMC shares; and that after a series of discussions and negotiations, both Gervel and MMC agreed to buy-back the shares of stock of petitioner at a price that is slightly lower than the book value of shares with the objective of preventing further antagonism among the members of the boards and stockholders of both corporations which may affect the corporation's business stability. Petitioner concludes that the difference between the sale consideration and its book value cannot be considered as a gift within the purview of Section 100 of the NIRC of 1997, as amended.

Petitioner likewise argues that the Formal Assessment Notice dated October 13, 2011, which he received on October 14, 2011 was issued beyond the three (3) year prescriptive period.

Respondent, on the other hand, alleges that where the property is transferred for less than an adequate and full consideration in money or money's worth, the amount by which the fair market value of the property exceeded the value of the consideration shall be considered a gift subject to donor's tax pursuant to Section 100 of the NIRC of 1997, as amended. Insofar as shares of stocks is concerned, respondent cites the pertinent provisions of Revenue Regulations No. 6-2008 that *in case of cash sale, the selling price shall be the consideration per deed of sale*[46]*; the excess of the fair market value of the shares of stock sold over the amount of money received as consideration shall be deemed a gift subject to donor's tax under Section 100 of the Tax Code*[47]*; and in the case of shares of stock not listed and traded in the local stock exchange, the book value of the shares of stock as shown in the financial statements duly certified by an independent certified public accountant nearest to the date of sale shall be the fair market value*[48].

THE COURT'S RULING

Donor's tax is imposed upon the transfer by any person of the property by gift as provided under Section 98 of the NIRC of 1997, as amended.[49]

While the NIRC of 1997, as amended, does not define transfer of property by gift, donation is defined in Article 725 of the Civil Code as an act of liberality whereby a person disposes gratuitously of a thing or right in favor of another, who accepts it.[50] Donation has the following elements: (a) the reduction of the patrimony of the donor; (b) the increase in the patrimony of the *donee*; and, (c) the intent to do an act of liberality or *animus donandi.*[51]

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[46] Section 7 (c.1), Revenue Regulations No. 6-2008.
[47] Section 7 (c.1.4), Revenue Regulations No. 6-2008.
[48] Section 7 (c.2.2), Revenue Regulations No. 6-2008.
[49] SEC. 98. *Imposition of Tax.* - (A) There shall be levied, assessed, collected and paid upon the transfer by any person, resident or nonresident, of the property by gift, a tax, computed as provided in Section 99.
[50] Abello et al., vs. Commissioner of Internal Revenue et al., G.R. No. 120721, February 23, 2005.
[51] Note 34, supra.

Included in the concept of a gift or donation is the amount in excess of the fair market value of the property over the value of the consideration for property transferred for less than adequate and full consideration pursuant to Section 100 of the NIRC of 1997, as amended, which provides:

> "**SEC. 100. *Transfer for Less Than Adequate and Full Consideration.*** - Where property, other than real property referred to in Section 24(D), is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this Chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

The afore-quoted provision of the NIRC of 1997, as amended, considers the amount by which the fair market value of the property transferred exceeded the value of the consideration received as a gift subject to donor's tax. The property covered under the said provision of the NIRC of 1997, as amended, includes any property, other than real property classified as capital asset referred to in Section 24(D) of the NIRC of 1997, as amended, which is transferred for a consideration less than its fair market value.

For transfers of shares of stock for less than their fair market value, Revenue Regulations No. 6-2008[52] provides the following:

> "SEC. 7. SALE, BARTER OR EXCHANGE OF SHARES OF STOCK NOT TRADED THROUGH A LOCAL STOCK EXCHANGE PURSUANT TO SECS. 24(C), 25(A)(3), 25(B), 27(D)(2), 28(A)(7)(c), 28(B)(5)(c) OF THE TAX CODE, AS AMENDED. —
>
> (c) Determination of Amount and Recognition of Gain or Loss. —
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> (c.1) Determination of Selling Price. — In determining the selling price, the following rules shall apply:
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> (c.1.1) In the case of cash sale, the selling price shall be the total consideration per deed of sale.

[52] Subject: Consolidated Regulations Prescribing the Rules on the Taxation of Sale, Barter, Exchange or Other Disposition of Shares of Stock Held as Capital Assets

(c.1.2) If the total consideration of the sale or disposition consists partly in money and partly in kind, the selling price shall be sum of money and the fair market value of the property received.

(c.1.3) In the case of exchange, the selling price shall be the fair market value of the property received.

(c.1.4) In case the fair market value of the shares of stock sold, bartered, or exchanged is greater than the amount of money and/or fair market value of the property received, **the excess of the fair market value of the shares of stock sold, bartered or exchanged over the amount of money and the fair market value of the property, if any, received as consideration shall be deemed a gift subject to the donor's tax** under Sec. 100 of the Tax Code, as amended.

(c.2) Definition of "fair market value" of the Shares of Stock.

For purposes of this Section, "fair market value" of the share of stock sold shall be:

(c.2.1) In the case of listed shares which were sold, transferred, or exchanged outside of the trading system and/or facilities of the Local Stock Exchange, the closing price on the day when the shares are sold, transferred, or exchanged. When no sale is made in the Local Stock Exchange on the day when the listed shares are sold, transferred, or exchanged, the closing price on the day nearest to the date of sale, transfer or exchange of the shares shall be the fair market value.

(c.2.2) In the case of shares of stock not listed and traded in the local stock exchanges, **the book value of the shares of stock as shown in the financial statements duly certified by an independent certified public accountant nearest to the date of sale shall be the fair market value.** *(Boldfacing supplied)*

Apparently, under Section 7 (c.1.4) of Revenue Regulations No. 6-2008, "in case the fair market value of the shares of stock sold, bartered, or exchanged is greater than the amount of money and/or fair market value of the property received, **the excess of the fair market value of the shares of stock sold**, bartered or exchanged **over the amount of money** and the fair market value of the property, if any, **received as consideration shall be deemed a gift subject to the donor's tax** under Sec. 100 of the Tax Code, as amended." Section 7(c.2.2) of same Revenue Regulations further provides that "in the case of shares of stock not listed and traded in the local stock exchanges, **the book value of the shares of stock** as shown in the financial statements duly certified by an independent certified public accountant nearest to the date of sale **shall be the fair market value.**"

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In ***The Philippine American Life and General Insurance Company vs. The Secretary of Finance and The Commissioner of Internal Revenue***,[53] the Supreme Court made the following pronouncements, *viz.*:

> "The price difference is subject to donor's tax
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> Petitioner's substantive arguments are unavailing. The **absence of donative intent**, if that be the case, **does not exempt the sales of stock transaction from donor's tax since Sec. 100 of the NIRC categorically states that the amount by which the fair market value of the property exceeded the value of the consideration shall be deemed a gift. Thus, even if there is no actual donation, the difference in price is considered a donation by fiction of law.**
>
> Moreover, **Sec. 7(c.2.2) of RR 06-08 does not alter Sec. 100 of the NIRC but merely sets the parameters for determining the "fair market value" of a sale of stocks. Such issuance was made pursuant to the Commissioner's power to interpret tax laws and to promulgate rules and regulations for their implementation.**" *(Boldfacing supplied)*

The foregoing declaration of the Supreme Court not only affirm the imposition of donor's tax on the amount considered as a gift, *i.e., the fair market value of the property in excess of the value of the consideration*, but more importantly, it categorically provides that **the absence of donative intent does not exempt the sales of stock transaction from donor's tax; and that even if there is no actual donation, the difference in price is considered a donation by fiction of law**. This would mean that proof of the presence or absence of the elements of donation for purposes of donor's tax imposition is insignificant in cases involving transfers of property falling under Section 100 of the NIRC of 1997, as amended.

Based from the aforesaid provisions of the NIRC of 1997, as amended, Revenue Regulations No. 6-2008 and the existing jurisprudence on the matter, it is undoubtedly clear that the amount by which the fair market value of the property, *i.e., book value of*

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[53] G.R. No. 210987, November 24, 2014.

shares of stock, sold by a taxpayer exceeded the value of consideration received is considered a gift subject to donor's tax.

Since the selling price of P86,428,514.07 and the book value of stocks of P122,739,627.27 are undisputed, and considering further that petitioner offered no evidence in contrast to the pre-determined fair market value as stated in Revenue Regulations No. 6-2008, respondent's conclusion in treating the excess of the book value of stocks over the consideration received as a gift subject to donor's tax must be sustained.

With respect to petitioner's contention about the absence of donative intent, and his alleged reasons behind the sale transaction, the same do not affect the outcome of the case since even if there is no actual donation, the difference between the fair market value of stocks and its selling price is considered a donation by fiction of law consistent with the *Philippine American Life and General Insurance Company case.*

While the foregoing shows that the excess in the fair market value over the consideration received for the stocks sold is subject to donor's tax, petitioner nonetheless is entitled to the cancellation of the assessment due to prescription.

Section 203 of the NIRC of 1997, as amended, sets the three (3) year prescriptive period within which an assessment of tax may be made, *viz.*:

> SECTION 203. Period of Limitation Upon Assessment and Collection. — Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

The afore-quoted provisions of Section 203 of the NIRC of 1997, as amended, mandates the government to assess internal revenue taxes *within three years from the last day prescribed by law for the filing of the tax return* ***or*** *the actual date of filing of such return, whichever comes later.* Hence, an assessment notice issued after the

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three-year prescriptive period is no longer valid and effective.[54] Exceptions, however, are provided under Section 222[55] of the NIRC of 1997, as amended, which specifies, among others, a period of ten (10) years in case a fraudulent return with intent to evade was submitted or in case of failure to file a return.[56]

The records of the case disclose that respondent, as stated in the Details of Discrepancy attached to the Formal Assessment Notice (FAN)[57] informed petitioner that it is not the three (3)-year prescriptive period under Section 203, but the ten (10)-year prescriptive period under Section 222(a) of the NIRC of 1997, as amended, that is applicable by stressing on the *"failure to file a return."* Petitioner then argues that the FAN dated October 13, 2011, which he received on October 14, 2011, was issued beyond the three (3) year prescriptive

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[54] Commissioner of Internal Revenue vs. Kudos Metal Corporation, G.R. No. 178087, May 5, 2010.

[55] Section 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. —

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

(b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.

(c) Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.

(d) Any internal revenue tax, which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove, may be collected by distraint or levy or by a proceeding in court within the period agreed upon in writing before the expiration of the five (5)-year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.

(e) Provided, however, That nothing in the immediately preceding Section and paragraph (a) hereof shall be construed to authorize the examination and investigation or inquiry into any tax return filed in accordance with the provisions of any tax amnesty law or decree.

[56] G.R. No. 128315. June 29, 1999
COMMISSIONER OF INTERNAL REVENUE, petitioner, vs. PASCOR REALTY AND DEVELOPMENT CORPORATION, ROGELIO A. DIO and VIRGINIA S. DIO

[57] Exhibits "8" and "8-a"., CTA Docket pp. 476-478.

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period noting that the transaction took place as early as September 12, 2008 and the return was allegedly filed on said date.[58]

It is undisputed that on September 12, 2008, petitioner sold to Gervel and MMC a total of 532,180 shares of stocks for a total consideration of P86,428,514.07. While petitioner did not mention what particular return he filed, records disclose that petitioner indeed filed his **Capital Gains Tax Returns** on **September 24, 2008** involving the sales of his shares of stocks with MMC[59] and Gervel.[60]

Although the assessed deficiency tax is in the nature of a donor's tax, petitioner's filing of Capital Gains Tax Returns constitutes sufficient compliance with the requirement of filing a tax return under Section 103 of the NIRC of 1997, as amended, for the purpose of computing prescription. On this point, the declaration in *Commissioner of Internal Revenue vs. B.F. Goodrich Phils., Inc. et al.,*[61] is enlightening:

> "Ineludibly, the BIR failed to show that private respondent's 1974 return was filed fraudulently with intent to evade the payment of the correct amount of tax. [15] Moreover, **even though a donor's tax**, which is defined as 'a tax on the privilege of transmitting one's property or property rights to another or others without adequate and full valuable consideration,' **is different from capital gains tax**, a tax on the gain from the sale of the taxpayer's property forming part of capital assets, **the tax return filed by private respondent to report its income for the year 1974 was sufficient compliance with the legal requirement to file a return**. In other words, the fact that the sale transaction may have partly resulted in a donation does not change the fact that private respondent already reported its income for 1974 by filing an income tax return." *(Boldfacing supplied)*

Counting, therefore, the three-year prescriptive period from the date of filing of the Capital Gains Tax Returns on **September 24, 2008**, pertaining to petitioner's sales of his shares of stocks with

[58] Petitioner's Memorandum, p. 7.
[59] BIR Records, p. 255.
[60] BIR Records, p. 278.
[61] G.R. No. 104171 February 24, 1999.

MMC and Gervel, respondent had only until **September 24, 2011**, to assess the disputed deficiency donor's tax. Considering that the FAN is dated **October 13, 2011**,[62] the same was obviously issued beyond the 3-year prescriptive period.

Needless to say, respondent's reliance on its authority to assess petitioner within the 10-year prescriptive period under Section 222(a) of the NIRC of 1997, as amended, as it highlights the phrase ***"failure to file a return"*** in the Details of Discrepancy attached to FAN, is erroneous.

In fine, the cancellation of the Preliminary Collection Letter, and the Warrant of Distraint and/or Levy is warranted since it is settled rule in this jurisdiction that "a void assessment bears no fruit."[63] Consequently, petitioner is entitled to the issuance of a Tax Clearance Certificate relating to the above-mentioned sales of stocks on September 12, 2008.

WHEREFORE, premises considered, the Petition for Review of petitioner Mr. Urbano L. Velasco is **GRANTED**. Accordingly, the Formal Assessment Notice, Preliminary Collection Letter, and the Warrant of Distraint and/or Levy issued against petitioner are **CANCELLED**. Respondent is **ORDERED** to issue Tax Clearance Certificate relating to petitioner's sales of stock transactions with Gervel Inc. and Metropolitan Management Corporation on September 12, 2008.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

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[62] BIR Records, pp. 482-483.
[63] Commissioner of Internal Revenue vs. Metro Star Superama, Inc., G.R. No. 185371, December 8, 2010.

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice
Chairperson, First Division