REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

METRO PACIFIC CORPORATION [now NEO ORACLE HOLDINGS, INC.],	**CTA CASE NO. 8318**
	Members:
Petitioner,	**CASTAÑEDA, JR.,** *Chairperson* **CASANOVA,** *and* **COTANGCO-MANALASTAS,** *JJ.*
- versus -	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** JUN 1 1 2014 4:30 p.m.

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DECISION

CASTAÑEDA, JR., *J.:*

STATEMENT OF THE CASE

This is a Petition for Review filed on August 9, 2011 by Metro Pacific Corporation (petitioner) pursuant to Section 7 of Republic Act No. 1125, as amended by Republic Act 9282, to review by appeal the Final Decision On Disputed Assessment (FDDA) dated June 28, 2011[1] of the Commissioner of Internal Revenue (CIR), through Zenaida G. Garcia, the Assistant Commissioner-Large Taxpayers Service of the Bureau of Internal Revenue (LTS-BIR) finding petitioner liable for alleged deficiency donor's tax, inclusive of surcharge and interest, in the aggregate amount of ₱212,241,737.90, on the excess of the book value over the selling price of Bonifacio Land Corporation (BLC) shares sold by petitioner to Columbus Holdings, Inc. (CHI).

[1] Exhibit "Y" for the petitioner, Docket, pp. 71-77; Exhibit "16" for the respondent, Docket, pp. 993-999.

STATEMENT OF FACTS

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines,[2] with principal office address at Unit 9-2, 9/F Net One Center, 26th cor. 3rd Avenue, Bonifacio Global City, Metro Manila[3].

On the other hand, respondent is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR) vested with the authority to exercise the functions of said office, including inter *alia*, the power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code (NIRC) or other laws or portions thereof administered by the BIR. She holds office at the BIR National Office Building, Agham Road, Diliman, Quezon City.

By a Deed of Absolute Sale executed on October 29, 2009, petitioner sold to Columbus Holdings, Inc. (CHI) 2,597,197 common shares in Bonifacio Land Corporation (BLC) with a par value of ₱100.00 each, for the amount of ₱410,357,126.00, or ₱158.00 per share.[4]

On October 30, 2009, petitioner, through Atty. Francisco G. Tagao, requested respondent for "confirmation that the sale of Bonifacio Land Corporation (BLC) shares of stocks owned by MPC to Columbus Holdings, Inc. (CHI) is not subject to donor's tax [as provided in Section 100 of the Internal Revenue Code] as it is an ordinary business transaction negotiated in good faith by unrelated parties for legitimate business purposes".[5]

On November 5, 2009, petitioner, as seller, filed the Capital Gains Tax (CGT) Return (BIR Form No. 1707) with the BIR Large Taxpayers Service-Regular (BIR LTS-Regular)[6] and the Documentary

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[2] Paragraph 3.01, Joint Stipulation of Facts, Documents and Issues (JSFDI), Docket, p. 313.
[3] Par. 2, Petition for Review, Docket, p.16.
[4] Paragraph 3.02, JSFDI, Docket, p. 313; Exhibit "A"; and Exhibit "EE", Judicial Affidavit of Mr. Jose Ma. K. Lim In Lieu of Direct Examination; Exhibit "II", Judicial Affidavit of Atty. Bryan S. Marin In Lieu of Direct Examination.
[5] Paragraph 3.03, JSFDI, Docket, p. 313; Exhibit "L"; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination.
[6] Paragraph 3.04, JSFDI, Docket, p. 314.

Stamp Tax (DST) Return (BIR Form No. 2000-OT)[7]. The said CGT return showed that there was no tax due or paid for the transaction given that the taxable base (selling price or fair market value whichever is higher) of ₱864,295,217.66 was lesser than the declared cost of ₱1,142,563,358.91 by ₱278,268,141.25, a loss, hence, no capital gains tax due.[8] On the other hand, the DST return showed that tax due for DST amounted to ₱973,949.00, computed based on a taxable base-shares of stock of ₱259,719,700.00, multiplied by the tax rate of ₱0.75/200.[9] The DST was paid by depositing BPI check no. 79923 to respondent's bank[10] account on November 5, 2009.[11]

On November 27, 2009, the CIR through James H. Roldan, Assistant Commissioner for Legal Service, issued BIR Ruling DA (DT-065)715-2009 confirming that the sales transaction over the BLC shares between petitioner as seller and CHI as buyer is not subject to donor's tax because it is an ordinary commercial transaction negotiated in good faith between unrelated parties and motivated by legitimate business reasons.[12] The BIR Ruling DA (DT-065)717-2009, addressed to petitioner, states in part as follows:

> "Although the sale of the BLC shares by MPC to CHI was made at a price lower than the book value of the shares, this Office is of the opinion that the instant case is an exception to the rule on deemed gift provisions. *First*, the sale was entered into as an ordinary commercial transaction for legitimate business purposes between unrelated parties. *Second*, and more important, the evil sought to be avoided by the law does not exist in the given set of facts. Granting that the selling price is lower than the book value, this is not intended to gain tax advantage due to the fact that the seller will still be in a loss position even if it disposes off the shares at book value because the acquisition cost is much higher than the book value. Hence,

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[7] Paragraph 3.05,JSFDI, Docket, p. 314.
[8] Exhibit "N"; Exhibit "II", Judicial Affidavit of Atty. Bryan S. Marin In Lieu of Direct Examination, Docket, pp. 519-520.
[9] Exhibit "O"; Exhibit "II", Judicial Affidavit of Atty. Bryan S. Marin In Lieu of Direct Examination, Docket, p. 520.
[10] Development Bank Of The Philippines, Exhibit "O-1"; Exhibit "II", Judicial Affidavit of Atty. Bryan S. Marin In Lieu of Direct Examination, Docket, p. 520.
[11] Exhibit "O-1", BIR Tax Payment Deposit Slip.
[12] Paragraph 1.02, JSFDI, Docket, p. 312; Exhibit "M"; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination.

there can be no instance where parties can avoid the payment of capital gains tax since the transaction does not yield any gain on the part of the seller.

In this connection, various BIR rulings recognize that Section 100 is not absolute and admits of certain exceptions. In BIR Ruling [DA-652-06] dated November 6, 2006 and BIR Ruling No. 033-02 dated August 16, 2002, the BIR ruled that as long as the transaction is conducted at arm's length such that a *bonafide* business arrangement or the dealings are done in the ordinary course of business, a sale for less than an adequate consideration is not subject to donor's tax. Moreover, in BIR Ruling DA-398-95 dated November 14, 1995, the BIR also held that the transfer of 1,000,000 shares in a Philippine corporation for US$1.00 is not subject to donor's tax because there was no intent on the part of the seller to donate. The BIR also ruled that a transaction is not subject to donor's tax under Section 100 of the Tax Code if there is no intention to donate and the transaction is undertaken for a legitimate or **bonafide** business purpose. (BIR Ruling [DA-(S40M-004)007-08, July 4, 2008; BIR Ruling [DA-075-03], March 11, 2003; BIR Ruling [DA-023-02], February 19, 2002. xxx

In view of the foregoing, this Office hereby confirms that the difference between the book value and the selling price of the BLC shares is not a taxable donation subject to the 30% donor's tax under Section 99(B) of the Tax Code, in relation to Section 100 of the same Code because it is an ordinary commercial transaction negotiated in good faith between unrelated parties and motivated by legitimate business reasons. Moreover, it has been ascertained that the transaction was not intended to avoid the payment of the capital gains tax as the total acquisition cost of the shares is very much higher than their book value.

This will therefore serve as a basis for the issuance of the Certificate Authorizing Registration (CAR)/Tax Clearance Certificate (TCC) on the sale of the BLC shares by MPC to CHI and the exemption from donor's tax pursuant to Section

99(B) in relation to Section 100, both of the Tax Code and RR 6-2008.

This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered as null and void."

The Tax Clearance Certificate (Exhibit "P") and the Certificate Authorizing Registration (Exhibit "P-1") pertaining to the sale of BLC shares subject of this case were issued on December 1, 2009 and December 2, 2009, respectively.

On June 16, 2010, petitioner received a Notice For Informal Conference (Notice) dated June 7, 2010, from respondent, through Mr. Rey Asterio L. Tambis, Head Revenue Executive Assistant of BIR LTS-Regular, informing petitioner that the subject transaction is actually subject to donor's tax in the amount of ₱184,601,490.61, inclusive of penalties.[13]

In response to the above Notice, petitioner wrote respondent on July 1, 2010 requesting for the re-evaluation of the factual information presented by petitioner and for the cancellation of the tax assessment shown in the Notice, which was received by respondent through the BIR LTS-Regular on the same date.[14]

On September 2, 2010, respondent through Nestor S. Valeroso, Assistant Commissioner of BIR LTS-Regular, issued a Preliminary Assessment Notice (PAN), with the corresponding details of discrepancy, which was received by petitioner on September 16, 2010.[15]

On October 11, 2010, petitioner, after obtaining an extension of time from the BIR LTS-Regular to file its protest until said date, filed

[13] Paragraph 3.06, JSFDI, Docket, p. 314; Exhibit "Q" for the petitioner; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination; Exhibit "3" for the respondent.
[14] Paragraph 3.07, JSFDI, Docket, p. 314; Exhibit "R"; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination.
[15] Paragraph 3.08, JSFDI, Docket, p. 314; Exhibit "S" for the petitioner; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination; Exhibits "5" and "6" for the respondent.

its protest on the PAN which was received by respondent through BIR LTS-Regular on the same date.[16]

On October 19, 2010, petitioner filed a letter dated October 15, 2010, addressed to respondent through the BIR LTS-Regular, requesting for the resolution of the legal issue raised in the PAN.[17]

On January 14, 2011, petitioner received from respondent, through Zenaida G. Garcia, Assistant Commissioner of the BIR LTS-Regular a Final Assessment Notice (FAN) dated January 7, 2011, details of discrepancy and Audit Result/ Assessment Notice No. DT-2010-0001, reiterating its demand for payment of deficiency donor's tax, in the total amount of ₱199,736,445.50, inclusive of penalties.[18]

The contents of the FAN for Audit Result/Assessment No. DT-2010-0001, are quoted below:

"**FINAL ASSESSMENT NOTICE**

January 7, 2011

MR. JOSE MA. K. LIM
President
METRO PACIFIC CORPORATION
MGO Building, Legaspi corner dela Rosa Street, Legaspi Village, Makati City

Sir:

Please be informed that after review and evaluation of your recent position paper dated October 11, 2010 on the herein case, still it has been found that there's due and demandable from METRO PACIFIC CORPORATION, deficiency Donor's Tax of ONE HUNDRED NINETY-NINE MILLION SEVEN HUNDRED THIRTY-SIX THOUSAND FOUR HUNDRED FORTY FIVE PESOS & 50/100 (₱199,736,445.50) on the excess of fair market value which in your case, is the book value (for unlisted shares) as shown in the audited financial statement over

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[16] Paragraph 3.09, Joint Stipulation of Facts, Documents and Issues (JSFDI), Docket, p. 315; Exhibit "T".
[17] Paragraph 3.10, Joint Stipulation of Facts, Documents and Issues (JSFDI), Docket, p. 315; Exhibit "U".
[18] Paragraph 3.11, Joint Stipulation of Facts, Documents and Issues (JSFDI), Docket, p. 315; Exhibit "V" for the petitioner; Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination; Exhibits "9", "10" and "11" for the respondent.

the selling price on your sale of 2,597,197.00 BLC shares to Columbus Holdings, Inc., pursuant to RR 6-2008 in consonance with Sec. 100 of the NIRC as Amended as summarized below:

Total stockholder's equity-see FS of BLC as of 12-31-2008	₱	18,946,349,000.00
Divided by total shares issued and outstanding– FS 12-31-08		56,933,005.00
Equals Book value per share	₱	332.78
Multiplied by the total number of shares sold		2,597,197.00
Equals Book Value = Fair Market Value	₱	864,303,593.03
Less selling price per deed of sale		410,357,126.00
Deemed gift subject to donor's tax	₱	453,946,467.03
Donor's tax rate		30%
Donor's tax due	₱	136,183,940.11
Penalty:		
Surcharge (25% of donor's tax due)	₱	34,045,985.03
Interest (Dec. 29, 2009 to January 31, 2011)		29,506,520.36
Deficiency Donor's Tax	₱	199,736,445.50

Please note that the interest and the total amount due will have to be adjusted depending on the actual date of payment.

The 25% surcharge has been imposed pursuant to the provisions of Section 248(A) of the National Internal Revenue Code, as amended by R.A. No. 8424, which took effect on January 1, 1998, in view of your failure to pay/file the donor's tax return.

The 20% interest per annum has been imposed pursuant to the provision of Section 249(B) of the National Internal Revenue Code as amended.

In view thereof, you are requested to pay your aforesaid deficiency donor's tax liability through the duly authorized agent bank in which you are enrolled within the time shown in the enclosed assessment notice.

Pursuant to the provision of Section 228 of the National Internal Revenue Code of 1997 and its implementing Revenue Regulations, you are hereby given the opportunity to respond in writing within (30) days from receipt hereof.

We hope that you will give this matter your preferential attention.

Very truly yours,

ZENAIDA G. GARCIA
Assistant Commissioner, LTS"

The Details of Discrepancy attached to the FAN likewise recommended the revocation of BIR Ruling No. DA (DT-065)715-2009 originally issued to petitioner.

On February 14, 2011, petitioner filed its Formal Protest Letter to the FAN which was received by respondent on the same date.[19] On April 14, 2011, petitioner submitted additional supporting documents on its Protest Letter to the FAN.[20]

On June 28, 2011, respondent subsequently issued a "Final Decision on Disputed Assessment" (FDDA) through Ms. Zenaida G. Garcia, denying its protest to the FAN issued for the deficiency donor's tax, which was received by petitioner on July 11, 2011.[21]

On July 11, 2011, petitioner received copies of respondent's letter dated May 18, 2011 and of the Revenue Memorandum Circular No. 25-2011.[22] In her letter dated May 18, 2011, respondent informed petitioner, through Atty. Tagao, that the BIR Ruling No. DA (DT-065)715-2009 dated November 27, 2009 had been revoked and declared null and *void ab initio*.[23] On the other hand, respondent issued the Revenue Memorandum Circular No. 25-2011, dated March 2, 2011, for the information and guidance of all internal revenue officials, employees and other concerned, which quoted the full text of a memorandum letter to the Assistant Commissioner, BIR LTS-Regular, declaring the BIR Ruling No. DA (DT-065)715-2009 dated November 27, 2009 as null and void *ab initio*.[24]

Revenue Memorandum Circular No. 25-2011, which revoked BIR Ruling No. DA (DT-065)715-2009 dated November 27, 2009, reads in part:

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[19] Paragraph 3.12, JSFDI, Docket, p. 315; Exhibit "W"; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination.
[20] Paragraph 3.13, JSFDI, Docket, p. 316; Exhibit "X".
[21] Paragraph 3.14, JSFDI, Docket, p. 316; Exhibit "Y" for the petitioner, Docket, pp. 71-77; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination; Exhibit "16" for the respondent, Docket, pp. 993-999.
[22] Paragraph 3.17, JSFDI, Docket, p. 316; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination.
[23] Paragraph 3.15, JSFDI, Docket, p. 316; Exhibit "FF"; and Exhibit "GG", Judicial Affidavit of Atty. Francisco G. Tagao In Lieu of Direct Examination.
[24] Paragraph 3.16, JSFDI, Docket, p. 316; Exhibit "13", Docket, pp. 984- 985.

"This refers to memorandum dated January 7, 2011 recommending the revocation of BIR Ruling DA (DT-065)715-2009 for lack of factual and legal basis.

Section 100 of the National Internal Revenue Code (NIRC) of 1997, as amended, provides that:

> '*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.*'

Furthermore, Revenue Regulations No. 6-2008 provides that:

> SECTION 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.—*
> *Xxx xxx xxx*
>
> *(c.1) Determination of Selling Price.- In determining the selling price, the following rules shall apply:*
> *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 property, if any, received as consideration shall be deemed a gift subject to the*

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donor's tax under Sec. 100 of the Tax Code, as amended.

It is noteworthy to state that the above provisions do not mention of any exempt transactions. The above provision is clear and free from any doubt or ambiguity. Hence, there is no room for interpretation. There is only room for application. (Cebu Portland Cement Co. vs. Municipality of Naga, Cebu, et. al., G.R. No. 24116-17, August 22, 1968).

Xxx xxx xxx

Foregoing considered, the taxpayer's claim for exemption from donor's tax has no legal basis. It is hereby declared that BIR Ruling DA (DT-065)715-2009 dated November 27, 2009 is null and void ab initio as it contravenes a direct provision of the NIRC of 1997.

(Original Signed)
KIM S. JACINTO-HENARES
Commissioner of Internal Revenue

All rulings issued upon the effectivity Revenue Regulations (RR) No. 6-2008 which are contrary to or inconsistent with the provisions of the said RR are hereby revoked accordingly.

All revenue officials and employees are enjoined to give this Circular the widest possible publicity.

KIM S. JACINTO-HENARES
Commissioner of Internal Revenue"

On August 9, 2011, petitioner filed the instant Petition for Review, praying that this Court: (1) reverse the FDDA dated June 28, 2011 issued by respondent as represented by Zenaida G. Garcia, Assistant Commissioner of the Large Taxpayers Service of the BIR, and withdraw and/or cancel Assessment Notice No. DT-2010-0001 for deficiency donor's tax; (2) declare Section 7(c.2.2.) of Revenue

Regulations No. 06-2008, dated April 22, 2008 as null and void for being in contravention of Section 100 of the NIRC of 1997; and (3) declare Revenue Memorandum Circular No. 25-2011, dated March 2, 2011 as null and void for being in violation of petitioner's constitutional right to due process; and assuming RMC No. 25-2011 is valid, declare and order the same not to be given retroactive effect.

On September 26, 2011, respondent filed her Answer[25] interposing the following Special and Affirmative Defenses:

> "6. Respondent hereby reiterates and repleads the preceding paragraphs of this answer as part of her Special and Affirmative Defenses.
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> 7. Petitioner Metro Pacific Corporation (MPC), is liable to pay its deficiency donors tax in the amount of One Hundred Thirty Six Million One Hundred Eighty Three Thousand Nine Hundred Forty Pesos and 11/100 (₱136,183,940.11) which is 30% of the excess of the book value against the selling price of Bonifacio Land Corporation (BLC) shares of stock sold by Petitioner on October 29, 2009 to Columbus Holdings, Inc. (CHI) for the following reasons:
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> > 7.1 When a property is sold for less than adequate and full consideration, the amount by which the fair market value of the property exceeded the value of the consideration received shall be deemed a gift and shall be subject to donor's tax. This is within the purview of Section 100 of the National Internal Revenue Code of 1997 (NIRC of 1997), as amended and as implemented by Revenue Regulations (RR) No. 6-2008 which are quoted below:
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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

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[25] Docket, pp. 196-203.

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.'

In relation thereto, Section 7 of RR No. 6-2008 provided 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.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 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.2.2) 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 and independent certified public accountant nearest to the date of sale shall be the fair market value.**

7.2 Respondent Commissioner of Internal Revenue has the power to interpret the provisions of the Tax Code. Section 4 of the NIRC of 1997, as amended expressly provides: *je*

> SEC. 4- 'The power to interpret the provision of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.'

Therefore, for the commissioner to interpret Section 100 of the NIRC is a clear grant of the law. If prior to the issuance of RR 6-2008, the Supreme Court, the Court of Tax Appeals and the BIR have ruled in some instances of exemption from Donor's Tax on the excess of book value against the selling price, that was because there was no express provision in law that such excess is subject to Donor's Tax.

7.3 The provisions of RR No. 6-2008 specifically Section 7-c.1.4 and 7-c.2.2 clearly provides that when 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. In 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 and independent certified public accountant nearest to the date of sale shall be the fair market value.

7.4 In the present case, MPC sold its 2,597,197 BLC shares of stocks to CHI for a consideration of ₱410,357,126.00 or P158.00 per share. However, the financial statements of BLC as of December 31, 2008, showed that its book value is ₱332.78 per share. The 2,597,197 shares of stocks were sold at a price or consideration very much lower than its book value. Thus, BLC shares of stocks with a book value of ₱864,303,593.03 was sold for only ₱410,357,126.00, which is less than adequate and full consideration in the amount of ₱453,946,467.03. Applying the above-mentioned provisions, the difference of ₱453,946,467.03 shall be subject to donor's tax at the rate of 30%.

7.5 The wordings of Section 7-c.1.4 and 7-c.2.2 of RR No. 6-2008 in relation to Section 100 of the Tax Code were expressed with utmost clarity with no more room for interpretation. It is a basic rule in STATUTORY CONSTRUCTION that where the law speaks in clear and categorical language, there is no room for interpretation. There is only room for application.[26] The Court has no choice but to see to it that its mandate is obeyed.

7.6 It bears stressing that the Commissioner of Internal Revenue issued Revenue Memorandum Circular (RMC) No. 25-11 circularizing the revocation of BIR Ruling DA (DT-065) 715-2009 dated November 27, 2009 which petitioner's claim for exemption from donor's tax finds support. Pertinent portion of RMC No. 25-11 is hereunder quoted:

> 'xxxxxx, the taxpayer's claim for exemption from donor's tax has no legal basis. It is hereby declared that BIR Ruling DA (DT-065)715-2009 dated November 27, 2009 is null and void ab initio as it contravenes a direct provision of the NIRC of 1997.'

7.7 After investigation it was found out by revenue examiners that the representations mentioned by petitioner in its application for ruling that MPC and CHI are not related parties and that the sale and purchase of the BLC shares is an ordinary business transaction negotiated in good faith and motivated by legitimate business reason, that BLC shares are no longer a significant asset and it does not expect to realize any meaningful returns on its investment therein, both immediately and in the long term and that the sale of the

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[26] Cebu Portland Cement Co. vs. Municipality of Naga, Cebu, et. al., G.R. No. 24116-17, August 22, 1968.

BLC shares at a price lower than their book value is not intended to avoid the payment of the capital gains tax were totally incorrect and untrue.

7.8 That selling of BLC shares by MPC to CHI was a key consideration for the release of the pledge lien in favor of Evergreen Holdings, Inc. and Ayala Land, Inc. a holding companies of Emerging City Holdings, Inc. and Berkshire Holdings, Inc. who are also holding companies of CHI as an indemnity of MPCs considerable obligation/s to Evergreen Holdings, Inc. and Ayala Land, Inc.

7.9 BLC shares, as the holding company at GROUP OF DEVELOPERS Led by MPC (originally 729% interest with BLC, currently 5%) to develop 150 hectars (originally 214 hectars) of land within Fort Bonifacio Global City into prime commercial, residential & recreational area which is now currently considered as PRIME DISTRICT is an investment of value totally contrary to the attestation of MPC. Therefore, for MPC to say that BLC shares are no longer a significant asset and it does not expect to realize any meaningful returns on its investment therein, both immediately and in the long term is a patent fallacy. To sell BLC shares at ₱158.00 per share appears to the best price that MPC can get is a very obvious misrepresentation.

7.10 The revocation of BIR Ruling DA (DT-065) 715-2009 dated November 27, 2009 and its retroactive application finds support in Section 246 of the NIRC of 1997 as amended, quoted hereunder:

> 'Any revocation, modification or reversal of any of the rules and regulation promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayer, except in the following cases:

- Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;
- Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based;
- Where the taxpayer acted in bad faith.'

7.11 BIR Ruling DA (DT-065) 715-2009 dated November 27, 2009 is considered as null and void considering that after investigation, it was disclosed that the representations made by petitioner in its application for BIR ruling are different.

8. It is a well-settled rule in taxation that the burden of proof is on the taxpayer to present evidence to show the incorrectness of the assessment. Despite re-investigation, petitioner failed to submit all pertinent papers, records and documents which could evidently prove the incorrectness of the assessment made by respondent.

9. The assessment in the amount of ₱212,241,737.90 was issued in accordance with law and regulations.

10. Well-settled is the rule that tax assessments are entitled to the presumption of correctness and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner, and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments (*Sy Po vs. Court of Tax Appeals, 164 SCRA 524*). Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices."

During trial, petitioner presented its witnesses: Jose Ma. K. Lim, Chief Executive Officer and President of petitioner[27]; Atty. Francisco G. Tagao[28]; Atty. Bryan S. Marin, Tax and Legal Manager of Fort Bonifacio Development Corporation (FBDC)[29]; Vivian S. Liban, formerly petitioner's Budget and Accounting Manager, Chief Finance Officer and now its consultant[30]; Lourdes R. Reyes, Chief Finance Officer of Fort Bonifacio Development Corporation (FBDC)[31]; and Atty. Sheila Marie L. Uriarte-Tan, Corporate Secretary of Bonifacio Land Corporation (BLC) and Columbus Holdings, Inc. (CHI)[32].

On September 14, 2012, a Resolution[33] was issued by this Court noting petitioner's manifestation filed on September 6, 2012, stating that petitioner has changed its name from Metro Pacific Corporation to Neo Oracle Holdings, Inc..

Thereafter, on September 18, 2012, petitioner filed its Formal Offer of Evidence,[34] submitting Exhibits "A" to "J", "L" to "Y", "CC", "EE" to "QQ", inclusive of sub-markings; which were admitted in the Resolutions dated November 13, 2012[35], except Exhibits "J-2" and "L-1".

On the other hand, respondent presented her lone witness Albert C. Eya, Revenue Officer I of the BIR[36]. Thereafter, on May 17, 2013 respondent filed her Formal Offer of Evidence[37], submitting Exhibits "1" to "18" and "20", inclusive of sub-markings, which this Court admitted in the Resolution dated June 11, 2013[38]. During the July 3, 2013 hearing, petitioner presented rebuttal documents, and orally offered Exhibits "RR", "RR-1" and "SS"; which were admitted by this Court.[39]

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[27] Minutes, Docket, pp. 419- 509.
[28] Minutes, Docket, p. 509.
[29] Minutes, Docket, p. 575.
[30] Minutes, Docket, p. 615.
[31] Minutes, Docket, p. 710.
[32] Minutes, Docket, p. 814.
[33] Docket, p. 820.
[34] Docket, pp. 821- 855.
[35] Docket, pp. 881- 883.
[36] Minutes, Docket, p. 931.
[37] Docket, pp. 935- 947.
[38] Docket, pp. 1008- 1009.
[39] Minutes, Docket, p. 1012.

On September 13, 2013, the case was submitted for decision, taking into consideration the Memorandum for Petitioner filed on August 13, 2013 and Memorandum for the Respondent filed on September 11, 2013.[40]

Hence, this decision.

ISSUES

The following are the parties' jointly stipulated issues[41] submitted for this Court's consideration:

> "6.01. Whether Petitioner is liable for the deficiency donor's tax assessment in the aggregate amount of Php212,241,737.90 inclusive of interest and penalty.
>
> 6.02. To resolve the first assignment of error of the Petition for Review, the following would be the issues:
>
> > 6.02.a. Is the consideration of Php410,357,126.00 for the sale by MPC to CHI of 2,597,197 common shares in BLC 'adequate and full' or is it 'less than adequate and full'?
> >
> > 6.02.b.What is the 'fair market value' of the shares?
> >
> > 6.02.c. Is Revenue Regulations No. 6-2008 dated April 22, 2008, particularly Section 7(c.2.2) thereof invoked by Respondent, valid?
>
> 6.03. To resolve the second assignment of error of the Petition for Review:

[40] Docket, p. 1218.
[41] Docket, pp. 319- 321.

6.03.a. Is BIR Ruling No. DA (DT-065) 715-2009 not in accord with the NIRC so as to warrant its revocation or reversal?

6.03.b. Is Revenue Memorandum Circular No. 25-2011, which reverses or reconsiders BIR Ruling No. DA (DT-065) 715-2009, valid?

6.03.c. Assuming Revenue Memorandum Circular No. 25-2011, which reverses or reconsiders BIR Ruling No. DA (DT-065) 715-2009 is valid, may Revenue Memorandum Circular No. 25-2011 be given retroactive effect?

6.04. To resolve the third assignment of error of the Petition for Review:

6.04.a. Could Section 100 of the NIRC have possibly intended in the sale transaction an imputed gift of Php453,946,467.03, which is larger than the selling price of Php410,357,126.00 and where MPC incurred an actual loss of Php748,460,815.12, and the imposition on such imputed gift of donor's tax of Php136,946,467.03?"

THE COURT'S RULING

In the instant case, petitioner assailed respondent's FDDA dated June 28, 2011 assessing and collecting it of subject deficiency donor's tax, inclusive of surcharge and interest.

Respondent, in issuing the FAN, used the following formula to extract the fair market value of the BLC shares in question:

(a) Total Stockholder's equity (₱18,946,349,000.00), per Financial Statements of BLC as of Dec 31, 2008, was divided by total shares issued and outstanding (56,933,005.00) as of the year, resulting in book value per share (₱332.78)[42];

(b) The book value per share (₱332.78) was multiplied by the total number of shares sold (2,597,197), resulting in the total book value (₱864,303,593.03).

(c) Respondent considered the book value as equivalent to their fair market value. This book value and/or fair market value (₱864,303,593.03) was deducted from the selling price (₱410,357,126.00) per Deed of Sale, resulting in the assessed deemed gift subject to donor's tax of ₱453,946,467.03.

(d) The amount deemed gift (₱453,946,467.03) was multiplied by 30% donor's tax rate, resulting in Donor's tax due of ₱136,183,940.11, excluding surcharges and penalties.

In support of the petition for review, petitioner cited the following grounds in assailing the assessment:

a) BIR Ruling DA (DT-065)715-2009, dated November 27, 2009, is determinative of the non-taxability of the transaction subject of the instant case.

b) The CIR's assessment of a deficiency donor's tax in the amount of ₱136,183,940.11 on the sale by Metro Pacific Corporation of 2,597,197 common shares of Bonifacio Land Corporation on October 29, 2009 to Columbus Holdings, Inc. with a par value of ₱100.00 each, for the amount of ₱410,357,126.00, or ₱158.00 per share, results from an erroneous application of Section 100 of the National Internal Revenue Code, and therefore not valid and without factual and legal basis, for the following reasons:

(1) the CIR made no prior determination that the consideration paid by CHI to MPC is "less" than adequate and full nor did she make a prior determination of the "fair market value" of the shares

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[42] Should actually be P332.783224774452 if not rounded off to nearest centavos. Respondent used this in the computation of the total book value of the shares.

of stock transferred. Consequently, there is no basis for concluding that the "fair market value" exceeded the "value of the consideration" and that a portion of the selling price may be deemed a gift;

(2) relying on Revenue Regulations No. 6-2008 issued on April 22, 2008, particularly its Section 7(C.2.2), the CIR arbitrarily and erroneously considered the "book value" of the subject shares of stock in BLC as their "fair market value" for the purpose of applying Section 100. The finding of the CIR that the market value of the shares is ₱864,303,593.03 because that is their "book value" is erroneous for "fair market value" and "book value" are entirely two (2) different concepts. To consider the "book value" as the "fair market value" is entirely unwarranted; and

(3) absent evidence to the contrary and a determination by the CIR that the consideration for the transfer by MPC to CHI of BLC shares for the amount of ₱410,357,126.00, or ₱158.00 per share, is "less" than adequate and full, the consideration of ₱410,357,126.00 must be deemed "adequate and full" and to be the "fair market value" of the shares at the time of transfer.

c) There is in fact evidence that the consideration of ₱410,357,126.00 is "adequate and full".

d) In addition, there is evidence that the subject transaction is an ordinary business transaction negotiated in good faith by unrelated parties for legitimate purposes.

e) The subsequent revocation of the ruling which the CIR had previously issued --- that the subject transaction was not subject to donor's tax --- is in violation of petitioner's due process rights and on an improper basis and therefore not valid; and assuming that the revocation is valid, the CIR likewise erred in giving the revocation a retroactive effect.

f) The imputation by the CIR of a gift of ₱453,946,467.03 by MPC to CHI, an amount even higher than the consideration of ₱410,357,126.00 which MPC received incident to the sale transaction and where MPC incurred an actual loss of ₱732,206,232.91, and the assessment of a donor's tax of ₱136,183,940.11, could not have been intended and authorized by Section 100 of the NIRC.

g) Respondent failed to prove the affirmative defenses in her Answer. The evidence she presented is not only weak but does not refute or rebut the evidence adduced by petitioner.

We find no merit to the contentions of petitioner.

At the outset, we emphasize that assessments are *prima facie* presumed correct and made in good faith. It is the taxpayer and not the Bureau of Internal Revenue who has the duty of proving otherwise.[43]

Pertinent to this case is Section 100 of the 1997 NIRC, 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**." *(Emphasis Supplied).*

"It is an elementary rule in statutory construction that when the words and phrases of the statute are clear and unequivocal, their meaning must be determined from the language employed and the statute must be taken to mean exactly what it says. The courts may not speculate as to the probable intent of the legislature apart from the words. When the law is clear, it is not susceptible of

[43] Commissioner of Internal Revenue v. Court of Appeals, G.R. Nos. 104151 & 105563, March 10, 1995, 242 SCRA 289, 313.

interpretation. It must be applied regardless of who may be affected, even if it may be harsh or onerous."[44]

Section 100 of the 1997 NIRC, as amended, is clear that in case where property 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 (FMV) of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year. It is thus, important to determine the **"fair market value"** (FMV) of the property sold or transferred, and whether it exceeded the value of the consideration.

The book value of BLC shares is same as the fair market value

In this case, the BLC shares were not listed and traded in the local stock exchange. This situation deprives a clear possibility of determining the stocks' benchmark fair market value/s as traded in the stock market.

In the determination of the fair market value of shares of stock not listed and traded in the local stock exchanges, respondent based it on the definition of the "fair market value" of the shares of stock as stated in Section 7 (c.2.2) of RR No. 6-2008[45] which states that

[44] Agpalo, *Statutory Construction*, Sixth Edition (2009), p. 209, citing Pascual v. Pascual-Bautista, 207 SCRA 561 (1992); Fagel Tabin Agricultural Corp. v. Jacinto, 203 SCRA 189 (1991); People v. Amigo, 67 SCAD 28, 252 SCRA 43 (1996).

[45] The definition of the "fair market value" of shares of stock not listed and traded in the local stock exchanges was amended in RR No. 006-13 (Exhibit "SS") which reads , as follows:
"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. —
xxx xxx xxx
(c.2) Definition of "fair market value" of the Shares of Stock. — For purposes of this Section, "fair market value" of the shares of stock sold shall be:
(c.2.1) . . .
(c.2.2) In the case of shares of stock not listed and traded in the local stock exchanges, the value of the shares of stock at the time of sale shall be the fair market value. In determining the value of the shares, the Adjusted Net Asset Method shall be used whereby all assets and liabilities are adjusted to fair market values. The net of adjusted asset minus the liability values is the indicated value of the equity. For purposes of this section, the appraised value of real property at the time of sale shall be the higher of —
(1) The fair market value as determined by the Commissioner, or
(2) The fair market value as shown in the schedule of valued fixed by the Provincial and City Assessors, or

"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". Pertinent portions of Section 7 of RR No. 6-2008 provide, as follows:

> **"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**.-
>
> xxx xxx xxx
>
> **(c) Determination of Amount and Recognition of Gain or Loss.-**
>
> **(c.1) Determination of Selling Price.-** In determining the selling price, the following rules shall apply:
>
> 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 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.
>
> xxx xxx xxx
>
> (**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:

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(3) The fair market value as determined by Independent Appraiser."

xxx xxx xxx

> (**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.**(emphases supplied)

In this case, petitioner questioned respondent's treatment of the book value as the FMV of the unlisted shares based on the above-quoted RR. However, we noted that the BIR Ruling No. DA (DT-065) 715-2009, which petitioner claims to be determinative of the non-taxability of the transaction subject of the instant case, applied the assailed RR 6-2008 in implementing Sec. 100 of the Tax Code. Pertinent portions of the said BIR Ruling No. DA (DT-065) 715-2009 provide:

> Section 100 of the Tax Code is implemented by Revenue Regulations (RR) 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:
>
> xxx xxx xxx
>
> Further, Section 7(c.2)(c.2.2) of the same regulations provides that:
>
> xxx xxx xxx
>
> **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.** While this is the general

> rule, it should be borne in mind, however, that the application of this provision is obtaining only in the situation where a tax is sought to be avoided by the parties to a sale. *(Emphasis supplied).*

Considering that petitioner invokes the said BIR Ruling No. DA (DT-065) 715-2009, which applies the assailed RR 6-2008 (although opines with exception), petitioner is deemed to have admitted the definition of the fair market value of the unlisted shares as the "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." Simply stated, the book value was treated as the FMV in the unlisted shares.

Petitioner attempts to prove that the prevailing price of BLC shares as of the date of the sale of the subject shares was P158.00 per share or could be sold lower than the consideration under the Deed of Absolute Share between petitioner and CHI, with value of ₱158.00 per share. Thus, petitioner presented in evidence the following: (i) Deed of Absolute Sale dated February 3, 2009 and February 10, 2009 between Development Bank of the Philippines and Columbus Holdings, Inc., with selling price of ₱157.87 per share;[46] (ii) Deed of Absolute Sale between Fort Bonifacio Development Corporation and Malayan Insurance Co., Inc. dated September 18, 2008 and September 30, 2008, with selling price of ₱157.98 per share;[47] (iii) Deed of Absolute Sale between Fort Bonifacio Development Corporation and Rosario P. Rivera dated September 23, 2008, with selling price of ₱158.07;[48] (iv) Deed of Absolute Sale between Fort Bonifacio Development Corporation and Bankers Assurance Corporation dated September 18, 2008 and September 30, 2008, with selling price of ₱157.93 per share;[49] and (v) Deed of Absolute Sale between Fort Bonifacio Development Corporation and Deutsche Bank AG dated April 1, 2009, with selling price of ₱158.00 per share[50]. These pieces of evidence, however, merely proved the consideration received in the sale of the BLC shares. gc

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[46] Exhibit "J".
[47] Exhibit "HH".
[48] Exhibit "HH-1".
[49] Exhibit "HH-2".
[50] Exhibit "HH-3".

With respect to the FMV of the BLC shares, petitioner itself admitted in its CGT return that the FMV is ₱332.78 per share. Petitioner filed a CGT return containing the taxable base of the BLC shares of stock sold to CHI amounting to ₱864,295,217.66,[51] or P332.78 per share notwithstanding that its Deed of Absolute Sale covering the same sale stipulated a proceeds of only ₱410,357,126.00 in exchange of selling 2,597,197 BLC shares of stocks or ₱158 per share. In Schedule I of CGT Return, it provides that the taxable base is the selling price or FMV whichever is higher. In the said schedule, petitioner declared ₱332.78 per share as the taxable base, which is the same as the FMV per share (₱332.78) used by the respondent in computing the donor's tax. The FMV used by the respondent is based on the book value of the BLC shares as shown in BLC's financial statements as of December 31, 2008. The CGT Return indicated that the fair market value was at ₱332.78 per share and not the ₱158 per share selling price. Again, petitioner is bound by this declaration under entry 18 of its CGT Return when it filed the same before respondent covering the subject transaction. The Court considers the credibility of the CGT Return because it was filed with the BIR and it was executed under the pain of perjury[52], thus, the figures appearing therein should be taken at face value. This Court is, therefore, convinced that book value of the BLC shares is same as the FMV.

Considering that the FMV/BV of the unlisted shares exceeds the consideration received, the excess is subject to donor's tax under Sec. 100 of the 1997 NIRC, as amended.

Petitioner failed to prove that there is an exemption/ exception in Section 100 of the 1997 NIRC, as amended

Petitioner alleges, on the assumption that the subject shares were sold for less than their "fair market value", that the subject transaction was an ordinary business transaction negotiated in good faith by unrelated parties for legitimate purposes operate to exclude the subject transaction from the coverage of Section 100 of the NIRC, the same being a transfer which is bona fide, at arm's length

[51] Exhibit N, line 18.
[52] Section 267 of the 1997 NIRC, as amended.

and free from any donative intent (Abello, et al. vs. Commissioner of Internal Revenue, CTA Case No. 4296, October 7, 1991; see Commissioner of Internal Revenue vs. B.F. Goodrich Phils., Inc.[now Sime Darby Internationsl Tire Col., Inc.], G.R. No. 104171, February 24, 1999, 303 SCRA 546[1999], and Ortega, National Internal Revenue Code of 1997 Annotated, First Ed., Vol. I, 2006, at pp. 671-674).

After a careful reading of the bases cited by petitioner, We find that the alleged exemption/exception from the donor's tax under the said provision of law was not clearly established therein.

The *Abello* case, supra, pertains to taxability of political contributions. The *BF Goodrich* case, supra, pertains to prescription and claim of falsity to take the questioned assessment out of the ambit of the statute of limitations. The subject matter of these cases, were different from the instant case, thus, these will not bolster petitioner's position.

The book cited by petitioner discussed, among others, that Section 100 of the Code was bodily lifted from the Federal Gift Tax law of the United States, hence, the U.S. jurisprudence on this law is persuasive in the Philippines, and that the background of this statutory provision may be gathered from the book on FEDERAL ESTATE AND GIFT TAXATION by RANDOLPH E. PAUL, Vol. 2, copyright 1942, Section 16.14, pp. 1111-1116. Apparently, the exception pointed out by petitioner was the one explicitly made by the Treasury Regulations in interpreting the section. Such exception was not written in Sec. 100 of the 1997 NIRC, as amended.

"*American decisions and authorities are not per se controlling in this jurisdiction. At best, they are persuasive for no court holds a patent on correct decisions.* Our laws must be construed in accordance with the intention of our own lawmakers and such intent may be deduced from the language of each law and the context of other local legislation related thereto."[53] *fc*

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[53] Republic of the Philippines v. Manila Electric Compay, G.R. Nos. 141314 & 141369, April 9, 2003, 401 SCRA 130, 134.

A plain reading of Sec. 100 of the 1997 NIRC, as amended, shows that no exemption/exception was stated therein. If the legislature intended an exception/exemption to Sec. 100 of the 1997 NIRC, as amended, it could have clearly stated therein such exception/exemption.

It has been held that exemptions are never presumed, the burden is on the claimant to establish clearly his right to exemption and cannot be made out of inference or implications but must be laid beyond reasonable doubt. In other words, since taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms.[54]

Moreover, considering that the book and the cases cited by petitioner were published or promulgated prior to the issuance of the pertinent RR and RMC subject matter of this case, it necessarily follows that it will not reflect the current interpretation made by the respondent.

Finally, the Supreme Court in the case *Abello, et al. v. Commissioner of Internal Revenue , et al.*[55], holds that, "the BIR is not precluded from making new interpretation of the law, especially when the old interpretation was flawed."

Due process is not violated

Petitioner alleges that the revocation of BIR Ruling No. DA (DT-065) 715-2009, which originally worked in its favor, was made in violation of its due process rights on the basis of the ruling of the Supreme Court in "Commissioner of Internal Revenue v. Court of Appeals"[56] ,thus:

> xxxxx When xxxxx the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but **substantially**

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[54]Quezon City, et al. v. ABS-CBN Broadcasting Corporation, G.R. No. 166408, October 6, 2008, 567 SCRA 496, 515-516.

[55] Abello et al v. Commissioner of Internal Revenue and Court of Appeals, G.R. No. 120721, February 23, 2005, 452 SCRA 162, 172.

[56] G.R. No. 119761, August 29, 1996, 261 SCRA 236.

> **adds to or increases the burden of those governed,** it behooves the agency **to accord at least to those directly affected a chance to be heard, and thereafter to be duly informed, before that new issuance is given force and effect of law.** (*Emphasis supplied by petitioner).*

To the same effect is "Commissioner of Internal Revenue v. Michel J. Lhuillier Pawnshop, Inc.", G.R. No. 150947, July 15,2003, 406 SCRA 178, 188-189.

The contention of petitioner is untenable.

The above-cited cases by petitioner distinguished between two kinds of administrative issuances – a legislative rule and an interpretative rule citing *Misamis Oriental Association of Coco Traders, Inc. v. Department of Finance Secretary*[57]. A legislative rule is in the nature of subordinate legislation, designed to implement a primary legislation by providing the details thereof. An interpretative rule, on the other hand, is designed to provide guidelines to the law which the administrative agency is in charge of enforcing.[58]

In *Commissioner of Internal Revenue v. Michel J. Lhuilllier Pawnshop, Inc., supra*, citing *Commissioner of Internal Revenue v. Court of Appeals, supra*, the Supreme Court categorically distinguished the requirements for the applicability of administrative rule which is merely interpretative in nature and of the administrative rule which substantially increases the burden of those governed, as follows:

> When an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance, for it gives no real consequence more than what the law itself has already prescribed. When, on the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but substantially increases the burden of those governed, it behooves the agency to accord at least to those directly affected a chance to be heard, and thereafter to be duly

[57] G.R. No. 108524, November 10, 1994, 238 SCRA 63.
[58] Misamis Oriental Association of Coco Traders, Inc. v. Department of Finance Secretary, *ibid.*

informed, before that new issuance is given the force and effect of law.

In this case, petitioner assailed the revocation of BIR Ruling No. DA (DT-065) 715-2009 by the issuance of RMC No. 25-2011.

Revenue memorandum-circulars are considered administrative rulings (in the sense of more specific and less general interpretations of tax laws) which are issued from time to time by the Commissioner of Internal Revenue.[59]

In this case, a perusal of RMC No. 25-2011, which revoked BIR Ruling No. DA (DT-065) 715-2009, shows that respondent is merely exercising her original and exclusive jurisdiction to interpret provision[60] of the NIRC of 1997, as amended, including the "power to revoke and nullify BIR rulings"[61]. The said RMC states that, "[a]ll rulings issued upon the effectivity Revenue Regulations (RR) No. 6-2008 which are contrary to or inconsistent with the provisions of the said RR are hereby revoked accordingly." The assailed RMC was issued to all internal revenue officials, employees, and others concerned in order to circularize the revocation of BIR Ruling DA(DT-065) 715-2009 dated November 27, 2009. Respondent interpreted that Section 100 of the NIRC of 1997, as amended, and Section 7 (c.1.4) of RR No. 6-2008, do not mention of any exempt transaction. Thus, the said BIR Ruling DA was revoked by respondent because the taxpayer's claim for exemption from donor's tax has no legal basis as stated in RMC No. 25-2011 which reads as follows:

> Foregoing considered, the taxpayer's claim for exemption from donor's tax **has no legal basis**. It is hereby declared that BIR Ruling DA(DT-065)715-2009

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[59] Philippine Bank of Communication v. Commissioner of Internal Revenue et al, G.R. No. 112024, January 28, 1999, 302 SCRA 241.

[60] SEC. 4. *Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.*- The power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner, subject to review by the Secretary of Finance.

Xxx xxx xxx

[61] SEC. 7. *Authority of the Commissioner to Delegate Power.*- Xxx xxx xxx Provided, however, That the following powers of the Commissioner shall not be delegated:

Xxx xxx xxx

(b) The power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau;

Xxx xxx xxx

> dated November 27, 2009 is **null and void ab initio as it contravenes a direct provision of the NIRC of 1997**. *(Emphasis Supplied).*

Based on the foregoing, it is apparent that RMC No. 25-2011 is merely an interpretative rule which provides guidelines to the law which the administrative agency is in charge of enforcing. The assailed RMC does not increase the burden of those governed. It only ensures the enforcement of RR 6-2008. Its applicability, therefore, needs nothing further than its bare issuance. No prior notice or hearing is necessary. RMC No. 25-2011 was issued and petitioner even admitted that it received a copy of the said RMC. In effect, respondent's revocation of BIR Ruling No. DA (DT-065) 715-2009 thru the issuance of RMC No. 25-2011 was made in accordance with law.

Non-retroactivity of rulings is not applicable

We will now determine whether the revocation of Ruling No. DA (DT-065) 715-2009 may be given retroactive effect.

Petitioner alleges that the retroactive effect given to the revocation is in violation of Section 246 of the NIRC, as amended.

Sec. 246 of the NIRC, as amended, as follows:

> SEC. 246. Non-retroactivity of Rulings.- Any revocation, modification or reversal of any of the rules and regulations promulgated in accordance with the preceding Sections or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers, except in the following cases:
>
> (a) Where the taxpayer deliberately misstates or omits material facts from his return or any

document required of him by the Bureau of Internal Revenue;

(b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or

(c) Where the taxpayer acted in bad faith.

We do not agree.

In *Commissioner of Internal Revenue v. San Roque*[62], the Supreme Court ruled that "[u]nder Section 246, taxpayers may rely upon a rule or ruling issued by the Commissioner from the time the rule or ruling is issued up to its reversal by the Commissioner or this Court. The reversal is not given retroactive effect."

The rule on non-retroactivity of rulings in Sec. 246 of the 1997 NIRC, as amended, should apply only when there is a valid interpretation made by the Commissioner of Internal Revenue.[63]

In this case, the ruling revoked by respondent thru the issuance of RMC No. 25-2011 was BIR Ruling No. DA (DT-065) 715-2009. This BIR Ruling was issued by the Assistant Commissioner, Legal Service pursuant to its delegated authority from the Commissioner of Internal Revenue. The said ruling, which is favorable to petitioner, is a specific ruling applicable only to petitioner. The Assistant Commissioner cited various rulings DA and ruling issued to different taxpayers, which do not have the same factual milieu with petitioner's case. Moreover, the bases cited by the Assistant Commissioner were issued prior to the effectivity of the RR 6-2008. The said ruling also stated that Sec. 100 of the NIRC, as amended, as implemented by RR 6-2008, is not absolute and admit exception.

We emphasize that at the time the BIR Ruling No. DA (DT-065) 715-2009 was issued involving petitioner's transaction subject of this *jc*

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[62] G.R Nos. 187485, 196113 & 197156, Resolution, October 8, 2013, 707 SCRA 66, 83.

[63] Commissioner of Internal Revenue v. San Roque Power Corp., G.R Nos. 187485, 196113 & 197156, Resolution, October 8, 2013, 707 SCRA 66, 124, Concurring and Dissenting Opinion of Associate Justice Leonen.

case, RR 6-2008 was already existing and effective. RR 6-2008 was issued by the Secretary of Finance, upon recommendation of the Commissioner, for the effective enforcement of the provisions of the NIRC, "[p]ursuant to Sec. 244, xxx xxx xxx of the 1997 National Internal Revenue Code (Tax Code), as amended, xxx xxx xxx in order to harmonize and consolidate the rules relative to the imposition of tax for the sale, barter, exchange or other disposition of shares of shares of stock of domestic corporation that are listed and traded through the Local Stock Exchange, or disposition of shares through Initial Public Offering (IPO) or disposition of shares not traded through the Local Stock Exchange."[64]

RR 6-2008 clearly states that in case the FMV of the stocks sold is greater than the amount of money received, 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 the donor's tax under Sec. 100 of the Tax Code, as amended. The said RR also defines what the FMV of the unlisted shares is.

After a careful scrutiny of the BIR Ruling No. DA (DT-065)715-2009, however, We find that the said ruling is a ruling of first impression issued by an Assistant Commissioner. Pursuant to Section 7 of the 1997 NIRC, as amended, the power of the Commissioner to issue rulings of first impression shall not be delegated.[65]

Rulings of first impression refer to the rulings, opinions and interpretations of the Commissioner of Internal Revenue with respect to the provisions of the Tax Code and other tax laws without established precedent, and which are issued in response to a specific request for ruling filed by a taxpayer with the Bureau of Internal Revenue. *Provided, however*, that the term shall include reversal,

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[64] SECTION. 1. SCOPE, RR No. 6-2008, April 22, 2008.
[65] SEC. 7. *Authority of the Commissioner to Delegate Power.* –The Commissioner may delegate the powers vested in him under the pertinent provisions of this Code to any or such subordinate officials with the rank equivalent to a division chief or higher, subject to such limitations and restrictions as may be imposed under rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner: *Provided, however*, That the following powers of the Commissioner shall not be delegated:

xxx xxx xxx

(b) The power to issue rulings of first impression or to reverse, revoke or modify any existing ruling of the Bureau;

xxx xxx xxx.

modifications or revocation of any existing ruling.[66] In this case, the ruling of the Assistant Commissioner which categorically opined that Sec. 100 of the NIRC, as amended, as implemented by RR 6-2008, is not absolute and admit exception by citing rulings, rulings DA, and case which do not involve similar factual scenario with petitioner, is in fact a ruling of first impression because there is no established precedent on the matter.

Considering that BIR Ruling No. DA (DT-065)715-2009 is invalid because it was issued in violation of Sec. 7 of the NIRC, as amended, it follows, therefore, that the provision on the non-retroactivity of rulings of the Commissioner does not apply.

Based on the foregoing discussions, petitioner failed to prove that the sale of BLC shares of stock is not subject to donor's tax. Undoubtedly, the FMV(book value) of the unlisted shares exceeded the consideration received, thus, the transaction is subject to donor's tax.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit. Accordingly, petitioner is hereby **ORDERED to PAY** respondent deficiency donor's tax in the amount of ₱170,229,925.14, inclusive of the 25% surcharge imposed under Section 248(A)(3) of the NIRC of 197, computed as follows:

Basic Tax Due	₱ 136,183,940.11
25% Surcharge	34,045,985.03
Total	**₱ 170,229,925.14**

In addition, petitioner is **ORDERED TO PAY:**

a) Deficiency interest at the rate of 20% per annum on the basic deficiency donor's tax of ₱136,183,940.11 computed 30 days after the gift is made (October 29, 2009 Deed of Absolute Sale) or from November 28, 2009 until full payment thereof pursuant to Section 249(B) of the NIRC of 1997, as amended; and

[66] *Supra.* at Note 63 , 707 SCRA 66, 126, Footnote 13 of the Concurring and Dissenting Opinion of Associate Justice Leonen, citing the definition of rulings of first impression in Revenue Administrative Order No. 2-2001, dated October 22, 2001.

b) Delinquency interest at the rate of 20% per annum on the total deficiency taxes due of ₱170,229,925.14 and on the 20% deficiency interest which have accrued as aforestated in a), computed from July 11, 2011 (receipt of the FDDA) until full payment thereof, pursuant to Section 249 (C)(3) of the NIRC of 1997, as amended.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

CAESAR A. CASANOVA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

ATTESTATION

I attest 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's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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