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TAX LAW FOR BUSINESS

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Antibusiness Tax Code provisions

Donor's tax on business transactions

Part Three

A donor's tax can be imposed, even in the absence of a donative intent for as long as property is transferred for less than an adequate or full consideration, or with insufficient consideration. Such is the pronouncement of the Court in a case involving an interpretation of Section 100 of the Tax Code on the imposition of donor's tax.

With this interpretation of the Court, many business transactions, including those transacted at arm's-length and even between competitors, may be subjected to donor's tax, even if there is no intent to donate, especially with the way the tax bureau defines and determines "insufficient consideration."

Under BIR rules, there is insufficient consideration if the selling price is less than the fair market value (FMV) of the goods exchanged or the service rendered. This is fine. The problem, however, lies in the determination of FMV. The BIR's determination of FMV ignores all business considerations, especially as it pertains to shares of stocks or real property.

FMV generally refers to the price that a buyer is willing to buy and a seller is willing to sell at the time of sale, with due consideration of all the attendant facts and circumstances surrounding the

sale. In business transactions, FMV is heavily dependent on the market situation at the time of the sale. For example, shares of stocks may be sold at a higher price now than if it were sold a day before, or an hour later.

Earning capacity, potential for growth, goodwill, competition, government restrictions and the likes are factors that heavily affect the pricing of shares.

For transfers of shares of stocks —either by way of sale, asset exchange, barter, dacion and other modes of transfer—the FMV of the shares transferred is measured by the FMV of its underlying assets, which is determined using fixed reference values, such as the zonal value for real properties, assessor's valuation or appraisal reports.

However, shares of stocks represent the value of a company taken in its totality and may not simply be computed using the value of its underlying assets taken individually.

In fact, this method results in premature taxing of income, as it taxes appraisal increase in properties even before it is earned or realized. Double taxation also kicks in, since tax is imposed on the stepped-up value of the underlying properties when shares are sold and then, this same income is again taxed upon disposal of the underlying asset.

In the case of real properties, the BIR uses zonal values to determine FMV.

But while zonal values are meant to mirror the market prices, yet because of the inability of the BIR to cope with the volatile market prices, zonal values are not an accurate measure of FMV of real-estate prices. These are not reflective of current market prices.

By its very nature, the existence of business is for profit. The concept of donation has no place in business as it runs against the very nature of its existence to earn profit. Business transactions are presumed transacted at arm's length and at fair market value, unless shown otherwise.

Even in transactions between related parties that are not arm's length, the remedy given under the Tax Code is not to impose a donor's tax but for the commissioner to re-allocate income between the parties, so as to reflect the proper income of each of the parties.

A donor's tax cannot and should not be imposed on business transactions, unless there is a clear intent to donate, which means that donative intent should be a prerequisite to the imposition of donor's tax. This should be clarified in Section 100 of the Tax Code.

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