



Republic of the Philippines  
**DEPARTMENT OF FINANCE**

Roxas Boulevard Corner Pablo Ocampo, Sr. Street  
Manila 1004

22 October 2018



*980*  
*10/25/18*  
*2:15*

**ATTY. MA. IOLANDA B. ABELLA**  
Partner  
Angara Abello Concepcion Regala & Cruz  
6<sup>th</sup> Floor, Cebu Holdings Center  
Cebu Business Park (Ayala)  
Cebu City, Philippines

*1077*  
OCT 25 2018

DOF Opinion No. 007.2018

**SUBJECT: Request for Review of Bureau of Internal Revenue Ruling No. 194-2015**

Dear **Atty. Abella**:

This refers to the subject letter dated 14 July 2015 ("Request for Review") which you filed with this Department on behalf of your client Lexmark International Technology, S.A. ("Lexmark") to request for review of Bureau of Internal Revenue ("BIR") Ruling No. 194-2015 dated 10 June 2015, which ruled on the taxability of the sale of Lexmark's shareholdings in Lexmark International Philippines, Inc., now Funai Electric Cebu, Inc. ("Target"), to Funai Electric Co., Ltd. ("Funai").

In particular, the Request for Review prays for the reversal of the BIR's finding that the sale of Lexmark's shareholdings in Target ("Subject Shares") to Funai is subject to 30% donor's tax on the excess of the fair market value of the shares of stock sold over its selling price under Section 100 of the National Internal Revenue Code of 1997 ("NIRC"), as amended. The pertinent portion of BIR Ruling No. 194-2015 provides:

"In reply, please be informed that Section 99 (B) of the Tax Code, as amended, imposes a 30% donor's tax on gifts made to a stranger including a corporation. The tax is payable on gratuitous transfers and on transfers with insufficient consideration. Relative thereto, Section 100 of the Tax Code 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, 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 the donor's tax.

x x x x x x x x x

Section 100 of the Tax Code is implemented by Revenue Regulations (RR) 6-2008, as amended by RR 6-2013, 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 of Recognition of Gain or Loss. –

(c.1) In the 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 exchange is greater than the amount 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." (Underscoring supplied)

On the other hand, as stated in your Request for Review, it is your position that said transaction must not be subject to donor's tax for the following reasons:

- a. The interpretation of Section 100 of the Tax Code in the questioned BIR ruling is not consistent with the purpose and intent of the law, and contrary to existing and applicable jurisprudential doctrines;
- b. Even if sold at its adjusted net asset value, still, the sale of the subject shares will not result in a gain on the part of Lexmark. Thus, the evil sought to be avoided by Section 100 of the Tax Code does not exist in the transaction.
- c. Section 100 of the Tax Code is not applicable to a sale, exchange or transfer which is a bona fide business transaction, conducted in arms length manner and free from any donative intent.

*We find that the BIR made a reversible error when it declared that the sale of Lexmark's shareholding in Target to Funai is subject to donor's tax pursuant to Section 100 of the NIRC, as amended.*

Under the NIRC, as amended, 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 than the actual amount of money exchanged, there is foregone revenue and the government is placed at a very disadvantageous position. In order to curb the tax leak and possible abuse



of this scenario, Section 100 of the NIRC, as amended imposes donor's tax on transfers made for less than an adequate and full consideration.

As can be deduced from above, the principal purpose of the "deemed gift" provision is to prevent a situation wherein parties to a sale endeavor to avoid/save in the payment of income taxes through the manipulation of the selling price of the sale.

A sweeping and rigid application of the rule even to dealings done in the ordinary course of business (a transaction which is a bona fide, at arm's length, and free from any donative intent) where the evil sought to be avoided is not present would frustrate the duly established purpose and intent of the law.

A law should not be interpreted so as to cause an injustice. There are laws which are generally valid but may seem arbitrary when applied in a particular sense because of its peculiar circumstances.<sup>1</sup> The spirit, rather than the letter of a statute determines its construction, hence, a statute must be read according to its spirit or intent. For what is within the spirit is within the statute although it is not within the letter thereof, and that which is within the letter but not within the spirit is not within the statute.<sup>2</sup> In doing so, we defer not to the letter that killeth but to the spirit that giveth life.

Thus, as long as the transaction is conducted at arm's length such that a bona fide business arrangement is done in the ordinary course of business, and the evil sought to be avoided by the law does not exist, a sale for less than an adequate consideration is appropriately not subject to donor's tax.

At the onset, it is alleged that Lexmark and Funai are not related parties. Lexmark's decision to sell the Subject Shares at the purchase price amounting to USD 60,000,000.00 or equivalent to Php 2,468,400,000.00 ("Purchase Price") was arrived after taking into account the following:

- a. that based on the global restructuring undertaken by Lexmark, Target was no longer a fit with Lexmark's global operations;
- b. Target was one of Lexmark subsidiaries with the lowest return of investment;
- c. Lexmark has already intended to close Target's operations, and divest itself of its inkjet printer facilities, and had in fact already proceeded on the assumption that Target's closure of operations would be completed by the year 2015. Hence, Lexmark had every expectation of losing the full amount of its investment in Target and no expectation of being able to provide a stable return of investment ratio that would entice third persons to enter into a profitable sale transaction with Lexmark;
- d. the market demand for the manufacture of inkjet printers has passed its maturity, and is shrinking with the proliferation of laserjet printers and other alternatives such as digital devices, which had a negative impact on the long term profitability of operating an inkjet printer manufacturing facility;
- e. the fact that at the time of the sale of the Subject Shares, Target had a deficit amounting to Php 155,074,058; and

---

<sup>1</sup> *Cometa v. CA*, G.R. No. 141855, 6 February 2001.

<sup>2</sup> *Alonzo v. IAC*, 234 Phil. 267, 272-273 (1987).



- f. the welfare of Target's 1,100 employees who would be left without employment upon the closure of the Target.

In arriving at the decision to accept Funai's offer to purchase the Subject Shares at the said Purchase Price, Lexmark took into account the foregoing insights and arrived at a conclusion that the purchase price offered by Funai appears to be the best price that Lexmark can get for the Subject Shares.

In addition, even if the Subject Shares were sold at its fair market value using the Adjusted Net Asset Method as required under Section 7 (c) (c.2.2) of Revenue Regulation No. 6-2008, the sale of the Subject Shares will not result in a gain on the part of Lexmark.

To recapitulate, Lexmark subscribed to the Subject Shares by paying up the acquisition cost of Php 2,765,655,910.00 with a paid-up value per share of Php 758.93. On 1 May 2013, at the time of the sale to Funai, the Subject Shares had an adjusted fair market value of Php 739.15 per share, which is equivalent to Php 2,693,569,037.60.

Even if the Subject Shares were sold at its adjusted net asset value of Php 2,693,569,037.60, the transaction would still result in a net capital loss since the acquisition cost of the Subject Shares of Php 2,765,655,910.00 is still higher than the former. Consequently, Lexmark would still not be liable capital gains tax and the evil sought to be avoided by the law would not exist.

With the Purchase Price being lower than the adjusted net asset value of the Subject Shares, there was no intention to gain any tax advantage as none could have been gained in any case as illustrated above.

Considering all the circumstances surrounding the transaction, we deem that the sale was made in the ordinary course of business. Accordingly, the sale of Lexmark's shareholding in Target to Funai is not subject to donor's tax.

Hence, the BIR erred when it declared that the sale of Lexmark's shareholding in Target to Funai is subject to donor's tax pursuant to Section 100 of the NIRC, as amended.

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.

Thank you.

Sincerely yours,

  
**CARLOS G. DOMINGUEZ**  
Secretary of Finance

OCT 23 2018

 CC

Commissioner Caesar R. Dulay  
Bureau of Internal Revenue