

REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE
Quezon City

February 28, 2019

REVENUE MEMORANDUM CIRCULAR NO. 30-2019

SUBJECT : Clarifying Section 100 of National Internal Revenue Code (NIRC) of 1997, as amended by Republic Act (RA) No. 10963, or the "Tax Reform for Acceleration and Inclusion (TRAIN Law)" in Relation to Sale of Shares of Stock Not Traded or Listed

TO : All Internal Revenue Officials, Employees and Others Concerned

This circular is issued to clarify Section 100 of National Internal Revenue Code (NIRC) of 1997 (the Tax Code), as amended, particularly on the issue of the existence or non-existence of "deemed gift".

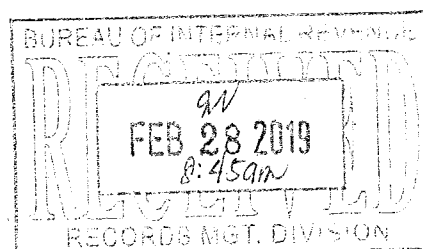
Prior to enactment of the TRAIN Law, Section 100 of the Tax Code, reads, *as follows*:

"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 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 very disadvantageous position. In order to plug this tax leakage, Section 100 automatically treats the disparity between the fair market value 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, accordingly, works to avoid the recurrence of under-declaration of the selling price.

Thus, if the FMV of the shares of stock is higher than the selling price, the excess/difference shall be treated as gift subject to donor's tax. This has been confirmed in *The Philippine American Life and General Insurance Company vs. Secretary of Finance, et. al.*¹ where the Supreme Court ruled that "[t]he absence of donative intent, if that be the case, does not exempt the sales of stock transaction from donor's tax since Section 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."

¹ G.R. No. 210987, November 24, 2014



The TRAIN Law which took effect on January 1, 2018, however, provides an exception. Section 100 of the Tax Code now further states that “[P]rovided, however, That a sale, exchange or other transfer of property made in the ordinary course of business (a transaction which is a bona fide, at arm’s length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money’s worth”.

Under the rules of statutory construction, exceptions, as a general rule, should be strictly, but reasonably construed; they extend only so far as their language fairly warrants, and *all doubts should be resolved in favor of the general provisions rather than the exception*.²

The appropriate and natural office of the exception is to exempt something from the scope of the general words of a statute, which is otherwise within the scope and meaning of such general words. Consequently, the existence of an exception in a statute clarifies the intent that the statute shall apply to all cases not excepted. Exceptions are subject to the rule of strict construction; hence, any doubt will be resolved in favor of the general provision and against the exception. Indeed, the liberal construction of a statute will seem to require in many circumstances that the exception, by which the operation of the statute is limited or abridged, should receive a restricted construction.³

Thus, starting January 1, 2018, *when shares of stock not traded in stock exchange are sold for less than its fair market value, the excess of the fair market value over the selling price shall be treated as gift subject to donor’s tax imposed by Section 100 of the 1997 NIRC, as amended, except when it is sold at arm’s length, free from any donative intent (in the ordinary course of business).*

The determination of whether the sale of shares of stock not listed and traded is *at arm’s length is a question of fact* and not of law. Since an arm’s length transaction is a question of fact, it therefore behooves upon the party seeking to apply the exception to prove that indeed the sale involves no irregularity between unrelated and independent parties. This would require presentation and reception of reasonable evidence sufficient enough to convince that the sale of the shares of stock for less than its FMV is without intent to evade tax and defraud the government (of the tax due therein). The evidence that should be presented should be viewed in accordance with its relation and relevance to the transaction on a case to case basis.

All revenue officials and employees are hereby enjoined to this Circular as wide a publicity as possible.


CAESAR R. DULAY
Commissioner of Internal Revenue

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² *Samson vs. CA*, G.R. No. L-43182, November 25, 1986

³ *Lokin, Jr. v. Commission on Elections*, G.R. No. 179431-32 and 180443, June 22, 2010

