

## THY WILL BE DONE

By Atty. Angelo M. Cabrera

### Simulated sale

In a recent press statement, Secretary Cesar Purisima of the Department of Finance announced that the Bureau of Internal Revenue would be targeting 50 billion in estate tax collections by the end of the term of President Aquino. This is five times higher than the 10 billion target announced by BIR Commissioner Kim Jacinto-Henares just a few weeks before. Even Commissioner Kim's lower target already represents a huge leap – a five-fold increase – from the agency's average annual collections of 850 million to 1 billion in estate taxes over the years.

One of the ways by which the agency intends to meet this target is to scrutinize intra-family transfers of property. Commissioner Henares said that what the heirs are currently doing to evade estate taxes is to buy the property of their parents while they are alive.

To avoid such skirting tactic, Jacinto-Henares said the Bureau of Internal Revenue would look into the capacity of the heir to purchase the property as well as the parent for owning the asset. "We will investigate the buyer and the seller. First, the seller, does he have the capacity to own the property he plans to sell? Did he report and pay the taxes? Second is the buyer, his capacity to buy the asset and if he reported the correct income to us," Jacinto-Henares said to us. (*Manila Bulletin*)

But what if the buyer is truly without financial capacity being, for instance, a fresh graduate as when the parents decide to transfer a property as a graduation gift to the child? Or, what if the parents decide to deprive their other children of any inheritance by selling everything to their favorite child who happens to be without financial capacity?

I guess the more basic question is, would a sale be considered without force and effect if proven to be without consideration?

This is a very relevant question in inheritance because one of the most common instruments used by families in transferring assets from the parents to their children is a deed of sale. Although the parents' intention is really to donate the property to, say, one of their children, the manner of execution is usually done through a simulated sale.

A simulated sale is defined as a one in which no price or other consideration is paid or intended to be paid. Rightly or wrongly, it is usually resorted to in estate planning in an attempt to avoid either the donor's tax or estate tax. In some cases, it is used to circumvent the law on legitimes or the rightful shares of compulsory heirs.

By making it appear that a real property was purchased instead of donated, the transfer could be taxed as low as 6% in capital gains tax, instead of donor's tax, which has a maximum rate of 15%. On the other hand, if the parents die without having transferred the property, the same shall be subject to estate tax up to a maximum of 20%.

On the effect on the rightful shares of compulsory heirs, by selling one or all of the parents' properties to one of their children under a fictitious sale, the other children are effectively deprived of their future share in the inheritance.

What does the law say about simulated sales?

In one case, the Supreme Court had the occasion to rule on this when it sustained the lower court's finding that respondent never received the consideration stipulated in the simulated deed of sale. The Court said, "It is a well-entrenched rule that where the deed of sale states that the purchase price has been paid but in fact has never been paid, the deed of sale is null and void *ab initio* for lack of consideration. Moreover, Article 1471 of the Civil Code, provides that "if the price is simulated, the sale is void," which applies to the instant case, since the price purportedly paid as indicated in the contract of sale was simulated for no payment was actually made." (G.R. 165851, February 2, 2011)

Although the case is not one of inheritance, I believe that the same principle applies in intra-family transfers, where the inheritance rights of other compulsory heirs are affected by the fictitious sale of a property to an heir.

On the tax implications of a simulated sale, Ma'am Chief has spoken.