

Tax – Informative Note

"Undetermined position of the Spanish Supreme Court on Stamp Duty creates tremendous uncertainty"

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The Supreme Court has unexpectedly changed its criterion regarding the taxpayer of the Stamp Duty triggered by the granting of a mortgage loan by ruling No. 1505/2018, dated 16 October.

Up to said date, the Stamp Duty -between 0.25% and 1.5% on the maximum secured liability depending on the region where the asset is located- levied on mortgage loans was borne by the borrowers, according to (i) traditional Supreme Court interpretation of the law (the loan and the mortgage were considered a single taxable event for this purposes and the party benefited by the loan –the taxpayer following the law– was the borrower) and (ii) article 68.2 of the Stamp Duty regulations, which specifically established it.

However, in the abovementioned judgment, the Supreme Court has stated that the Stamp Duty should be paid by the lender as (i) the mortgage must be considered as an independent taxable event and (ii) the benefited party by the mortgage would be the lender since the mortgage is registered in the Property Registry (not the loan) and such public registration on the asset registry sheet protects the lender from third parties.

The consequences of this new doctrine were deep and far to be well determined for the time being. Banks, as final taxpayers of the Stamp Duty, could be obliged to refund a huge amount of money directly to clients or to the tax administration (which logically would be requested for refund by taxpayers). First calculations of the economic impact for banks are close to be a nightmare.

Notwithstanding the above, due to the “enormous economic and social impact”, the Supreme Court announced that this criterion will be reviewed during a Plenary Session to be held on November 5th 2018, in order to determine if this ruling constitutes a judicial precedent for future cases. Therefore, we will have to wait until November 5th 2018 to know the final decision and, its impact on previous and future transactions.

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