

Spanish High Court Wavers Over Ruling Banks Are Liable for Tax

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The impact of a recent Spanish Supreme Court decision making banks liable for stamp tax on mortgages could be mitigated if the full Court decides on November 5 that it should not be applied retroactively.

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In a 5-1 decision (No. 1505/2018), the Supreme Court on October 16 reversed its previous interpretation of the Transfer Tax and Stamp Duty Law that the borrower is responsible for paying stamp tax, which varies between 0.25 percent and 1.5 percent of the maximum secured liability, depending on the region where the underlying property is located.

Javier Prieto, a tax lawyer with Araoz & Rueda, said the courts had previously held that both the loan and the related mortgage were considered a single taxable event for purposes of paying stamp duty, and that the party who benefited from the loan was the borrower, who was therefore liable for the tax.

Barbara Mambrilla, a tax lawyer with Gómez-Acebo & Pombo, said article 8d of the Transfer Tax and Stamp Duty Law establishes that the borrower is considered the taxpayer, and that article 15 states that the formalization of a mortgage is taxable only for “the concept of loan granting.” Mambrilla said both articles apply to actions subject to transfer tax, which she said is distinct from stamp duty. “According to the law, the same transaction cannot be subject to . . . both transfer tax and stamp duty,” she said.

Mambrilla said article 29 of the law provides that when a document is handled by a notary, the taxpayer for stamp duty purposes is the party acquiring the goods or rights. If there is no acquiring party, the party that asked the notary to formalize the document is considered the taxpayer, she said. Paragraph 2 of article 68 of the transfer tax and stamp duty regulations states that, in the case of public deeds registered to grant a mortgage or other loan guarantee, the acquirer of the right is considered to be the borrower, Mambrilla said.

“Considering and interpreting all these articles, the Supreme Court criterion [had been] that, in the case of loans guaranteed with a mortgage, the acquirer of the right was the borrower,” Mambrilla said in an email. “Such criterion had been [upheld] until these last decisions. (There are [actually] three decisions supporting the new criterion.) So, the latest decisions of the Supreme Court were unexpected, considering all these prior decisions.” Mambrilla said the Court declared paragraph 2 of article 68 of the regulations null because it is inconsistent with the Transfer Tax and Stamp Duty Law.

The share prices of several publicly listed banks fell sharply after the decision, which was made public October 18. The following day, the Court said the ruling needed further review. “Considering that the [decision] represented a radical change in the judicial criterion that has been applied until now, and taking into account at the same time [its] enormous economic and social impact,” the Court said it was staying application of the ruling for similar pending cases pending a review of the decision by the full Supreme Court.

Prieto said the law relating to stamp duty is complicated, as evidenced by the fact that one of the justices dissented and another who voted with the majority based his decision on different legal grounds. "If you explain to 100 people how the stamp duty works in this case, 99 would tell you that the taxpayer is the bank," he said.

Prieto said early estimates of the economic impact on banks "are close to being a nightmare."

The *Asociación de Usuarios de Bancos Cajas y Seguros* (ADICAE), a consumer association, estimated that approximately 8 million borrowers have paid stamp duty that was actually the responsibility of their banks. «

On October 22 Supreme Court President Carlos Lesmes issued a statement saying the decision that banks are liable for the tax is "firm and not subject to revision" with respect to the parties to the dispute. Lesmes said the full Court will meet November 5 to consider the "pending and unresolved issues" related to the case.

Retroactivity Remains an Issue

Mambrilla said the full Court will likely decide whether the new interpretation that banks are responsible for paying stamp duty should apply retroactively. "According to the Spanish law, the effect of declaring a provision null is equivalent to [declaring it nonexistent] as from its origin," she said. "It would permit taxpayers to claim [that] the tax authorities [should] refund stamp duty paid in connection with these transactions for the last four years, [which is] the statute of limitations. Then, the tax authorities would request the lenders — the banks — to pay the tax."

The full Court could alternatively accept the argument that lenders and borrowers had been relying on what was, until October 16, both an enforceable regulation and the unanimous criterion of the courts. "It [might apply] the new criterion from now on, but not to prior payments, [which] would reduce the contingency for the banks," Mambrilla said.

Prieto agreed that if the question of retroactivity is based on the tax statutes, banks could be liable to the extent of the four-year statute of limitations. "[But] this tax could be considered abusive and therefore null under our legislation for consumer protection," he said. "There is no statute of limitations under civil law if nullity exists."

ADICAE said October 18 that it would prefer either an extrajudicial resolution of the dispute or collective action. The association said that before the Supreme Court ruling, it planned to file 60 class action suits "to avoid a parade of hundreds of thousands of people affected in individual lawsuits which, in addition to causing the court system to collapse, would leave millions of mortgage holders who do not intend to take individual legal action without compensation." ADICAE said "a fraud" that affects almost all mortgages can't be resolved on a case-by-case basis because the banks intend to take each consumer to court individually.

The Spanish Banking Association said its members have complied both with regulations approved over 20 years ago and with what had — at least until the Supreme Court decision — been settled case law. The association said its members will comply with the ruling, even though they have not been compensated by

their customers for the stamp duty in the past. The association also stressed that the decision pertains to a “tax issue,” possibly out of concern about the potential for unlimited retroactivity if the courts determine that banks had been committing abusive violations of consumer protection laws.

DOCUMENT ATTRIBUTES

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