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The Supreme Court reconsiders whether the lender is finally liable for stamp duty in mortgage loans

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Just two days after becoming public, the conclusions of the Supreme Court judgment holding, counter to its earlier view, that the lender in mortgage-backed loan transactions is the person liable for stamp duty, are the subject of reconsideration by the same court.

1. Analysis of the Judgment of the Supreme Court of 16 October 2018

In its Judgment of 16 October 2018, the Supreme Court ruled on an appeal (no. 5350/2017) lodged against the Judgment of the Madrid High Court of Justice of 19 June 2017, the main purpose of which was to determine who was the taxpayer for the purposes of stamp duty when the formalisation of a mortgage loan is recorded in a deed.

In the appealed judgment, the court upheld the tax inspector's view, according to which the borrower must be liable for the aforementioned duty in such cases, and did so relying on both one of its previous judgments (Judgment of 9 June 2016, appeal no. 867/2014) and the case law of the Supreme Court.

Indeed, as can be seen from the judgments cited in the appealed judgment, the Supreme Court has been defending in judicial review proceedings the above-mentioned conclusion, justifying it on the basis of several arguments.

Firstly, it was considered that this view was the only one in conformity with a joint interpretation of arts. 8(d) and 15(1) of the Transfer Tax and Stamp Duty (Recast) Act. Secondly, and after analysing the content of art. 29 of the cited legal text in relation to the payment of the duty under the category of notarial documents, the Supreme Court interpreted that, when that article provides that "the acquirer of the property or right shall be liable", such "right", in the transactions we are dealing with, had to be understood as referring to the loan itself, even if secured with a mortgage. Finally, the wording of art. 68(2) of the regulations implementing the aforementioned recast statute - which provides that "in the case of deeds of arrangement of a secured loan, the borrower shall be regarded as the acquirer" - was considered by the Supreme Court to be a rule with "undoubted interpretative value".

The same view upheld by the Supreme Court within the branch of judicial review was also relied on by two judgments of 2018 of its Civil Division (appeals nos. 1211/2017 and 1518/2017). With these, the court of last resort corrected the doctrine that that same Division had established in a judgment of 23 December 2015, in which it was held that it was the lender that should be considered the taxpayer for the stamp duty insofar as it "acquires" through the mortgage a registrable right in rem.

Well, the subject matter has been analysed again by the Supreme Court in the judgment under review. On this occasion, the court takes a different stand, taking now the view that it is the lender who is liable for the stamp duty in mortgage-backed loans.

To justify this change of position, the court resorts to several arguments, among which we highlight the following:

- On the one hand, the court recalls scholarly criticism, in its opinion well-deserved, against the wording of art. 29 of the aforementioned recast statute in its identification of the taxpayer as the person who is the "*acquirer*" of the property or right. In the court's view, the term acquirer, while it may be accepted in connection with singular legal transactions, is inappropriate when the documents cover transactions involving several connected acts.

  This is precisely the case with mortgage-backed loans, where both a transfer of title - the loan - and ancillary collateral business - the mortgage - can be identified. Thus, in principle, two "acquirers" can be identified: the borrower in the first case and the mortgagee in the second. However, taking into account that, according to art. 31 of the recast statute, a mortgage-backed loan is a single unit for tax purposes, it is not possible to identify more than one taxpayer who, in the view of the court, is none other than the mortgagee.

  In order to justify its position, the judgment refers, on the one hand, to the reason that determines the subjection of the analysed transactions to the stamp duty; if these transactions are subject to such duty, it is because they meet the conditions provided by law, including that of being publically registrable juristic acts. In accordance with the foregoing, it is the opinion of the court that, in the analysed transactions, the mortgage is the legal transaction for tax purposes, since it is a registrable right in rem, whilst a loan in itself is not registrable.

Thus, it is the very mortgage and its registrable status that acts as a *conditio iuris* of the subjection itself to the stamp duty.

- On the other hand, and also based on the lack of clarity afforded by the expression "acquirer" to the transactions analysed for the purpose of identifying the taxpayer, the court refers to the second part of the wording of the cited art. 29, in which it is stated that, "in the absence" of an acquirer, taxpayers shall be "the persons who enjoin or request notarial documents, or those in whose interest they are issued".

  In the court's opinion, this secondary criterion of identification of the taxpayer does not only apply when an acquirer cannot be identified, but must also be used when there are difficulties in specifying, from among the various participants in the transaction, which of them has the status of acquirer, as is the case here. In this way, the category of "interested party" in the issuance of notarial documents takes on a fundamental role in the transactions analysed, which the court ends up identifying as the mortgagee since, it is argued, such is the one who has standing to assert any claim deriving from this right.

- Finally, the Supreme Court had to contend with the wording of article 68(2) of the Transfer Tax and Stamp Duty Regulations, which provides that "in the case of deeds of arrangement of a secured loan, the borrower shall be regarded as the acquire". In order to overcome the same, the court denies this provision the interpretative or explanatory nature assigned to it by the case law that is now being altered, considering it to be an "obvious regulatory excess" and therefore unlawful.

On the basis of the foregoing reasons, the Supreme Court sets aside the appealed judgment, whilst expressly stating its change of view in relation to the subject matter analysed. In addition, it quashes the cited art. 68(2) on account of being contrary to law.

2. The Supreme Court will once again analyse its interpretive criterion

Surprisingly, only two days after the analysed judgment became known, the presiding judge of the Third Division of the Supreme Court announced the decision to leave without effect all summons in pending appeals that have a similar subject matter and "to refer to the Plenum of the Division the hearing of some of these pending appeals, in order to decide if said change in case law should be affirmed or not".

Therefore, it will be the Plenum of the court that will finally determine which is the view that must prevail with respect to the issue analysed here, a determination that will be applied to future appeals with the same subject matter.

This decision, justified by the "enormous economic and social repercussion" of the aforementioned judgment (which may even affect operators other than those directly involved in mortgage loan transactions), may actually represent an opportunity to prevent the latter from becoming an

inexhaustible source of litigiousness, especially so -as we point out below- because the court did not make a pronouncement on the temporal scope of its ruling.

In that regard, the borrowers' reclaiming from the Public Treasury of the amounts that would have been overpaid according to the ruling, would correspondingly entail the Public Administration's claiming of payment of the duty by the lenders, to which the latter could raise as a defence their reliance on the legal certainty and legitimate expectation provided heretofore by both existing legislation and case law. Hence, one need not stretch the imagination to foresee actions claiming the pecuniary liability of public authorities, as well as to denounce the violation of the principle of tax legality, which, in tax base matters, requires from the legislator clarity in its classification, clarity that art. 29 of the recast statute does not provide in the absence of a regulatory interpretation that the Supreme Court now holds void.

The above consequences, which in principle could be understood as limited to those legal situations not yet affected by the statute of limitations mechanism, could even have a longer temporal scope. In this sense, it cannot be ignored that the Supreme Court has quashed the cited regulatory provision (art. 68(2)), which could lead to consider whether the ab initio voidness would also reach the final acts issued under that provision.

It is thus to be expected that the Plenum of the court, in the event that it ends up agreeing with the substance of the interpretation offered in the analysed judgment, will exercise extreme caution in determining with precision the temporal effects of the judgment, especially taking into account the balance that must exist in these cases between the principles of legality, on the one hand, and legal certainty and legitimate expectation, on the other.