Spanish Real Estate Legal Update

Review

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Transfer Tax (TPO) questioned by the European Courts.

The Supreme Court, in its Sentence dated 23 September 2009, has referred a question for a preliminary sentence to the European Court of Justice (ECJ) in relation to the application of Article 108 of the Spanish Securities Market Act (LMV), a provision that determines the rate for the Transfer Tax (TPO) on transfers of stakes in companies whose assets are more than 50% comprised of real estate.

Historically this provision has been the target of constant criticism because, while its purpose is to prevent the concealment of real estate sales (taxable by TPO or VAT) following the transfer of shares/stakes (fiscally exempt), in those cases in which the transfer of real estate is subject to VAT instead of TPO and such VAT is deductible for the purchaser, the application of the provision involves a cost of 6-7% for TPO which would otherwise not have existed.

To this respect, the purpose of such referral to the ECJ is to clarify whether the application of Article 108 LMV is appropriate in accordance with the European rules the following cases:

i) When, following the direct transfer of the real estate (as opposed to the transfer of shares representing share capital in the company) TPO is not applicable, and VAT is instead levied on such transfer.

ii) In those cases of fully operational companies where it is impossible to disassociate the real estate from the business activity pursued on it.

In accordance with the foregoing, in practice the main cases in which taxpayers are obligated to pay TPO in the transfer of shares/stakes by application of the aforementioned provision could consist of the acquisition of stakes in the following types of companies:

i) Those devoted to the activity of construction or real estate development in which the value of the plots and/or land amounts to more than 50% of the total value[1] of the asset.

Please note that while the general rule holds that in this type of companies, the real estate that forms a part of the current assets is not taken into consideration, land and plots are exempt from such rule and as such do form a part of this calculation.

ii) Companies for which, by virtue of their activity, it is customary for the valuation of real estate to surpass the aforementioned 50% threshold (case for example of hotel companies, or companies that operate technology, theme or renewable energy parks, as well as companies that lease/manage shopping and business centres, among others).

It is important to avoid the prescription of those transactions executed within the last four years.

To this regard, consider that it is foreseeable that the aforementioned question for referral may be resolved within the course of approximately one year, and the ECJ may possibly understand that Article 108 LMV is not applicable in the cases of reference, and its resolution may be retroactive.

In such case, taxpayers affected by the resolution would be empowered to seek the refund of any TPO paid, providing that the statute of limitations on their rights has not elapsed by the time of the ECJ sentence, which is 4 years.

In accordance with the foregoing, the avoidance of the statute of limitations on the foregoing transactions is particularly important – particularly in those transactions with a duration greater than 2 but less than 4 years, which are those that run the risk of becoming final within the time it takes the ECJ to deliver its sentence – in order to be able to claim the amount of any TPO "unduly" paid, as well as the corresponding default interest.

This is why we deem it important:

i) To monitor the sentence of the ECJ in order to, where appropriate, prepare any corresponding applications for refunds

[1] To perform the asset calculation, the net accounting value of all goods shall be replaced by their respective **real values** determined at the date on which the transfer or purchase takes place.

ii) To act as quickly as possible on any appropriate legal actions in order to prevent the lapse of taxpayer rights during the time in which the ECJ makes its sentence.

Our tax department is at your complete disposal to monitor this procedure, undertake any legal actions necessary to suspend statutes of limitation and, as appropriate, file the documentation necessary to obtain the refund of the TPO.

Luis de Ulíbarri

Amendments to the identification of means of payment in deeds of sale for Real Estate.

On 19 January the BOE (Official Gazette of the Spanish State) published Royal Decree 1/2010, 8 January, (hereinafter, the "Royal Decree"), in amendment of given formal tax obligations and procedures for tax application and the amendment of other tax rules which, among others, introduces an amendment to the Regulation on the Organisation and Operation of Spanish Notaries, approved by the Decree dated 2 June 1944, to define, with regard to certain means of payment, the specific data that must be included in deeds relative to the acts or agreements by which ownership and other real rights on real estate are declared, established, transferred, levied, amended or cancelled against payment, whether by documental accreditation or notarised declaration, evidence which shall involve sufficient identification of such means of payment for access of the aforementioned deeds to the Land Register.

To this respect it is worthy to recall that when the compensation consists fully or partially of cash or token that represents it, the aforementioned deeds of sale should identify the means of payment employed by the parties. For such purpose it should be indicated whether the price was received prior to or at the time of deed execution, the amount thereof as well as whether it was paid in cash, by check, bank check or otherwise and, as appropriate, to order or to the bearer, any other draft instrument or by transfer.

For this purpose, a series of rules are mentioned below:

1. The appearing parties shall indicate the amounts paid in cash, reflecting such representations in the deed.

2. The Notary shall attach a notarial certificate of the checks and other draft instruments delivered upon execution of the deed.

Furthermore, with respect to the checks and any other draft instruments delivered prior to execution of the deed, the appearing parties shall provide the aforementioned data, likewise indicating the number thereof and the debit account code. In the event of bank checks or other draft instruments issued by a credit institution and delivered prior to or at the moment of deed execution, the appearing party making the payment shall

state the debit account code to which the funds were provided for the draft or, as appropriate, that it was issued against the delivery of the amount in cash. All of these representations should be recorded in the deed.

3. In the event of payment by transfer or bank debit, the appearing parties shall state the data corresponding to the debit and credit account codes, and such statements shall be recorded in the deed.

The amendment introduced by the Royal Decree requires that if the appearing parties refuse to identify the means of payment employed (as opposed to the prior and broader wording that envisaged the case of a refusal *"to furnish any of the aforementioned data or documents"*), the Notary shall verbally admonish them on the formal closing of registration for such deeds penalised by the Spanish Mortgage Act, noting this admonition therein.

As previously mentioned, the amendment introduced by the Royal Decree specifies, for the purposes of the formal closing of registration envisaged in the preceding paragraph, that the means of payment shall be deemed as identified if the essential elements thereof are recorded in the deed by means of supporting documentation or declaration. For this purpose it is specified that if payment is made by check an indication of the drawer and drawee shall suffice, beneficiary if it is a personal check, data and amount, and in the case of a transfer it shall be deemed as sufficiently identified, even if the debit and credit account codes are not furnished, providing that the ordering party is indicated, along with the beneficiary, date, amount, issuing and ordering and recipient or beneficiary institution.

It is necessary to identify the means of payments used to avoid the closing of the Public Registry

In accordance with the foregoing, it shall be understood that not all failures to identify means of payment lead to the formal closing of registration as envisaged in the Mortgage Act, but only the aforementioned essential elements, whether by supporting documentation or declaration.

On the other hand, the amendment introduced by the Royal Decree specifies that, in particular, the General Council of Spanish Notaries Public shall provide the Tax Authorities with information on payments by transfer or direct debt when the Notary has not been notified of the debit and credit accounts. Such notice of information was established in general, among others, in cases of transactions in which the obligation to notify the Notary of the means of payment utilised was not fulfilled or, where appropriate, of a refusal to identify the means of payment.

Lastly, it should be recalled that the deeds of sale in question should likewise include the prior tax return on the movement of the means of payment (model S-1) when appropriate in accordance with legislation on the prevention of money laundering, likewise indicating the breach of this obligation on such deed, where appropriate.

Alfonso López

The new Law on "Express Eviction".

On 24 November 2009, Law 19/2009, dated 23 November, on measures designed to develop and speed up the rental process and the energy efficiency of buildings (the "Law"), was published in the Spanish Official State Bulletin (BOE). This Law, which was soon to become known as the "Express Eviction" Law, introduced significant changes in regulations which directly affected the property sector: the Law on Urban Leases, the Horizontal Property Law and the Civil Procedure Law.

As the statement of motives of the Law states, its objective is to reinforce legal safeguards for all parties in rental contracts in the interest of promoting property Leases over the market trend of recent years (the general preference has been to purchase property).

In particular, Article 1 modifies Article 9 of **Law 29/1994, dated 24 November, on Urban Leases** (the "LUL") regarding situations where the obligatory extension of the contract over a period of 5 years is not applicable.

Up until now the obligatory extension of the contract was not applicable when, at the time of signing, it was expressly stated in the contract that the lessor needed to use the property as his permanent residence. With the new Law, this case of the obligatory extension not being applicable is broadened to include situations where the lessor needs the property for his immediate family (parents and children) or for his spouse in divorce or marriage annulment situations. The Law expressly states that all these cases should be expressly written into the contract to avoid cases of fraud and in favour of legal safeguards.

The obligatory extension will not apply if the lessor needs the property for his spouse, parents or children

We must, however, highlight the right of the tenant to: (i) re-occupy the residence for a new period of five years if the lessor or the relatives of the lessor have not moved in to occupy the residence within three months of the tenant leaving or, alternatively, (ii) to claim compensation equal to the sum of the rent which corresponds to the period of time left before the five years are up.

Regarding **Law 1/2000, dated 7 January, on civil procedure**, 20 of its precepts are modified to help speed up the processes eviction and claiming overdue rent. These are areas where legal processes are sometimes very drawn out and burdensome for all parties involved.

The new Law plans that all claims regarding overdue rental payments (which until now were decided in ordinary civil proceedings) will be given a verbal hearing that is quicker and simpler than the previous type.

A series of measures are also adopted for summonses and notification which will be settled via the small claims court once the Law has come into effect.

Other changes of note designed to speed up proceedings mean a sentence requiring eviction will be enough for the eviction order to be executed directly without the need for a new process to be started or any follow-up proceedings to be carried out.

Furthermore, the period of time between the moment the lessor gives notice of the summons to pay the overdue rent and the lawsuit being presented is reduced from two months to one month. The tenant may avoid the process being started if they pay the overdue monthly payments within this time.

Claims related overdue rental payments will be given a verbal hearing

Regarding **Law 49/1960, dated 21 July, on Horizontal Property**, Article 3 is amended to make it easier for homeowners associations to agree to carry out improvements and install equipment or systems which will improve the energy efficiency of the building, thereby reducing energy costs in residences and helping to fight global warming. This objective also applies to regulations regarding the installation of charging points for electric vehicles in car parks for residential blocks.

The reforms introduced allow for flexibility in the majority votes needed in homeowners meetings for the association to carry out improvements in energy efficiency in their buildings, thereby avoiding a situation where the decision of one person affects the collective will.

Finally, in December 2009 the Government announced that the temporary measures for the **State Plan for Property and Restoration 2009-2012 (SPPR)** will be extended for a further year. The main objectives of this SPPR will be to make the most of the excess of empty properties and make it easier for citizens with fewer means to purchase a property.

The temporary regulations of this plan include the possibility of families with an annual income of up to 7 times the IPREM index (establishing a basic level of income), in other words 48,900 euros, can buy an agreed-on property.

In addition, any empty property with a works licence from before the 1 September 2009 can be classed as a Government-subsidised Property for purchase or rental, as long as the terms and conditions established in the SPPR are met. The temporary regulation by which finished but empty properties can be classed as used (for government-subsidised purchase) without the requirement of waiting a year, is also extended for a further year until the 31 December 2010. The 20% increase in subsidy amounts for government-subsidised rental properties with an agreed loan and in priority urban areas is also maintained until the 28 February, 2010,

Alejandra Fernández de la Cigoña

Resolutions of the Directorate-General of Registries and Notaries.

Registry and Notary Directorate-General. Resolution of 15 September 2009.

This resolution settles the appeal lodged against the refusal of the Arcos de la Frontera Property Registrar to register a purchase deed after the estate was divided up when a license was obtained by tacit consent.

A document authorised by the Notary of Arcos de la Frontera was presented to the aforementioned Property Registrar containing details of the purchase of a country estate after the estate had been divided up. It also stated that the license for the division of the estate had been obtained due to administrative silence.

Later on (two days later), an official document issued by the assistant secretary of the Arcos de la Frontera Town Council was also presented to the Property Registrar. This document requested the total ban on the use of the estate as a preventive measure, with the interested parties being informed of this. The Registrar was in favour of this.

Granting of segregation licenses by the silence proceeding are questioned

Regarding the aforementioned purchase deed, the Registrar refused to register it in the belief that no license had been granted for its subdivision, as a license cannot be granted by tacit consent for land that is not for development.

Moreover, the Registrar argued that the granting of said license is conditioned by Article 79 of Royal Decree 1093/1997, dated 4 July, which approves the additional rules for the Mortgage Law Regulations regarding Property Register entries on acts related to town-planning (hereinafter Royal Decree 1093/1997). That is to say that Property Registrars, if they have justifiable doubts regarding the danger of creating a population centre (even when the public deed has been authorised) in line with the terms established in the applicable town-planning rules or regulations and if the corresponding license is not provided, will send a copy of the title or titles they have been presented with to the corresponding Town Council, accompanied by a document with a request for the pertinent agreement for each case and with the express warning that if no reply is received action will be taken in accordance with the stipulations of said Article.

In this case, the notification stipulated in the Article was ignored because the official document from Arcos Town Council had been presented with a request for the total ban on the use, given that this document supposes the express declaration by the Town Council regarding the stipulations in number 3 of Article 79 of the aforementioned Royal Decree.

However, the Notary who authorised the deed to be filled with the Registry, alleged that the procedure detailed in Article 79 was used inappropriately as this document is based on the fact that for its use no municipal license must have been provided, and yet a license for the division of the estate was obtained by tacit consent and is included in the authorised document. This is in accordance with the applicable regulations in Article 42 of the Law on the Legal System of the Civil Service and General Administrative Procedure (hereinafter “Law 30/92”) and in Law 7/2002, dated 17 December, on Town-planning Regulations in Andalusia (hereinafter “Law 7/2002”) in which it is stated administrative silence will be classed as tacit consent in the case of division or subdivision of lands.

According to the settled case law of the General Directorate, the granting of licenses for the division of land by tacit consent (once the legal period of time has elapsed allowing the Council to process the application of the

interested party) is a consequence of Article 42 of Law 30/92, and its completion may not be altered by the stipulations of Article 242.6 of the Redrafted Text of the Law on Land Use and Town-planning (Legislative Royal Decree 1/1992, dated 26 June), current Article 8.1b), last paragraph of the Redrafted Text of the Law on Land Use of the 20th June, 2008, which establishes the impossibility of obtaining planning permission via administrative silence when this contravenes regulations or town-planning. This is also a guarantee by the individual parties that once the established period of time has elapsed without a decision being made by the administrative body, an administrative action is created that is applicable to all persons whether they are natural or legal, or public or private. This should be initially taken as valid and therefore it should be registered, regardless of the fact that the Council may, at the same time, take the appropriate measures regarding registration to ensure this results in a statement of inefficiency.

However, the General Directorate understood that the position, as it has been understood up until now, and which accepts the granting of licenses for division by tacit consent, should comply with the stipulations of the High Court Sentence, Court Three of 28 January 2009, which in the settlement of a cassation matter declared that licenses which contravene land and town-planning regulations cannot be taken as obtained as a result of administrative silence. In this way, and in accordance with this High Court sentence, (and even though Article 43.2 of Law 30/92, dated 26 November, establishes tacit consent as the general rule), the regulation itself contains the exception that another rule with the status of a Law or European Community Regulation may establish the opposite, as happens in this case with Article 242.6 of the Redrafted Text of the Law on Land Use and Town-planning which is not repealed by the only derogation provision of Law 8/2007 and with the stipulations of Article 8.1 b) of the Law on Land Use 2008.

Finally, and in relation to the principal of registration priority, in spite of the fact that the communication sent to the Property Registry by the Town Council was registered two days after the purchase deed was presented (which contradicts the applicable settled case law of the General Directorate and Articles 24 and 25 of the Mortgage Law, on registration priority), the General Directorate deemed that it was in keeping with the duty of the Registrar in such cases, so that the Authorities might take the legally established measures necessary to defend the legality of town-planning.

By virtue of the above, the General Directorate rejected the appeal.

Sandra Paoletti

Resolution of the General Directorate of Spanish Registers and Notaries dated 17 September 2009.

This resolution addresses whether the court sentence on ownership proceedings by means of the resumption of an interrupted chain-of-title to a plot should expressly contain the decision on the cancellation of contradictory entries or, to the contrary, has virtual extinguishing effects on its own without the need for any express mandate.

In the first place, an authenticated copy of the court sentence was submitted to the Land Register of Novelda, Alicante, declaring that the purchase of a plot by its owner was justified by virtue of a title deed executed before a notary.

Such sentence was negatively classified by the Land Registrar on the grounds that the court sentence did not order the cancellation of the contradictory entry in accordance with Article 286 of the Decree dated 14 February 1947 which approves the Mortgage Regulation (hereinafter the "Mortgage Regulation") and establishes that any decree for the approval of ownership proceedings, in cases of the resumption of an interrupted chain-of-title, shall stipulate the cancellation of any contradictory entries to which Article 202 of the Mortgage Act refers, and shall necessarily indicate that all requirements of the aforementioned Article have been observed, as the case may be, and the manner in which the citations of rule 3 of Article 201 of the same Act were executed.

The appellant filed the appeal against such resolution, in consideration of the fact that such sentence need not indicate the express cancellation of the contradictory entries, on the basis of the Resolution from the General Directorate of Spanish Registers and Notaries Public (hereinafter "The General Directorate"), 7 March 1979 and case law of the Supreme Court, which consider that the exercise of any contradictory claim to ownership recorded in the name of another in the Land Register, without specifically requesting the annulment or cancellation of the contradictory entries in force, implicitly involves such request. He likewise alleged the impossibility of the rectification of the defect because the resolution passed on the proceeding had become final.

Administrative resolutions must comply with legal requirements

The General Directorate argued that this formal matter had already been previously addressed and that the solution was as established in Article 286 of the Mortgage Regulation.

With regard to the resolution alleged by the appellant, the General Directorate considers that regardless of the fact that this is an excessively formal and not fully justified requirement, the fact that the sentence pronounced for the resumption of the chain-of-title does not expressly contain the order for the cancellation of the contradictory entries, as imposed by Article 286 of the Mortgage Regulation, is a rectifiable defect. Along these same lines are the resolutions of 29 August 1983, 24 January 1994 and 4 October 2004, or the one of 16 March 2006, which deems the order for the cancellation of contradictory entries as obligatory.

Therefore the General Directorate deemed it important to differentiate the two following issues: the first, that the exercise of a contradictory claim to ownership recorded in the name of another in the Land Register, without specifically requesting the annulment or cancellation of the contradictory entries in force can implicitly lead to such request, and a second one on whether the court sentence to resolve such proceeding should comply with all the formal and substantive representations and requirements of legislation applicable thereto.

On the basis of the foregoing, the General Directorate concludes on the need to adapt the court sentence to applicable legislation, since by legal

mandate the cancellation of given registration entries takes place for the legal safeguard of the registration entries established by Article 1 of the Mortgage Act itself and which would otherwise be relativised to the clear detriment of legal security.

Sandra Paoletti

Andalusia High Court of Justice Sentence, 20 October 2009.

This sentence settles the appeal made by the entity NUEVOS ESPACIOS COMERCIALES, S.A., against the Order dated 20 September 2007 of the Tourism, Commerce and Sports Board. This Order imposes a fine of 600,000 euros on the company for committing a serious violation of Article 93.b of Law 1/1996, dated 10 January, on Domestic Trade in Andalusia (hereinafter the "Andalusia Trade Law").

This violation corresponds to the opening of commercial premises in the Vialia Shopping Centre in Malaga every Sunday and bank holiday since the 15 April, 2007. This is in violation of Article 19 of the Andalusia Trade Law which establishes a maximum of eight days per year for businesses to open on Sundays and bank holidays.

Notwithstanding the above, Article 20.1 of the Andalusia Trade Law states that premises in border areas and in land, sea or air stations / ports and means of transport are free to determine the days and times they open to the public.

Freedom to open premises located in Train and Bus Stations is questioned.

Given this rule, the first matter settled in the sentence is whether the shopping centre located in Malaga railway station (Vialia Shopping Centre) is entitled to the freedom of opening hours as stipulated in Article 20.1.c) of the Andalusia Trade Law.

Regarding the above, the location of the shopping centre was checked. The shopping centre is within the grounds of the railway station as can be seen in the trade license granted by the local government itself, and which has been further proven with plans and aerial photographs that show there is both a physical and functional connection between the station and the shopping area. Both are located in the same building, and no legal or physical division exists between the different areas, with the shopping centre located in a single area.

In this respect, it is also argued that the Andalusia Trade Law establishes the location of these premises as a requirement for the application of the freedom of opening hours in Article 20.1.c). The premises must be inside land transport stations but they are not required to provide direct and necessary services related to the transport services themselves. Neither does it restrict the concept of station to the lines, platforms or facilities which are strictly needed for rail transport.

Following this reasoning, the Andalusia High Court of Justice ruled in favour of the appeal made against the authorities and therefore declared the Order of 20 September 2007 unlawful as the collective commercial

premises is located within the grounds of the railway station, making freedom of opening hours applicable as stipulated in Article 20.1.c) of the Andalusia Trade Law. The shopping centre, therefore, has total freedom to determine the days and times it is open to the public, without the restrictions quoted from Article 19 being applicable to it.

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