

Supreme Court Rulings 147/2018 and 148/2018, Section 991, of 15 March 2018

Both rulings arose from the motions to vacate filed with the Supreme Court arising from a lack of clarity regarding the sharing of mortgage loan costs between contracting parties. Previously, judgments declaring the nullity of the clause that charged all mortgage costs and taxes to the borrower were inconsistent. This matter led the Supreme Court to assess this issue based on the two cassation appeals.

The two cases in hand were filed after the borrowers took out mortgages in which all costs and taxes were charged to the borrowers. The borrowers filed actions to have these clauses declared abusive and thereby invalid because no distinction was made with respect to the type of tax or to which party the tax in question should have been imposed. The plaintiffs alleged that it was not possible to solely hold the borrower liable for all the taxable transactions related to the Property Transfer and Stamp Duty Tax (ITPAJD). Both actions were partially admitted and the rulings found that the obligation of the borrowers to pay the aforementioned tax held good. After subsequent appeals by the borrowers, the Supreme Court took it upon itself to study the case.

In its analysis, the Supreme Court stated that to assess the matter, applicable legislation had to be considered, namely paragraph 22 of the First Additional Provision of the General Consumer and User Defence Act 26/1984 (LGCU), which is currently equivalent to Article 89(3) of the codifying legislation of the General Consumer and User Defence Act (TRLGCU), which holds an abusive clause to be: "the imposition on the consumer of documentation and processing costs that by peremptory norm correspond to the professional. Specifically, in the first sale of dwellings, the stipulation that the buyer must assume the costs arising from the preparation of the deeds which owing to the nature of the same correspond to the seller (new construction, horizontal property, mortgages to finance their building or their division and redemption)."

The Supreme Court pointed out that in accordance with its own case law, the indiscriminate charging to the consumer/borrower of all the taxes and duties, when according to legislation the taxpayers may be different, in accordance with taxable transactions that are also different, is tortious.

In the cases under study, what was at stake was the charging of ITPAJD to the borrower. Regarding this particular issue, the court referred to Article 8 of the codifying legislation of the Property Conveyance Tax and Stamp Duty Act (LITPAJD), which provides that whoever benefits from this act (with the respect to taking out loans, the beneficiary is the borrower) is the liable party.

Moreover, Article 15 of the LITPAJD states that granting bonds and mortgage, pledge and antichresis rights, as guarantees for a loan, are taxed in terms of property conveyances, exclusively, under the loan concept. Moreover, Articles 27 and 28 state that the person acquiring the asset or right, and, failing this, the person requesting or seeking the notarial documents, is liable for, or the taxpayer of, the Stamp Duties (AJD). Accordingly, the lender is not always exempt from the ITPAJD, rather, it is the taxpayer who issues those copies, deeds and certificates its requests.

The Supreme Court stated that a "clause indiscriminately charging the payment of all duties to the borrower, without distinction and unreservedly, can be abusive under the Article 89(3)(c) of the TRLGCU, which in dwelling purchase and sale contracts considers abusive the stipulation imposing on the consumer the payment of all the taxes in which the business person is the liable taxpayer, given that the loans serve to finance that main transaction which is the purchase of a dwelling."

Nevertheless, in the cases studied by the Supreme Court, the imposing of "all the taxes" was not in question, but rather that of the ITPAJD. Accordingly, the Supreme Court pointed out that repeated case law of the Court Three of the Supreme Court holds that the liable taxpayer for the ITPAJD is the borrower and not the lender in accordance with Article 15 of the LITPAJD, citing Constitutional Court case law, which declares the constitutionality of considering the AJD liable taxpayer as the taxpayer of the main business transaction, namely the borrower.

Lastly, it pointed out that a distinction should be made between two AJD types:

- A variable duty depending on the amount involved in the legal or business act that was documented
- A fixed duty for deeds documented on the stamped paper exclusively used for the original notarial document and its authorised copies on which the legal acts are documented

With respect to these two types, the sentence ruled that the liable taxable subject for the first type is always the borrower. With respect to the second type, it held that the borrower was liable for paying the duty on the original notary document, whereas, as regards any authorised copies, the requesting party was considered the liable taxpayer. Consequently, the Supreme Court declared the clause in dispute to be invalid owing to its abusive character on imposing on the borrower the payment of all costs and duties.

It held that the payment of the ITPAJD corresponded to the borrower and, therefore, found the return of the payments it made for this item to be unwarranted.

It can be concluded that banks shall not have to return all the costs paid by their customers when taking out a mortgage loan. Specifically, **banks shall not have to return the AJD costs paid by their customers as the law holds the borrower to the liable taxpayer for this and, thus, its imposition cannot be regarded as abusive.** The importance of this duty lies in its amount, given that these costs constitute approximately a little over one-third of the total costs regarding the granting of mortgages. On foot of these sentences, it is expected that there will be a drop in the number of lawsuits filed against banks which exclusively alleged the abusive nature of the aforementioned clauses and aspired to the corresponding refund.