

PROCESS OF SALE OF A SPANISH PROPERTY

Being well represented when selling a property is as important as it is when purchasing it.

The process is done in three stages, once a formal offer is received from an interested purchaser and confirmed by the seller: **RESERVATION, EXCHANGE OF PRIVATE CONTRACTS and SIGNING OF THE FINAL PUBLIC DEED OF SALE.**

1.- **RESERVATION:** The acceptance of the offer is done in writing signing a reservation contract. At this reservation contract the selling price and the calendar of payments will be set. An amount will be received (generally between 3.000,00 € and 6.000,00 € depending on the property's price) to secure the deal so in case the purchaser pulls out in a later stage, the payments done until that moment will be lost. When the reservation is signed and the reservation deposit paid, the property can be considered as legally out of the market.

2.- **EXCHANGE OF CONTRACTS:** Once the reservation is signed, the Lawyers of the purchaser will carry forward a due diligence process over the property. If a serious legal problem is detected, then the vendor will have to refund the reservation deposit. In a different case the parties must enter into a private purchase and sale contract (or option to purchase contract).

On exchange of this contract the 10% of the asking price will be received, deducting the reservation deposit already paid. Once private contracts are exchanged, if the purchaser pulls out will lose the 10% paid being the vendor will be free to sell to another person. In case it is the vendor who pulls out, it is common to agree a penalty of double the payment received on exchange of contract, what is to say, 20% of the asking price.

Finally, just add that at this private contract it will also be set the date for completion. The date for completion is set depending on the purchaser's financial needs. In case of cash buyers, it will be allowed a period between 2 – 3 weeks to complete. In case buyers require setting up finances (mortgage) 4 to 6 weeks should be allowed to properly organize the mortgage. This process could be quite lengthy depending on what bank is chosen to finance the purchase.

3.- COMPLETION

In Spain, it is the Spanish Lawyer who must coordinate all the parties that participate in the sale: sellers, purchasers, Notaries, mortgagor banks, banks to cancel existing mortgages, real estate agencies, etc. It's a delicate process that involves a very active and diligent management of the case to reach a successful completion.

The Spanish Notary will witness the deal between the parties usually drafted in common agreement between the Lawyers acting for purchaser and vendors.

The vendor will be required to prepare for the completion appointment the following documents:

- ***Certificate showing the accounts in relation with the payment of service charges to the complex owner's association (comunidad).*** This certificate is issued by the Administrator of the Owner's association and signed by the President of the association. It has a cost of 40 – 50 € depending on the Administration Firm.
- ***Certificate of energetic efficiency.***- Vendors are also required to provide the purchaser with a certificate stating the property status in relation with the consumption of electricity. Engineers prepare this certificate. It has an approximate cost of 200 – 400 € depending on the property extension. The price rises for bigger properties
- ***List of payments***

When there is a mortgage over the property to be sold, the vendor needs to coordinate its cancellation with the mortgagor bank (usually through the appointed solicitor).

Having a mortgage on a property for sale is nothing unusual. In this case, the amount owed to the bank (plus any banking costs such as the early redemption fee) plus the costs of the mortgage cancellation deed (Notary fees and Land Register fees to literally erase the mortgage from the land Register) will be discounted from the selling price. The purchaser's Lawyer will make sure that all these expenses are withheld and paid to whoever may be necessary so the property is finally purchased free of charges.

COMMON EXPESNES FOR VENDORS WHEN SELLING PROPERTY

Basically, the vendor will not pay the same costs that where paid when purchasing. These will now be paid by the buyer. So, what are those costs now when selling?

We can say that roughly they are:

- Plusvalia Tax (in case a formal gain is made).
- Capital gains tax (this item is connected with the 3% Withholding tax to be explained below).
- Real estate agent commission, which usually is a 5% of the selling price plus 21% VAT. In case there are 2 agencies they will share the 5% at a 50%.
- Lawyers' fee, which usually is a 1% of the selling price plus VAT.
- Certificate of energetic efficiency, which cost is usually between 200 and 400 € depending on the property's extension.
- Certificate of accounts with the Owners' association, usually between 40-50 €

We would be delighted to make a simulation for you if you let us know selling price, commission agreed with your agent and let us have a copy of your purchase deed as well as a copy of a recent IBI tax bill and an approximate date for the sale (to calculate the Plusvalia Tax).

The 3% withholding tax (WT) and the Capital Gains Tax (CGT)

Property owners can either have a loss or make a gain when selling the property. In case there is a gain, the Spanish Government has put in place legal measures that prevent the evasion of the CGT.

When a foreigner (UE resident or not) is selling a Spanish property, the purchaser is legally obliged to discount or withhold the 3% of the selling price and cash it at the Inland Revenue (Hacienda o Agencia Tributaria). This 3% is a guarantee for the Spanish government. In case of capital gains the applicable tax has to be settled. The tax over profits is the 19% (despite EU citizen or not) over the NET GAIN. Netting the gain is very important since this is what will really help you pay less taxes and where a good lawyer or tax advisor with experience and knowledge on taxation **can be really helpful**. This is one of the keys to your higher margin of profits.

Few days after completion of the sale the purchaser's Lawyer will cash the 3% with the Spanish I.R. sending to the vendor's Lawyer the proof of payment. This is the so called 211 tax form. Then the purchaser's Lawyers use the form 210 to activate the refund process attaching the evidence for the 3% payment, the copy of the form 211.

During the process of refund, the Spanish I.R. will open a file for a brief tax inspection where it will be checked:

- Whether the vendor paid every year the yearly taxes for non-residents, the IRNR & wealth tax.
- Whether the vendor is having any taxable gain with the sale. Again here is another moment where you really need a good advisor to discuss these matters with the Spanish I.R. (Hacienda) and obtain the most favourable results for you.

PLUSVALIA TAX

What is the plusvalia tax in Spain?

The plusvalía is a local (municipal) tax charged by the town hall on properties when sold.

How much is it?

It is calculated on the rateable value of property (stated at your IBI tax bill called “valor catastral” in Spain) and the number of years that have passed since the property was last changed hands.

The base for this tax is the “valor catastral” (an administrative value that is usually lower than the market value and that should according to law be a maximum of 50% of the market value) of the property. The amount to pay will depend on the number of years that the seller has owned the property: the longer the period, the higher the amount of tax to pay but with a maximum of 20 years.

Who pays this tax in Spain?

Legally it should be paid vendor, though both parties are free to negotiate who pays it.

What happens if it is not paid?

In case this tax it is not paid, the local Town hall will go against the new owner **if** the seller wasn't tax resident in Spain. This doesn't happen when the seller is tax resident in Spain. This explains why most Lawyers acting for purchasers deduct from the selling price the amount payable to the local own hall as Plusvalia Tax.

How is it paid?

There are 30 days from the date of sale to offer the payment of the plusvalia to the Town Hall. In case this offer of payment is done after those 30 days, delay interests will be added.

The purchaser's Lawyer (in case the plusvalia payment has been deducted from the selling price) is who usually requires the local Town hall to send the tax bill. Sometimes this formal request is done by the Public Notaries who are empowered by the parties into the deed of sale to do it. Only when the payment of this tax is formally offered the doors to the Land Register will open.

Unfortunately Town Halls can take months to send the bill so this basic administrative task can take quite long. The timings vary depending on the Town Halls.

NEWS NEW RULES SET OUT FROM FEBRUARY 2018

Back in 2017 we reported important news. The Spanish Constitutional court ruled that, in those sales where there isn't a taxable capital gain it is not legally allowed to local Town halls to collect the Plusvalia tax from the seller. However, the necessary change of the applicable legislation was not yet produced leaving us all in a quite peculiar and, why not to say it, unfair situation. We attach a note with our thoughts on this matter at the end of this document.

A year later the new precedent in law, the Spanish Government reacted to the precedent settled by the Constitutional Court and prepared a project of Law should have been passed for approval in summer 2018. In that project, it is included the right to not to be charged plusvalia if the sale of a property hasn't produced any profits. This could be proved with copies of the deeds of purchase and sale of the property but in some cases this will not be enough since to calculate "the profits" and then the real values of purchase and sale, it is necessary to account all the expenses had in the purchase (notary, land register, lawyers, taxes, etc) and in the sale (agent's commissions, lawyers, certificates, etc).

The best part of this new rule seems to be that it can be claimed retroactively from the 15th June 2017.

It is still early to celebrate the legal change since it is not in place yet and since there have been changes in our Government we can't really say when will it be in place. Nevertheless, as we will explain later, there are means to recover the plusvalia if you have to pay it in your sale with losses.

SPLITTING SOME COSTS: COMMUNITY, IBI AND GARBAGE COLLECTION. Retentions for utilities

There are payments that are done once and for the whole year, so what happens if someone purchases a property in the middle of the year? Is it legally required that the vendor to pay for the whole year?

As an example, the IBI is paid once a year, usually in July. It is a local tradition to split the IBI and garbage collection tax between the vendor and the buyer paying each party for the number of days that the house has been owned. However, this is the legal fact, the person legally obliged to pay the IBI tax is the person who owns the property on the first of January of each year so the apportionment of the buyer for the current IBI is more a tradition than a legal requirement.

It does not seem fair that an owner sells in January or February and has to pay for the whole year, hence the flexibility with this matter, in principle.

Same thing happens with the community / service charges. Many times, these are paid quarterly, by semesters or even yearly so what happens when at the time of selling there are payments done in advance? In practical terms, it is done same as with the IBI, the payment will be split between the parties so each one pays in proportion to the number of days that has owned the property.

Finally, it is important to make a brief mention about utilities bills. In Spain, the utilities bill arrives months in arrears so in reality it's very difficult to know how much the next bill will be. The Spanish company for supply of electric energy (usually Endesa though there are others like Iberdrola, Gas Natural Fenosa and several more), does not have offices open to public and only attends by the phone. Sometimes it is possible to find out by telephone how much will the next bill amount what allows making the necessary purchaser's withholdings / retentions (from the selling price) to pay the vendor's bill when they are finally issued. It is quite frequent to retain an amount of 100 or 200 € per each supply (water, gas, electricity, internet, etc) subject to a further liquidation once the bills arrive. This amount is higher in case of big villas that are supposed to produce higher utility bills.

REPATRIATION OF THE SALES PROCEEDS – CURRENCY EXCHANGE

This is another important point to have in mind. Many citizens of different countries purchase property in Spain. When doing so, they use (or buy) Euro but what happens when the property is sold and it is desired to repatriate the money to the country of origin where there is a different currency? This is the case for British, Russians or Scandinavians citizens. What to do then? A lot of money can be lost on the conversion of the currency.

This is a problem that the local real estate industry has solved very successfully. There are many different companies that will help to buy currency or to repatriate it at a competitive rate, avoiding big losses on the exchange rate. These losses can be sometimes really significant.

As we all know the currencies market has daily fluctuations. This is why you must wait for a favourable moment to convert your euro into your country's currency. These currency companies what they do in essence is to purchase all the different currencies when their price is very low and then they resale it to individuals wishing to repatriate funds with a small profit.

As you see there is no big secret. Specialists accumulate currency that is later sold. You must only be careful with the profit or margin that the currency company will do, so check with several of them prior converting the currency before choosing the final one.



MORE ABOUT THE PLUSVALIA TAX AND THE RECENT NEW PRECEDENTS SETTLED BY OUR CONSTITUTIONAL COURT. HOW THE SITUATION STANDS TODAY.

Perhaps I could start to explain this item from the basics, avoiding legal terminology to make it easier to understand.

When a property owner sells a property in Spain must pay a tax on the profit made when selling, this is the Capital Gains Tax (CGT). This tax is currently the 19% on the gain, costs, taxes, improvements and investments excluded. In case no gain is made, there is no CGT to pay. This tax, same as in all countries, is paid to the central Government.

Unfortunately, in Spain this is not the only tax payable for property sellers. There is another tax to be paid by sellers when selling a property. This tax is the "Plusvalia Tax".

This tax is a tax over the *increase of value of the portion of land included at any and all properties*. The value of this portion of land could be seen at IBI / Suma bills ... "Valor catastral del Suelo" in English "Rateable value of Land". In fact, this is another capital gains tax, but referred only to that portion of land and payable not to the central Government but to the local Town Hall where the property is located.

However, the rules of this tax calculation are quite strange... According to Law this tax becomes payable in all cases, despite the property owner has or not a gain on the sale or despite that specific portion of land may have, at the moment of its sale, a lower value than when it was purchased. It does not look fair at all and it wasn't, but now this matter does not work like this anymore, fortunately.

Throughout the last years we have witnessed how clients in our Firm who purchased their properties when the prices were really high and had to sell those properties when the prices were not that high or even really much lower, additionally to have a big loss had to pay the Plusvalia tax.

Now, due to a new precedent in Law settled by our Constitutional Tribunal in February 2018, later on ratified in another sentence in the same sense issued in May 2018, we can confirm that this unfair practise is not longer allowed to Spanish Town Halls. Since very recently, in cases where property sellers are not having a gain and it is proven that the value of the land included at the property sold is lower than when purchased, the Plusvalia Tax can be recovered.

Unfortunately I can't write that the tax won't be collected anymore. At this moment in time I can only write that the tax can be recovered what in fact is still quite unfair. I will explain why below.

As the situation stands today, when a non-resident sells property is more than likely that will be deducted / withheld from the proceeds the amount required for the payment of the Plusvalia tax. This happens mainly because according to Law, if the seller does not pay, the amount of the Plusvalia tax can be claimed to the purchaser. The property sold is itself is the legal guarantee for Town Halls to collect this tax. They could, in theory, seize the property sold, and auction it to collect the tax. This means that there is little chance for vendors to avoid this retention from the proceeds.



What in fact is still needed is a change at the Law for the Plusvalia tax. This legal modification of the Plusvalia Law should require that Town Halls prove that the specific portion of land included in the deeds has increased in value before being able to issue the bill for the Plusvalia Tax (and as long as the vendor does not make money, does not have a gain). Until this change at the Law is done, the collection of the tax will continue to happen since the applicable law, in fact is still in place.

So what can be done now?

Well, what can be done now is to demand the Town Hall to return the payment received.

How is this done?

The first thing will be to collect from the purchasers the proof of payment of the Plusvalia.

Then my advice is to obtain evidence that the land included at the property sold has a lower value at the moment if the sale than when it was purchased. Our Constitutional Court ruled that any means accepted in Law could be used to that purpose. The deeds of purchase and sale that include the prices can be that evidence.

What is the process to follow?

A Lawyer must file an application at the Town Hall (here in after TH) to require the refund of the Plusvalia tax paid. The 2 things can happen (well 3). The TH refunds you the money, what ends the fight. The TH replies and refuses to refund the money. The TH does not say anything.

In case of option 3 then, according to Law, if in the period of 3 months there is no reply you can legally understand that the petition is refused (this is called the “administrative silence”, that can be positive or negative, being in this particular type of petitions negative).

In both cases 2 and 3 next step would be to reproduce the petition in a higher instance, the called “Economic – Administrative Tribunal”, herein after EAT or to seek the help of the Courts of Justice.

It is likely that the TH will refuse to pay back the money since the applicable Law to collect the plusvalia is not yet changed. Besides TH are reluctant (though they should) to apply precedents in Law. This is something that a Judge can't do.

Process at the EAT. In this instance, the individual to decide is not a Judge. The referee here is still a civil servant from the Spanish Inland revenue so it is likely, for the same reasons, that the outcome will be exactly the same as before, a refusal. The time that this case will take, in my experience, could be between 6 months and a year. In case the claim succeeds, again the case will be over. An order to refund from the EAT will be issued to the TH who will return the money in the same way it was cashed or making a transfer.

Note that in case of losing the case before the TH or at the EAT no legal fees of the winning party will be placed on the loser.

Then, in case of a refusal from the EAT, we can access the judicial route. This means that the case can be taken to the Jurisdiction of the “Courts of justice for Administrative matters”. That is the place where people litigate versus the Administration: Town Halls, Regional Governments, Social Security, public companies etc. In this instance is where we finally will find a judge. Judges do use precedents in Law so it is likely that the case can be won. Talking about court matters it is not possible to certify anything but this does not look a difficult case to win.

The bad news is that this jurisdiction is quite slow. The case can easily take a year and a half. The good news is that interests could be added to the amount originally paid. Note that in this jurisdiction the losing party pay all legal costs. TH will have to pay legal costs if they insist on litigating.

How long do we have to file the claim?

The time that a claimant has is 4 years since the plusvalía was paid

How much will that cost?

Well, this is the most important question in practical terms. As you seen there are 3 possible jurisdictions where to fight, one after the other. Besides when reaching the courts of justice a team of solicitor and barrister (here called Abogado and Procurador) will be required what means to retain another professional more.

Under this scenario, the legal representative of the claimant will have to be several years involved in the case. In my personal opinion I doubt that, bearing in mind the cost of legal advisors only cases with an amount to claim above 3.000,00 € may be economically viable.

Naturally another alternative is we aware of the time left to start the rebate process and wait to see if the Spanish Government passes any Law that obliges local Town Halls to refund their Plusvalía charged in a less expensive and straighter forward way.

It was expected a new law to be put in place in summer 2018 that would allow retroactively reclaim the plusvalía since 15th June 2017 (four years back), but unfortunately this didn't happen due to the change of Government. Unfortunately for those who wish to reclaim now the only available way of doing it is following the process stated above.

If you are interested in the matter we can study your case and together see the way to approach it.

Jose Francisco Criado Sanchez

Abogado - Solicitor

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