

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

29 November 2018 (\*)

(Reference for a preliminary ruling — Taxation — Value added tax (VAT) — Directive 2006/112/EC — Article 314 — Article 316 — Article 322 — Special arrangements for works of art — Margin scheme — Taxable dealers — Supply of works of art by the creator or his successors in title — Intra-Community transactions — National tax authorities' refusal to grant a taxable person the right to opt for application of the margin scheme — Conditions under which applicable — Right to deduct input tax — Works of art, collectors' items and antiques)

In Case C-264/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Münster (Finance Court, Münster, Germany), made by decision of 11 May 2017, received at the Court on 17 May 2017, in the proceedings

**Harry Mensing**

v

**Finanzamt Hamm,**

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász and C. Vajda (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: R. ?ere?, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2018,

after considering the observations submitted on behalf of:

- Mr. Mensing, by O.-G. Lippross, Rechtsanwalt, and H. Portheine, accountant,
- the German Government, by T. Henze and R. Kanitz, acting as Agents,
- the European Commission, by L. Lozano Palacios, F. Clotuche-Duvieusart, M. Wasmeier and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2018,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 316(1)(b) and

Article 322(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive').

2 The request has been made in proceedings between Mr Harry Mensing, an art dealer, and Finanzamt Hamm (Tax Office in Hamm, Germany) concerning the refusal of the Tax Office to grant the benefit of the margin scheme to supplies of works of art acquired by Mr Mensing in other Member States.

## **Legal context**

### **European Union law**

3 Recitals 4, 7 and 51 of the VAT Directive state:

'(4) The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.

...

(7) The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.

...

(51) It is appropriate to adopt a Community taxation system to be applied to second-hand goods, works of art, antiques and collectors' items, with a view to preventing double taxation and the distortion of competition as between taxable persons.'

4 The second paragraph of Article 1 of the VAT Directive states:

'The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.'

5 Article 311(1) of that directive reads as follows:

'For the purposes of this Chapter, and without prejudice to other Community provisions, the following definitions shall apply:

...

(2) “works of art” means the objects listed in Annex IX, Part A;

...

(5) “taxable dealer” means any taxable person who, in the course of his economic activity and with a view to resale, purchases, or applies for the purposes of his business, or imports, second-hand goods, works of art, collectors’ items or antiques, whether that taxable person is acting for himself or on behalf of another person pursuant to a contract under which commission is payable on purchase or sale;

...’

6 Article 314 of that directive provides:

‘The margin scheme shall apply to the supply by a taxable dealer of second-hand goods, works of art, collectors’ items or antiques where those goods have been supplied to him within the Community by one of the following persons:

(a) a non-taxable person;

(b) another taxable person, in so far as the supply of goods by that other taxable person is exempt pursuant to Article 136;

(c) another taxable person, in so far as the supply of goods by that other taxable person is covered by the exemption for small enterprises provided for in Articles 282 to 292 and involves capital goods;

(d) another taxable dealer, in so far as VAT has been applied to the supply of goods by that other taxable dealer in accordance with this margin scheme.’

7 Under Article 315 of the VAT Directive:

‘The taxable amount in respect of the supply of goods as referred to in Article 314 shall be the profit margin made by the taxable dealer, less the amount of VAT relating to the profit margin.

The profit margin of the taxable dealer shall be equal to the difference between the selling price charged by the taxable dealer for the goods and the purchase price.’

8 Article 316 of that directive provides:

‘(1) Member States shall grant taxable dealers the right to opt for application of the margin scheme to the following transactions:

(a) the supply of works of art, collectors’ items or antiques, which the taxable dealer has imported himself;

(b) the supply of works of art supplied to the taxable dealer by their creators or their successors in title;

(c) the supply of works of art supplied to the taxable dealer by a taxable person other than a taxable dealer where the reduced rate has been applied to that supply pursuant to Article 103.

(2) Member States shall lay down the detailed rules for exercise of the option provided for in paragraph 1, which shall in any event cover a period of at least two calendar years.'

9 Article 317 of that directive reads as follows:

'If a taxable dealer exercises the option under Article 316, the taxable amount shall be determined in accordance with Article 315.

In respect of the supply of works of art, collectors' items or antiques which the taxable dealer has imported himself, the purchase price to be taken into account in calculating the profit margin shall be equal to the taxable amount on importation, determined in accordance with Articles 85 to 89, plus the VAT due or paid on importation.'

10 Article 322 of that directive states:

'In so far as goods are used for the purpose of supplies carried out by him and subject to the margin scheme, the taxable dealer may not deduct the following from the VAT for which he is liable:

- (a) the VAT due or paid in respect of works of art, collectors' items or antiques which he has imported himself;
- (b) the VAT due or paid in respect of works of art which have been, or are to be, supplied to him by their creator or by the creator's successors in title;
- (c) the VAT due or paid in respect of works of art which have been, or are to be, supplied to him by a taxable person other than a taxable dealer.'

### **German law**

11 Paragraph 25a of the Umsatzsteuergesetz (Law on turnover tax, the 'UStG') provides:

'(1) Supplies within the meaning of Paragraph 1(1)(1) of movable tangible property shall be taxed in accordance with the following provisions (margin scheme) if the following conditions are met:

- 1. The trader is a dealer. A dealer shall be deemed to be a person who deals with movable tangible property in the course of his business or sells such property in his own name by public auction.
- 2. The objects were delivered to the dealer on the territory of the Community. In respect of that supply,
  - (a) turnover tax was not payable or was not levied pursuant to Paragraph 19(1); or
  - (b) the margin scheme was applied.

...'

(2) The dealer may declare to the Tax Office no later than upon submission of the first advance return of a calendar year that he will apply the margin scheme from the beginning of that calendar year also to the following goods:

...

2. works of art, if the supply to him was subject to tax and was not carried out by a dealer.

The declaration shall be binding on the dealer for a period of at least two calendar years.

(3) The transaction shall be assessed on the basis of the amount by which the sale price exceeds the purchase price of the goods; ...

...

(7) The following special provisions shall apply:

1. The margin scheme shall not apply

(a) to supplies of goods which the dealer has acquired within the Community, if the exemption in respect of intra-Community supplies has been applied to the supply of the goods to the dealer elsewhere in the territory of the Community,

...'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

12 Mr Mensing is an art dealer residing in Germany who operates art galleries in a number of German cities. In 2014, works of art originating from artists residing in other Member States were supplied to him. Those supplies were declared in the Member States where the artists reside as exempt intra-Community supplies. Mr Mensing paid VAT on those supplies in respect of the intra-Community acquisition.

13 Mr Mensing asked the Hamm Tax Office to apply the margin scheme to those supplies. The Hamm Tax Office refused his request, and he was declared liable to pay an additional amount of VAT of EUR 19 763.31.

14 Mr Mensing did not exercise his right to deduct the input tax although, according to the referring court, procedurally, it was still open for him to do so.

15 Following the rejection of his request contesting the tax assessment, Mr Mensing brought an action before the Finanzgericht Münster (Finance Court, Münster, Germany). He claims that the national legislation at issue is incompatible with EU law and he seeks the direct application of Article 316(1)(b) of the VAT Directive.

16 The referring court has doubts as to the compatibility of Paragraph 25a(7)(1)(a) of the UStG with Article 316(1)(b) of the VAT Directive. It points out that, according to German law, the margin scheme is not to be applied to the supply of goods that the dealer has acquired within the European Union, if the supply of the goods to the dealer benefited from an exemption for intra-Community supplies in the other Member States of the European Union. However, according to that court, such an exclusion from the scope of that scheme does not follow from Article 316(1)(b) of the VAT Directive and may lead to a distortion of competition.

17 The referring court states that, in its view, the right to opt for the application of the margin scheme laid down in Article 316(1)(b) of the VAT Directive applies solely to the supply of goods by one of the categories of persons listed in Article 314 of that directive. Yet, exempt intra-Community supplies do not come under Article 314. Therefore, according to the referring court, that right does

not apply to the supply of works of art that the taxable dealer has acquired in the context of exempt intra-Community trade.

18 Should a person in the situation of Mr Mensing nonetheless benefit from the application of the margin scheme provided in Article 316(1)(b) of the VAT Directive, the referring court questions whether such a person may rely both on that scheme and on the right to deduct input tax. That court takes the view that the possibility of applying the margin scheme and, at the same time, of being able to exercise the right to deduct input tax is incompatible with the system established by the VAT Directive.

19 In those circumstances, the Finanzgericht Münster (Finance Court, Münster) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is Article 316(1)(b) of the [VAT] Directive to be interpreted as meaning that taxable dealers may apply the margin scheme also to the supply of works of art supplied to the taxable dealer within the Community by their creators or their successors in title where such creators or successors in title are not persons referred to in Article 314 of Directive 2006/112?

(2) If the answer to the first question is in the affirmative: Does Article 322(b) of the [VAT] Directive require that the dealer be denied the right to deduct input tax paid on the intra-Community acquisition of works of art, even if there is no equivalent provision under national law?

## **Consideration of the questions referred**

### **The first question**

20 By its first question, the national court asks, in essence, whether Article 316(1)(b) of the VAT Directive must be interpreted as meaning that a taxable dealer may opt for the application of the margin scheme to an input supply of works of art which were supplied to him in the context of an exempt intra-Community supply by the creator or his successors in title, when those persons do not fall within the categories of persons listed in Article 314 of that directive.

21 As a preliminary point, it must be noted, subject to verification by the referring court, that the dispute in the main proceedings concerns the supply of works of art mentioned in Article 311(1)(2) of the VAT Directive to a taxable dealer, as defined by Article 311(1)(5) of that directive.

22 It should also be noted that the scheme for the taxation of the profit margin made by the taxable dealer on the supply of works of art constitutes a special arrangement for VAT, derogating from the general scheme of the VAT Directive. Consequently, Articles 314 and 316 of that directive, which identify the cases in which this special arrangement is to be applied, must be construed narrowly (see, to that effect, judgment of 18 May 2017, *Litdana*, C-624/15, EU:C:2017:389, paragraph 23 and the case-law cited).

23 However, that rule of strict interpretation does not mean that the terms used to set out that arrangement should be construed in such a way as to deprive it of its effects. In fact, the interpretation of those terms must conform to the objectives pursued by that arrangement and respect the requirements of tax neutrality (see, by analogy, judgment of 21 March 2013, *PFC Clinic*, C-91/12, EU:C:2013:198, paragraph 23 and the case-law cited).

24 Furthermore, according to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 21 September 2017, *Aviva*, C-605/15, EU:C:2017:718, paragraph 24 and the case-law cited).

25 In the first place, as regards the wording of Article 316 of the VAT Directive, that article states that the Member States are to grant taxable dealers the right to opt for application of the margin scheme to the supply of goods exhaustively listed in that article. It does not follow from the wording of that article that that right of option is subject to compliance with the conditions laid down in Article 314(a) to (d) of that directive or that the Member States, which must establish the conditions for the exercise of that right, have discretion as regards the conditions to which they may subject the right of a taxable dealer to opt for the application of that scheme.

26 It would therefore be contrary to the very wording of Article 316(1)(b) of the VAT Directive if a Member State were to subject a taxable dealer's right to apply the margin scheme to a supply made after an intra-Community supply of a work of art, within the meaning of that provision, to the condition that the work of art be supplied by one of the persons listed in Article 314(a) to (d) of that directive.

27 That interpretation is, in the second place, confirmed by the analysis of the context of which Article 316(1) of the VAT Directive forms part.

28 First, it is apparent from that analysis that the scope of Article 316(1) of the VAT Directive is autonomous and additional to that of Article 314 of that directive. In fact, Article 314 lays down an obligation to apply the margin scheme to some supplies made by a taxable dealer, while Article 316(1) simply lays down a right to opt, under certain conditions, for the application of that scheme. That right of option would be rendered pointless if its exercise were to be subject to the same conditions as those laid down in Article 314 for the compulsory application of the margin scheme. Therefore, while the scope of Article 314 of the VAT Directive is limited to the supply of goods within the European Union, such a limitation does not apply to Article 316(1) of that directive.

29 Secondly, a combined analysis of Article 322(b) of the VAT Directive and of Article 316(1) of that directive confirms the autonomous and additional character of the latter article in relation to Article 314 of that directive. Article 322(b) precludes, in essence, a taxable dealer's right to deduct the VAT owed or paid for a work of art supplied in accordance with Article 316(1)(b) of the VAT Directive from the VAT which he is liable to pay.

30 However, such an exclusion, which presupposes that a right to deduct and, therefore, a taxed input transaction exists, cannot be applied in the situations covered in Article 314 of the VAT Directive, which require that the supply of the work of art to the taxable dealer was not subject to VAT or was exempted from it.

31 Thirdly, it must be noted that the analysis of the context of which Article 316 of the VAT Directive forms part also makes it possible to reject the German Government's argument that the margin scheme arrangement cannot be applied to the supply of works of art acquired from operators established in other Member States on the ground that the chargeable event, namely the intra-Community acquisition, is not mentioned in Article 316(1)(b) of that directive. In fact, as pointed out by the Advocate General in point 65 of his Opinion, the margin scheme does not regulate the taxation of goods when they are acquired by the taxable dealer, but at the stage when they are sold by that taxable dealer, which is confirmed by the fact that the taxable amount is calculated, according to Articles 315 and 317 of that directive, by reference to the selling price charged by the taxable dealer for the goods.

32 In the third place, as regards the general objectives pursued by the VAT Directive, it follows from recitals 4 and 7 of that directive that the directive aims to establish a VAT system that does not distort conditions of competition or hinder the free movement of goods and services. Furthermore, it is apparent from the Court's settled case-law that the principle of tax neutrality is inherent to the common system of VAT established by the VAT Directive and that that principle precludes, in particular, economic operators carrying out the same transactions from being treated differently in relation to the collection of VAT (see, to that effect, judgment of 13 March 2014, *ATP PensionService*, C?464/12, EU:C:2014:139, paragraphs 42 and 44 and the case-law cited).

33 The interpretation suggested by the German Government, according to which Article 316 of the VAT Directive does not apply to supplies that are preceded by an intra-Community transaction, is likely to infringe the principles upon which the VAT system is founded. In fact, that interpretation would result in creating, inter alia, discrimination between the applicable tax arrangement for, on the one hand, the input supplies of works of art supplied within the territory of that Member State and, on the other, exempt intra-Community input supplies of works of art. As the German Government acknowledged during the hearing, a prohibition such as that laid down in Article 25a(7)(1)(a) of the UStG leads to a discrimination founded on the national or intra-Community origin of the works of art that are supplied to the taxable dealer, since a taxable dealer cannot, according to that national legislation, opt for the application of the margin scheme to an intra-Community input supply of a work of art, but can, however, apply the margin scheme as regards the input supply of a work of art that occurred within the German territory.

34 The discrimination resulting from that national legislation, aside from the risk of compromising the free movement of those works of art and of distorting competition between taxable dealers within the European Union, may call into question the principle of tax neutrality, inasmuch as the taxable dealers carrying out the same transactions, in particular the acquisition and resale of works of art, will be treated differently as regards the possibility of opting for the application of the margin scheme for those objects, depending on whether they were supplied, as an input, within the territory of the Member State, or were the subject of an exempt intra-Community input supply.

35 In addition, as regards, more specifically, the objectives pursued by the margin scheme, it must be observed that, according to recital 51 of the VAT Directive, that scheme seeks, in the field of second-hand goods, works of art, antiques and collectors' items, to prevent double taxation and the distortion of competition as between taxable persons.

36 In this respect, it must be noted that, in that field, it may be difficult to establish whether goods were previously subject to VAT, to the extent that, in the light of the very nature of the works of art, collectors' items and antiques, the goods may be old or may have previously been traded amongst various non-taxable persons. It is precisely in the light of those difficulties in the assessment of the VAT that was, as the case may be, previously imposed on such goods, that the



VAT Directive provides for the right to opt for the application of the margin scheme and to calculate the VAT owed, as was pointed out in paragraph 31 of the present judgment, by referring, in essence, to the selling price of those goods.

37 However, such difficulties cannot arise when a work of art covered by Article 316(1)(b) of the VAT Directive is supplied by one of the persons listed in Article 314(a) to (d) of that directive, since such a supply is not subject to VAT or was exempt from VAT, as is apparent from paragraph 30 of the present judgment. In a situation such as that, the objective referred to in paragraph 35 of the present judgment would not have warranted the introduction, in the VAT Directive, of the margin scheme for the supply of goods referred to in Article 316 of that directive.

38 It follows, therefore, from the wording of Article 316(1)(b) of the VAT Directive, but also from the context and the objectives pursued by that provision and by the legislation of which it forms part, that a Member State cannot require a taxable dealer to satisfy the conditions listed in Article 314(a) to (d) of the VAT Directive in order to opt for the application of the margin scheme.

39 In the light of all the foregoing considerations, the answer to the first question is that Article 316(1)(b) of the VAT Directive must be interpreted as meaning that a taxable dealer may opt for the application of the margin scheme to the input supply of works of art in the context of an exempt intra-Community supply by the creator or his successors in title, when those persons do not fall within the categories of persons listed in Article 314 of that directive.

### **The second question**

40 By its second question, the referring court asks, in essence, whether a taxable dealer may, at the same time, opt for the application of the margin scheme provided for in Article 316(1)(b) of the VAT Directive to an input supply of works of art that were supplied to him in the context of an exempt, intra-Community supply, and rely on a right to deduct input VAT in the situations in which such a right is precluded under Article 322(b) of that directive, if that latter provision has not been transposed into national law.

#### *Admissibility*

41 As a preliminary point, it is necessary to consider the argument raised by the German government, according to which the second question is inadmissible. According to that government, that question concerns a hypothetical problem and is not decisive for the outcome of the dispute in the main proceedings to the extent that, as regards the supplies at issue, Mr Mensing has not exercised a right to deduct the input VAT.

42 In that regard, it must be borne in mind that, in the context of the cooperation between the Court and the national courts established in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need of a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, when the question put by the national court concerns the interpretation of EU law, the Court is, in principle, bound to give a ruling. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 17 March 2016, *Aspiro*, C-40/15, EU:C:2016:172, paragraph 17 and the case-law cited).

43 While it is undisputed that Mr Mensing has not yet exercised a right to deduct the input VAT, it is apparent from the order for reference, as summarised in paragraph 14 of the present judgment, that, from the national procedural law point of view, it is still possible for him to rely on such a right in the main proceedings.

44 In those circumstances, the second question cannot be regarded as bearing no relation to the actual facts of the main action or its purpose, and must be declared admissible.

### *Substance*

45 A central principle of the VAT system is that the right to deduct input VAT affecting the acquisition of goods or services presupposes that the expenditures incurred in acquiring the goods are a component of the price of the taxed output transactions giving rise to the right to deduct (judgment of 28 November 2013, *MDDP*, C-319/12, EU:C:2013:778, paragraph 41).

46 As the Advocate General has noted in points 71 and 72 of his Opinion, allowing a taxable dealer to deduct the paid input VAT in the situation covered by Article 322(b) of the VAT Directive, when the taxable dealer opts for the application of the margin scheme under Article 316(1)(b) of that Directive, would ignore that principle. In fact, when the derogating margin scheme is applied, the chargeable amount is, under Articles 315 and 317 of the VAT Directive, the profit margin made by the taxable dealer, less the amount of VAT relating to the profit margin itself. In those circumstances, the VAT paid in the purchase price is not included in the tax levied on the sale and therefore does not give rise to a right to deduct.

47 Therefore, Article 322(b) of the VAT Directive provides that a taxable dealer cannot deduct, from the amount of the tax that he is liable to pay, the VAT owed or paid for the works of art that are or will be supplied to him by the creator or his successors in title, to the extent that those goods are used for the purposes of his supplies subject to the margin scheme.

48 In other words, he cannot, for such a supply, opt for the application for the margin scheme laid down in Article 316(1)(b) of that directive, and also claim a right to deduct input VAT.

49 In this instance, it must be observed that Mr Mensing directly invokes the right of option laid down in Article 316(1)(b) of the VAT Directive, which is not provided for in the national legislation at issue for intra-Community supplies of works of art. It follows that Mr Mensing can benefit from the margin scheme under that article solely under the conditions laid down in that directive, namely when he does not exercise, for those same supplies, the right to deduct input VAT.

50 In those circumstances, the answer to the second question is that a taxable dealer may not opt for the application of the margin scheme laid down in Article 316(1)(b) of the VAT Directive to an input supply of works of art that were supplied to him in the context of an exempt intra-Community supply and, at the same time, claim a right to deduct input VAT in the situations in which such a right is precluded under Article 322(b) of that directive, if that latter provision has not been transposed into national law.

### **Costs**

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 316(1)(b) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that a taxable dealer may opt for the application of the margin scheme to the input supply of works of art which were supplied in the context of an exempt intra-Community supply, by the creator or his successors in title, when those persons do not fall within the categories of persons listed in Article 314 of that directive.**

2. **A taxable dealer may not opt for the application of the margin scheme laid down in Article 316(1)(b) of the VAT Directive to an input supply of works of art that were supplied to him in the context of an exempt intra-Community supply and, at the same time, claim a right to deduct input VAT in the situations in which such a right is precluded under Article 322(b) of that directive, if that latter provision has not been transposed into national law.**

[Signatures]

\* Language of the case: German.