Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 13 September 2018[1]

Case C-264/17

Harry Mensing
v
Finanzamt Hamm

(Request for a preliminary ruling from the Finanzgericht Münster (Finance Court, Münster, Germany))

Reference for a preliminary ruling — Taxation — Value added tax — Directive 2006/112/EC — Articles 314 and 316 — Special arrangements — Taxable dealers — Margin scheme — Supply of works of art by their creators or their successors in title — Intra-Community transactions — Right to deduct input tax

Introduction

1. Where a transaction liable for value added tax ('VAT') concerns goods whose price already includes, without the possibility of deduction, VAT charged at earlier stages of trade, as is often the case with goods that are placed on the market again, such as works of art, the normal taxation mechanism does not ensure that the fundamental principle of VAT, namely the principle of its neutrality for taxable persons, is observed. For this reason, the EU legislature introduced a special taxation scheme which allows only the profit margin, that is, the added value generated at a given stage of trade, of the taxable person to be taxed. However, while the relevant provisions of EU law, considered separately, seem to be perfectly clear, their combined application does not always achieve the desired purpose. Is this a sufficient reason, however, not to apply these provisions at all in certain situations? This question will have to be answered by the Court in the present case.

Legal framework

European Union law

2. Pursuant to Article 2(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax:[2]

'The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

1 Original language: Polish.
2 OJ 2006 L 347, p. 1, as amended by Council Directive 2013/61/EU of 17 December 2013 (OJ 2013 L 353, p. 5).

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;

…

…

(d) the importation of goods.'

3. Article 14(1) of that directive defines the supply of goods as 'the transfer of the right to dispose of tangible property as owner'.

4. The definition of the intra-Community acquisition of goods, in turn, is included in the first paragraph of Article 20 of that directive, according to which:

'"Intra-Community acquisition of goods" shall mean the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.'

5. Pursuant to Article 138(1) of Directive 2006/112:

'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.'

6. Article 168 of that directive provides:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;

…

(c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);

…

(e) the VAT due or paid in respect of the importation of goods into that Member State.'

7. Pursuant to Article 169(b) of that directive:

‘In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:

…

(b) transactions which are exempt pursuant to [Article] 138 ...’

8. Chapter 4 of Title XII of Directive 2006/112 contains rules on special arrangements for second-hand goods, works of art, collectors’ items and antiques. Pursuant to Article 311(1)(2) and (5) of that directive:

‘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;

…’

9. Subsection 1 of Section 2 of that chapter of Directive 2006/112 establishes a margin scheme for taxable dealers. Pursuant to Articles 312 to 317 and Article 319 of that directive:

‘Article 312

For the purposes of this Subsection, the following definitions shall apply:

(1) “selling price” means everything which constitutes the consideration obtained or to be obtained by the taxable dealer from the customer or from a third party, including subsidies directly linked to the transaction, taxes, duties, levies and charges and incidental expenses such as commission, packaging, transport and insurance costs charged by the taxable dealer to the customer, but excluding the amounts referred to in Article 79;

(2) “purchase price” means everything which constitutes the consideration, for the purposes of point (1), obtained or to be obtained from the taxable dealer by his supplier.

Article 313

1. In respect of the supply of second-hand goods, works of art, collectors’ items or antiques carried out by taxable dealers, Member States shall apply a special scheme for taxing the profit margin made by the taxable dealer, in accordance with the provisions of this Subsection.

…

Article 314

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.

Article 315

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.

Article 316

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.

…

Article 317

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.

…

Article 319

The taxable dealer may apply the normal VAT arrangements to any supply covered by the margin scheme.'

10. Articles 320 and 322 of Directive 2006/112 lay down the rules for the application of the right to deduct input VAT to taxable dealers. They provide:

'Article 320

1. Where the taxable dealer applies the normal VAT arrangements to the supply of a work of art, a collectors' item or an antique which he has imported himself, he shall be entitled to deduct from the VAT for which he is liable the VAT due or paid on the import.

Where the taxable dealer applies the normal VAT arrangements to the supply of a work of art supplied to him by its creator, or the creator's successors in title, or by a taxable person other than a taxable dealer, he shall be entitled to deduct from the VAT for which he is liable the VAT due or paid in respect of the work of art supplied to him.

…

Article 322

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.'

11. Finally, pursuant to Article 342 of that directive:

'Member States may take measures concerning the right of deduction in order to ensure that the taxable dealers covered by special arrangements as provided for in Section 2 do not enjoy unjustified advantage or sustain unjustified harm.'

German law

12. The margin scheme for taxable dealers has been transposed into German law in Paragraph 25a of the Umsatzsteuergesetz (Law on Turnover Tax) ('the UStG'), which provides, in particular:

'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 satisfied:

(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 property was supplied to the dealer within 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 another dealer.

…

3. The transaction shall be assessed on the basis of the amount by which the selling price exceeds the purchase price of the goods ... In the cases referred to in the first sentence of Paragraph 2(2), the purchase price includes the turnover tax charged by the supplier.

…

5. ... By way of derogation from Paragraph 15(1) the dealer shall not, in the cases covered by subparagraph 2, be entitled to deduct turnover tax on imports, tax entered separately on an invoice, or tax due under Paragraph 13b(5) as input tax.

…

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,

…'

Facts and procedure

13. Harry Mensing is a taxable dealer within the meaning of Article 311(1)(5) of Directive 2006/112 and Paragraph 25a(1)(1) of the UStG. He runs a business that involves dealing in works of art in various cities in Germany. In the course of the 2014 tax year he acquired, inter alia, works of art from creators in other Member States. Those supplies were exempt from VAT in the Member States of origin, and Mr Mensing paid the tax due in respect of intra-Community acquisitions in relation to them. He did not exercise his right to deduct that tax.

14. At the beginning of 2014 Mr Mensing declared to the Finanzamt Hamm (Hamm Tax Office, Germany) that he was applying the margin scheme to works of art acquired from their creators. However, the tax office refused him the right to apply the margin scheme to works of art acquired from creators in other Member States, citing Paragraph 25a(7)(1)(a) of the UStG, and as a result increased the amount of VAT due by EUR 19 763.31.

15. After an unsuccessful appeal, Mr Mensing brought an action before the Finanzgericht Münster (Finance Court, Münster, Germany) against the decision of the Hamm Tax Office. That court, having doubts as to the compatibility of Paragraph 25a(7)(1)(a) of the UStG with EU law and as to the interaction between Articles 314 and 316 of Directive 2006/112, 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 [Directive 2006/112] to be interpreted as meaning that taxable dealers may apply the margin scheme also to intra-Community supplies of works of art supplied to them by their creators or their successors in title who are not persons covered by Article 314 of the VAT Directive?

(2) If the first question is answered in the affirmative: does Article 322(b) of Directive 2006/112 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?'

16. The request for a preliminary ruling was received by the Court on 17 May 2017. Written observations were submitted by Mr Mensing, the German Government, and the European Commission. The same interested parties were represented at the hearing on 14 June 2018.

Analysis

The first question referred

17. By its first question, the referring court seeks clarification as to whether a taxable dealer is entitled to benefit from the margin scheme under Article 316(1)(b) of Directive 2006/112 in respect of the sale of works of art which he has acquired from their creators or their successors in title in other Member States who do not fall within the category of persons referred to in Article 314 of that directive. This question conceals two legal issues. The first issue is the relationship between Article 314 and Article 316 of Directive 2006/112. The second issue is whether the margin scheme can be applied to the sale of works of art acquired by a taxable dealer from operators in other Member States who are taxable persons.

The interaction between Article 314 and Article 316 of Directive 2006/112

18. In the grounds of its request for a preliminary ruling, the referring court states that, in its view, Article 314 of Directive 2006/112 exhaustively specifies the scope of the margin scheme. In other words, in that court's view, the margin scheme can only apply to goods acquired from operators that satisfy the conditions set out in Article 314 of that directive, or simultaneously in Articles 314 and 316. Such an understanding of the relationship between Articles 314 and 316 of Directive 2006/112 would justify the exclusion from the margin scheme — as provided for in Paragraph 25a(7)(1)(a) of the UStG — of goods which a taxable dealer has acquired from an operator in another Member State, where that operator has benefited from the exemption with the right to deduct input VAT provided for in respect of intra-Community supplies of goods in Article 138(1) of Directive 2006/112 in conjunction with Article 169(b) thereof. Indeed, the operators listed in Article 314 of that directive do not benefit from such an exemption with the right of deduction.

19. I do not believe, however, that such an understanding of the relationship between Articles 314 and 316 of Directive 2006/112 is justified.

20. First of all, this does not in any way follow from the wording of those provisions. The introductory sentence of Article 314 of that directive provides that the margin scheme 'shall apply' in the cases listed in that article. This means that the scheme is automatically applied if the listed circumstances arise.[3] Article 316(1) of that directive, on the other hand, grants taxable dealers 'the right to opt for application of the margin scheme' in the situations listed in that provision, other than the situations covered by the provisions of Article 314. Nothing in the wording of those provisions indicates that the right to apply the margin scheme under Article 316(1) of Directive 2006/112 is subject to the fulfilment of the conditions set out in Article 314 thereof. On the contrary, in my view, it follows from that wording that the legislature treated the right provided for in Article 316(1) of that directive as additional to the essential scope of the margin scheme set out in Article 314 thereof. Article 316 therefore broadens the potential scope of that scheme, leaving it to the taxable person to decide on the matter himself.

21. The justification for such an interpretation is provided by the Commission in its observations in the present case. The Commission clarifies that the main purpose of establishing the margin scheme was to avoid the double taxation of goods in respect of which the taxable dealer's purchase price already included the VAT paid by the vendor, without the right of deduction, at earlier stages of trade.

22. The operators listed in Article 314, which do not have the right to deduct input tax, bear the economic burden of that tax, and thus naturally include its value in the price of the goods at the time of sale. If such goods, when sold by a taxable dealer, were taxed in accordance with the normal VAT arrangements, that is, the taxable amount was equal to the total selling price, then this taxable amount would also include the value of the tax paid at earlier stages of trade, which would result in double taxation (a 'tax on tax'). The application of the margin scheme, whereby the taxable amount is only the profit margin, that is, the added value generated at the stage of the taxable dealer's transactions, avoids such double taxation.

23. However, it is not always possible or desirable to determine precisely in respect of which goods sold by a taxable dealer VAT has been deducted at earlier stages of trade and in respect of which goods it has not. Indeed, it may have been only partially deducted or the goods may not have been liable for VAT at all, which further complicates the matter. For this reason, the legislature provided for the automatic application of the margin scheme in cases where VAT could not be deducted at earlier stages of trade, either because the vendor was not a taxable person or because the sale benefited from an exemption without the right to deduct input VAT. This is the current provision of Article 314 of Directive 2006/112. In certain other cases, however, the legislature — probably for reasons of administrative rationalisation — gave taxable dealers the option to apply the margin scheme (currently Article 316 of Directive 2006/112). Article 316 of Directive 2006/112 is therefore independent of and additional to Article 314 thereof.

24. An interpretation of Article 316 of that directive according to which its application would be subject to the fulfilment of the conditions set out in Article 314 of that directive would also be inconsistent with the structure and logic of the provisions relating to the margin scheme.

3 Without prejudice to the possibility for a taxable person to apply the normal VAT arrangements pursuant to Article 319 of Directive 2006/112.

25. Indeed, it is conceivable that the group of operators covered by Article 316(1)(b) of Directive 2006/112 could be limited to those who are simultaneously covered by Article 314. They would therefore primarily be creators or their successors in title who are not taxable persons (Article 314(a)) and, albeit rather exceptionally, creators or their successors in title who are taxable persons but whose supply takes place in the circumstances set out in Article 314(b) and (c).[4]

26. Simultaneous fulfilment of the conditions set out in Articles 314 and 316 is not possible, however, with reference to Article 316(1)(a) and (c).

27. Article 316(1)(a) of Directive 2006/112 refers to goods imported directly by taxable dealers. The introductory sentence of Article 314, on the other hand, refers to goods which have been ‘supplied to [such a taxable dealer] within the Community’. Therefore, Article 314 excludes in advance its application to imported goods. This is explained by the fact that, in the case of goods originating from outside the territorial scope of the common system of VAT, it is impossible to speak of tax paid at an earlier stage of trade and included in the price of such goods. From the point of view of the VAT system, the price of imported goods is always the price ‘without tax’.

28. Article 316(1)(c), for its part, concerns works of art supplied to the taxable dealer ‘where the reduced rate [of VAT] has been applied to that *supply*’.[5] Since this is about applying a reduced rate of tax not to goods but to supplies, I believe that it precludes the application of that provision to supplies which are not subject to tax at all (Article 314(a)) or are exempt from tax (Article 314(b) and (c)).

29. It follows from the foregoing that Article 314 and Article 316(1)(a) and (c) of Directive 2006/112 cannot be applied jointly. In those circumstances, an interpretation according to which Article 314 of that directive would be applied jointly with only Article 316(1)(b) thereof does not seem logical.

30. Nor is there any teleological justification for making the application of Article 316(1) of that directive subject to the fulfilment of the conditions set out in Article 314 thereof. Fulfilment of the conditions set out in Article 314 of that directive automatically results in the application of the margin scheme. What would be the point, therefore, of granting taxable dealers the right to apply that scheme in certain cases which would in any event be covered by Article 314? This could perhaps be regarded as an ‘opt-out’ entitlement, but the possibility of opting out of the margin scheme is already provided for in Article 319 of Directive 2006/112, while Article 316 thereof is clearly intended as an ‘opt-in’ entitlement.

31. Finally, to make the application of Article 316 of Directive 2006/112 subject to the fulfilment of the conditions set out in Article 314 thereof would render Article 322 of that directive meaningless. That provision deprives the taxable dealer of the right to deduct input tax on goods which he sells under the margin scheme in three cases corresponding to those referred to in Article 316(1). Thus, Article 322(a) concerns imports (Article 316(1)(a)), Article 322(b) concerns the acquisition of a work from its creator or his successors in title (Article 316(1)(b)), and Article 322(c) concerns the acquisition of a work from other taxable persons at a reduced rate (Article 316(1)(c)).

32. Article 314 of Directive 2006/112, on the other hand, excludes the very existence of input tax, since it concerns either supplies which are not subject to VAT at all or supplies which are exempt from it.[6] Therefore, if the application of Article 316(1) of that directive were subject to the fulfilment of the conditions set out in Article 314 thereof, Article 322 of that directive would be redundant. Even if only the application of Article 316(1)(b) were artificially made subject to the fulfilment of those conditions, it would still render Article 322(b) meaningless.

4 The application of Article 314(d) would naturally be excluded, since it is not possible to act simultaneously as a creator or his successor in title and as a taxable dealer.

5 Emphasis added.

6 Except for the case referred to in Article 314(d), but this cannot be combined with any of the cases listed in Article 316(1).

33. For the above reasons, I consider that Article 316(1) of Directive 2006/112 should be interpreted as meaning that its application is not subject to the fulfilment of the conditions set out in Article 314 of that directive.

The possibility of applying the margin scheme pursuant to Article 316(1)(b) of Directive 2006/112 to goods acquired by a taxable dealer from operators in other Member States

34. In its observations in the present case, the German Government justifies the exclusion of the application of the margin scheme to works of art acquired by a taxable dealer from operators in other Member States which have benefited from the exemption in respect of intra-Community supplies contained in Paragraph 25a(7)(1) of the UStG. It puts forward three arguments in support of its reasoning.

– *Argument concerning the purpose of the margin scheme*

35. According to the German Government, in the case of works of art supplied to a taxable dealer by operators in other Member States with an exemption in respect of intra-Community supplies, the application of the normal VAT arrangements to the resale of those works by the taxable dealer would not result in double taxation, since no tax would be included in the purchase price of the work acquired by the taxable dealer, and the tax in respect of intra-Community acquisition would be deductible. The application of the margin scheme in such cases would therefore not fulfil the purpose of that scheme, which, in accordance with recital 51 of Directive 2006/112, is to prevent double taxation and the distortion of competition as between taxable persons.

36. I do not agree with this argument, however, for reasons which are somewhat similar to those which I set out in the section on the doubts of the referring court as to the interaction between Article 314 and Article 316 of Directive 2006/112 (see paragraphs 20 to 32 of this Opinion).

37. Indeed, in the cases set out in Article 316(1) of that directive, the application of the normal VAT arrangements, that is, the taxation of the entire amount of the transaction with the right to deduct input tax, would not lead to double taxation. However, this applies not only to goods acquired from operators in other Member States, but to all the cases covered by Article 316(1) of Directive 2006/112.

38. Intra-Community supply is, from the point of view of VAT, the normal, taxable supply of goods. The only difference is that, by virtue of the exemption provided for in Article 138(1) of that directive and the simultaneous taxation of intra-Community acquisitions of goods under Article 2(1)(b) thereof, the tax jurisdiction is transferred from the Member State of sale to the Member State of acquisition. Therefore, the exemption of intra-Community supplies is not, in actual fact, an exemption such as that provided for in Article 136 of that directive, but a transfer of taxation to another Member State. This type of exemption is sometimes referred to as taxation at a rate of 0%.

39. From the point of view of taxable persons, this exemption changes very little. The vendor supplies the goods at a price ‘without tax’ and is not required to pay the tax to the tax authorities, but he retains the right to deduct input tax on the goods and services used for the purposes of his intra-Community supply (Article 169(b) of Directive 2006/112). The purchaser, in turn, does not pay the vendor’s tax in the price of the acquired goods, as is the case with supply in the territory of the same Member State, but instead pays it to the tax authorities. At the same time, however, he obtains the right to deduct that tax as input tax, provided, of course, that he uses the acquired goods for the purposes of his taxable business.

40. A similar taxation mechanism exists for the import of goods. The importer pays the price of the goods, in which no VAT is included (within the meaning of Directive 2006/112), since those goods originate from outside the territorial scope of the common system of VAT. In addition, the importer pays VAT on importation to the tax authorities, at the same time obtaining the right to deduct it as input tax.

41. Therefore, there is no problem of double taxation, irrespective of whether the goods concerned are imported works of art acquired in the territory of the same Member State or acquired from an operator in another Member State (that is, by way of intra-Community acquisition). Thus, if double taxation in the event of applying the normal VAT arrangements were to be regarded as a condition for the application of the margin scheme, this would make Article 316 of Directive 2006/112 and also Article 322 thereof entirely redundant, given that the sense of those provisions is that there is an input tax which may be deductible, which is not the case for goods whose supply is exempt (in the strict sense of the word) or not subject to tax.[7]

42. The purpose of Article 316 of Directive 2006/112 is not to avoid double taxation but, as the Commission explains in its observations, to avoid placing excessive administrative burdens on taxable dealers, such that they are not required to examine and prove on a case-by-case basis whether the price of a given work of art includes VAT paid at an earlier stage of trade and in what amount. These administrative burdens also include the obligation on taxable dealers to conduct double-entry bookkeeping where they sell both goods taxed under the margin scheme and goods taxed under the normal VAT arrangements. This obligation follows directly from Article 324 of Directive 2006/112.

43. For this reason, I am not convinced by the German Government's argument that the conditions for applying the margin scheme, as an exception to the normal taxation arrangements, should be interpreted strictly. The principle that exceptions should be interpreted strictly must not lead to them being rendered completely meaningless and thus redundant.

44. The applicant in the main proceedings claims that Article 316 of Directive 2006/112 is primarily intended to preserve the favourable tax treatment of certain goods provided for in Article 103 of that directive. That provision allows works of art, collectors' items and antiques to be taxed at a reduced rate when they are imported and, in the case of works of art, also when they are supplied by their creators or their successors in title. Under Article 94(1) of that directive, this reduced rate also applies to the intra-Community acquisition of works of art supplied by their creators or their successors in title.

45. I do not rule out that such a purpose was also behind the introduction of Article 316 of Directive 2006/112, although it should be noted that, while the application of Article 103 of that directive is optional for the Member States, the application of Article 316 thereof is compulsory. In any event, the purpose of Article 316 of Directive 2006/112, unlike that of Article 314 thereof, is not to avoid double taxation.

46. In addition, it is worth noting that, while Article 316(1)(b) of Directive 2006/112 does not prevent the risk of double taxation, because no such risk exists, the application of that provision to supplies within the territory of a Member State and the simultaneous refusal to apply it in the case of intra-Community acquisitions could lead to a distortion of competition as between taxable persons. This is because certain taxable dealers would be prevented from benefiting from the margin scheme, even though they would in other respects be in a comparable situation to taxable dealers acquiring works of art within the same Member State.

7 I do not agree with the argument of the German Government that the wording of Article 316(1)(b) of Directive 2006/112 allows it to be applied regardless of whether the supply of a work of art to a dealer was exempt or taxed. Supplies which are exempt or not subject to tax are covered by Article 314 of that directive, whereas Article 316 thereof concerns supplies that are taxed, although the chargeable event may arise for either the vendor (domestic supply) or the purchaser (intra-Community acquisition and import).

47. For the above reasons, I believe that the argument based on the absence of any risk of double taxation does not justify the refusal to apply Article 316(1)(b) of that directive to works of art acquired by a taxable dealer from operators in other Member States.

– Argument concerning the inability to add VAT on intra-Community acquisitions to the purchase price

48. The German Government also points out that, contrary to the provisions on goods imported by taxable dealers, where the second paragraph of Article 317 requires VAT on importation to be added to the purchase price, Directive 2006/112 does not contain a similar provision concerning VAT on intra-Community acquisitions. According to the German Government, this demonstrates that the EU legislature, when drawing up Article 316 of that directive, did not intend it to regulate works of art acquired by taxable dealers from operators in other Member States.

49. The absence of a provision equivalent to the second paragraph of Article 317 of Directive 2006/112 concerning intra-Community acquisitions is indeed problematic. This is because the general rules laid down in Article 315 of that directive in conjunction with the first paragraph of Article 317 thereof must apply to works of art acquired by taxable dealers from operators in other Member States. Under those provisions, the profit margin that is the taxable amount under the margin scheme is the difference between the selling price of the goods charged by the taxable dealer and the price at which the taxable dealer purchases those goods from the supplier. However, Article 312(2) of that directive defines the purchase price as everything which constitutes the consideration obtained from the taxable dealer by his supplier.

50. Those provisions therefore apply both to works of art that a taxable dealer acquires within the territory of the same Member State and to those he acquires by way of intra-Community acquisition. In each of those cases, however, the application of those provisions has a different effect.

51. In the case of acquisition within the territory of a single Member State, the components of the consideration that the supplier receives from the taxable dealer also include input VAT, which is charged by the supplier in situations where the supply is not exempt from tax, that is, inter alia, in those situations covered by Article 316(1)(b) of Directive 2006/112. The selling price of the goods sold by the taxable dealer is then equal to the purchase price (including VAT) plus the profit margin. Thus, the profit margin does not cover the cost of the VAT paid by the taxable dealer, even though that VAT affects the total price of the goods he sells.

52. This is not the case with intra-Community acquisitions, where the taxable dealer pays the supplier the price exclusive of VAT, since the intra-Community supply is exempt under Article 138(1) of Directive 2006/112. However, the taxable dealer is liable to pay the tax on the intra-Community acquisition pursuant to Article 2(1)(b)(i) of that directive, without the right to deduct that tax pursuant to Article 322(b) thereof. The taxable dealer must therefore include the cost of that tax in the price of the goods when he sells them. However, the cost of the tax does not form part of the purchase price within the meaning of Article 312(2) of that directive. It therefore raises the taxable dealer's profit margin as calculated in accordance with the second paragraph of Article 315 thereof.

53. The cost of the VAT paid by the taxable dealer on the intra-Community acquisition is therefore included in the taxable amount of his sale transaction. This results in double taxation (a 'tax on tax'), which the margin scheme is designed to prevent, as set out in recital 51 of Directive 2006/112. In the case of goods imported by taxable dealers, such double taxation is prevented by the second paragraph of Article 317 of that directive, which stipulates that in order to calculate the profit margin, the taxable amount of the goods imported (and thus their purchase price) plus the VAT due or paid on their

importation should be deducted from the selling price. The absence of a similar solution for intra-Community acquisitions is a loophole that does not allow the purpose of the margin scheme to be fully achieved in the case of works of art acquired by taxable dealers from operators in other Member States.

54. This loophole cannot, in my view, be closed with the aid of interpretation, since the definition of purchase price set out in Article 312(2) of Directive 2006/112 refers explicitly to the amount received 'by the supplier' from the taxable dealer. It is therefore difficult to include in the purchase price the tax paid by the taxable dealer to the tax authorities. Article 322(b) of that directive, for its part, excludes the right of the taxable dealer to deduct the VAT paid by him 'in respect of works of art' which he has acquired from their creators or their successors in title, which undoubtedly includes the tax paid on the intra-Community acquisition of such works of art. This loophole should therefore be removed by the legislature.

55. I do not believe, however, that the existence of this loophole indicates, as the German Government would have it, that the legislature deliberately excluded the possibility of applying the margin scheme to works of art which a taxable dealer has acquired from operators in other Member States with an exemption in respect of intra-Community supplies.

56. This is not indicated, above all, by the wording of Article 316(1)(b) of Directive 2006/112 or Article 322(b) thereof. Let us recall that the first of those provisions refers to works of art 'supplied to the taxable dealer by their creators or their successors in title'. What is involved, therefore, is the supply of works of art without any additional conditions. The concept of 'supply' used in Directive 2006/112 covers both supply within the territory of a single Member State and intra-Community supply. This is revealed simply by comparing the definition of supply of goods contained in Article 14(1) of that directive [8] with the definition of intra-Community acquisition of goods contained in the first paragraph of Article 20 thereof. [9] In situations where only one of these types of supply is involved, the legislature makes this clear; for example, in Article 2(1)(a), which provides that 'the supply of goods for consideration within the territory of a Member State' is subject to tax, or in Article 138(1), which provides that Member States are to exempt from tax 'the supply of goods dispatched or transported to a destination outside their respective territory but within the Community'. A literal interpretation of Article 316(1)(b) of Directive 2006/112 does not therefore provide grounds for the exclusion from its scope of works of art acquired by a taxable dealer from operators in other Member States.

57. Similarly, the wording of Article 322(b) of Directive 2006/112, which complements Article 316(1)(b) thereof, is broad enough to prohibit the deduction of both the tax paid on acquisition within the territory of a single Member State and the tax paid on intra-Community acquisition (see also paragraph 54 above).

58. It would also be difficult to find a teleological justification for excluding the possibility of applying the margin scheme to works of art acquired by taxable dealers from operators in other Member States. If such a possibility exists in relation to both works of art acquired within the territory of a single Member State (in two cases: Article 316(1)(b) and (c)) and imported works (Article 316(1)(a)), then why would the legislature want to discriminate against intra-Community trade, given that facilitating the free movement of goods and services is one of the fundamental objectives of the introduction of a common system of VAT? [10]

8 '... the transfer of the right to dispose of tangible property as owner'.

9 '... the acquisition of the right to dispose as owner of movable tangible property ...'.

10 See recital 4 of Directive 2006/112.

59. I regard this loophole, therefore, as more of an oversight by the legislature than a deliberate intervention. However, does this oversight justify a refusal to apply the margin scheme to works of art acquired by taxable dealers from operators in other Member States? In my view, it does not.

60. The existence of the loophole does indeed place the taxable dealer who acquires works of art from operators in other Member States at a disadvantage compared with dealers who acquire works of art within the territory of the same Member State or from outside the European Union. This is because that loophole results in double taxation, which I have mentioned above, and increases the overall level of taxation by artificially inflating the taxable amount, that is, the profit margin.

61. It should be borne in mind, however, that the application of the margin scheme in the cases referred to in Article 316 of Directive 2006/112 is optional for the taxable person (but not for the Member State, which is obliged to allow him to apply it). Thus, if a taxable person wishes to avoid the double taxation of the part of his profit margin that covers the cost of the VAT paid in respect of an intra-Community acquisition, he may opt for taxation based on the normal VAT arrangements, with the full right to deduct the tax paid.

62. However, as I have mentioned above, the main purpose of applying the margin scheme in the cases referred to in Article 316 of Directive 2006/112 is not so much to prevent double taxation, since this is already ensured by taxation on the basis of the normal VAT arrangements, but rather to avoid the excessive administrative burdens connected with the taxation of individual goods sold by the taxable dealer according to different rules. If, therefore, for that reason, the taxable person opts for taxation under the margin scheme, he cannot feel aggrieved — according to the ancient principle of *volenti non fit iniuria* — and does not need to be ‘protected’ by being denied the right to apply that scheme.

63. It is true that, pursuant to Article 342 of Directive 2006/112, Member States may take measures to ensure that taxable dealers do not sustain unjustified harm as a result of, inter alia, the application of the margin scheme. However, such measures may concern the right to deduct input tax, but not the right to apply the margin scheme itself.

– Argument based on the wording of Article 316(1)(b) of Directive 2006/112

64. At the hearing, the German Government developed another argument in favour of excluding the application of the margin scheme to works of art acquired by a taxable dealer from operators in other Member States. It claimed, in particular, that because in the case of intra-Community supplies of goods the tax jurisdiction is transferred from the Member State of sale to the Member State of acquisition, the chargeable event is not the intra-Community supply of the goods but their intra-Community acquisition. Article 316(1)(b) of Directive 2006/112 does not, however, mention such a chargeable event, which, according to the German Government, means that works of art acquired from operators in other Member States are not covered by that provision.

65. It should be noted, however, that Articles 314 and 316 of Directive 2006/112 do not regulate the taxation of goods at the stage of their acquisition by a taxable dealer, but at the stage of their sale by that taxable dealer. The cases listed in Article 314(a) to (d) and Article 316(1)(a) to (c) of that directive merely indicate how a taxable dealer may take possession of goods, which he will then have the right to tax according to the margin scheme when he sells them. The acquisition of those goods by a taxable dealer may, but is not required to take place as a result of a chargeable event. Article 314(a) to (c) of that directive concerns cases where no chargeable event (in VAT) arises at all, since those transactions are either untaxed or exempt. Similarly, the methods of acquiring goods by a taxable dealer referred to in Article 316(1)(a) to (c) may, but are not required to involve a chargeable event.

66. Moreover, whereas an intra-Community supply of goods does not, as such, constitute a chargeable event, since it enjoys an exemption, it nevertheless inevitably entails the creation of a tax obligation when an intra-Community acquisition of those same goods takes place. This is because there is no intra-Community supply without intra-Community acquisition. The exemption of intra-Community supply does not, however, apply where intra-Community acquisition is exempt (see the second subparagraph of Article 139(1) of Directive 2006/112). The German Government's argument therefore seems to be based on an overly formalistic interpretation of Article 316(1)(b) of that directive.

Answer to the first question referred

67. In the light of the foregoing, I propose that the Court answer the first question referred for a preliminary ruling as follows: Article 316(1) of Directive 2006/112 should be interpreted as meaning that a taxable dealer is entitled to benefit from the margin scheme under that provision in respect of the sale of works of art which he has acquired from their creators or their successors in title in other Member States who do not fall within the category of persons referred to in Article 314 of that directive, even where those operators have benefited from the exemption in respect of intra-Community supplies under Article 138(1) thereof.

The second question referred

68. If the Court agrees with my proposed answer to the first question referred for a preliminary ruling, it will then be necessary to consider the second question referred. By its second question, the referring court asks whether Article 322(b) of Directive 2006/112 should be interpreted as meaning that it excludes the right of a taxable dealer to deduct the VAT paid by him in respect of an intra-Community acquisition of a work of art to the supply of which that taxable dealer applies the margin scheme under Article 316(1)(b) of that directive, even where the domestic law of the Member State concerned does not provide for such an exclusion of the right of deduction.

69. This question is related to the fact that German law, by excluding, in Paragraph 25a(7)(1)(a) of the UStG, goods acquired by taxable dealers from operators in other Member States and covered by the exemption laid down in respect of intra-Community supplies from the application of the margin scheme, does not contain a provision that excludes the right of a taxable dealer to deduct the tax in respect of an intra-Community acquisition where the margin scheme is applied to such goods.

70. If, therefore, on the basis of the answer to the first question, the referring court finds that Paragraph 25a(7)(1)(a) of the UStG is incompatible with Directive 2006/112, it must disregard that provision and grant the applicant in the main proceedings the right to apply the margin scheme. However, will the applicant also be entitled to deduct the tax paid in respect of the intra-Community acquisition of the goods in dispute? According to the settled case-law of the Court of Justice, a directive cannot of itself impose obligations on an individual, and therefore a Member State cannot rely on a directive as such against that individual,[11] while in German law there has been no transposition of Article 322(b) of Directive 2006/112 with regard to the deduction of tax on intra-Community acquisitions. I share the view of all the interested parties who have submitted observations in the present case, including the applicant in the main proceedings, that this question should be answered in the negative.

11 See, in particular, the judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others* (C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 55 and the case-law cited).

71. The right to deduct input tax is not an inherent right of taxable persons. It is part of the system of VAT, which is based on the mechanism of taxing each transaction while deducting the tax paid at the previous stage of trade. In this way, the overall tax burden is only increased each time by the added value of the goods or services at the stage of trade concerned, and the entirety of that tax burden is transferred to the final stage of trade, that is, to the stage of sale to the consumer. The right of deduction only serves to ensure the proper functioning of that mechanism and, as the Court has ruled on numerous occasions, presupposes that the expenditure incurred in acquiring goods and services giving rise to the right of deduction is a component of the cost of the transactions subject to output tax.[12] A taxable person to whom the domestic law of a Member State grants an exemption for his own transactions is therefore not entitled to deduct input tax, even if that exemption is incompatible with Directive 2006/112.[13]

72. A similar solution should be adopted in a situation such as that at issue in the present case. If the taxable amount is not the total price of the goods but only the vendor's profit margin, that is, the difference between the selling price and the purchase price — as is the case under the margin scheme — the VAT paid in the purchase price (input tax) is not included in the sales tax (output tax). Therefore, there is no basis for deducting that input tax. A different solution would de facto exempt from tax — contrary to Directive 2006/112 — the supply of goods to the taxable dealer, since he would in fact be entitled to a refund of the full amount of the tax paid, without having to pay the equivalent amount in output tax.

73. Thus, if national law, contrary to the provisions of Directive 2006/112, denies a taxable person the right to benefit from a special taxation scheme, that taxable person may rely directly on the provisions of that directive in order to benefit from that scheme, but he will forfeit his right to deduct input tax under national law if the loss of that right is entailed by the application of the scheme.

74. This is not altered by the fact that — as discussed in paragraphs 46 to 60 of this Opinion — in the case of works of art acquired by a taxable dealer from operators in other Member States, that part of the profit margin which covers the cost of the VAT paid in respect of an intra-Community acquisition is taxed twice on account of a loophole in the provisions of Directive 2006/112. This loophole should be removed by changing the way in which the purchase price is calculated, and not by granting the taxable dealer — contrary to the logic of the common system of VAT — the right of deduction.

75. I propose, therefore, that the second question referred for a preliminary ruling be answered as follows: Article 322(b) of Directive 2006/112 should be interpreted as meaning that it excludes the right of a taxable dealer to deduct the VAT paid by him in respect of an intra-Community acquisition of a work of art to the supply of which that taxable dealer applies the margin scheme under Article 316(1)(b) of that directive, even where the domestic law of the Member State concerned does not exclude such a right of deduction.

Conclusion

76. In the light of all the foregoing considerations, I propose that the questions referred for a preliminary ruling by the Finanzgericht Münster (Finance Court, Münster, Germany) be answered as follows:

(1) Article 316(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax should be interpreted as meaning that a taxable dealer is entitled to benefit from the margin scheme under that provision in respect of the sale of works of art which he has

12 See, in particular, the judgment of 28 November 2013, *MDDP* (C-319/12, EU:C:2013:778, paragraph 41).

13 Judgment of 28 November 2013, *MDDP* (C-319/12, EU:C:2013:778, paragraph 56, first indent).

acquired from their creators or their successors in title in other Member States who do not fall within the category of persons referred to in Article 314 of that directive, even where those operators have benefited from the exemption in respect of intra-Community supplies under Article 138(1) thereof.

(2) Article 322(b) of Directive 2006/112 should be interpreted as meaning that it excludes the right of a taxable dealer to deduct the VAT paid by him in respect of an intra-Community acquisition of a work of art to the supply of which that taxable dealer applies the margin scheme under Article 316(1)(b) of that directive, even where the domestic law of the Member State concerned does not exclude such a right of deduction.