



ECJ on the application of the margin scheme: VAT paid in respect of the intra-Community acquisition does not reduce the taxable amount

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1 Background

Contradictions between the VAT Directive and the German VAT Act are not uncommon. The ECJ case, *Mensing*, provides one such example. The ECJ has been addressed by this case on two occasions. According to sec. 25a para 2 of the German VAT Act, a taxable dealer may opt for the application of the margin scheme if he himself has imported works of art, collectors' items or antiques, or if the supply to him was subject to VAT and was not carried out by a reseller. In *Mensing I* the ECJ addressed the question of whether the margin scheme is applicable at all if the taxable dealer has acquired the works of art via intra-community acquisition and the VAT exemption for the intra-Community supply of goods was applied in another Member State. In *Mensing II* the ECJ dealt with the determination of the taxable amount for the margin scheme in these cases.

2 Facts of the case

The plaintiff, *Harry Mensing*, is an art dealer residing in Germany. In 2014, artists supplied works of art to him from other Member States. These supplies were declared in the Member States of origin as being zero-rated intra-Community supplies. The plaintiff paid the reduced VAT rate on these supplies in respect of the intra-Community acquisition. He did not exercise his right to deduct input VAT. The plaintiff opted for the application of the margin scheme with the Tax Office (defendant). The defendant refused his request with reference to sec. 25a para 7 no. 1a of the German VAT Act. According to this section, the margin scheme does not apply to the sale of goods, which the reseller has acquired from another Member State, if the seller in the country of departure has treated this supply as a zero-rated intra-Community supply. Such an exemption is not included in Art. 316 para 1b of the VAT Directive. Therefore, the plaintiff sought the direct application of



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the VAT Directive. In its judgment *Mensing I* of 29.11.2018 – C-264/17 – the ECJ came to the conclusion that the plaintiff is entitled to opt for the margin scheme. The question of how to determine the taxable amount for the resale of the works of art in such a scenario was not addressed in this judgement. The Federal Fiscal Court asked the ECJ for a preliminary ruling in that regard.

3 Decision of the ECJ

The ECJ ruled in *Mensing II*, dated 13 July 2023 (C-180/22), that the VAT paid by the taxable dealer for the intra-community acquisition is not part of the purchase price. Therefore, the VAT does not reduce the taxable amount of the margin. This results from the wording of the VAT Directive. The taxable amount in respect of the supply of goods is the profit margin made by the taxable dealer, less the amount of VAT relating to the profit margin. The purchase price equates to everything which constitutes the consideration obtained by the supplier from the taxable dealer. According to the ECJ, payments made by the taxable dealer to third parties are not part of the purchase price. Thus, VAT paid by the taxable dealer to its tax office for the intra-community acquisition would not form part of the purchase price. The provision that the profit margin is 'less the amount of VAT relating to the profit margin' does not change anything in this respect, as this only refers to the VAT on the margin of the taxable dealer itself. The ECJ rejected an interpretation deviating from the wording of the VAT Directive in light of the context and aims of the VAT Directive. The clear and precise wording prevail. The result is that works of art purchased by a taxable dealer from another Member State are treated less favourably than works of art purchased by a taxable dealer within one country or from a third country. In these cases, the VAT on the purchase reduces the margin for sales. However, the ECJ accepts this less favourable treatment due to the wording of the VAT Directive. This can be amended only following the intervention of the EU legislature.

4 Consequences for the practice

Taxable dealers who opted for the margin scheme in such cases in the past must now consider the judgment *Mensing II* when determining the taxable amount. This applies for all supplies made until 5 April 2022.

However, *Mensing I* and *II* are likely to remain relevant for supplies after 6 April 2022. With effect from 6 April 2022, the EU legislator has restricted the scope of the VAT Directive. The right to opt for the application of the margin scheme should only be possible if no reduced VAT rate has been applied to the purchase by the taxable dealer. The member states must implement this amendment of the VAT Directive into their domestic law by 1 January 2025. This has not yet happened in Germany. Nevertheless, taxable dealers should still be able to directly invoke the right to opt laid down in the old version of Art. 316 para. 1 of the VAT Directive until 31 December 2024. The VAT Directive has not been annulled, only amended. However, invoking the new version of the VAT Directive directly is not possible as long as the implementation period is still open. The German VAT Act, in its current version, is still the result of an incorrect implementation of the VAT Directive by the German legislator.

The right to directly invoke the Directive is intended as a sanction for the Member State that does not properly implement the Directive. Taxable dealers who purchase works of art at a reduced VAT rate via an intra-Community purchase could therefore continue to benefit from this right.