



VAT NEWSLETTER

Risk margin scheme: Most recent decisions and criminal investigations

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1 Overview

The margin scheme, in accordance with sec. 25a of the German VAT Act, entails a number of VAT pitfalls. If these are overlooked, there is a risk that the tax office will refuse to apply the margin scheme. Recently, the German Federal Fiscal Court (BFH) issued a further two decisions on its application. The result: the conditions for the application of the margin scheme were found not to have been met. The taxable person is required to pay additional VAT. In the case *Litdana* (ECJ, judgment of 18 May 2017 – C-624/15), the ECJ clarified that the margin scheme can also be applied in individual cases if the objective requirements of the scheme are not met. However, this will only be the case if the taxable person applied the margin scheme in good faith. But even then, the requirements are by no means low.

2 BFH, decision of 11.12.2024 - XI R 15/21: used motor vehicles

The first decision concerned the trade in used motor vehicles. The plaintiff, a dealer, purchased motor vehicles from supposedly private customers who, however, were not the last registered owners of the motor vehicles. In some cases, the chassis numbers were incomplete, which prevented an inspection by the tax office. The latter therefore assumed that the plaintiff had actually purchased the vehicles from non-registered dealers and denied the application of the margin scheme – none of the possibilities of sec. 25a para. 1 no. 2 of the German VAT Act were fulfilled. Both the fiscal court and the BFH confirmed this view to be correct. The BFH emphasised that the party seeking taxation, in accordance with the application of the margin scheme, must prove that the conditions are met. If this is not possible, this will be at the expense of the taxable person, in this case the plaintiff. The BFH left open the question as to whether protection of legitimate expectations may already be taken into account in the VAT assessment procedure or whether a separate application for equitable relief is



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required. The plaintiff did not act in good faith. It had not taken all reasonable audit measures to ensure that the supplies in question did not lead to participation in tax evasion. Some specific suggestions for such measures can be derived from the decisions: If the supplier and the owner do not match, a power of attorney to sell should be obtained for private sales. Using model contracts, which are typically used for private sales, is not sufficient. Special caution should be exercised in the case of one-off business relationships. Contracts should include a reference to the application of the margin scheme, as well as complete documentation of chassis numbers.

3 BFH, decision of 11 December 2024 - XI R 9/23: Remodeled washing commodes (upcycling)

The application of the margin scheme also proved challenging in the second decision. It concerned the VAT treatment of so-called “upcycled” washstands. These consisted of both vintage (used) components on the one hand and new washbasins on the other. The plaintiff's purchase of washbasins was subject to input VAT deduction, the purchase of the used commodes was not. The plaintiff claimed the application of the margin scheme as regards the resale of the commodes. The fiscal court assumed a uniform item characterised by the refurbished used commode. Assuming the accuracy of this assessment by the fiscal court, the BFH followed the ECJ. In the *Bawaria Motors* case (judgement of 19 July 2012 - C-160/11), the ECJ decided that a (proportionate) right to input VAT deduction (in this case for the washbasins) excluded the application of the margin scheme. Nevertheless, the BFH referred the legal case back to the fiscal court. The latter must again determine as to whether the plaintiff really supplied a single, already processed item (washstand) or whether it first supplied several items (commode; washbasin) and then subsequently processed them.

4 Saxon Fiscal Court, decision of 24 October 2023 – 2 K 92/21: other goods via online platforms

The Saxon Fiscal Court also denied a plaintiff the right to apply the margin scheme for its distribution of goods via online platforms. The plaintiff had purchased large quantities of goods from various suppliers. It assumed the goods to be second-hand. However, the product warranty cards had apparently never mentioned advance sales to private customers. The upstream suppliers had noted on the invoices that the items were subject to VAT, in accordance with the margin scheme. The plaintiff relied on this. However, the tax offices responsible for dealing with the upstream suppliers denied the application of the margin scheme. In some cases, criminal sentences were handed down. The Saxon Fiscal Court interpreted sec. 25a para. 1 no. 2 lit. b of the German VAT Act, in line with the Directive, to the effect that the plaintiff could only apply the margin scheme in cases where the upstream suppliers had also applied it correctly. This was not the case. The fiscal court did not address the plaintiff's arguments regarding the protection of legitimate expectations but referred to separate proceedings for equitable relief. The case is currently pending before the BFH under case number XI R 23/24.

5 The margin scheme targeted by the criminal prosecutors

The European Public Prosecutor's Office is, under the code name 'Nimmersatt', currently investigating a special case (sale of imported and remanufactured accident-damaged vehicles), inter alia, the alleged unjustified application of the margin scheme on a large scale, just recently with dawn raids in 10 Member States (see [Link EPPQ](#)).

6 Practical tips

The margin scheme has its VAT pitfalls. Resellers should not blindly rely on the information provided by previous suppliers. They bear the full risk here. They should draw up contracts properly and, where necessary, obtain authorisations. The specific circumstances of the individual case must appear plausible and, if necessary, they should carry out and document further reasonable checks. In disputed cases, resellers should, as a precaution, submit an application for equitable relief.