European Union; Germany

ECJ Advocate General Opines That VAT Paid in Intra-Community acquisitions of Art Objects Should be Included Within VAT Taxable Base (*Mensing II*, (Case C-180/22) (VAT)) – Details

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Report from Verónica Fernández Cobo, Tax Lawyer and Economist

On 23 March 2023, Advocate General (AG) Maciej Szpunar of the Court of Justice of the European Union (ECJ) opined that it is necessary to carry out an amendment to the VAT margin scheme legislation established by the VAT Directive (2006/112), in order to avoid situations of double taxation, as currently it is not possible to take into account the VAT paid in intra-Community acquisitions of works of art that are subsequently sold under the margin scheme, and which is included in the "purchase price". In the case of *Finanzamt Hamm v. Harry Mensing* (Case C-180/22) the AG considered the possibility of interpreting the provisions of both German legislation and Directive 2006/112 on the VAT margin scheme in a way which respects the principles of fiscal neutrality and non-aggregation of VAT. Details of the opinion are summarized below.

(a) Facts. Mr Harry Mensing is a taxable art dealer operating in various cities in Germany, who requested in 2014 the application of the VAT margin scheme envisaged for intra-Community acquisitions of works of art that he carried out in that year. Mr Mensing declared the application of the margin scheme to those acquisitions. The German tax authorities denied him such possibility and adjusted the amount of VAT due. A judicial claim was filed by Mr Mensing before the Finance Court of Münster, which derived in a preliminary ruling request before the ECJ to confirm whether the German VAT legislation was compatible with Directive 2006/112. In the 2018 judgment, the ECJ, sustained that the VAT margin scheme could also be applied to intra-Community acquisitions of works of art acquired by taxable dealers from artists and that, in such a situation, the taxable dealers are not entitled to deduct the VAT paid in respect of those transactions (judgment Mensing C-264/17). Following the ECJ's ruling, the Finance Court of Münster solved the claim initially filed by Mr Mensing, indicating that the VAT amount due by a taxable dealer because of the realization of intra-Community acquisitions should be included in the purchase price of the works of art for calculating the margin which constitutes the VAT taxable base of the subsequent sale of those art objects, under the VAT margin scheme. The German tax authorities disagreed with this interpretation and appealed to the German Federal Finance Court (the referring court) to get a new ruling on the compatibility of that interpretation with Directive 2006/112.

(b) Issue. The German Federal Finance Court decided to stay the proceedings, seeking clarity on the feasibility of considering, via interpretation of German national law or Directive 2006/112, that the VAT paid on intra-Community acquisitions of works of art is included in the purchase price for calculating the margin if those works of art are subsequently sold.

(c) Advocate General's Opinion. The AG initiated his opinion by examining the second question referred to the ECJ, which related to the interpretation of Directive 2006/112, outlining that the analysis refers to a double taxation problem where the margin scheme is applied to the supply of works of art acquired by a taxable dealer as an intra-Community supply. The AG briefly analysed the multi-stage characteristic of the VAT, and how the VAT margin scheme was established, allowing that only "added value" of goods is taxed. This, because second-hand goods, works of art, antiques and collectors' items do not behave in the same way as firstly supplied goods, especially when they are sold by non-taxable persons. If the goods are sold on by taxable dealers, their taxation on the basis of the total sale price would result in the sale of goods which VAT has already been paid, being taxed again. The AG confirmed the existence of an unintentional loophole in the provisions of Directive 2006/112 which derives into a problem of partial double taxation in intra-Community acquisitions or scenarios where the reverse charge mechanism applies for a supply to a taxable dealer of goods for onward supply under the margin scheme.

Concretely, the referred problem derives from the definition of "purchase price" foreseen by article 312 of Directive 2006/112, which foresees that VAT related to the purchase transaction itself should be included in its price. However, according to the AG's opinion, what Directive 2006/112 pretends is that only those taxes which should be directly paid to the provider of art objects are taken into consideration. Thus, VAT linked to the intra-Community acquisition, which is calculated and owed by the acquirer taxable dealer, cannot be considered within the purchase price of an art object, contrarily to Mr Mensing and the Commission approaches.

In this sense, the AG argued that the judgment issued in 2018, does not modify his previous conclusion, as that judgment was limited to declare that, according to the VAT margin scheme, the purchase cost of art objects sold by a taxable dealer does not constitute part of the VAT taxable base (i.e. commercial margin). Therefore, that there is no argument that could support the deductibility of input VAT borne for the acquisition of the works of art.

The AG concluded that article 312 of Directive 2006/112 cannot be interpreted against its own literality (*contra legem*), although this causes the abovementioned partial double taxation issue. Hence, the solution of this problem necessarily requires an intervention of the EU legislator, because the interpretation capability of the ECJ extends its effects into unclear or uncompleted legal prescriptions or situations where fundamental EU principles are in breach, which does not occur in the present case. In particular, the AG considered that the issue detected does not leave the VAT margin scheme without effect in intra-Community acquisitions or reverse charge mechanism cases, as the impact of considering the corresponding VAT as included within the benefit margin is relatively small: on one hand, because of the application of a reduced VAT rate in certain Member States, when acquiring works of art directly from the artists; and on the other hand, due to the inelastic demand which characterizes those works of art.

Lastly, the AG considered there is no chance of interpreting national law in a way that is respectful of the principles of fiscal neutrality and non-aggregation of VAT, where such interpretation does not derive from a literal reading of Directive 2006/112. In his opinion, not doing it like this, would lead to an effect contrary to any Directive's main goal, which is, the harmonized application of the EU law. Due to this, the AG opted for not answering the first question raised by the referring court.

The AG proposed to answer the referred questions as follows:

"Articles 312 and 315 and the first paragraph of Article 317 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax should be interpreted as meaning that the value added tax paid by a taxable dealer in respect of the intra-Community acquisition of a work of art whose subsequent supply by the taxable dealer is subject to the margin scheme in accordance with Article 316(1)(b) of the directive should be included in the taxable amount of that subsequent supply."
