VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 833

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN: Commission
REFERENCE: Article 315
SUBJECT: Special arrangements for works of art
1. **INTRODUCTION**

The Commission has been faced on several occasions with questions concerning the application of the VAT Directive¹ provisions on the special arrangements for taxable dealers in relation to supplies of works of art, in the context of the statement entered into the Council minutes when these special arrangements were introduced.

The Commission services therefore consider it appropriate to submit this question to the VAT Committee for comments.

2. **SUBJECT MATTER**

Chapter 4 of Title XII of the VAT Directive sets out special arrangements for second-hand goods, works of art, collectors' items and antiques.

According to Article 313 of the VAT Directive, Member States must apply special arrangements for taxing the profit margin made by the taxable dealer, referred to as the "margin scheme", to supplies of works of art. Under Article 315 of the VAT Directive, the profit margin is equal to the difference between the selling price charged by the taxable dealer for the goods and the purchase price.

These special arrangements were introduced by Council Directive 94/5/EC². When this Directive was adopted the following statement was entered into the Council minutes³:

"The Council and the Commission state that, for the application of Article 26a(B)(3), for the works of art referred to in point (a) of Annex I, where it is not possible to determine exactly the purchase price paid by the taxable dealer to his supplier, or where this price is not significant, Member States may provide that the margin on which the value added tax is applied shall be equal to a fraction of the selling price which may not be less than 30% thereof."

In this context the question has arisen whether a Member State may apply a rule whereby for all pieces of art that have been in the possession of a taxable dealer for more than a certain number of years the profit margin could be deemed to be a certain percentage of the selling price (but not less than 30%), independently of whether the purchase price is actually known or not. The justification for such a rule might be linked to the duration of the obligation for traders to keep records of their transactions for a limited number of years only.

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³ Council's Information note to the Members of the Working Party on Tax Questions – Indirect Taxation (VAT), 6th VAT Directive (recast) – Statements entered into the Council minutes at the time of adoption of the Directives which will be repealed when the "recast" will be adopted, Brussels, 21 June 2005, GM/lv, second paragraph of point 76 of the note.
3. **THE COMMISSION SERVICES’ OPINION**

It is settled case-law that, where a statement recorded in Council minutes is not referred to in the wording of a provision of secondary legislation, it cannot be used for the purpose of interpreting that provision\(^4\).

This said and despite such a strict position of the Court of Justice of the European Union, it should be noted that the Council minutes statement in question reflects, even though in an informal manner, a certain common agreement as to the meaning of the provisions of the Directive, supported by the Commission services, and it is therefore worth taking a look at its contents.

The statement in question refers to a situation, whereby it is not possible to determine exactly the purchase price paid by the taxable dealer to his supplier (or where this price is not significant). In such a case Member States may provide that it is presumed that the taxable amount, i.e. the profit margin, is equal to a fraction of the selling price which may not, however, be less than 30% thereof.

For the sake of clarity, it should be mentioned, that the above solution cannot apply to supplies already covered by a simplified method of calculation of the taxable amount under Article 318 of the VAT Directive, referred to as a "total margin" or "in the gross" approach.

If, therefore, a Member State chooses to apply, in situations where the purchase price is not known, a presumption that the profit margin amounts to 30% (or more) of the selling price, such a practice may be considered in line with the spirit and purpose of Article 315 of the VAT Directive and does not contradict the statement in the Council minutes. Further, this statement to the minutes ensures uniform application across the EU of the special scheme, in a case not specifically dealt with in the relevant provisions.

On the other hand, where a Member State sets out a rule or follows an administrative practice according to which such a presumption applies to all the sales of works of art that have been in the possession of a taxable dealer for more than a certain number of years, such a rule and such a practice would not be compatible with Article 315 of the VAT Directive. Moreover, they would go beyond the agreement reflected in the statement in the Council minutes.

The rule and the practice in question would be contrary to the provision of Article 315, because they cover all situations in which the works of art have been in the possession of a taxable dealer for more than a certain number of years, even when the price at which the dealer purchased these works of art is known. Article 315 requires that in such situations the profit margin is calculated by subtracting the purchase price from the selling price. Thus, if a dealer is able to show the purchase price (through the relevant documentation kept by him or through any other means of proof admitted by the domestic law of the Member State concerned) he would be certainly in a position to challenge the rule or administrative practice in question.

In addition, such a rule setting the profit margin at 30% (or more) of the selling price for all the sales of works of art that have been in the possession of a taxable dealer for more than a certain number of years, independently of whether the purchase price is known or not, would go beyond the agreement recorded in the statement in the Council minutes. The intention behind the latter was to cover the situations in which it is not possible to determine exactly the purchase price.

For these reasons the Commission services consider that a rule according to which in relation to all works of art that have been in the possession of a taxable dealer for more than a certain number of years the profit margin is deemed to be 30% (or more) of the selling price, independently of whether the purchase price is actually known or not, is incompatible with Article 315 of the VAT Directive.

4. **DELEGATIONS' OPINION**

Delegations are invited to express their views on the matter raised by the Commission services.

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