AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Between

71TACD2023

[redacted]

**Appellant**

and

**REVENUE COMMISSIONERS**

**Respondent**

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**Determination**

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**Contents**

## A. Introduction

1. This is an appeal of a decision of the Revenue Commissioners (hereafter "the Respondent") of [redacted] whereby it refused the Appellant's claim for the period [redacted] for the repayment of Value Added Tax (hereafter "VAT") in the amount of €151,565.00.

2. The claim for repayment arose in circumstances where the Appellant, which is an [redacted] auctioneering and valuing business operating under the auctioneer's margin scheme, sought to deduct €250,904.10 of import VAT that it paid in respect of a [redacted] collection imported to Ireland from [redacted] in two consignments in [redacted].

3. The Appellant made this payment while it was the consignee of the [redacted] collection, though it was not its owner at the time of importation. It was not in dispute in this appeal that the VAT was chargeable at the time of importation to the [redacted] based owners of the collection (hereafter "the clients"), who had entered into an agreement with the Appellant on or about [redacted] to provide the service, in conjunction with an English firm of auctioneers, of conducting its sale by public auction. In return for the provision of this service, the Appellant was entitled to charge commission to the purchaser of each item sold comprising the collection. No commission was payable by the clients in respect of each sale. The auction occurred on [redacted].

4. The auctioneer's margin scheme was a central feature of this appeal and it is necessary at this point to provide a brief introductory explanation regarding its features. Articles 333 – 341 of EU Council Directive 2006/112/EC (hereafter "the VAT Directive") gives Member States the option of making provision for special arrangements for sales conducted by way of public auction. These special arrangements involve the taxation of goods supplied to purchasers in the context of a public auction by reference to the profit margin achieved by the auctioneer, rather than by the value of the goods supplied. The profit margin is the difference between the price achieved at auction and the sum paid by the auctioneer to its client (i.e. its premium or commission).The auctioneer is the taxable person that charges the VAT on the supply to the purchaser and returns it to the Respondent.

5. Ireland opted to transpose the special arrangements in relation to sales by public auction by way of the enactment of section 89 of the Value Added Tax Consolidation Act 2010 ("the VATCA 2010"). This legislation created the auctioneer's margin scheme, which operates in the manner prescribed by the VAT Directive referred to above.

6. Also of relevance to this appeal is the margin scheme under section 87 of the VATCA 2010 applicable to [redacted] dealers (those involved in the buying and selling of [redacted] themselves rather

than acting as auctioneer for a principal). This differs from the auctioneer's scheme in that (a) it is optional to dealers, who retain the right to charge VAT at 13.5% on the consideration received on foot of the sale [redacted], and (b) it expressly excludes those who opt to operate under the scheme from deducting the VAT paid on the purchase of the [redacted] subsequently sold or its importation. Both of these schemes are subject to greater explanation and analysis in part F on in this Determination. The relevant legislation is set out in full in Part C.

**B. Background and Evidence**

7. The Appellant is an auctioneer and valuer, which specialises in the auctioning of [redacted]

8. On [redacted], the Appellant conducted a public auction of a collection [redacted] (hereafter "the collection"), [redacted].

9. The Appellant had come to be engaged by the clients in [redacted] to act as auctioneers in the sale in conjunction with a separate English firm of auctioneers. The Commissioner heard evidence from the former Managing Director of the Appellant that the clients [redacted] were disposed to hold the auction in Ireland given their own close connection [redacted] to the country.

10. [redacted]

11. As [redacted] comprising the collection were located in [redacted], it was necessary to arrange for their importation to Ireland and the EU prior to public auction. It was not in dispute that the clients consigned the collection to the English firm of auctioneers, who then arranged for its shipping to Ireland to be received by the Appellant as consignee. It was also not in dispute that the clients remained the owners of the collection upon importation. Their retention of ownership is in any event apparent from declarations of ownership signed by the clients prior to importation, which were produced in the course of this appeal.

12. Upon the arrival of the collection in Ireland in [redacted], the Respondent charged importation VAT in respect of it at the reduced rate of 13.5% applicable to [redacted] The total amount of VAT payable based on the value of the collection was €250,804.10. This sum was paid by the Appellant.

13. Following the auctioning of the collection on [redacted], the Appellant claimed a deduction under section 59 of the VATCA 2010 in respect of the import VAT that it had paid. When set against the VAT charged to the purchasers on the profit margin achieved (at the standard rate of 23%) the result was a repayment claim in the amount of €151,565.00 for the period [redacted].

14. On [redacted] the Respondent issued a notification of a verification check in respect of the Appellant's repayment claim. Thereafter, the Appellant and the Respondent entered into correspondence in relation to the deductibility of the import VAT paid in respect of the collection.

15. The essence of the Appellant's position expressed in its correspondence was that section 89 of the VATCA 2010 required it to account for VAT and that subsection (9) therein deemed the supplies made to the purchasers to have been of goods, in the form of the auctioned [redacted], rather than of a service. As section 89 was silent on the question of deductions, the general rule as stated in section 59 of the VATCA 2010 was applicable. Accordingly, the question was whether the goods imported were used for the purposes of its subsequent supplies. The answer to this, according to the Appellant, was that they were on the basis that the supplies could not have occurred but for the importation of the collection and the consequent payment of the import VAT.

16. The Respondent, however, decided that there was no right of deduction for two related reasons. Firstly, the import VAT was chargeable to the owners of the [redacted] and not the Appellant, who, as noted already, at the time of their arrival in the EU was simply the consignee. Secondly, notwithstanding the Appellant's deemed status pursuant to section 89(9) of the VATCA 2010 as supplier upon auction sale to the purchasers of the [redacted] comprising the collection, the VAT actually paid was calculated on the profit margin received in respect the service provided as auctioneer. It was not calculated on the sale price of the goods deemed supplied. Thus, the [redacted] giving rise to the import VAT were not used for the purposes of the Appellant's taxable supply. Having reached this conclusion notwithstanding the representations made by the Appellant, on [redacted] the Respondent refused the repayment of €151,565 claimed by the Appellant. This decision was duly appealed to the Commission.

17. The Managing Director of the Appellant at the time of the auction gave evidence relating to the history and operation of its business and the importation of the collection. In particular, he explained why the decision was taken to pay the import VAT in this instance even though it was chargeable at the time of arrival to its clients, the owners of the [redacted].

18. In this regard, he stated that since the introduction of the Margin Scheme in the mid-1990's, the Appellant had on numerous occasions auctioned [redacted] imported from outside the EU. In the main, the items in question came from [redacted], though some were from other places such as South Africa and Australia.

19. He stated that in acting as consignee and auctioneer in respect of non-EU goods, the Appellant had habitually paid the import VAT due. This was done because, otherwise, its clients from outside the EU would have been obliged to pay a premium of 13.5% to auction in Ireland, rather than in their own non-EU country. The Managing Director gave evidence that on each previous occasion on which it had auctioned goods from outside the EU, the Appellant had claimed a deduction in respect of the import VAT that it had paid, which the Respondent had never refused. He observed that the importation at issue in this appeal was the most valuable importation of goods destined for auction by the Appellant.

20. The Managing Director gave evidence that were the owners of goods intended for auction required to pay the import VAT, the Appellant would be placed at a competitive disadvantage relative to auctioneers in locations outside the EU. In this regard the Appellant cited those in [redacted], the non-EU country in which it had most clients, and the United Kingdom. According to the Managing Director, the consequence of the decision of the Respondent was that the Appellant would be faced with the choice of continuing to pay itself or leaving the import VAT to the owners of the goods. The net effect, he said, was that either way "[The Appellant] *would have to stop bringing in* [redacted] *from outside the EU."*

**C. Legislation and Guidelines**

21. Article 2 of the VAT Directive provides that the importation of goods from outside of the European Union shall be subject to VAT. This has been transposed by section 3 of the VATCA 2010, which provides:-

> *"Except as expressly otherwise provided by this Act, a tax called value-added tax is, subject to and in accordance with this Act and regulations, chargeable, leviable and payable on the following transactions:*
>
> […]
>
> *(b) the importation of goods into the State;*
>
> […]"

22. Chapter 1 of Title X of the VAT Directive is entitled "*Origin and scope of right of deduction".* The first provision therein is Article 167, which provides:-

"*A right of deduction shall arise at the time the deductible tax becomes chargeable.*"

23. Article 168 of the VAT Directive then specifies the circumstances giving rise to a right of deduction:-

"*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:*

[…]

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

16. This has been transposed into national law by section 59 of the VATCA 2010, which provides at subsection (2) therein:-

*"Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct—*

*(b) in respect of goods imported by him or her in the period, the tax paid by him or her or deferred as established from the relevant customs documents kept by him or her in accordance with section 84(3)"*

24. Articles 333-341 of the VAT Directive allows for special arrangements for the taxation of the profit margin made on goods sold by way of public auction. Ireland opted to transpose these special arrangements by way of the enactment of section 89 of the VATCA 2010. As there was no dispute at hearing that this provision was in accordance with the terms of the Directive, it is sufficient in this Determination to quote it alone in full:-

*"In this section—*

*"auctioneer" means an accountable person who, in the course or furtherance of business, acting on behalf of another person pursuant to a contract under which commission is payable on purchase or sale, offers tangible movable goods for sale by public auction with a view to handing them over to the highest bidder;*

*"auctioneer's margin" means an amount which is equal to the difference between the total amount, including any taxes, commissions, costs and charges whatsoever, payable by the purchaser to the auctioneer in respect of the auction of auction scheme*

*goods and the amount payable by the auctioneer to the principal in respect of the supply of those goods and shall be deemed to be inclusive of tax;*

*"auction scheme" means the special arrangements for the taxation of supplies of auction scheme goods;*

*"auction scheme goods" means any works of art, collectors' items, antiques or second-hand goods sold by an auctioneer at a public auction while acting on behalf of a principal who is—*

*(a) a person who was not entitled to deduct, under Chapter 1 of Part 8, any tax in respect of that person's purchase, intra-Community acquisition or importation of those goods where that person is neither—*

*(i) a person referred to in paragraph (d), nor*

*(ii) an accountable person who acquired those goods from—*

*(I) an auctioneer who applied the auction scheme to the supply of those goods to that accountable person, or*

*(II) a taxable dealer who applied the margin scheme to the supply of those goods to that accountable person,*

*(b) an insurer to whom section 20(3) applies—*

*(i) who took possession of those goods in connection with the settlement of a claim under a policy of insurance, and*

*(ii) whose disposal of the goods is deemed not to be a supply of the goods as provided by section 20(3),*

*(c) a person in another Member State who was not entitled to deduct, under the provisions implementing Articles 167, 173, 176 and 177 of the VAT Directive, in that Member State, any value-added tax referred to in that Directive in respect of that person's purchase, intra-Community acquisition or importation of those goods, or*

*(d) a taxable dealer who applied the margin scheme to the supply of those goods or applied the provisions implementing Articles 4 and 35, first subparagraph of Article 139(3) and Articles 311 to 325 and 333 to 340 of the VAT Directive, in another Member State to the supply of those goods;*

*"principal" means the person on whose behalf an auctioneer auctions goods;*

*"purchaser" means the person to whom an auctioneer supplies auction scheme goods.*

*(2) Subject to and in accordance with this section, an auctioneer shall apply the auction scheme to any supply of auction scheme goods.*

*(3) The amount on which tax is chargeable in accordance with section 3(a) or (c) on a supply by an auctioneer of auction scheme goods is, notwithstanding Chapter 1 of Part 5, the auctioneer's margin less the amount of tax included in that margin.*

*(4) Where auction scheme goods are auctioned, the auctioneer shall issue, subject to such conditions (if any) as may be specified in regulations, to both the principal and the purchaser, invoices or documents in lieu thereof setting out the relevant details in respect of the supply of the auction scheme goods.*

*(5) Notwithstanding Chapter 2 of Part 9, an auctioneer shall not, in relation to any supply to which the auction scheme has been applied, indicate separately the amount of tax chargeable in respect of the supply on any invoice or other document in lieu thereof issued in accordance with that Chapter.*

*(6) Where auction scheme goods are auctioned by an auctioneer on behalf of a principal who is an accountable person—*

> *(a) the invoice or document in lieu thereof issued to the principal in accordance with subsection (4) shall be deemed to be an invoice for the purposes of Chapter 2 of Part 9, and*
>
> *(b) that principal shall be deemed to have issued such invoice.*

*(7) Where the auction scheme is applied to a supply of goods dispatched or transported from the State to a person registered for value-added tax in another Member State, then, notwithstanding paragraph 1(1) of Schedule 2, section 46(1)(b) shall not apply unless such goods are of a kind specified elsewhere in that Schedule.*

*(8) Notwithstanding section 30, where the auction scheme is applied to a supply of goods dispatched or transported, the place of supply of those goods shall be deemed to be the place where the dispatch or transportation begins.*

*(9) Where an auctioneer supplies auction scheme goods by public auction, the principal shall be deemed to have made a supply of the auction scheme goods in question to the auctioneer when that auctioneer sells those goods at a public auction.*

*(10) Notwithstanding paragraph 12 of Schedule 1, where an accountable person acquires goods to which the auction scheme has been applied and the person subsequently supplies those goods, that paragraph shall not apply to that supply unless the goods consist of—*

*(a) motor vehicles within the meaning of section 60(1) which that person acquired other than—*

*(i) as stock-in-trade,*

*(ii) for the purposes of a business which consists in whole or in part of the hiring of motor vehicles, or*

*(iii) for use, in a driving school business, for giving driving instruction,*

*or*

*(b) goods used by that person solely in the course of an exempted activity.*"

25. Section 19(1)(b) of the VATCA 2010 provides that a "supply" in relation to goods means:-

"*the sale of movable goods pursuant to a contract under which commission is payable on purchase or sale by an agent or auctioneer who concludes agreements in the agent's or auctioneer's own name but on the instructions of, and for the account of, another person"*

26. Section 22 of the VATCA 2010, headed "Special rules in relation to the supply of goods" provides:-

*"(1) Where an agent or auctioneer makes a sale of goods in accordance with section 19(1)(b), the transfer of those goods to that agent or auctioneer shall be deemed to be a supply of the goods to the agent or auctioneer at the time that the agent or auctioneer makes that sale."*

27. Section 87 of the VATCA 2010 makes separate provision for a margin scheme for persons who act as "taxable dealers" [redacted]. Such a person is one who, in contrast to an auctioneer, buys [redacted] for the purpose of selling [redacted] at a profit. Whereas the scheme under section 89 applies automatically to auctioneers, section 87(4)(a) of the VATCA 2010 gives taxable dealers an option. They can either decide to charge VAT in the normal way on the value of [redacted] sold by them or, alternatively, charge pursuant to subsection 3 therein on the profit margin achieved in their dealing. Where, however, the dealer opts for the latter course subsection (6) provides:-

*"Subject to subsection (7) and notwithstanding Chapter 1 of Part 8, a taxable dealer who exercises the option in respect of the goods specified in subsection (4)(a) shall not be entitled to deduct any tax in respect of the purchase or importation of those goods."*

**D. Submissions**

*Appellant*

28. In oral submission counsel for the Appellant emphasised, firstly, that the sales by auction of the [redacted] comprising the collection constituted, pursuant to section 19(1)(b) of the VATCA 2010, supplies of goods and not of services. This was so notwithstanding the application of the 23% rate to the transaction, rather than the reduced rate for goods supplies of [redacted].

29. Counsel then referred to section 22(1) of the VATCA 2010, which deems a supply of the auctioned goods to the auctioneer to occur "*at the time the agent or auctioneer makes the sale* [to the purchaser at auction]". The effect of this provision was explained by counsel in the following terms:-

"[…] *it is effectively a deeming provision* […] *it merges the consideration supplied on the sale with the consideration obtained by the auctioneer to create a legal fiction effectively, but there can be no dispute that there is, in fact, a supply for the purposes of the sale of* [redacted]*."*

30. The Appellant then drew attention to section 59 of the VATCA 2010 governing deductions. This provides that in calculating the amount of tax payable, a taxable person such as the Appellant may, insofar as goods are used for the purpose of their own taxable supplies, deduct VAT paid in respect of the import of those goods.

31. Counsel contrasted the special schemes applicable to taxable dealers and auctioneers. The former allows the dealer in question to opt under section 87(4) of the VATCA 2010 to have the scheme applied to its supplies. If the dealer so opted, VAT would be charged only on the profit margin achieved on sale, rather than on the full sale price. The trade-off in this regard however was, under section 87(6) of the VATCA 2010, that a deduction could not be claimed in respect of any tax arising from the importation or purchase of goods used in the supply. However, even if the dealer chose under subsection 4 to operate under the margin scheme, they retained the right under section 87(7) to decide in respect of individual transactions to opt out and be taxed on their supply in the normal way. If they did, the prohibition on the deductions specified in subsection 6 would not apply.

32. Counsel observed that auctioneers are, however, possessed of no equivalent right of election under section 89 of the VATCA 2010. The application of the special scheme to their trade is mandatory. Notably, the provision contains no subsection such as that in section 87 of the VATCA 2010 prohibiting the deduction of tax arising from the importation or purchase of goods. Such a provision could not be read in to section 89 of the VATCA 2010.

33. The effect of the foregoing, submitted counsel for the Appellant, was that in determining whether a deduction could be made, the general rules in respect of deductions enumerated in section 59 of the VATCA 2010 had to apply in the Appellant's case.

34. Before analysing this provision, counsel emphasised the fundamental principle that VAT is a tax on consumption to be paid by the person to whom the good or service is supplied. It is not a tax which a trader should bear. It is to avoid this occurring – and to avoid multiple layers of VAT being incorporated into a good or service and being passed on by the supplier to the consumer – that the deduction mechanism exists within the VAT system. In the Appellant's case, the refusal of the deduction had the effect that VAT was being paid to the Respondent twice. Firstly, on the importation of the collection to Ireland from [redacted] and, secondly, on the margin achieved upon the sale of the goods by auction. This was, according to the Appellant's counsel, contrary to the aforementioned principle underpinning the VAT system.

35. It was submitted that supplies of goods had occurred on the sale of the collection to the relevant purchasers at auction. Counsel stressed that the effect of section 89(9) of the VATCA 2010 was that these supplies were deemed to have been made by the Appellant as principal, having itself acquired the goods from the owners at the moment of sale and, simultaneously, supplied them to the purchasers at auction. This submission was in accordance with the Respondent's own Tax and Duty Manual published in October 2021, entitled *"VAT treatment of the auctioneers margin scheme",* which stated:-

> *"Auctioneers selling moveable goods are regarded for VAT purposes as buying and selling goods in their own right."*

36. Counsel pointed out that section 59(2)(b) of the VATCA 2010 is explicit in allowing for the deduction of VAT paid on the importation of goods used for the purpose of making a supply. In this context she submitted:-

> "*There's a clear link between the importation and the sale* [redacted] *that cannot be disputed. The* [redacted] *were brought in for one purpose and one purpose only, to sell at public auction. The import is essential for the transaction."*

37. Counsel for the Appellant contended that the Respondent's decision to refuse the Appellant's claim constituted a "*deviation from the general principles*" that import VAT associated with an input be deductible against VAT arising from output for the same period. The consequence of the stance adopted was that the Appellant was not in a "*VAT neutral situation following* [the] *transaction"*. Counsel for the Appellant, anticipating the Respondent's submissions, accepted that the import VAT calculated on the value of the collection was greater than the sum charged under the scheme in respect of the auctioneer's margin. This, however, could not disentitle the Appellant to its deduction in circumstances where section 59(2)(b) of the VATCA 2010 (which transposes Article 168 of the VAT Directive) is clear in conferring on it this right.

38. It was accepted by the Respondent that it was the [redacted] based owners of the collection that imported it to Ireland. In the submission of counsel, while Article 167 of the VAT Directive provides that the right to a deduction arises when the VAT becomes chargeable, this did not preclude a deduction being sought subsequently against the VAT paid to it by the relevant purchasers in respect of its supply of the [redacted] comprising the collection. As support for this proposition, reliance was placed on case law of the CJEU in which it was held that a trader's pre-registration investment costs incurred for the purposes of and with a view to its future intended economic activity was deductible input in respect of post-registration output (see *Polski Trawertyn* (ECLI:EU:C:2012:107)).

39. Counsel referred to the evidence of the Managing Director of the Appellant that it had claimed the deduction of VAT paid on [redacted] imported from outside of the EU on numerous occasions in the past, without objection being raised by the Respondent. It was not submitted on behalf of the Appellant that it could hold a legitimate expectation based on the Respondent's past conduct in relation to different import deductions, or that the content of the aforementioned Tax and Duty Manual could be relied upon were it in conflict with the law. However, counsel submitted that the Respondent was correct in law in not making objection in relation to previous, less valuable, import deductions resulting in repayment claims. In her view, the Respondent had, in this case, become distracted by the large figure involved. Moreover, the correspondence leading up to and including the decision under appeal revealed a lack of understanding regarding the differences between the legislation governing the margin scheme applicable to [redacted] dealers and that to auctioneers.

40. Finally, the Appellant referred to the judgments of the Supreme Court in *Bookfinders v Revenue Commissioners [2020] IESC 60* and *Dunnes Stores v Revenue Commissioners [2019] IESC 50* regarding the need to take into consideration the purpose of legislation when seeking to ascertain its meaning based on the wording used. In this regard, counsel

submitted that it could not have been the intention of the Oireachtas that the Appellant would find itself exposed to double taxation in relation to VAT.

*Respondent*

41. Counsel for the Respondent chose at the outset of oral submission to frame the issue by reference to a question: "*how can you recover VAT on a cost that you never incurred on an input that* [didn't] *exist?"*

42. The Appellant was not the owner of the collection when it was imported. At no stage then or later had it paid to become the owner. It had, by means of a legal fiction occurring under section 89 of the VATCA 2010, become the principal responsible for the supply as the hammer fell at auction. This did not mean, however, that the [redacted] forming the collection became an input of the Appellant's actual taxed output supplies.

43. Counsel for the Respondent agreed with the Appellant's argument that deductibility had to be determined by reference to the general rules of deduction under section 59 of the VATCA 2010. However, in her submission, the correct result upon the application of these rules was that the Appellant's claim should not be allowed.

44. The Respondent referred to Article 167 of the VAT Directive, which provides that the right of deduction "*shall arise at the time the deductible tax becomes chargeable".* The tax at issue in the Appellant's case became chargeable upon import from the [redacted]. The question had to be: what was the position that pertained at that moment? The answer to this was that the clients of the Appellant were the owners and it was they who were ultimately liable. While the Appellant had taken the view that it was commercially necessary to pay the charge, this was a matter between it and its clients and could not alter the answer to the question of deductibility.

45. Secondly, the Respondent argued that even if one disregarded the matter of when the VAT became deductible, it was plain that the right to deduct is circumscribed by Article 168 and section 59 of the VATCA 2010 in such a way that the VAT paid by the Appellant fell outside its scope. Specifically, counsel submitted that the goods in respect of which the VAT was charged on import were not used "*for the purposes of the taxed transactions*" of the Appellant.

46. In support of this, the Appellant opened the judgment of the CJEU in *Mensing v Finanzamt Hamm* (ECLI:EU:C:2018:968)*.* This case concerned the operation of the special scheme for dealers under Articles 312 – 325 of the VAT Directive, which section 87 of the VATCA 2010 transposed. The facts were that the German dealer of art sought to have his sale

taxed by reference to his profit margin obtained, rather than the price paid by the purchaser for the art. One of the issues that fell to be determined by the Court was whether, having done so, he was entitled to the deduction of input VAT paid on the intra-Community acquisition of art in circumstances where German national law had not implemented the exclusionary provision under Article 322 of the VAT Directive. In answering this in the negative, the Court found at paragraphs 45 and 46 that:-

> *"A central principle of the VAT system is that the right to deduct input VAT affecting the acquisition of goods or services presupposes that the expenditure incurred in acquiring the goods are a component of the price of the taxed output transactions giving rise to the right to deduct.*
>
> *As the Advocate General has noted in point 71 and 72 of his Opinion, allowing a taxable dealer to deduct the paid input VAT in the situation covered by Article 322(b) of the VAT Directive, when the taxable dealer opts for the application of the margin scheme under Article 316(1)(b) of that directive would ignore that principle. In fact, when the derogating margin scheme is applied, the chargeable amount is, under Articles 315 and 317 of the VAT Directive, the profit margin made by the taxable dealer, less the amount of VAT relating to the profit margin itself. In those circumstances, the VAT in the purchase price is not included in the tax levied on the sale and therefore does not give rise to a right to deduct.*
>
> *Therefore, Article 322(b) of the VAT Directive provides that a taxable dealer cannot deduct, from the amount of the tax that he is liable to pay, the VAT owed or paid for the works of art that are or will be supplied to him by the creator or his successors in title, to the extent that those goods are used for the purposes of his supplies subject ot the margin scheme.*
>
> *In other words, he cannot, for such a supply, opt for the application for the margin scheme laid down in Article 316(1)(b) of that directive, and also claim a right to deduct input VAT*."

47. As noted already, *Mensing v Finanzamt Hamm* concerned the trade of a dealer, rather than that of an auctioneer. However, in the submission of counsel for the Respondent it showed that the prohibition under Article 322 of the VAT Directive, implemented by section 87(6) of the TCA 1997, does not create a prohibition where a right to deduct would otherwise exist. In actual fact, it is reflective of the principles underpinning the deduction system. Thus, as the court noted at paragraph 49 of its judgment:-

"*It follows that Mr Mensing can benefit from the margin scheme under that article solely under the conditions laid down in that directive, namely where he does not exercise, for those same supplies, the right to deduct input VAT*."

48. As further authority for the submission that the VAT [redacted] paid by the Appellant was non-deductible, Counsel cited the reasoned order of the CJEU in *Weindel Logistik Service* (ECLI:EU:C:2020:814). There, the court held in the operative part of its order:-

"*Article 168 of [the VAT Directive] must be interpreted as precluding the grant of a right to deduct value added tax (VAT) to an importer where he does not dispose of the goods as an owner and where the upstream import costs are non-existent or are not incorporated in the price of particular output transactions or in the price of the goods and services supplied by the taxable person in the course of his economic activities*."

49. Reliance was also placed on *Skattesministeriat v DSV Road AS* (ECLI:EU:C:2015:421). This concerned the refusal to allow a deduction claimed by a transportation and logistics firm in relation to VAT paid on goods in respect of which it was the carrier, but not the owner. Summarising the issue, the court stated from paragraph 48:-

*"By its fourth question, the referring court asks, in essence, whether Article 168(e) of the VAT Directive must be interpreted as precluding national legislation which excludes the deduction of VAT on import which the carrier, which is neither the importer nor the owner of the goods in question and has merely carried out the transport and customs formalities as part of its activity as a transporter of freight subject to VAT, is required to pay.*

*In that regard it must be noted that, under the wording of Article 168(e) of the VAT Directive, a right to deduct exists only in so far as the goods imported are used for the purposes of the taxed transactions of the taxable person. In accordance with the settled case-law of the Court concerning the right to deduct VAT on the acquisition of goods or services, that condition is satisfied only where the cost of input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities.*

*Since the value of the goods transported does not form part of the costs of making up the prices invoiced by a transporter whose activity is limited to transporting those goods for consideration, the conditions for application of Article 168(e) of the VAT Directive are not satisfied in the present case."*

50. Counsel for the Respondent submitted that the critical point was that the goods brought in and thus the VAT arising therefrom did not form part of the cost of the supply provided by

the Appellant. The fact that the Appellant took it upon itself to satisfy the import VAT owed by its client did not alter this.

51. The cases of *BLP Group v Commissioners of Customs and Excise* (ECLI:EU:C:1995:107), *Commissioners of Customs and Excise v Midland Bank plc* (ECLI:EU:C:1995:107) and *Abbey National v Commissioners of Customs and Excise* (ECLI:EU:C:2006:289) were also cited by the Respondent. These each concerned the attribution of taxable supplies acquired by the relevant taxpayer in circumstances where they were involved in both vatable and VAT exempt economic activities. Their particular relevance, submitted the counsel for the Respondent, rested on the explanation by the court in each instance of the meaning of the "used for" condition in relation to the deduction of VAT. In *BLP Group v Commissioners of Customs and Excise*, the court held that for VAT on an acquired supply to be deductible it must be linked objectively to a taxable output transaction or transactions. Specifically, it held at paragraphs 24 and 25:-

> "[…] *if BLP's interpretation were accepted, the authorities, when confronted with supplies which, as in the present case, are not objectively linked to taxable transactions, would have to carry out inquiries to determine the intention of the taxable person. Such an obligation would be contrary to the VAT system's objectives of ensuring legal certainty and facilitating application of the tax by having regard, save in exceptional cases, to the objective character of the transaction in question.*
>
> *It is true that an undertaking whose activity is subject to VAT is entitled to deduct the tax on the services supplied by accountants or legal advisers for the taxable person's taxable transactions and that if BLP had decided to take out a bank loan for the purpose of meeting the same requirements, it would have been entitled to deduct VAT on the accountant's services required for that purpose. However, that is a consequence of the fact that those services, whose costs form part of the undertaking's overheads and hence of the cost components of the products, are used by the taxable person for taxable transactions*."

52. In response to a query from the Commissioner regarding the effect of denying the right to deduct on the principle of fiscal neutrality underpinning the VAT system, counsel for the Appellant argued that one had to look to the service that was in fact supplied. This was apparent from the invoice in respect of the sale of one of the [redacted] provided as part of the appeal documents, which underlined that what was actually taxed was the Appellant's premium of €[redacted] ([redacted]% of the hammer price achieved at auction of €[redacted]). The VAT charged at 23% thus came to €[redacted]. In this regard, counsel posed and answered the following rhetorical question:-

"*So what is the price going out? It's the premium. That is the price going out. What are the cost components of that price? Many things: rent, light, heat, accountancy, legal* […] *maybe the* [redacted] *are* […] *buffed and polished and brought out to their best effect, all of those things. But what isn't an input of that output price is the value of the* [redacted]*."*

53. Thus, it was submitted, the principle of fiscal neutrality was not in any way compromised by the Appellant's inability to deduct the VAT incurred on the importation of the collection. Counsel reiterated that the imported goods were, at the time they arrived and the VAT was paid, not those of the Appellant and not a cost component of the output supply at auction.

**E. Material Facts**

54. The facts material to this appeal were as follows:-

- the Appellant entered into an agreement with the owners of the collection to act as auctioneer in its sale;
- this sale was to take place in Ireland;
- the collection was imported in two consignments from [redacted] on or about [redacted];
- at the time of importation the clients were the owners of the collection;
- the Appellant acted as consignee in respect of the importation of the collection to Ireland;
- pursuant to an agreement between the Appellant and the clients, the Appellant paid the VAT due on importation at a rate of 13.5%. The total amount of VAT paid was €250,804.10;
- on or about [redacted] was sold by way of public auction conducted by the Appellant;
- on each item of [redacted] sold, the Appellant charged VAT at 23% on the difference between the sum to be paid by the purchaser and the sum to be remitted to its clients – i.e. its premium, commission or profit margin;
- the Appellant made a claim for the refund of VAT for the period [redacted] in the amount of €151,565.00. Included in this was a deduction sought in respect of the VAT paid by the Appellant on the importation of the collection from [redacted];

- on [redacted], the Respondent decided that the sum of €250,804.10 paid in respect of the import VAT was not deductible. The consequence of this was that the Appellant's claim for repayment of the sum of €151,565.00 was refused;
- the Appellant appealed the refusal to make the repayment to the Commission.

**F. Analysis**

55. Chapter 4 of Title XII of the VAT Directive creates *"Special arrangements for second-hand goods, works of art, collectors' items and antiques"*. There are two such special arrangements in this Chapter; those contained in section 2 concerning supplies by "taxable dealers" (Articles 312 – 325 of the VAT Directive and those in section 3 (Articles 333 – 341 of the VAT Directive) concerning sales conducted by way of public auction.

56. Ireland has transposed the special arrangement in respect of auction supplies by way of the enactment of Section 89 of the VATCA 2010. This provision, which is mandatory in its application those taxable persons such as the Appellant acting as auctioneers, requires the VAT charged on their supply to be computed on profit margin (i.e. the premium earned in holding the auction and arranging for the supply of the good).

57. The question that falls to be determined in this case is whether the Appellant, which operates as an auctioneer within the meaning of section 89 of the VATCA 2010, was entitled to deduct import VAT it paid on the collection that was chargeable to its clients, and which it subsequently supplied to various purchasers as auction scheme goods. In so doing, the VAT that it charged to the purchasers was, pursuant to section 89 of the VATCA 2010, calculated on the profit margin that it earned on the sale of each good comprising the collection.

58. A taxable person has the right to deduct VAT input used for the purposes of making their output supplies. A good or service acquired, however, can only be held to be used for such a purpose where it is a *"cost component*" of the finished good or service supplied by the taxable person (see in addition to the authorities referred to in paragraph 51 of this determination, paragraph 41 of *Minister Finansów v MDDP* (ECLI:EU:C:2013:778)**).**

59. In this appeal, the Appellant placed much emphasis on section 89(9) of the VATCA 2010, which deems that a supply was made to it by the principal at the time of sale, and on sections 19(1)(b) and 22(1) of the VATCA 2010. What occurred as a consequence were not the supplies of a service by the Appellant to relevant purchasers, but rather the deemed supplies of goods. These supplies, so it was submitted, could not have occurred but for the importation of the goods from [redacted] and the consequent payment of the

importation VAT by the Appellant on the goods it thereafter came to be deemed to own and supply simultaneously upon sale at auction.

60. In *Mensing v Finanzamt Hamm,* the CJEU considered as part of its judgment whether an art dealer who sought to avail of the special arrangement taxing profit margin available to that type of person could deduct the VAT he had paid to his national tax authority in respect of an intra-community supply of art. While Article 322 of the Directive forbade such a deduction, this had not been transposed into German law. As observed at paragraph 46 of this Determination, the CJEU found that the trader had the right to rely on the scheme directly given the failure to transpose. However, it also held that allowing the deduction sought where the trader chose to operate within the margin scheme would have violated the fundamental tenet of the system that the sum of VAT to be deducted must be on an input supply representing a cost component of the taxed output. In its words, "[…] *the VAT paid in the purchase price* [of the art in question] *is not included in the tax levied on the sale and therefore does not give rise to a right to deduct."* Indeed, the court expressly referenced paragraph 71 AG Szpunar's Opinion in this case. This paragraph and the two paragraphs following it are worth setting out in full in this Determination:-

> *"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. A taxable person to whom 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* [the VAT Directive].
>
> *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.*

*Thus, if national law, contrary to the provisions of [the VAT Directive], denies a taxable person the right to benefit from a special taxation scheme, the 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."*

61. It appears that the critical question that must be answered is whether the [redacted] comprising the collection that were imported, which gave rise to the VAT charged, were cost components of the transactions that were actually taxed. By answering this, one gets to the fundamental issue of whether the deduction is necessary to preserve VAT neutrality by the avoidance of double taxation.

62. While there were deemed supplies [redacted] in this instance upon auction sale, what actually was taxed was not the sale price paid by the purchasers. Rather, it was the difference in price between the amount received from the purchasers at auction and the amount remitted by the Appellant to its clients. Thus, the Appellant's supply was taxed at the rate of 23% (not, it may be observed, on the reduced 13.5% rate applicable to supplies [redacted]).

63. As noted by AG Szpunar in his Opinion in *Mensing v Finanzamt Hamm*, there is no inherent right to deduct. The mechanism exists for one reason only; to ensure that the principle of neutrality in respect of each supply is not violated. The Commissioner agrees with the submission made by counsel for the Respondent that [redacted] constituting the collection were not cost components of the supplies in respect of which VAT was actually levied. Permitting the deduction of the import VAT in question would go beyond ensuring that transactions that occurred at auction were VAT neutral. While the CJEU's judgment in *Mensing v Finanzamt Hamm* was given in the context of the operation of the special arrangement in respect of [redacted] dealers, the Commissioner finds that the key principle expressed therein applies in the instant case. Once it is the margin that is taxable, the good that is sold is not itself a cost component of the supply. Differences between the schemes relating to their mandatory and optional application and the express exclusion of deductions under the special arrangement for dealers do not change this.

64. Nor does the fact that the Respondent collects both import VAT and VAT on the margin in respect of the Appellant's supply have an effect on the application of the principle underlying the decision in *Mensing v Finazamt Hamm.* The Appellant in this instance actually paid the importation VAT that was charged on the arrival of [redacted] from [redacted]. This was done despite the fact that it was chargeable to its clients who were the

importing owners of [redacted], whereas the Appellant was its consignee. As was pointed out in submission, at no stage did the Appellant pay anything in consideration to become the owner of the collection. The Appellant's Managing Director was clear in his evidence as to why it paid the import VAT. Were the Appellant's clients to have been required to discharge the VAT on import themselves, they would in his view have been liable, notwithstanding their desire to see [redacted] sold in Ireland, to have opted to sell it in a place where no equivalent figure was required to be paid. In this regard he suggested that persons in their position might choose either [redacted] or, possibly, the United Kingdom as the venue for such auctions.

65. Article 167 of the VAT Directive provides that VAT is deductible at the time that it is charged. However, the clients of the Appellant as non-taxable persons were not capable themselves of deducting this amount from anything. That the Appellant later became, by virtue of the deeming section under section 89(9) of the VATCA 2010 and sections 19 and 22 of the VATCA 2010, the principal in the supply did not confer on it the right to make a claim in respect of VAT previously charged to another person. This is not altered by the voluntary payment by the Appellant of the VAT for reasons which, while understandable, were purely commercial in nature. Its decision to pay the import VAT was a private arrangement with its clients, which can have no impact on the core question already adverted to: namely whether [redacted] was used for the purpose of the taxable supply. To be so used it must have been a cost component of the supply, which the Commissioner finds that it was not. The argument to the effect that the supply could not have been made but for its importation does not equate to the requirement that it was used, within the meaning of Article 168 of the VAT Directive and section 59 of the VATCA 2010, for the purpose of the taxable supply.

66. Finally, reference at hearing was made to paragraph 1 of the Respondent's Tax and Duty Manual on the VAT treatment of the auctioneer's margin scheme. No argument, however, was advanced that if it could be construed as a statement that the Appellant was entitled to deduct import VAT on goods sold at auction, this must be binding on the Respondent. That no such submission was made is reflective of the law as expressed *Lee v Revenue Commissioners [2021] IECA 18,* where the Court of Appeal held that the function of the Commission is to determine whether tax is owed, and if so the amount, by reference to the applicable legislation.

67. The Commissioner is not necessarily convinced that the sentence adverted to in paragraph 1 of the Tax and Duty Manual in question means that the import VAT on the collection is deductible. Whether it is or is not, however, is of no consequence in the

context of the determination of this appeal on the basis of the findings already made concerning the correct interpretation of the legislation governing deductibility and its application to the Appellant's claim.

### G. Determination

68. The Commissioner determines that the decision of the Respondent of [redacted] to refuse the Appellant's claim for the deduction of €250,904.10 in VAT paid on the importation of the collection from [redacted] was correct. The Appellant's appeal must therefore fail.

69. This appeal has been determined in accordance with section 949AL of the TCA 1997. Either party dissatisfied has the right to appeal to the High Court on a point or points of law within a period of 42 days from the date of the communication of this Determination.

Conor O'Higgins
Appeal Commissioner
9 March 2023