Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

8 December 2022 (*)

(Reference for a preliminary ruling – Harmonisation of fiscal legislation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 203 – Adjustment of the VAT return – Recipients of services who not entitled to make deductions – No risk of loss of tax revenue)

In Case C?378/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzgericht (Federal Finance Court, Austria), made by decision of 21 June 2021, received at the Court on 21 June 2021, in the proceedings

P GmbH

v

Finanzamt Österreich,

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), acting as President of the Chamber, N. Wahl and J. Passer, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Austrian Government, by A. Posch, acting as Agent,

– the European Commission, by L. Lozano Palacios and R. Pethke, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive (EU) 2016/1065 of 27 June 2016 (OJ 2016 L 177, p. 9) (‘the VAT Directive’).

2 The request has been made in proceedings between P GmbH and the Finanzamt Österreich (Tax Office, Austria; ‘the tax authorities’) concerning the tax authorities’ refusal of an

application to adjust P's value added tax ('VAT) return on the ground that the invoices P issued featured a VAT amount calculated using the incorrect rate.

Legal context

European Union law

3 Under Article 193 of the VAT Directive:

'VAT shall be payable by any taxable person carrying out a taxable supply of goods or services, except where it is payable by another person in the cases referred to in Articles 194 to 199b and Article 202.'

4 Article 203 of that directive provides as follows:

'VAT shall be payable by any person who enters the VAT on an invoice.'

5 Article 220(1) of that directive provides as follows:

'Every taxable person shall ensure that, in respect of the following, an invoice is issued, either by himself or by his customer or, in his name and on his behalf, by a third party:

(1) supplies of goods or services which he has made to another taxable person or to a non-taxable legal person;

…'

Austrian law

6 Point 1 of Paragraph 11(1) of the Umsatzsteuergesetz 1994 (Law on turnover tax 1994, BGBl. 663/1994), in the version applicable to the dispute in the main proceedings ('the UStG 1994'), provides as follows:

'Where the trader effects transactions within the meaning of point 1 of Paragraph 1(1), he or she shall be entitled to issue invoices. Furthermore, if he or she effects the transactions to another trader for the latter's undertaking or to a legal person where the latter is not a trader, he or she shall be obliged to issue invoices. If the trader makes a taxable supply of work or services connected with immovable property to a non-trader, he or she shall be obliged to issue an invoice. The trader must comply with his or her obligation to issue an invoice within six months of the date on which the transaction was effected.'

7 Paragraph 11(6) of the UStG 1994 provides that:

'Invoices the total amount of which does not exceed EUR 400 shall include, in addition to the date of issue, the following information:

1. The name and address of the trader who supplied the goods or services;

2. The quantity and the usual commercial description of the goods or the nature and extent of the services supplied;

3. The date of the supply of the goods or service or the period over which the service extends;

4. The consideration and the tax on the supply of the goods or service in a single sum; and

5. The rate of tax.’

8 Paragraph 11(12) of the UStG 1994 reads as follows:

‘Where the trader has, in an invoice for a supply of goods or services, separately stated an amount of tax for which he or she is not liable under this federal law as regards the transaction, he or she shall be liable for the amount stated in the invoice if he or she does not correct that invoice accordingly in respect of the recipient of the supply of goods or services. In the case of correction, Paragraph 16(1) shall apply *mutatis mutandis*.’

9 Paragraph 16(1) of the UStG 1994 provides that:

‘When the basis of assessment of a taxable transaction for the purposes of points 1 and 2 of Paragraph 1(1) has changed,

1. the trader who effected that transaction shall correct correspondingly the amount of tax payable in that regard, and

2. the trader receiving the supply must correct correspondingly the deduction made in that regard. Corrections shall be made in respect of the taxable period in which the consideration has been altered.’

10 Paragraph 239a of the Bundesabgabenordnung (Federal Tax Code), in the version applicable to the dispute in the main proceedings, provides:

‘In so far as a charge, which, in accordance with the purpose of the provision establishing the charge, is to be borne economically by a person other than the taxable person, has been borne economically by a person other than the taxable person, the following must not take place:

1. crediting of the tax account;

2. repayment, rebooking or transfer of credit balances; and

3. use for the repayment of tax debts;

where this would lead to the unjust enrichment of the taxable person.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 During the 2019 tax year, the appellant in the main proceedings, which operates an indoor playground, applied VAT to its services at a rate of 20%. It issued its clients with a total of 22 557 till receipts, which are invoices for small amounts falling within the scope of Article 11(6) of the UStG 1994; those receipts stated that rate.

12 It is clear from the request for a preliminary ruling that the customers of the appellant in the main proceedings were exclusively final consumers who were not entitled to deduct input VAT.

13 Having realised that the statutory rate of VAT applicable to its services was not 20%, but 13%, the appellant in the main proceedings adjusted its VAT return so that the excess VAT would be credited to it by the tax authorities.

14 The latter refused to allow that adjustment on the ground, first, that, under national law, the appellant in the main proceedings is required to pay the higher rate of VAT on account of the failure to correct its invoices and, second, that, since the customers of the appellant in the main

proceedings bore the cost of the higher rate of VAT, the adjustment sought would result in the appellant being unjustly enriched.

15 The appellant in the main proceedings brought an action against that decision and the dispute came before the referring court, the Bundesfinanzgericht (Federal Finance Court, Austria), which is uncertain, in the light of the case-law of the Court of Justice, whether or not Article 203 of the VAT Directive can be applied in the case before it when there is no risk of loss of tax revenue. If so, that court raises the question whether, in so far as it is practically impossible for the appellant in the main proceedings to correct the invoices issued to final consumers, account must be taken of the fact that there is no risk of loss of tax revenue in allowing it to correct its VAT return in the manner required. The referring court also expresses doubts as to whether the VAT Directive must be interpreted as meaning that the fact that final consumers have borne the VAT in full and that, consequently, the appellant in the main proceedings would be enriched if that tax were adjusted, means that such an adjustment must not be made.

16 In those circumstances the Bundesfinanzgericht (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is VAT payable by the issuer of the invoice under Article 203 of the VAT Directive if, as in the present case, there may be no risk of loss of tax revenue, because the recipients of the services are final consumers who are not entitled to the right of deduction?

(2) If the first question is answered in the affirmative and VAT is payable by the issuer of an invoice under Article 203 of the VAT Directive:

(a) Can the correction of invoices in respect of the recipients of services be precluded if, on the one hand, a risk of loss of tax revenue is excluded and, on the other, the correction of invoices is effectively impossible?

(b) Does the fact that final consumers have borne the tax as part of the consideration, thereby enriching the taxable person by correcting the VAT, preclude the correction of the VAT?’

Consideration of the questions referred

The first question

17 By its first question, the referring court asks, in essence, whether Article 203 of the VAT Directive must be interpreted as meaning that a taxable person who has supplied a service and who has stated on the invoice an amount of VAT calculated on the basis of an incorrect rate is liable to pay that VAT even where there is no risk of loss of tax revenue on the ground that the recipients of that service are exclusively final consumers who do not have a right to deduct input VAT.

18 As a preliminary point, it should be noted that it is clear from the request for a preliminary ruling that the questions referred by the national court are based on the premiss that, in the present case, there is no risk of loss of tax revenue, since the customers of the appellant in the main proceedings were, for the financial year concerned, exclusively final consumers who do not have a right to deduct the VAT invoiced to them by the appellant in the main proceedings. It is only in the light of that premiss that the Court will examine the first question.

19 In order to respond to that question, the Court notes that, under Article 203 of the VAT Directive, VAT is to be payable by any person who enters the VAT on an invoice and that, according to the Court’s case-law, the VAT indicated on an invoice is payable by the issuer of the

invoice even in the absence of an actual taxable transaction (judgment of 8 May 2019, *EN.SA.*, C?712/17, EU:C:2019:374, paragraph 26).

20 It is also clear from the Court's case-law that Article 203 of the VAT Directive seeks to eliminate the risk of loss of tax revenue which the right of deduction provided for in that directive might entail (judgments of 8 May 2019, *EN.SA.*, C?712/17, EU:C:2019:374, paragraph 32, and of 18 March 2021, *P (Fuel cards)*, C?48/20, EU:C:2021:215, paragraph 27).

21 As the Advocate General observed in point 26 of her Opinion, Article 203 of the VAT Directive therefore applies where VAT has been invoiced incorrectly and there is a risk of loss of tax revenue on account of the fact that the recipient of the invoice in question has a right to deduct such VAT.

22 Accordingly, Article 203 of the VAT Directive can be distinguished from Article 193 of that directive in that the latter article, read in conjunction with Article 220(1) of that directive, covers a situation where the taxable person has issued an invoice stating the correct amount of VAT under the latter provision, under which a taxable person making a taxable supply of goods or services to another taxable person must issue an invoice to that other taxable person. In such a case, according to Article 193 to the VAT Directive, VAT is payable by the taxable person making such a supply to another taxable person.

23 It follows, as the Advocate General stated in point 26 of her Opinion, that Article 203 of the VAT Directive applies only to a tax debt exceeding that due in situations in which Article 193 of that directive applies and therefore does not cover situations in which the VAT stated on the invoice is correct. In a situation in which part of the VAT invoiced was incorrectly invoiced, Article 203 of that directive applies only to the amount of VAT exceeding that which was duly invoiced. In the latter case, there is a risk of loss of tax revenue, since a taxable person who is the recipient of such an invoice might be led to exercise his or her right to deduct VAT without the competent tax authorities being in a position to determine whether the conditions for exercising that right are satisfied.

24 In the present case, as was noted in paragraph 18 above, the referring court has found that there was no such risk of loss of tax revenue on the ground that the customers of the appellant in the main proceedings were, during the tax year concerned, made up exclusively of final consumers who do not have a right to deduct input VAT. The Court must therefore find that Article 203 of the VAT Directive does not apply in such a situation.

25 In the light of all the findings above, the answer to the first question is that Article 203 of the VAT Directive must be interpreted as meaning that a taxable person who has supplied a service and who has stated on the invoice an amount of VAT calculated on the basis of an incorrect rate is not liable, under that provision, for the part of the VAT invoiced incorrectly if there is no risk of loss of tax revenue on the ground that the recipients of that service are exclusively final consumers who do not have a right to deduct input VAT.

The second question

26 In view of the answer given to the first question, there is no need to answer the second question.

Costs

27 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in

submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive (EU) 2016/1065 of 27 June 2016

must be interpreted as meaning that a taxable person who has supplied a service and who has stated on the invoice an amount of value added tax (VAT) calculated on the basis of an incorrect rate is not liable, under that provision, for the part of the VAT invoiced incorrectly if there is no risk of loss of tax revenue on the ground that the recipients of that service are exclusively final consumers who do not have a right to deduct input VAT.

[Signatures]

* Language of the case: German.