

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

30 January 2024 (*)

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 203 – Obligation to pay – Person who enters VAT on an invoice – Person liable to pay VAT – Fake invoices issued by an employee including the employer’s details without its knowledge or consent – Employer due diligence)

In Case C-442/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 26 May 2022, received at the Court on 5 July 2022, in the proceedings

P sp. z o.o.

v

Dyrektor Izby Administracji Skarbowej w Lublinie,

interested party:

Rzecznik Małych i Średnich Przedsiębiorców,

THE COURT (Eighth Chamber),

composed of N. Piçarra, President of the Chamber, K. Jürimäe (Rapporteur), President of the Third Chamber, and M. Safjan, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- P sp. z o.o., by B. Przeciechowski, adwokat, and I. Skrok, doradca podatkowy,
- Dyrektor Izby Administracji Skarbowej w Lublinie, by B. Kołodziej and T. Wojciechowski,
- Rzecznik Małych i Średnich Przedsiębiorców, by P. Chrupek, radca prawny,
- the European Commission, by J. Jokubauskaitė and M. Rynkowski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2023,

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; ‘the VAT Directive’).

2 The request has been made in proceedings between P sp. z o.o. (‘Company P’) and Dyrektor Izby Administracji Skarbowej w Lublinie (Director of the Tax Administration Chamber, Lublin, Poland) (‘the tax authority’) regarding value added tax (VAT) debts in respect of fake invoices issued by P.K., an employee of Company P.

Legal context

European Union law

3 Article 9 of the VAT Directive provides:

‘1. “Taxable person” shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

2. In addition to the persons referred to in paragraph 1, any person who, on an occasional basis, supplies a new means of transport, which is dispatched or transported to the customer by the vendor or the customer, or on behalf of the vendor or the customer, to a destination outside the territory of a Member State but within the territory of the [European] Community, shall be regarded as a taxable person.’

4 Under Article 167 of that directive:

‘A right of deduction shall arise at the time the deductible tax becomes chargeable.’

5 Article 203 of that directive provides:

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

6 Article 205 of that same directive reads as follows:

‘In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT.’

Polish law

7 Article 108(1) of the Ustawa o podatku od towarów i usług (Law on the tax on goods and services), of 11 March 2004 (Dz. U. of 2011, No 177, item 1054), in the version applicable to the dispute in the main proceedings (‘the Law on VAT’), which transposed Article 203 of the VAT Directive, provides:

'If a legal person, an unincorporated organisational unit or a natural person issues an invoice in which the amount of tax is shown, he or she is obliged to pay that tax.'

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

8 During the period from 2001 to 2014, Company P, which is a taxable person for VAT purposes, operated, inter alia, a retail business for the sale of fuel in a petrol station which was managed, from November 2005, by P.K., an employee of that company.

9 Following a tax audit, it was determined that, between January 2010 and April 2014, Company P had issued 1 679 invoices indicating a VAT amount that did not reflect the actual sale of goods, for a total amount of 1 497 847 Polish zlotys (approximately EUR 319 254), to entities that deducted the VAT indicated on those invoices. Those invoices were not recorded in Company P's accounts and the corresponding VAT was not paid into the State budget, nor was it included in the company's tax returns.

10 The invoices at issue were falsely linked to actual sales made by the petrol station managed by P.K. and recorded by Company P's cash registers. Those invoices were accompanied by authentic receipts, corresponding to transactions actually carried out with entities other than those indicated on those invoices, and were issued and sold by P.K., without the consent or knowledge of the management of the company, so that the entities who were recipients of those invoices could fraudulently obtain VAT refunds.

11 Those receipts were collected by employees of the petrol station, who delivered them to P.K. in return for financial benefit. The invoices at issue were recorded on the petrol station's computer in a different format to that of the normal invoices issued by Company P and could not be consulted without that computer being unlocked. P.K. used Company P's details by entering the company as the issuer of the invoices at issue and indicating the company's tax identification number (TIN) number on them.

12 On 24 May 2014, P.K.'s employment was terminated for misconduct.

13 Following a tax audit, the Naczelnik Urzędu Skarbowego (Head of the Tax Office, Poland) issued a decision determining the amount of VAT payable by Company P pursuant to the invoices at issue drawn up between January 2010 and April 2014.

14 By decision of 31 October 2017, the tax authority upheld that decision. It regarded Company P as not having exercised the due diligence required to avoid the issuance of the invoices at issue. No document specified precise responsibilities of P.K., who, in the light of her duties, was able to issue invoices corresponding to the petrol station's revenue, outside of the company's computerised accounting system, without the approval of company management. Given that the chair of the board of Company P knew that invoices were issued in relation to receipts issued by the petrol station, and that this had occurred without accounting oversight, he could have and should have foreseen that that way of working would facilitate the issuance of invoices for fraudulent purposes. According to that decision, it is precisely because of the lack of supervision and adequate organisation that the chair of the board of Company P detected the conduct at issue only when the tax authority carried out its audit. Accordingly, P.K. could not be considered a third party vis-à-vis Company P.

15 Furthermore, according to that decision, there was still a risk of budgetary loss for the tax authority with the result that Article 108(1) of the Law on VAT was applicable.

16 By decision of 23 February 2018, the Wojewódzki Sąd Administracyjny w Lublinie (Regional Administrative Court, Lublin, Poland) dismissed the action brought by Company P against the tax authority's decision. That company then lodged an appeal on a point of law before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), the referring court in the present case.

17 According to that court, there are two contradicting lines of national case-law regarding the interpretation of Article 108(1) of the Law on VAT, which transposes Article 203 of the VAT Directive.

18 According to one interpretation, there is no need, in order to apply that provision, to take into account the fact that it is an employee who issued the invoices in question using the name and TIN of her employer. It is sufficient that that employee was entitled to issue those invoices and that, therefore, the employing company must assume the risks associated with selecting its employees. Exempting the employer where invoices are issued by an employee would amount to transferring that liability to the Member State, which would not be acceptable. However, such an interpretation would mean that it is necessary to determine whether that liability is strict or fault-based. If it is the latter, the company whose details are entered on the invoice at issue would only be liable to pay VAT if it had been at fault or negligent, or had failed in its duty of supervision.

19 According to a second interpretation, an entity whose details were unlawfully appropriated by another entity is not to be considered to be the issuer of the invoice in question and therefore is not liable to pay the VAT indicated on that invoice under Article 108(1) of the Law on VAT. That provision clearly states that the entity who 'issued the invoice', and not the entity whose details were appropriated, is liable to pay the VAT. The referring court adds that such an interpretation could emerge from the wording of Article 203 of the VAT Directive.

20 In those circumstances, the Naczelny Sąd Administracyjny (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'(1) Must Article 203 of [the VAT Directive] be interpreted as meaning that in a situation where an employee of a VAT taxable person has issued a fraudulent invoice showing VAT, on which he or she has included the employer's details as the taxable person, without that employer's knowledge [or] consent, the person who enters the VAT on the invoice and who is thus liable to pay the VAT is to be considered:

- the VAT taxable person whose details were unlawfully used in the invoice; or
- the employee who unlawfully entered VAT on that invoice using the details of the VAT taxable person?

(2) In connection with the question of who is to be considered, within the meaning of Article 203 of [the VAT Directive], the person who enters VAT on the invoice and is thus liable to pay VAT in the circumstances described in Question 1, is it relevant whether the VAT taxable person that employs the employee who unlawfully entered that taxable person's details on a VAT invoice may be considered to have failed to exercise due diligence in supervising that employee?'

Consideration of the questions referred

21 By its two questions, which is appropriate to examine together, the referring court asks, in essence, if Article 203 of the VAT Directive must be interpreted as meaning that, where an

employee of a taxable person for VAT purposes has issued a fake invoice showing VAT using the employer's identity as a taxable person, without that employer's knowledge or consent, that employee must be considered to be the person who enters the VAT, within the meaning of that article.

22 Article 203 of the VAT Directive provides that any person who enters VAT on an invoice is liable to pay the tax entered on that invoice.

23 In the first place, in respect of the scope of Article 203, the Court pointed out that the VAT entered on an invoice is payable by the issuer of the invoice even in the absence of an actual taxable transaction (see, to that effect, judgments of 31 January 2013, *Stroy trans*, C?642/11, EU:C:2013:54, paragraph 38, and of 8 December 2022, *Finanzamt Österreich (Wrongly invoiced VAT to final consumers)*, C?378/21, EU:C:2022:968, paragraph 19).

24 It is settled case-law that Article 203 seeks to eliminate the risk of loss of tax revenue which the right of deduction provided for in the VAT Directive might entail (judgments of 31 January 2013, *Stroy trans*, C?642/11, EU:C:2013:54, paragraph 32, and of 8 December 2022, *Finanzamt Österreich (Wrongly invoiced VAT to final consumers)*, C?378/21, EU:C:2022:968, paragraph 20). It 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 (see, to that effect, judgment of 8 December 2022, *Finanzamt Österreich (Wrongly invoiced VAT to final consumers)*, C?378/21, EU:C:2022:968, paragraph 21).

25 Thus, the issuer of the invoice indicating a VAT amount is liable for that amount irrespective of any fault, where there is a risk of loss of tax revenue. If, by contrast, there is no such risk, Article 203 of the VAT Directive does not apply (see, to that effect, judgment of 8 December 2022, *Finanzamt Österreich (Wrongly invoiced VAT to final consumers)*, C?378/21, EU:C:2022:968, paragraph 24).

26 In the present case, it is apparent from the order for reference that the invoices in question were issued for fraudulent purposes. The VAT amounts were indeed falsely invoiced to enable the recipients of those invoices fraudulently to obtain the right to deduct that VAT. The referring court indicates that there is still a risk of a loss of tax revenue to the extent that the right to deduct which could be claimed by the recipients of those invoices would not be offset by the payment of the corresponding amount by the issuer of those same invoices. Therefore, in principle, where such a risk exists, such a situation comes within the scope of Article 203 of the VAT Directive.

27 In the second place, in respect of identifying on whom the obligation set out in Article 203 is imposed, it should be noted that the use of the expression 'any person' indicates that the person subject to that obligation is not necessarily a taxable person, within the meaning of Article 9 of the VAT Directive. A natural non-taxable person may therefore, theoretically, be subject to the obligation set out in Article 203 of that directive where that person enters VAT on an invoice.

28 However, the wording of Article 203 does not make it possible to know who is the 'person who enters the VAT' within the meaning of Article 203, where the apparent issuer of the invoice, who is a taxable person for VAT purposes, has had their identification details as a taxable person for VAT purposes appropriated and the invoice is a fake invoice issued for VAT fraud purposes by an employee of that taxable person. The expression 'any person', given its general and unelaborated nature, could also refer to the taxable person rather than the employee.

29 On that basis, the Court notes that, according to settled case-law, the prevention of fraud and potential abuse is an objective recognised and promoted by the VAT Directive and EU law cannot be relied on by individuals for abusive or fraudulent ends (see, to that effect, judgments of

29 April 2004 *Gemeente Leusden and Holin Groep*, C-487/01 and C-7/02, EU:C:2004:263, paragraph 76, and of 2 July 2020, *Terracult*, C-835/18, EU:C:2020:520, paragraph 38).

30 It would be contrary to that objective to interpret Article 203 of the VAT Directive as meaning that the apparent issuer of a fraudulent invoice showing VAT, whose identity as a taxable person for VAT purposes has been appropriated by another, is the 'person who enters the VAT', within the meaning of Article 203, when the apparent issuer acted in good faith and the tax authority is aware of the identity of the person who actually issued that fake invoice. In such a situation, it is therefore that latter person who must be considered to be the 'person who enters the VAT' within the meaning of Article 203.

31 In the present case, an employee used her employer's details, without its knowledge or consent, to issue the fake invoices showing VAT and indicating the employer as the taxable person, so as unlawfully to sell those invoices so that their buyers may unduly benefit from the right to deduct VAT that was not payable.

32 In its order for reference, the referring court states, however, that the employer had failed to exercise any of the due diligence required to prevent the issuance of fraudulent invoices. That employee was responsible for invoicing and, in particular, had the ability to issue those VAT invoices outside of the computerised invoicing system, without the need to obtain additional consent from her employer. The tax authority therefore concluded that that employer had failed to meet its obligation to supervise and that its negligence precluded it from discovering and preventing the fraudulent practices of its employee. That authority argues that that employer had to be considered to be the person who entered the VAT, within the meaning of Article 203 of the VAT Directive, and that that employer was therefore liable to pay the VAT entered on the invoices at issue, in accordance with the national provision transposing Article 203.

33 In that respect, the Court notes that, according to settled case-law, which was admittedly developed in circumstances different from those in the main proceedings, it is not contrary to EU law to require a trader to take every step which could reasonably be required of him or her to satisfy himself or herself that the transaction which he or she is effecting does not result in his or her participation in VAT fraud (judgments of 27 September 2007, *Teleos and Others*, C-409/04, EU:C:2007:548, paragraph 65, and of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 54).

34 From that point of view, the Court has ruled previously that when there are indications pointing to an infringement or fraud, a reasonable trader may, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he or she intends to purchase goods or services in order to ascertain the latter's trustworthiness (judgment of 21 June 2012, *Mahagében and Dávid*, C-80/11 and C-142/11, EU:C:2012:373, paragraph 60).

35 Having regard to the objective referred to in paragraph 29 above, a similar duty of care must, under Article 203 of the VAT Directive, be owed by an employer to its employee, in particular when that employee is responsible for issuing invoices showing VAT in the name of and on behalf of his or her employer. Thus, such an employer, which is a taxable person for VAT purposes, cannot be regarded as having acted in good faith if it failed to exercise the due diligence reasonably required to monitor the conduct of its employee and, in so doing, prevent the latter from using its identification details as a taxable person for VAT purposes to issue fake invoices for fraudulent purposes. In such a situation, the employee's fraudulent conduct may be imputed to the employer with the result that the employer must be considered to be the person who entered the VAT on the invoices at issue within the meaning of Article 203.

36 Thus, in those circumstances, it is for the tax authority or the court before which a case has

been brought to carry out an overall assessment of all the relevant information in order to determine whether the taxable person whose VAT identification details were appropriated by its employee to issue fake invoices for fraudulent purposes exercised the due diligence reasonably required to monitor the conduct of that employee. If such is not the case, that taxable person is liable to pay the VAT entered on those invoices, pursuant to Article 203 of the VAT Directive.

37 In the light of the foregoing, the answer to the questions referred is that Article 203 of the VAT Directive must be interpreted as meaning that, where an employee of a taxable person for VAT purposes has issued a fake invoice showing VAT using the employer's identity as a taxable person, without that employer's knowledge or consent, that employee must be considered to be the person who enters the VAT, within the meaning of Article 203, unless that taxable person did not exercise the due diligence reasonably required to monitor the conduct of that employee.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as meaning that, where an employee of a taxable person for value added tax (VAT) purposes has issued a fake invoice showing VAT using the employer's identity as a taxable person, without that employer's knowledge or consent, that employee must be considered to be the person who enters the VAT, within the meaning of Article 203, unless that taxable person did not exercise the due diligence reasonably required to monitor the conduct of that employee.

[Signatures]

* Language of the case: Polish.