Case C-235/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

12 April 2021

Referring court:

Vrhovno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer:

17 March 2021

Appellant:

RAIFFEISEN LEASING, trgovina in leasing d. o. o.

Respondent:

Republika Slovenija

Subject matter of the main proceedings

Appeal in cassation in the context of contentious administrative proceedings; value added tax (VAT); Council Directive 2006/112/EC; characterisation of an immovable property financial leasing agreement as an invoice for the purposes of the declaration and deduction of VAT; essential information that the agreement must contain in order to be regarded as an invoice;

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law; Article 267 TFEU

Questions referred for a preliminary ruling

1. May a written agreement be regarded as an invoice, for the purposes of Article 203 of the VAT Directive, only if it contains all of the information that is required to be set out in an invoice in accordance with Chapter 3 (‘Invoicing’) [of Title XI] of the VAT Directive?

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In the event that that question is answered in the negative:

2. On the basis of what information and circumstances may a written agreement in any event be regarded (also) as an invoice giving rise to an obligation to pay VAT within the meaning of Article 203 of the VAT Directive?

More specifically:

3. May a written agreement, concluded by two taxable persons subject to VAT and concerning the supply of goods or services, be regarded as an invoice within the meaning of Article 203 of the VAT Directive if it evidences an express and objectively identifiable intention on the part of the seller or the provider of services, as a contracting party, to issue an invoice for a specific transaction, such that the purchaser could reasonably assume that it had, on the basis thereof, a right to deduct the input VAT paid?

Provisions of EU law cited

Council Directive 2006/112/EC, in particular Article 203, and Articles 63, 178, 218 and 226 to 230 thereof

Provisions of national law cited

Zakon o davku na dodano vrednost (Law on value added tax; 'the ZDDV-1'), Articles 67, 76 and 82 to 84.a thereof

Succinct presentation of the facts and procedure in the main proceedings

1 The appellant in cassation, the company Raiffeisen Leasing, d.o.o. ('Raiffeisen Leasing'), entered into a financial leasing agreement and a sale and purchase agreement relating to immovable property (a sale and lease back transaction) with the company RED, d.o.o. ('RED').

2 RED was the owner of land on which stood an old residential building, in Rožna Dolina. It wished to erect a new building there. For financing purposes, the parties agreed, in an immovable property financial leasing agreement concluded on 19 November 2007 ('the agreement'), that Raiffeisen Leasing would purchase the property from RED and that RED would then pay leasing instalments up to the value of the existing land and the new buildings (EUR 1 294 786.56). That agreement also stated an amount of value added tax ('VAT'), namely EUR 110 056.86.

3 Raiffeisen Leasing did not issue to RED any (specific) invoice on the basis of the agreement. Nor did it declare or pay VAT. RED exercised its right to deduct VAT on the basis of the agreement, as if the agreement itself had been an invoice, and reported the deduction in its VAT return.

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4 In that context, three days later, as agreed, the two companies concluded a sale and purchase agreement, dated 22 November 2007 (‘the sale agreement’), relating to the land and the old building. The two companies agreed upon a price inclusive of VAT and RED issued to Raiffeisen Leasing an invoice inclusive of VAT.

5 In November 2007, Raiffeisen Leasing, the appellant in cassation, exercised the right to deduct VAT on the basis of the sale agreement.

6 RED, however, failed to fulfil its obligations within the stipulated period and the agreement was terminated by mutual consent almost four years later, on 21 February 2011. Raiffeisen Leasing subsequently sold the property on to another purchaser, at a price inclusive of VAT.

7 On 25 July 2014, RED was served with a final decision refusing it the right to deduct VAT on the basis of the agreement.

8 In the course of a tax inspection procedure, it was established (in a first- and second-instance tax assessment) that Raiffeisen Leasing (1) ought to have accounted for VAT on the agreement and (2) should not have exercised the right of deduction on the basis of the sale agreement.

9 As regards (1): the Finančna uprava Republike Slovenije (tax authority of the Republic of Slovenia; ‘the tax authority’) based the liability to VAT on Article 76(1)(9) of the Zakon o davku na dodano vrednost (Law on value added tax; ‘the ZDDV-1’), which provides that ‘VAT is payable by any person who mentions VAT on an invoice’. In its opinion, the agreement, which set out a price inclusive of VAT, had substantially the content of an invoice and RED had become entitled, on the basis thereof, to exercise its right to deduct VAT. Consequently, an obligation to pay VAT also arose at that time.

10 The tax authority subsequently adopted a decision refusing RED the right to deduct VAT on the basis of the agreement. At that point, Raiffeisen Leasing accordingly acquired the right to reduce (correct) the VAT declaration, since the effect of the tax authority’s decision was that there was no longer a risk of loss of tax revenue. Prior to that, however, (from 3 January 2008 to 25 July 2014) there had been a period during which Raiffeisen Leasing was under an obligation, in the tax authority’s opinion, to declare the VAT, which it had failed to do. With reference to that intervening period, the tax authority applied interest on the tax debt amounting to EUR 50 571.88.

11 As regards (2): in the tax authority’s opinion, the transaction under the sale agreement was legally exempt from VAT pursuant to Article 44(7) of the ZDDV-1, which provides that ‘the supply of buildings or parts thereof, and of the land on which they stand, shall be exempt from VAT, unless the supply takes place before the buildings or parts thereof are occupied or otherwise used for the first time, or the supply takes place within two years of the date of first occupation or first use.’ The tax declaration under which a person may choose to render a transaction subject to VAT, in accordance with Article 45 of the ZDDV-1, was

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not submitted by the contracting parties to the tax authorities. Consequently, no right to deduct could be claimed, even though an invoice had been issued which (wrongly) stated an amount of VAT. The tax authority therefore assessed additional VAT of EUR 44 200.00, together with interest of EUR 11 841.97. In the tax authority's opinion, it was irrelevant that (once the agreement had been terminated) the property was sold on to another purchaser under a transaction subject to VAT. The transaction under the sale agreement was exempt from VAT, and subsequent events had no bearing on that.

12 In the course of administrative proceedings, the Ministry of Finance rejected the appellant's claim as unfounded and upheld the decision of the tax authority, as the authority of first instance.

13 Raiffeisen Leasing brought an action which was dismissed by the Upravno sodišče (Administrative Court) on grounds substantially identical to those set out in the decision of the tax authority and the decision of the Ministry of Finance, as the authority of second instance.

14 Raiffeisen Leasing then applied for leave to bring an appeal in cassation against the judgment of the Upravno sodišče (Administrative Court), which was partially granted by the Vrhovno sodišče (Supreme Court), which granted leave for the appeal in cassation by order of 20 May 2020, inter alia, for the purpose of resolving the following important legal issue: 'When may a bilateral arrangement (an agreement) be regarded as an invoice for the purposes of the [ZDDV-1] and the [VAT] Directive?' On that basis, Raiffeisen Leasing brought its appeal in cassation, on which the Vrhovno sodišče (Supreme Court) is now required to give its ruling.

The essential arguments of the parties in the main proceedings

15 The respondent, taking the view that the agreement in question also constituted an invoice, one in which VAT was stated, decided that the appellant was required to pay the VAT, in accordance with Article 76(9)(1) of the ZDDV-1, something which it had failed to do in the relevant tax year.

16 The important point is that the appellant did not regard the agreement in question as an invoice for the purposes of the ZDDV-1 and the VAT Directive, whereas the other contracting party, RED, used the agreement, or more precisely attempted to use the agreement, as an invoice, in order to make the VAT deduction.

17 The respondent's position was also held to be substantially correct by the Upravno sodišče (Administrative Court) in the judgment under appeal. In its appeal in cassation, the appellant once again disputes, by reasoned argument, the characterisation of the agreement as an invoice, from which its obligation to pay the VAT, in accordance with the legislative provision cited above, allegedly arose. It disputes that the agreement concluded may be regarded as an invoice, asserting that it did not contain all the information required to be set out in an invoice (in

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that neither the VAT rate was mentioned nor the date on which the supply of goods was to take place) and that the formal requirements were therefore not met which would have enabled the other contracting party, RED, to exercise the right to deduct input VAT, and so there was no risk of loss of tax revenue. In the appellant's submission, it merely undertook in the agreement to supply to its counterparty the immovable property, which it had not yet acquired at the time when it entered into the agreement (and which it acquired only three days later), and so the agreement did not, as such, give rise to the supply of immovable property. This shows that it was not the appellant's intention that the agreement should constitute an invoice, since, had it intended to issue an invoice, it would have issued one containing all the information prescribed by the ZDDV-1. The appellant therefore disputes the position taken by the respondent and the Upravno sodišče (Administrative Court) according to which the agreement may be regarded as an invoice simply because it mentioned the subject matter of the supply, the basis of assessment and the amount. In the appellant's submission, that position is arbitrary, inasmuch as it could imply that even an offer (agreement) in which only those items of information are stated could be regarded as an invoice (and thus as a basis for VAT liability).

Succinct presentation of the grounds for the request for a preliminary ruling

18 In the present case, the dispute persists only in so far as concerns the obligation to pay VAT on the basis of an invoice which is alleged to have been issued in the form of a written agreement concluded between the appellant in cassation, Raiffeisen Leasing, and the other party to the agreement, RED, on 19 November 2007, in which an amount of VAT was stated (EUR 110 056.86). The question which arises concerns the interpretation of when liability to pay VAT arises, and it arises from the fact that the issuer of the alleged invoice entered VAT on it, as provided for by Article 203 of the VAT Directive and Article 76(1)(9) of the ZDDV-1, which transposed the provision into Slovenian law in identical terms. The correct interpretation of the provision in question of the ZDDV-1 thus depends entirely on the correct interpretation of Article 203 of the VAT Directive.

19 That obligation, provided for by Article 203 of the VAT Directive, is, according to the case-law of the Court of Justice of the European Union ('the Court'), independent of the actual existence of a taxable transaction until such time as any possible deficiency is remedied in accordance with the conditions laid down in the directive (see, for example, the judgment of 31 January 2013, *LVK*, C-643/11, EU:C:2013:55). The purpose of that provision, in the context of guaranteeing the effectiveness and neutrality of the VAT system, is to prevent any risk of loss of tax revenue from arising where the addressee of an invoice in which VAT is incorrectly stated might still use it for the purpose of exercising the right of deduction (see, to that effect, the judgment of 18 June 2009, *Stadeco* (C-5[6]6/07, EU:C:2009:380, paragraph 29).

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20 In order for that obligation to pay VAT to arise it is therefore necessary for an invoice within the meaning of the VAT Directive and the ZDDV-1 to have been issued. If no such invoice has been issued, then no obligation to pay VAT can logically arise. Article 218 of the VAT Directive is relevant in this regard: it provides that, for the purposes of the directive, the Member States are to accept documents or messages on paper or in electronic form as invoices if they meet the conditions laid down in Chapter 3 ('Invoicing') [of Title XI]. Article 218 of the VAT Directive was transposed by Article 81(8) of the ZDDV-1.

21 The Vrhovno sodišče (Supreme Court) is nevertheless unsure whether a document that does not set out all the mandatory information that an invoice must include, in accordance with Articles 226 to 230 of the VAT Directive (Articles 82 to 84 of the ZDDV-1), can cause an obligation to pay VAT to arise for the party which issued that document. In other words, it is unsure what particulars may, in any event, constitute an invoice and trigger the obligation to pay VAT in accordance with Article 203 of the directive.

22 It is apparent from the Court's case-law that the VAT Directive allows the obligation under Article 203 to arise even where the invoice does not contain all the required information stipulated in Article 226 *et seq.* of the directive. According to the case-law to date, an obligation to pay VAT can arise as a result of the issue of an invoice which mentions VAT, even where the invoice does not contain some of the information required by the VAT Directive, for example, where the place of the supply of services to which the invoice relates is not mentioned, that information being irrelevant with regard to the question of whether the tax debt in question arises (judgment of 18 June 2009, *Stadeco* (C-5[6]6/07, EU:C:2009:380, paragraph 26 *et seq.*) That interpretation is also corroborated by the case-law of other Member States of the European Union (see, for example, the judgment of the Bundesfinanzhof (Federal Finance Court, Germany) of 17 February 2011, V R 39/09).

23 In addition, a literal interpretation of Article 203 of the VAT Directive suggests that the condition which must be fulfilled in order for the obligation to arise is the existence of an invoice on which VAT is entered. Article 203 does not expressly mention compliance with all the formal requirements for invoices, as is stipulated in Article 178(a) of the VAT Directive for the exercise of the right of deduction in respect of the supply of goods or services by another taxable person. A teleological interpretation produces the same result: the fact that the obligation arises (simply) from the issue of an invoice that mentions VAT, in accordance with Article 203 of the VAT Directive, is responsive to the risk of loss of tax revenue which could arise from the use of such a document as the basis for the exercise of the right of deduction by another taxable person. It would run counter to the objective of that provision if the issuer of such an invoice could escape the obligation simply by omitting to set out in the invoice one of the prescribed items of information. Indeed, the risk of loss of tax revenue already arises from the fact that the document contains the essential elements of a VAT invoice, and thus suggests to the recipient that he may rely on the document in order to deduct the

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input VAT mentioned in it (as expressly held by the Bundesfinanzhof (Federal Finance Court, Germany) in its judgment of 17 February 2011, V R 39/09, paragraph 24).

24 In order for the obligation to pay VAT to arise, on the basis that a particular person has issued an invoice, it does not therefore appear necessary that the invoice be expressly identified as such or that it contain all the information prescribed by the VAT Directive (for example, by Article 226 of the VAT Directive).

25 It therefore appears that the interpretation according to which, in order for the obligation referred to in Article 203 of the VAT Directive to arise, it is sufficient if the document evidences an express and objectively identifiable intention on the part of the issuer to issue an invoice for a specific transaction, such that the addressee could reasonably assume that it had a right to deduct the input VAT paid on the basis thereof, is the correct interpretation. The items of information which would generally permit that are an indication of the issuer and addressee of the invoice, a description of the transaction and a statement of the value of the supply of goods or services such as to give the amount of VAT payable by the addressee (see, to that effect, the judgment of the Bundesfinanzhof (Federal Finance Court, Germany) of 19 November 2014, V R 29/14). Other facts and circumstances may come into play, and these must be assessed on a case-by-case basis. In particular, account could be taken of other documents to which the document in question (the invoice) refers or which might otherwise relate to it (see, to that effect, the case-law of the Bundesfinanzhof (Federal Finance Court, Germany), for example, the judgment of 26 June 2019, XI R 5/18, ECLI:DE:BFH:2019:U.260619.XIR5.18.0, paragraph 28).

26 However, that interpretation calls, in the present case, for further clarification of the question of whether, and, if so, under what conditions, a written agreement between two contracting parties and relating to a transaction subject to VAT (such as a supply of goods or services) may be regarded as an invoice for the purposes of Article 203 of the VAT Directive.

27 It is necessary, in this connection, to start from the premiss that an agreement, representing a binding arrangement, may differ from an invoice in that it may simply constitute the legal basis for the transaction which is subject to VAT, and that, pursuant to the agreement, the supplier of goods or services must, in accordance with the VAT Directive (and the ZDDV-1), issue an invoice at the time when the chargeable event occurs (see, for example, Article 63 of the VAT Directive). Equally, the essential items of information which permit a document to be characterised as an invoice may coincide with the essential items of information that must appear in an agreement for the supply of goods or services (*essentialia negotii*). The mere fact that an agreement identifies the contracting parties, defines the subject matter of the agreement and states the contract value of the supply of goods or services as well as the amount of VAT does not, therefore, mean, in and of itself, that the agreement will always constitute an invoice, within

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the meaning of the VAT Directive and the ZDDV-1. Mentioning the amount of VAT in the agreement itself is in fact important in order to ensure the clarity of the contractual relationship and of the amount of the payment that is due, given that, if there is no specific indication of the obligation to pay a particular amount of VAT, it must, according to the case-law of the Slovenian courts, be deemed that VAT is included in the contract price stated.

28 In light of the foregoing considerations, the Vrhovno sodišče (Supreme Court) is unsure whether an agreement may constitute an invoice for the purposes of Article 203 of the VAT Directive only if it evidences an express and objectively identifiable intention on the part of the seller or the provider of services, as a contracting party, to issue an invoice for a specific transaction, such that the purchaser could reasonably assume that it had a right to deduct the input VAT paid on the basis thereof. Such a conclusion might be drawn on the basis of an express contractual term stating clearly the same (for example, a term stating that the agreement serves as an invoice) or possibly also where the circumstances of the transaction and the characteristics of the agreement itself are such that there is clear evidence that the issue of an invoice, as a separate document, was not provided for under the agreement. Consequently, in light of the foregoing, the Vrhovno sodišče (Supreme Court) questions whether it is right to interpret Article 203 of the directive as meaning that it is only in the cases mentioned that an agreement may be regarded (also) as a VAT invoice giving rise to an obligation to pay VAT, pursuant to Article 203 of the VAT Directive (Article 76(1)(9) of the ZDDV-1).

29 Since the answer to the question of whether the agreement at issue may be regarded as an invoice depends on the correct interpretation of Article 203 of the VAT Directive, the Vrhovno sodišče (Supreme Court), as the highest court in the Republic of Slovenia, is required to refer to the Court of Justice of the European Union a question on the interpretation of that directive.

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