Case C-247/21

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:

20 April 2021

Referring court or tribunal:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

8 April 2021

Appellant in the appeal on a point of law:

Luxury Trust Automobil GmbH

Defendant authority before the Verwaltungsgericht (Austria):

Finanzamt Österreich (Austrian Tax Office), Baden Mödling office

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Subject matter of the main proceedings

Common system of value added tax – Directive 2006/112 – Intra-Community acquisition of goods – Triangular transaction – Designation of the person to whom the supply is made as liable for payment of VAT – Mentions on the invoice – Amendment – Conditions – Retroactive effect – Invoicing – Applicable provisions

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is Article 42(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in conjunction with Article 197(1)(c) of that Directive (as amended by Council Directive 2010/45/EU of 13 July 2010) to be interpreted as meaning that the person to whom the supply is made is to be designated as liable for payment of VAT if the invoice, which

does not show the amount of value added tax, states: 'Exempt intra-Community triangular transaction'?

2. If the first question is answered in the negative:

   a) Can such a mention on the invoice be amended so as to apply retroactively (by stating: 'Intra-Community triangular transaction in accordance with Article 25 of the Austrian Law on turnover tax ('the UStG'). Liability for payment of VAT is transferred to the customer')?

   b) Is it necessary for the invoice recipient to receive the amended invoice in order for an amendment to be effective?

   c) Does the effect of the amendment apply retroactively to the original date of invoicing?

3. Is Article 219a of Directive 2006/112/EC (as amended by Council Directive 2010/45/EU of 13 July 2010 and the Corrigendum in OJ L 299/46 of 17 November 2010) to be interpreted as meaning that the rules on invoicing to be applied are those of the Member State whose provisions would be applicable if a 'customer' has not (yet) been designated on the invoice as the person liable for payment of VAT; or are the rules to be applied those of the Member State whose provisions would be applicable if the designation of the 'customer' as the person liable for payment of VAT is accepted as valid?

Provisions of EU law cited

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, in particular Articles 40, 41, 42, 141, 197, 219a Nos 11 and 11a

Provisions of national law cited

Bundesgesetz über die Besteuerung der Umsätze (Umsatzsteuergesetz 1994) (Austrian Law on turnover tax 1994, 'the UStG 1994'), in the version applicable in 2014 (Bundesgesetzblatt (Federal Law Gazette, 'the BGBl.') I No 112/2012)

Article 25

'Triangular transaction

Term

Article 25 (1) A triangular transaction occurs where three traders effect taxable transactions concerning the same goods in three different Member States, and these goods are sent directly by the first supplier to the end customer and the conditions set out in paragraph 3 are satisfied. That shall also apply where the end

customer is a legal entity that is not a trader or that is not acquiring the goods for its business.

Place of the intra-Community acquisition in the case of a triangular transaction

(2) The intra-Community acquisition within the meaning of the second sentence of Article 3(8) shall be deemed to be taxed when the trader (customer) proves that a triangular transaction has occurred and that it has complied with its obligations concerning the duty to declare under paragraph 6. If the trader does not comply with its duty to declare, the tax exemption shall be forfeited retroactively.

Tax exemption for intra-Community acquisition of goods

(3) The intra-Community acquisition shall be exempt from VAT where the following conditions are met:

a) the trader (customer) has no place of residence or registered office within the national territory but is identified for turnover tax purposes as being within the territory of the Community;

b) the acquisition is made with a view to a subsequent supply by the trader (customer) in the national territory to an trader or a legal entity identified for VAT purposes as being in the national territory;

c) the goods acquired originate from a Member State other than that in which the trader (customer) is identified for VAT purposes;

d) the power of disposal over the goods acquired is transferred by the first trader or first customer directly to the end customer (recipient);

e) in accordance with paragraph 5, the recipient is liable to pay the tax.

Issuing of invoice by the customer

(4) The issuing of the invoice shall be governed by the provisions of the Member State in which the customer operates its undertaking. If the supply is made from the customer's permanent establishment, the law of the Member State in which the establishment is situated shall be applicable. If the person to whom the supply is made to whom liability for payment of tax is transferred settles by means of a credit note, the issuance of the invoice shall be governed by the provisions of the Member State in which the supply is made.

Where the provisions of this federal law are applicable to the issuance of the invoice, the invoice must additionally contain the following details:

– an express reference to the existence of an intra-Community triangular transaction and the fact that the end customer is liable for payment of VAT,

– the VAT identification number under which the trader (customer) made the intra-Community acquisition and subsequent supply of the goods, and

– the VAT identification number of the person to whom the supply is made.

Person liable for payment of VAT

(5) In the case of a triangular transaction, the recipient of the taxable supply shall be liable to pay the tax where the invoice issued by the customer corresponds to paragraph 4.

Obligations of the customer

(6) In order to comply with the duty to declare under paragraph 2, the trader shall be required to provide the following details in the recapitulative statement:

– the VAT identification number in the national territory under which it made the intra-Community acquisition and subsequent supply of goods;

– the VAT identification number of the recipient of the subsequent supply by the trader, issued to it in the Member State of destination of the goods dispatched or transported;

– for each one of those recipients, the total consideration paid in respect of the supplies thus effected by the trader in the Member State of destination of the goods dispatched or transported. These amounts are to be stated in respect of the calendar quarter in which the tax liability arose.

Obligations of the recipient

(7) In calculating the tax under Article 20, the amount payable under subparagraph 5 is to be added to the amount ascertained.'

Article 3

'Place of intra-Community acquisition

(8) The intra-Community acquisition is made within the territory of the Member State in which the goods are located at the end of the transport or dispatch process. Where the customer uses a VAT identification number issued to him by another Member State in respect of the supplier, the acquisition shall be regarded as being made within the territory of that Member State until the customer proves that the acquisition has been subject to tax by the Member State referred to in the first sentence. In the case of such proof, Article 16 shall apply by analogy.'

Summary of the facts and proceedings

1 The appellant is an Austrian limited liability company with its registered office in Austria. Its business includes cross-border brokering and cross-border sales of luxury vehicles.

2 On multiple occasions in 2014, the appellant purchased vehicles from a supplier in the United Kingdom and sold them on to a company with its registered office in the Czech Republic ('M s.r.o.'). The three traders involved each acted under the VAT identification number (VAT ID) of their State of establishment. The vehicles arrived directly from the supplier in the United Kingdom to the recipient in the Czech Republic; the transport of the vehicles had been arranged by the appellant. The appellant's three invoices (each from March 2014) stated the Czech VAT ID of the recipient, the Austrian VAT ID of the appellant and the UK VAT ID of the supplier. Each of the invoices included the reference 'tax-exempt intra-Community triangular transaction'. Value added tax was not mentioned on the invoices (only the 'net amount of the invoice' in each case; similarly, as is apparent from the case documents, the purchasing agreements indicated only a 'net purchase price'). In the recapitulative statement for the month of March 2014, the appellant reported these supplies of goods in relation to the VAT ID of the Czech recipient and reported the existence of triangular transactions.

3 The Czech company M s.r.o. is classified by the Czech tax authorities as a 'missing trader'. The company could not be contacted by the Czech tax administration and it did not declare and pay VAT in the Czech Republic on the triangular transactions. During the period in which the supplies at issue were made, M s.r.o. was registered for VAT in the Czech Republic.

4 In its decision dated 25 April 2016, the Finanzamt (Austrian Tax Office) assessed the appellant's VAT for the year 2014. In the grounds of its decision, the Tax Office stated – with reference to a report on an audit by the tax authorities – that the three invoices issued by the appellant to the Czech company M s.r.o. did not contain any reference to the transfer of the tax liability (Article 25(4) of the UStG 1994). Therefore, it deems the transaction to be a 'failed triangular transaction' that cannot be remedied after the event. Due to the use of the Austrian VAT ID, an intra-Community acquisition in Austria was assumed to exist in accordance with Article 3(8) of the UStG 1994.

5 With the judgment under appeal before the Verwaltungsgerichtshof (Supreme Administrative Court), the Bundesfinanzgericht (Federal Finance Court) dismissed the action brought by the appellant against that decision.

6 In its statement of grounds, the Federal Finance Court added that the applicant had amended the three invoices by adding amendments dated 23 May 2016, making reference to the transfer of the tax liability to the person to whom the supply is made.

7 It stated that the provisions relating to triangular transactions are not mandatorily applicable in a set of circumstances as referred to in Article 25(1) of the UStG 1994. Rather, the customer (the intermediate trader in a triangular transaction) has the right to choose whether or not to apply the triangular transaction regime with respect to a particular supply. The right of option has to be exercised in accordance with the statutory requirements at the time of the transaction. If the customer wishes to obtain tax exemption for its intra-Community acquisition in the Member State of destination and to transfer the tax liability relating to its supply to the recipient, it must include in the invoice the details stipulated in Article 25(4) of the UStG 1994. The court deems that the issuing of invoices by the appellant proved to be defective, as the invoices in dispute lack a reference to the liability of the end customer for payment of VAT.

8 According to the court, if the customer's invoice does not fulfil the substantive requirements of Article 25(4) of the UStG 1994, the provisions of Article 25 of the UStG 1994 are not applicable. In that case, the chain transaction would have to be treated in accordance with the general rules.

9 The appellant had credibly shown that it had made amendments to the disputed outgoing invoices and then attempted to send them to the Czech company. Proof of actual service of the invoice amendments to the Czech company has not been established, however, with the result that the appellant did not discharge its burden of proof.

10 Therefore, in the absence of any amendment of the incorrect invoices, the court believes there is no need to examine the question further of whether a subsequent correction of an invoice makes it possible to benefit from the simplification rules for triangular transactions. In the present case, no tax was paid in the country of destination.

11 The court went on to state that, as the invoices did not contain any reference to the liability of the end customer for payment of VAT, the simplification rules for triangular transactions could not be applied; the turnover transactions were therefore to be assessed on the basis of the rules for chain transactions. Since the appellant used its Austrian VAT ID, it made an intra-Community acquisition in Austria. The acquisition is considered to have been made in Austria until the appellant establishes that the acquisition was taxed in the country of destination of the Czech Republic. This condition subsequent was not satisfied. Furthermore, the appellant was not entitled to an input tax deduction from the cumulative intra-Community acquisition.

Brief summary of the grounds for the reference

Question 1

12 In the present case, it is not disputed that this is a chain transaction, whereby the supply of the United Kingdom supplier is the 'active supply'. Accordingly, the appellant effected an intra-Community acquisition in the Czech Republic; this was followed by a 'passive supply' by the appellant in the Czech Republic to M s.r.o. Furthermore, in accordance with Article 3(8) of the UStG 1994, the intra-Community acquisition is also deemed to have been effected in Austria, since the appellant used the Austrian VAT ID. The appellant does not claim that the intra-Community acquisition or the subsequent passive supply was taxed in the Czech Republic.

13 The subject matter of the proceedings is the taxation applicable in Austria under Article 3(8) of the UStG 1994, in other words, the additional taxation of a (notional) intra-Community acquisition in respect of the use of the Austrian VAT ID. The appellant is financially burdened with this turnover tax because there is no right to input tax deduction (see Court of Justice of the European Union, 22 April 2010, *X and fiscale eenheid Facet-Facet Trading*, C-536/08 and C-539/08).

14 The intra-Community acquisition under Article 3(8) of the UStG 1994 is deemed to be taxed under Article 25(2) of the UStG 1994 if the trader (customer) proves that a triangular transaction exists and that it has complied with its duty to declare under Article 25(6) of the UStG 1994. The fact that the appellant complied with this duty to declare is not disputed in the present proceedings.

15 The existence of a triangular transaction is governed by Article 25(1) of the UStG 1994. Of the conditions stated therein, only the question of whether the conditions referred to in Article 25(3) of the UStG 1994 were fulfilled, is in dispute.

16 In accordance with Article 25(3) of the UStG 1994 (which itself governs situations in which the third participant in the triangular transaction – the 'recipient' – has its registered office in Austria), the intra-Community acquisition is, in particular, exempt from VAT only if the tax is payable by the recipient in accordance with Article 25(5) of the UStG 1994 (Article 25(3)(e) of the UStG 1994). In turn, under Article 25(5) of the UStG 1994, this requires that the invoice issued by the customer complies with paragraph 4.

17 In accordance with Article 25(4) of the UStG 1994, the invoice must contain, in particular, an express reference to the existence of an intra-Community triangular transaction and the liability of the end customer for payment of VAT.

18 The appellant's invoices did not fulfil this requirement, as, although they contained a reference to a triangular transaction, they did not include any reference to the liability of the end customer for payment of VAT. On this basis,

with the application of national law only, the fiction of taxation of the intra-Community acquisition in Austria would not have occurred.

19 Similarly, in accordance with Article 42 of the directive, Article 41(1) of the directive (according to which an intra-Community acquisition is also deemed to be within the territory of the Member State that issued the VAT identification number that was used) is also not applicable if, in particular, the person to whom the supply is made has been designated as having liability to pay VAT in accordance with Article 197 of the directive. To this extent, Article 197(1)(c) merely provides that the invoice must comply with Sections 3 to 5 of Chapter 3. The Supreme Administrative Court considers there to be a 'designation' as the person liable for payment of VAT in the sense of Article 42(1) of the directive if the invoice contains a mention such as that stated in Article 226(11a) ('Reverse charge').

20 However, the appellant's original invoices did not contain that very mention required by the directive ('Reverse charge').

21 The reference in the appellant's original invoices was apparently based on incorrectly confusing the reference to an 'exempted intra-Community supply' for the reference to a reverse charge in the context of a triangular transaction. In the recapitulative statement, however, the appellant formally and clearly identified the supplies as triangular transactions.

22 In accordance with recital 7 of Council Directive 2010/45/EU of 13 July 2010 amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing, certain requirements concerning the information to be provided on invoices should be amended to allow better control of the tax and to create a uniform treatment of cross-border supplies. This argues in favour of requiring strict compliance with the rules on invoicing, in particular the mention required by Article 226(11a) of the directive: 'Reverse charge', as a condition for obtaining the favourable treatment based on this (in this case, the application of the rules on triangular transactions).

23 The purpose of the invoice reference in triangular transactions is, in particular, to enable the end customer in an intra-Community triangular transaction to identify clearly and easily that the tax liability is transferred to it. This purpose could, if need be, also be fulfilled by the invoice reference in the present case, especially if account is taken of the fact that a VAT amount is not shown on the invoice, but the amount is expressly referred to as 'net amount of the invoice'. At most, it could also be taken into account that the tax revenue from such supplies belongs to the Member State in which final consumption occurs (in this case, not in Austria; see, to that effect, Court of Justice of the European Union, 27 September 2007, *Collée*, C-146/05, paragraph 37).

24 Against this background, it does not seem inconceivable that the mention on the original invoice could satisfy the conditions under EU law for designating the

recipient as the person liable for payment of VAT (see also Court of Justice of the European Union, 18 May 2017, *Litdana*, C-624/15, paragraph 21, where – although the Court itself did not give an opinion in this respect – a reference on an invoice that did not comply with the wording of the directive was not considered to preclude, in itself, the application of the special rules). In this case, however, the conditions would be met for the fictitious intra-Community acquisition to be deemed as taxed in Austria.

Question 2

25 If the answer to the first question is in the negative, the additional question arises as to whether such a mention on an invoice can be amended in a way that is deemed valid.

26 In its judgment of 19 April 2018 in Case C-580/16, *Firma Hans Bühler*, paragraph 49, the Court of Justice held that, while Article 42(a) of the directive specifies the basic condition required for an acquisition such as that at issue in the main proceedings [in this particular case] to be deemed to be subject to VAT in accordance with Article 40 of that directive, Article 42(b) of the VAT Directive specifies the manner in which proof of taxation in the Member State of destination […] must be adduced […]. These obligations must be regarded as being formal.

27 It follows that one of the substantive conditions laid down in Article 42(a) is the fact that the person to whom the supply is made has been designated in accordance with Article 197 of that directive as liable for payment of VAT. Article 141(e) of the directive also makes reference to this. This designation of the recipient as the person liable for payment of VAT is made on the invoice in accordance with Article 197(1)(c) of the directive.

28 In the context of the deduction of input tax, invoices must be regarded as formal requirements. Invoices may, as a general rule, be amended with retroactive effect to the year in which the invoice was originally prepared (see Court of Justice of the European Union, 15 September 2016, *Senatex*, C-518/14). Even if the value added tax is incorrectly invoiced, invoices may be amended if the person who issued the invoice shows that he or she acted in good faith or if the issuer of the invoice has, in sufficient time, wholly eliminated the risk of any loss of tax revenue (see Court of Justice of the European Union, 2 July 2020, *Terracult*, C-835/18, paragraphs 27 and 28).

29 However, the question arises as to whether such a possibility of amendment also exists in the light of a substantive condition. It should also be noted that the application of the rules on triangular transactions is not mandatory; taxable persons may also decide not to make use of the simplification measure (see the Opinion of the Advocate General in Case C-580/16, in particular footnote 15). Accordingly, an amendment of the invoice would not merely be a formal measure, but would result in the application of other rules (preferential triangular transaction instead of ordinary chain transaction). If the invoice could be validly

amended, however, the consequence of this could be that the fictitious intra-Community acquisition is also regarded as taxed in Austria.

30 In that context, the additional question that arises in the present proceedings is whether it is sufficient for the invoice issuer to amend that invoice and send it to the recipient or whether it is also necessary, for the purposes of making a valid amendment to an invoice, for that invoice to have been received by the recipient. Finally, it seems unknown whether, in such a situation – in keeping with the judgment in *Senatex* – an invoice amendment could be backdated to the original date of the invoice or would be effective only for the period in which the invoice was amended. Were that invoice amendment to have no retroactive effect, it would not be necessary to take into account an adjustment made in 2016 in the present proceedings relating to the 2014 turnover tax.

Question 3

Under Article 25(4) of the UStG 1994, invoicing is (as a general rule) governed by the provisions of the Member State from which the customer operates its business. In the present case, the customer (namely the appellant) operates its business from Austria, with the result that invoicing would have to be assessed under Austrian law in accordance with Article 25(4) of the UStG 1994.

31 However, the appellant claims that the VAT exemption of the intra-Community acquisition in the Czech Republic is not governed by Austrian law, but by the law of the Czech Republic. By way of derogation from Austrian law, under the law of the Czech Republic, liability for payment of VAT is transferred to the recipient (M s.r.o.), even if the invoice contains no reference to the transfer of liability for payment of VAT; in that regard, it is sufficient – as is apparent from the arguments set out above by the appellant – to indicate on the invoice that it concerns a triangular transaction (whether this submission relating to Czech law is correct has not yet been examined).

32 Under Article 42(a) of the directive, the provision on the notional intra-Community acquisition in Article 41(1) of the directive does not apply where, inter alia, the recipient has been designated in accordance with Article 197 as liable for payment of VAT . In turn, Article 197(1)(c) provides that the invoice must correspond to Sections 3 to 5 of Chapter 3.

33 In accordance with Article 219a No 1. of the directive (as amended by Directive 2010/45/EU and the Corrigendum of the German-language version in OJ L 299/46 of 17 November 2010), invoicing is, in principle, subject to the rules applying in the Member State in which the supply of goods or services is deemed to be made, in accordance with the provisions of Title V.

34 The invoice to be issued by the appellant relates to the ‘passive’ supply by the appellant to M s.r.o. As this takes place in the Czech Republic, Czech law would be applicable under this general rule.

35 However, under Article 219a No 2. of the directive, invoicing is subject to Austrian law under certain conditions, since the appellant as the supplier has established its business in Austria and not in the Czech Republic. In addition, however, this would also require that the VAT is payable by the 'customer'.

36 First of all, it must be assumed here that 'customer' in this situation does not mean the 'customer' within the meaning of Article 25 of the UStG 1994, namely the 'intermediate' participant (intermediary) in the triangular transaction, but the recipient of the performance (in the present case, therefore, M s.r.o.). In that regard, it should be noted, however, that M s.r.o. is not liable a priori to pay VAT, but only once it has been designated as the liable party; this designation is made in the invoice.

37 If the appellant's submission (the substance of which – as already mentioned – has not yet been examined) were well-founded, the mentions on the invoice could, under Czech law, result in the effective designation of the recipient as the person liable for payment of VAT. Under Article 219a No 2. of the directive, this would mean that the invoicing would be assessed under Austrian law, precisely because the recipient was effectively designated as the person liable for payment of VAT. Under Austrian law, however, the mere reference to a triangular transaction would not constitute an effective designation of the recipient as the person liable to pay VAT, meaning that Czech law would again have to be applied.

38 In order to break this 'logical roundabout', the law applicable to the invoicing could be determined according to what was the case before the invoice was issued (independently of this). According to this, the issuing of the invoice would be subject to Czech law. According to the appellant's submission, under Czech law there would be an effective designation of M s.r.o. as the person liable for payment of VAT. That could also mean that the fictitious intra-Community acquisition is therefore deemed to be taxed in Austria.

39 A similar point of law is addressed in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Under Article 3(5) of this regulation, the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13. Under Article 10(1) of this regulation, the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this regulation if the contract or term were valid.

40 Even if this regulation – as already follows from Article 1(1) of this regulation – does not apply 'in particular to revenue, customs or administrative matters', the idea behind this regulation could at least be applied by analogy to the point of law at issue here. Assuming that the designation of M s.r.o. as the person liable for payment of VAT is effective (which is exactly the appellant's assumption), the invoicing would, in accordance with Article 219a No 2. of the directive, have to be assessed under Austrian law. However, on the basis of Austrian law (only; see

the first question), the mention on the invoice does not fulfil the requirements for designating M s.r.o. as liable for payment of VAT. This could lead to the conclusion that the fictitious intra-Community acquisition is not regarded as taxed in Austria.