Case C-794/23

Request for a preliminary ruling

Date lodged:

21 December 2023

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

14 December 2023

Appellant on a point of law:

Finanzamt Österreich

Verwaltungsgerichtshof

EU 2023/0009-2
(Ro 2023/13/0014)
14 December 2023

The Verwaltungsgerichtshof (Supreme Administrative Court, Austria) […], in the appeal on a point of law brought by the Finanzamt Österreich (Tax Office, Austria – 'the tax office'), Niederösterreich Mitte office in the Neustadt district of Vienna, […] against the decision of the Bundesfinanzgericht (Federal Finance Court, Austria) of 27 January 2023 […] concerning, inter alia, 2019 value added tax (interested party: P GmbH in W, represented by LBG Burgenland Steuerberatung GmbH in […] Mattersburg) has made the following

O r d e r

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax to be interpreted as meaning that a taxable person who has supplied a service and mentioned in his invoice a VAT amount calculated on the basis of an incorrect tax rate is not liable, under that provision, for the part of the VAT invoiced incorrectly if the service mentioned on the

specific invoice in question was supplied to a non-taxable person, even if the taxable person has supplied similar services to other taxable persons?

2. Is 'final consumer who does not have a right to deduct input VAT' within the meaning of the judgment of the Court of Justice of the European Union of 8 December 2022 in Case C-378/21 to be understood as referring only to a non-taxable person or also to a taxable person using the specific service only for private purposes (or for other purposes not conferring the right to deduct input VAT) and therefore lacking the right to deduct input VAT?

3. In the event of simplified invoicing in accordance with Article 238 of Directive 2006/112/EC, what criteria are to be used to assess (possibly by way of an estimate) for which invoices the taxable person is not liable for the incorrectly invoiced amount because there is no risk of loss of tax revenue?

Statement of reasons:

1 A. Facts and proceedings to date

2 P GmbH is a limited liability company incorporated under Austrian law. It operates an indoor playground. In 2019, it subjected the admission fees to the indoor playground (the consideration paid for its services) to a rate of VAT of 20%. When its customers paid the consideration, it issued them with invoices (cash register receipts) which constituted small-value invoices under Paragraph 11(6) of the Umsatzsteuergesetz 1994 (Law on turnover tax 1994) (simplified invoicing under Article 238 of Directive2006/112/EC). P GmbH subsequently corrected its VAT return on the grounds that the reduced rate of 13% should be applied to the admission fees. P GmbH did not supply its services exclusively to non-taxable persons (non-traders).

3 By its assessment of 18 January 2021, the tax office determined VAT for the year 2019. In its statement of reasons, it explained that P GmbH had taxed revenue from admission to indoor playgrounds at 20%, that VAT having been mentioned on the receipts issued using the cash register. It stated that an a posteriori correction to the 20% VAT rate for 2019 was not permissible, because it was not possible either to correct the invoices or to pass on to customers the amounts credited as a result of the difference in VAT rates. Therefore, the tax office argued, it was necessary to require VAT of 20% on the grounds of the invoicing and on the grounds of unjust enrichment.

4 P GmbH brought an action against that assessment. It submitted that the services had been supplied 'practically exclusively' to private individuals not entitled to deduct input VAT and any risk of loss of tax revenue could therefore be ruled out. Consequently, it argued, the formal correction of invoices, with corrections passed on to the invoice recipients, was unnecessary.

5 By order of 21 June 2021, the Bundesfinanzgericht (Federal Finance Court) submitted a request for a preliminary ruling to the Court of Justice of the European Union.

6 In its judgment of 8 December 2022 in *Finanzamt Österreich*, C-378/21, the Court ruled as follows:

‘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.’

7 By the decision contested before the Verwaltungsgerichtshof (Supreme Administrative Court), the Bundesfinanzgericht amended the 2019 VAT assessment.

8 The Bundesfinanzgericht held that the services of P GmbH had been used ‘(almost) exclusively’ by customers who, as final consumers, could not exercise a right to deduct input VAT. It found that, apart from an estimate amounting to 0.5% of the total turnover attributable to the indoor leisure facility, there was no risk of loss of VAT revenue. It derived that finding from the declaration of the managing director of P GmbH, which stated that the recipients of P GmbH’s services in 2019 had only been final consumers not entitled to deduct input VAT. There had been no travel services or support services. However, as it could not be completely ruled out that customers of P GmbH may have (rightly or wrongly) deducted input VAT on the invoices, the Bundesfinanzgericht held that an estimate had to be made. Due to the overwhelming probability that the services of P GmbH had been supplied for the customers’ private use, the Bundesfinanzgericht estimated the tax liability that existed by virtue of invoicing at 0.5% of the total turnover. That, it stated, equated to approximately 112 invoices on which (rightly or wrongly) input VAT had been deducted (among a total of 22,557 invoices issued).

9 The appeal on a point of law brought by the tax office is directed against that decision. The tax office submits that the contested decision deviates from the case-law of the Court. It argues that the Court stated that a taxable person is not liable 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. A split by way of an estimate into final consumers on the one hand and taxable persons entitled to deduct input VAT on the other cannot, the tax office argues, be inferred from the judgment of the Court. The tax office submits that the Court examined the

question only in the light of the premiss that the service was supplied exclusively to final consumers who do not have the right to deduct input VAT.

10 B. Relevant provisions

11 1. National law

12 Paragraph 11 of the Umsatzsteuergesetz 1994 (Law on turnover tax 1994) in the version applicable in the dispute (Bundesgesetzblatt – Federal Law Gazette – I, No 13/2014) reads, in extract, as follows:

‘(1) 1. ‘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.’

[…]

(6) 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.

[…]

(12) 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.’

13 2. EU law

14 Article 193 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax reads as follows:

'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 199 and Article 202.'

15 Article 203 of the Directive reads as follows:

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

16 Article 220(1) of the Directive reads, in extract, 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;

[…]'

17 C. Explanation of the questions referred for a preliminary ruling

18 In the statement of reasons for its request for a preliminary ruling of 21 June 2021, the Bundesfinanzgericht explicitly stated that P GmbH's customers in 2019 'were exclusively final consumers who were not entitled to deduct input VAT'.

19 That factual finding on the part of the Bundesfinanzgericht has already been called into question within the framework of the preliminary ruling procedure (see, in particular, the Opinion of the Advocate General of 8 September 2022 in Case C-378/21, point 38 et seq.). In its judgment of 8 December 2022 in Case C-378/21, the Court did not address those considerations raised by the Advocate General. The Court noted in its judgment that the questions referred by the referring court were based on the premiss that there was no risk of loss of tax revenue, since the customers of P GmbH were exclusively final consumers who did not have a right to deduct the VAT invoiced to them by P GmbH. The Court pointed out that it would examine the first question 'only in the light of that premiss' (paragraph 18).

20 When the proceedings resumed, the Bundesfinanzgericht departed from that factual finding. It now finds that it cannot be ruled out that customers of P GmbH (rightly or wrongly) deducted input VAT. It has estimated the proportion of those customers at 0.5% of total turnover (or approximately 112 invoices among a total of 22,557 invoices).

21 Particularly in view of the fact that the Court's response in the previous preliminary ruling procedure was expressly based on all of P GmbH's customers

being final consumers not entitled to deduct input VAT, there are doubts as to what should apply if even a small proportion of P GmbH's customers were taxable persons (traders). The risk of a loss of tax revenue is therefore not ruled out (in any event and in its entirety).

22 It could be inferred from the above that, since a correction of the invoices was in fact not carried out (as the recipients of the service were not mentioned on the 'small-value invoices' and are therefore unknown), the risk of loss of overall tax revenue was not eliminated in time and in full, and P GmbH is therefore liable for the full amount of VAT mentioned on all the invoices.

23 The Advocate General observes that Article 203 of the Directive relates to the individual incorrect invoice. It could be inferred from that statement that there is a risk of loss of tax revenue only in respect of invoices issued to taxable persons (traders) (even if the recipient of the service is not mentioned on the invoice).

24 In the event that the individual incorrect invoice is decisive, there is also doubt as to what criteria should be used to identify (possibly by way of an estimate) those invoices where there is a risk of loss of tax revenue. In that context, it is unclear how the term 'final consumer who does not have a right to deduct input VAT' is to be understood. The question arises whether it refers to a final consumer in the sense only of a non-taxable person or also a taxable person using the specific service only for private purposes (or for other purposes not conferring the right to deduct input VAT) and therefore lacking the right to deduct input VAT.

25 The risk of loss of tax revenue where an excessive tax rate is entered – as is not disputed to have occurred in the present case – arises from the recipient of the service claiming an excessive amount of input VAT. That will primarily concern situations where taxable persons (traders) use the services of P GmbH as inputs for their own taxable services (for example – as suggested by the Advocate General in her Opinion, point 39 – a self-employed photographer selling photographs taken at the playground). If that occurs, there is a risk of the input VAT being claimed rightly in principle but wrongly in terms of the amount (because the level would be too high).

26 It can also, however, concern those situations where taxable persons (traders) use the services for private purposes or for other purposes not conferring the right to deduct input VAT (such as private photographs; traders visiting the park with their children) and are consequent also wrong in principle to deduct input VAT. The Verwaltungsgerichtshof considers that the nature of the service provided may be relevant in that regard. It is readily apparent, for example, that in respect of the services of an indoor playground, precisely because they will serve as inputs for professional services only in exceptional situations, even taxable persons receiving those services will wrongly claim input VAT for them – on erroneously applied grounds (and, in the present case, for an incorrect amount) – only in exceptional situations.

27 If, on the other hand, the recipient of the service is a non-taxable person, there will generally be no risk of the amount mentioned on the invoice being claimed (either in principle or relation to the amount).

28 However, it may also be necessary to take into account the fact that the invoices issued are ‘small-value invoices’, with the result, in particular, that the recipient of the service is not apparent from them. It would therefore be impossible to rule out that a taxable person who did not receive those services might make improper use of that invoice (regarding potential abuses, see the Opinion of the Advocate General of 21 September 2023 in Case C-442/22, point 2).

29 Overall, the interpretation of EU law in relation to those questions does not appear to be so obvious as to leave no scope for any reasonable doubt (see judgment of 4 October 2018, *Commission* v *French Republic*, C-416/17, paragraph 110).

30 The questions are therefore referred to the Court for a preliminary ruling pursuant to Article 267 TFEU.

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