

Case C-442/22**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:**

5 July 2022

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

26 May 2022

Appellant:

P Sp. z o.o.

Respondent:

Dyrektor Izby Administracji Skarbowej w Lublinie

Subject matter of the main proceedings

Appeal on a point of law to the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland, ‘the SAC’) against the judgment of the Wojewódzki Sąd Administracyjny (Regional Administrative Court) in Lublin, Poland, of 23 February 2018 dismissing the appeal by P Sp. z o.o. against the decision of the Dyrektor Izby Administracji Skarbowej (Director of the Tax Administration Chamber) in Lublin of 31 October 2017 upholding the decision of the Naczelnik Urzędu Skarbowego (Head of the Tax Office) in P. of 15 March 2017 that determined with respect to P Sp. z o.o. the amount of value added tax (‘VAT’) due for the period from January 2010 to April 2014 in connection with the practice of issuing fraudulent VAT invoices (not reflecting actual sales of goods) by an employee of the company.

Subject matter and legal basis of the request

Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the referring court refers questions to the Court in order to determine whether, in a

situation where an employee of a VAT taxable person has issued, without the knowledge and consent of that taxable person, a fraudulent invoice showing VAT, the person who enters the VAT on the invoice and who is thus liable to pay the VAT is to be considered, in the light of Article 203 of Council Directive 2006/112/EC, the taxable person whose details were unlawfully used in that invoice, or the employee who unlawfully entered VAT on that invoice using the details of the VAT taxable person that was his or her employer. The significance of the employer's failure to exercise due diligence in supervising the employee. Strict liability.

Questions referred for a preliminary ruling

1. Must 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) ... 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 and 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 aforementioned Council Directive 2006/112/EC, 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?

Provisions of European Union law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), Article 203:

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

Provisions of national law relied on

Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Law of 11 March 2004 on the Tax on Goods and Services, Dziennik Ustaw (Journal of Laws) of 2011, No 177, item 1054, as amended, ‘the Law on VAT’), Article 108(1):

‘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.’

Succinct presentation of the facts and procedure in the main proceedings

- 1 From 2001 to 2015, the appellant – the company P Sp. z o.o. – was in the business of selling fuel, property development, publishing and leasing commercial space. It kept full accounts and was registered as a VAT taxable person with an average of 14 employees and one person working under a contract of mandate.
- 2 As a result of a cross audit conducted by the Tax Office, it was determined that between January 2010 and April 2014, the appellant company issued 1 679 fraudulent VAT invoices (not reflecting actual sales of goods) for a total VAT amount of PLN 1 497 847 to entities that subsequently accounted for the VAT shown in those invoices in their tax settlements. The fraudulent invoices were not recorded in the appellant company’s sales register, and the output VAT shown therein was neither paid to the central budget nor accounted for by the appellant company.
- 3 The issuance of the fraudulent invoices was linked to actual sales made at a petrol station, which were recorded by the appellant company using cash registers. To that end, copies of the fraudulent VAT invoices were accompanied by cash register receipts actually related to transactions carried out with entities other than those indicated in the VAT invoices.
- 4 As a result of the findings of the tax audit, the chair of the board of the appellant company conducted an internal investigation into the matter, which revealed that the fraudulent VAT invoices had been issued and sold by P.K., an employee of the company, without the knowledge or consent of the company’s board.
- 5 P.K. was employed as the manager of a petrol station owned by the appellant company from 25 November 2005 until 24 May 2014, when her employment was terminated on the grounds of misconduct under Article 52 of the Labour Code. Her duties included operating the cash register, making out invoices and preparing documents for the chief accountant.
- 6 According to P.K.’s statements, from 2010 she issued summary invoices for receipts collected by employees of the petrol station she managed. The receipts were found in rubbish bins, and all the employees who collected them benefited financially. The receipts for each invoice, segregated by year, were kept in the boiler room, which was meant to ensure that the invoices issued were not fraudulent, and the entire practice was not meant to cause damage to the appellant company. The fraudulent invoices were saved on a computer in the office, in a file that was invisible until unlocked. P.K. issued those invoices in a format which differed from that of the correct invoices, and did so only when her deputy was absent. She did not print copies of the invoices so as not to create a paper trail;

since they were invoices that accompanied cash register receipts, she did not submit them to the accounting department either. She used the details of the appellant company, indicating it as the issuer of the invoice and using its tax identification number. The invoices bore P.K.'s signature and stamp, and from 2014 a computer-generated signature with no stamp. All the cooperating employees received financial benefits. They received sums equivalent to the amount of fuel indicated in the provided receipts that were used to issue the fraudulent invoices.

- 7 As a result of the findings of the audit, the Head of the Tax Office in P. issued a decision determining, with respect to the appellant company, the amount of VAT due in connection with the practice of issuing fraudulent invoices between January 2010 and April 2014.
- 8 In appeal proceedings, the Dyrektor Izby Skarbowej (Director of the Tax Chamber) in Warsaw upheld that decision by way of a decision of 31 October 2017.
- 9 On the basis of the established facts, both tax authorities found, and the parties did not deny, that the fraudulent invoices documented supplies of goods and services that had not been actually made. Those invoices simulated actual transactions for the purpose of obtaining undue tax refunds. The tax authorities found that the employer had failed to exercise due diligence in preventing the issuance of the fraudulent VAT invoices. P.K. did not possess a precisely defined written job description. Her broad responsibilities included the issuance of VAT invoices for receipts outside the BOS computer system in Excel format without the employer's additional approval. Since the chair of the appellant company's board of directors was aware that invoices which accompanied receipts were issued at the petrol station, without accounting checks, he could and should have foreseen that this facilitated the issuance of fraudulent invoices. It was due to the lack of proper supervision and organisation that the chair of the company only discovered the practice in question after a cross audit conducted by the tax authority.
- 10 According to the tax authorities, P.K. was not a third party in relation to the appellant company. She was the manager of a petrol station owned by that company, an employee who was authorised to issue invoices and who was in charge of a team of other employees.
- 11 Furthermore, the authorities found that despite the measures taken to exclude the counterparties who used the fraudulent VAT invoices from settlements, the loss of tax revenue was not prevented in a timely manner, and therefore Article 108(1) of the Law on VAT was applicable to the case.
- 12 In its judgment of 23 February 2018, the Regional Administrative Court dismissed the appellant company's appeal against the decision of the Director of the Tax Administration Chamber in Lublin, accepting the arguments of the appeal body.

- 13 Pursuant to Article 173(1) of the Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi (Law of 30 August 2002 on Proceedings before Administrative Courts, Dziennik Ustaw (Journal of Laws) of 2019, item 2325, as amended), the appellant company lodged an appeal on a point of law against the above judgment.

Essential arguments of the parties in the main proceedings

- 14 In its appeal on a point of law, the appellant company alleges:

1. An infringement of Article 108(1) through its misapplication, in that:

(a) it was not the legal person (the appellant company) that issued the invoices, but rather an individual – the company’s employee – in order to facilitate unlawful tax deductions by the entities she cooperated with. In so doing, she acted as a third party, outside the legal relationship between her and her employer and outside the scope of her authority to issue invoices to ‘eligible persons’. She indicated the appellant company in the invoices without its knowledge or consent.

(b) the entities indicated as the recipients of the invoices were obliged to refund the amount of tax resulting from the understatement of their tax liabilities, and thus no tax revenue was lost. However, the primary purpose of Article 203 of Directive 2006/112/EC and Article 108(1) of the Law on VAT, which transposes that provision into Polish law, is to prevent the loss of tax revenue through the unlawful deduction of tax shown in an invoice by its recipient; it is not to introduce a penalty aimed at imposing an obligation on the taxable person to pay a certain amount as a result of a fraudulent invoice having been issued without its knowledge and consent.

2. An infringement of Article 108(1) through its misinterpretation, since in the judgment it is held:

(a) that ‘to consider the employer not liable for the above would have the effect of entrepreneurs shifting that liability to the state, which is unacceptable’. The correct literal interpretation of that provision, however, is that where the legal person (employer) is not liable, liability is not shifted to the Treasury – the liability for issuing fraudulent invoices lies with the individual who actually issued them.

(b) that an unlawful act by an employee, who used her employer’s details, identified the employer as the issuer of the invoice and thus exceeded her authority to issue VAT invoices to ‘eligible persons’, constitutes the issuance of an invoice by the legal person. The appellant company did not, however, grant its employee express or implied consent to pursue such unlawful practices, which is a necessary prerequisite for the company to be held liable under that provision.

(c) that for a legal person to be held liable under that provision it is sufficient that its governing body could have learned of the unlawful actions of its employee owing to the fact that they took place over a long period of time. In order for that provision to be applicable, however, it is necessary that the governing body of the legal person be actually aware of, and approve of, the practice of issuing fraudulent invoices. Any negligence with respect to supervision on the part of the board of directors of a legal person and inadvertently allowing a company employee to engage in criminal practices resulting in a loss of Treasury revenue, may only provide the basis for that legal person's liability for damages under separate provisions.

- 15 The respondent maintains the position presented at earlier stages of the proceedings.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 16 In the view of the Supreme Administrative Court, to resolve this appeal on a point of law requires an answer from the Court of Justice of the European Union to the question concerning the interpretation and rules of application of Article 203 of Directive 2006/112/EC, which was transposed into Polish law by Article 108(1) of the Law on VAT.
- 17 The dispute between the parties to the proceedings boils down to the question of whether, in a situation in which an employee of a VAT taxable person issued a fraudulent VAT invoice without the knowledge and consent of that taxable person, it is the taxable person whose details were unlawfully used in the invoice, or rather the employee who unlawfully entered the VAT on the invoice using the details of the VAT taxable person, who should be considered the person who has entered the VAT on the invoice and is thus liable to pay the VAT in the light of Article 203 of Directive 2006/112/EC.
- 18 In cases with facts similar to those in the present case, national administrative courts have taken two different positions regarding the interpretation of the above provision.
- 19 According to the first position, 'there are no grounds for considering the employee who is guilty of issuing the disputed invoices to be liable for the tax, since the provision refers to the person who is indicated in the invoice as its issuer, namely the person making the sale' (see, for instance, the judgment of the Supreme Administrative Court of 10 April 2013, Ref. No I FSK 362/12). The proponents of this view point to the role played by the employee who issues the invoices. Due to the employment relationship and the powers granted to such an employee, his or her participation in the fraudulent invoicing practices cannot be ignored. The entrepreneur bears the risk of running its business, choosing its employees and controlling the performance of their duties. To consider the employer not liable in that regard would have the effect of shifting the liability for conducting its

business to the state, which cannot be accepted. That is the position taken by the court of first instance in the present case.

- 20 On the other hand, the proponents of the second position argue that an entity whose details were unlawfully used in the invoice and which was unlawfully ‘impersonated’ by another entity is not the issuer of the invoice who is obliged to pay tax under Article 108(1) of the Law on VAT. This also applies to situations where the details of a VAT taxable person have been used unlawfully (see the judgment of the Supreme Administrative Court of 27 June 2017, Ref. No I FSK 1459/15), for it is accepted that the interpretation of Article 108(1) of the Law on VAT cannot result in the obligation to pay the tax shown on the invoice being imposed on an entity that had nothing to do with issuing that invoice. The provision in question indicates that the entity that ‘issues the invoice’ rather than the entity whose details have been entered on the invoice as the issuer’s details is liable to pay the tax.

In other words, if as a result of an unlawful act by another person, an entity that was not aware of the invoice being issued, did not consent to it being issued, did not actually issue it, did not order it to be issued, and did not use it in any legal relationships, is indicated in the invoice as its issuer, that entity cannot be considered the issuer of the invoice within the meaning of Article 108(1) of the Law on VAT.

- 21 If the first position is adopted, namely that the entity entering the VAT on the invoice in those circumstances, and thus the entity liable to pay tax under Article 203 of Directive 2006/112/EC, is the entity indicated in the invoice as its issuer, even where an employee deceives their employer, who is unaware of the practice of issuing fraudulent invoices, an answer is required to the question of whether that entity is liable for the issuance of the fraudulent invoices on a strict basis (that is, solely on the basis that the person employed by it issued the invoice) or whether it is liable on a fault basis (that is, on the basis of its failure to exercise due diligence in the organisation of its enterprise, including with respect to entrusting its employees with invoicing tasks). In the latter case, the employer could free itself from liability if no failure to exercise due diligence could be attributed to it. The question then becomes whether, in such circumstances, no one will be obliged to pay the VAT unlawfully entered on the invoice, or whether liability will pass to the employee who unlawfully entered that VAT.
- 22 On the other hand, to consider that the person who entered the VAT on the invoice and is thus liable to pay the tax is the person (employee) who actually entered the VAT on the invoice, using the employer’s details without its knowledge and consent, raises the risk that the obligation set out in Article 203 of the directive will not be performed due to that person’s financial situation. There is no doubt, however, that it was that person who actually entered the VAT on the unlawfully issued invoice. For that reason, such a person, as is also the case here, usually has criminal charges brought against them, which demonstrates that the law enforcement authorities attribute liability to the person who is the actual issuer of

the VAT invoice rather than the taxable person whose details that person unlawfully used. This would also suggest that likewise on tax grounds, it is the person (employee) who actually commits tax fraud by issuing a fraudulent invoice showing VAT that is obliged to pay the tax under Article 203 of Directive 2006/112/EC rather than the entity whose details that person used without its knowledge.

WORKING DOCUMENT