

Case C-378/21

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:

21 June 2021

Referring court:

Bundesfinanzgericht (Austria)

Date of the decision to refer:

21 June 2021

Appellant:

P GmbH

Respondent:

Finanzamt Austria

Subject matter of the main proceedings

Value added tax – Payment of VAT by final consumers – Invoice correction – Unidentifiable final consumer – Enrichment

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Questions referred for a preliminary ruling

1. Is VAT payable by the issuer of the invoice under Article 203 of the VAT Directive if, as in the present case, there may be no risk of loss of tax revenue, because the recipients of the services are final consumers who are not entitled to the right of deduction?

2. If the first question is answered in the affirmative and VAT is payable by the issuer of an invoice under Article 203 of the VAT Directive:

- a. Can the correction of invoices in respect of the recipients of services be precluded if, on the one hand, a risk of loss of tax revenue is excluded and, on the other, the correction of invoices is effectively impossible?
- b. Does the fact that final consumers have borne the tax as part of the consideration, thereby enriching the taxable person by correcting the VAT, preclude the correction of the VAT?

Provisions of European Union law relied on

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive')

Provisions of national law and case-law relied on

Bundesgesetz über die Besteuerung der Umsätze (Umsatzsteuergesetz 1994 – UStG 1994) (Federal law on turnover tax (Turnover tax 1994 – UStG 1994; 'UStG 1994')) Paragraphs 11(1), (4), (5), (6) and (12) and Paragraph 16(1)

Paragraph 11(6) provides:

'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 supplier;
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.

...'

Paragraph 11(12) provides:

'If the trader has, in an invoice for a supply of goods or services, stated separately an amount of tax for which he is not liable under this federal law for the transaction, he shall be liable for the amount stated in the invoice if he does not adjust 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.'

Bundesgesetz über allgemeine Bestimmungen und das Verfahren für die von den Abgabenbehörden des Bundes, der Länder und Gemeinden verwalteten Abgaben (Bundesabgabenordnung – BAO) (Federal Act on General Provisions and the Procedure for Taxes Administered by the Federal, *Land* and Local Tax Authorities (Federal Tax Code)), Paragraph 239a

Bundesgesetz, mit dem Bestimmungen über Preise für Sachgüter und Leistungen getroffen werden (Preisgesetz 1992) (Federal Act Making Provisions on Prices for Goods and Services (Prices Act 1992)), Paragraph 7.

Succinct presentation of the facts and procedure in the main proceedings

- 1 P GmbH is a limited liability company under Austrian law which operates an indoor playground.
- 2 The 20% standard rate of VAT was charged for the admission fees to the indoor playground in 2019. Cash register receipts were issued in each case, which are small-value invoices under Paragraph 11(6) of the Austrian law on turnover tax. In fact, however, a 13% reduced rate of tax should have been applied.
- 3 The customers of P GmbH are exclusively final consumers, who do not have a right of deduction.
- 4 P GmbH corrected its annual VAT return for the year 2019 in order to be credited for the overpaid VAT. That credit was refused by the Finanzamt ('the Tax Office') because the higher VAT is payable as a result of accounting for the individual invoices without correction and because P GmbH would enrich itself with a correction as the customers had paid the VAT.

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

- 5 It is clear that the tickets issued by P GmbH for the payment of the admission fees are invoices within the meaning of the VAT Directive. They are simplified invoices under Article 238 read in conjunction with Article 226b of the directive. They give rise to a liability for payment of VAT under accounting rules under Paragraph 11(12) of UStG 1994.
- 6 The customers of P GmbH are exclusively final consumers without a right of deduction. The question therefore arises whether Article 203 of the VAT Directive can be applied, as in this case there cannot be a threat to tax revenue due to the deduction of input tax by the recipient of the supply.
- 7 A correction of invoices is, in principle, possible in Austria, but the corrected invoices must be sent to the person to whom the supply is made. That is not possible in the present case, as the final consumers are no longer identifiable.

- 8 In Austria, the view has been taken that a change in VAT, especially if there is no danger to tax revenue and an invoice correction is technically or factually impracticable, should also be possible without an invoice correction. However, this is countered by the argument that taxable persons are not obliged to issue invoices in transactions with consumers. If this had not been done, the invoices would not now have to be corrected.
- 9 The question also arises whether, in a case such as that described, the invoice correction can be precluded in relation to the recipients of the services.
- 10 In the present case, the VAT for the admission fees was ultimately paid by the customers, not by P GmbH. If P GmbH were to receive money back from the state by correcting the VAT, that would constitute an enrichment of P GmbH.
- 11 Austrian national law provides that, where taxes and duties are omitted, the prices are to be reduced by those amounts.
- 12 The Tax Office also based its refusal of VAT correction on the consequent enrichment of P GmbH. The case-law of the Court of Justice in Cases C-191/12 and C-309/06 also appears to support that interpretation.
- 13 The question thus arises as to whether a VAT correction is precluded where the final consumers have borne the tax as part of the consideration and so enriching the trader by the correction of the VAT.