Case C-622/23

Request for a preliminary ruling

Date lodged:

10 October 2023

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

25 September 2023

Applicant:

rhtb: projekt gmbh

Defendant:

Parkring 14-16 Immobilienverwertung GmbH

The Oberster Gerichtshof (Supreme Court, Austria), as the court of appeal on points of law […] in the case of the applicant rhtb: projekt gmbh, […] 1220 Wien, […] against the defendant Parkring 14-16 Immobilienverwertung GmbH, […] 1010 Wien, […] concerning EUR 1,540,820.10 […], in the proceedings of the applicant's appeal on a point of law against the judgment of the Oberlandesgerichts Wien (Higher Regional Court, Vienna), hearing the case on appeal, of 28 December 2022, GZ 5 R 143/22v, 5 R 144/22s-66, amending the judgment of the Handelsgerichts Wien (Commercial Court, Vienna) of 30 June 2022, GZ 22 Cg 24/20b-51, […] has issued the following

O r d e r

1. The following question shall be referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Must Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax read in conjunction with Article 73 of that directive be interpreted as meaning that the amount which a customer owes to a contractor even where the work has not been (fully) carried out, but the contractor was ready to provide the service and, through circumstances attributable to the

customer (for example, cancellation of the work), was prevented from doing so, is subject to VAT?

2. […] [Stay of proceedings]

Grounds

A. Facts

[1] At the end of March 2018, a works contract was concluded between the parties (both being limited companies) whereby the applicant, as the contractor, was to carry out drywall construction work for the defendant, as the customer, as part of a building project. The agreed remuneration for the work was EUR 5,377,399.69, including VAT at 20% of EUR 896,233.28.

[2] After the applicant had begun the work, the defendant informed the applicant at the end of June 2018 that it no longer wished to use the applicant's services.

[3] The background to the termination of the work was that the defendant's managing director lost patience with the applicant's managing director and he had also received a more favourable offer from the other undertaking.

[4] On 19.12.2018, the applicant submitted a final invoice (contractual claim for unjustified cancellation of the works), amounting, after addition of 20% VAT and deduction of s 3% security deposit, to EUR 1,607,.695.07.

[5] As a result of the cancellation, the applicant saved on costs

- in materials, equipment and bought-in services of EUR 1,362,979
- in wages of EUR 1,578,591
- in building finance interest (1%) of EUR 42,584 and
- in project-related risk of EUR 21,292,

amounting to a total of EUR 3,005,446.

B. Arguments of the parties

[6] The **applicant** seeks payment of EUR 1,540,820.10. It argues that it is not responsible for the termination of the works contract. Therefore, under Paragraph 1168 of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code, 'the ABGB'), it is, in principle, entitled to full payment for the works. After deduction of savings, it is entitled to EUR 1,252,995 net, or EUR 1,503,594 gross, for the unjustified termination of the contract. To this are to be added

EUR 37,226.10 for works services already provided minus payments already received. The amount which is the subject of the action is calculated from the sum of the gross amount owed because of the unjustified termination of the contract and outstanding wages.

[7] The **defendant** disputes the formation of a works contract. It contends that the applicant has already received appropriate payment for the improperly provided drywall construction work. There can be no question of a right to further remuneration pursuant to Paragraph 1168 of the ABGB.

C. Procedure to date

[8] The **court of first instance** granted the application. It confirmed the existence of a works contract. The defendant unjustifiably cancelled the contract. Although the performance of the work remained partly unfinished, the applicant was therefore entitled to payment for the work minus the resulting savings under Paragraph 1168(1) of the ABGB. Without providing any further explanation, the court of first instance also awarded to the applicant the VAT of EUR 250,599 contained in the amount which is the subject of the action in respect of the services which, though no longer being provided, are to be remunerated pursuant to Paragraph 1168 of the ABGB.

[9] The **appeal court** varied the judgment of the court of first instance in that it upheld the application amounting to EUR 1,290,221.10 […] and dismissed the remainder of the application seeking payment of EUR 250,599 […]. It ruled that a works contract had been formed. Remuneration is payable under the first sentence of Paragraph 1168(1) of the ABGB where, in spite of the contractor's readiness to provide the service, the performance of the work remains ultimately unfinished owing to circumstances attributable to the customer. Although the contractor must be ready at the time to provide the service, the contractor's obligation to perform the service expires upon the cancellation of the service ex nunc. The reduced right to remuneration from the customer is not in consideration for a service provided by the contractor and (in the absence of an exchange of services) is also not subject to VAT. The VAT contained in the claimed amount is EUR 250,599. To that extent, the application must be dismissed.

[10] The matter was brought by both parties before the **Supreme Court** which**,** by order of today, rejected the **defendant's plea on a point of law**, in which the defendant continued to dispute the existence of a works contract between the parties, essentially on the ground that the assessment of the lower courts that the works contract was formed is not in need of correction. That legal assessment must therefore be assumed for the remainder of the proceedings.

[11] The **Supreme Court** still now has to rule on **the applicant's plea on a point of law**, essentially seeking reinstatement of the judgment at first instance, on the ground that it is also entitled to VAT in respect of the claim under

paragraph 1168 of the ABGB, because that claim is subject to VAT on the basis of specific considerations of EU law.

D. Applicable EU law

[12] Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p 1, 'the Directive') provides that *'the supply of services for consideration within the territory of a Member State by a taxable person acting as such'*, is subject to VAT.

Article 9(1) of the Directive provides:

'"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.'

[14] Article 24(1) of the Directive provides:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods.'

[15] Article 73 of the Directive provides:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

E. National law

E. 1. Civil law

[16] Paragraph 1168 of the ABGB contains provisions on the works contract to be assessed in the present case. The first sentence of the first subparagraph of that paragraph reads as follows:

'Where the performance of the work remains unfinished, the contractor shall, however, be entitled to the agreed remuneration, if the contractor was ready to provide the service and, through circumstances attributable to the customer, was prevented from doing so; the contractor must, however, deduct what it has saved

or what it has acquired through other use or intentionally failed to acquire as a result of the discontinuance of the work.'

According to the settled case-law of the Supreme Court, the contractor has no right to perform or complete the work. The customer, on the other hand, can, if it wishes, prevent the commencement, continuation or completion of the work (RS0021809; see also RS0021831; RS0025771). In the present case, this means that the defendant's express refusal in June 2018 to make further use of the applicant's services results in the performance of the (still outstanding) work (ultimately) remaining unfinished and therefore in the applicability of the cited provision. The cancellation of the work results (as a further legal consequence) in the premature termination of the contractual relationship. Upon the cancellation of the work, the contractor's obligation to (further) carry out the work ceases, without the contractor needing to withdraw (7 Ob 43/14w; 8 Ob 131/17y). The right to remuneration under the first sentence of Paragraph 1168(1) of the ABGB is a right to consideration and not a right to compensation (RS0021875).

E.2. Tax law

Under Paragraph 1(1)(1) of the Umsatzsteuergesetz (Law on turnover tax, 'the UStG'), supplies and other services carried out for consideration within the country by an operator in the course of his business are subject to VAT. The charge to tax is not excluded because the transaction is effected on the basis of a legal or administrative act or is to be regarded under a legal provision as effected.

[18] There is no (Supreme Court) case-law on whether the 'consideration' to be paid in this case under the first sentence of Paragraph 1168(1) of the ABGB is subject to VAT under Paragraph 1(1)(1) of the UStG.

[19] The view mainly held in the legal literature is that the remuneration under the second sentence of Paragraph 1168(1) of the ABGB at issue is precluded (not by any actual service, but) by the entitled claimant's mere readiness to provide the service which, in the absence of any other circumstances, is not, in principle, subject to VAT […].

[20] The guidance addressed only to the tax authorities of the Austrian Bundesministeriums für Finanzen (Federal Ministry of Finance) of 4.11.2015, BMF-010219/0414-VI/4/2015 ('UStR 2000'), provides, in paragraph 15 thereof, that payments which a contracting party (generally the purchaser) must make owing to its premature withdrawal from the contract are not subject to VAT.

F. Statement of reasons for the request for a preliminary ruling

[21] F.1. As stated in E.2., according to the view prevailing in Austria, the claim asserted in the action is not subject to VAT and therefore the applicant's appeal on a point of law (which only concerns the VAT contained in the application) is unjustified.

[22] F.2. In the light of the more recent case-law of the Court of Justice of the European Union on situations similar to that in the present case, there are, however, doubts as to whether the prevailing Austrian view is compatible with EU law.

[23] F.2.1. In *Air-France v KLM* C-250/14 and *Hop!-Brit Air SAS* C-289/14 (ECLI:EU:C:2015:841) the Court of Justice of the European Union ruled, by judgment of 23 December 2015, that Article 2(1) and Article 10(2) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 1999/59/EC of 17 June 1999, then by Council Directive 2001/115/EC of 20 December 2001, must be interpreted as meaning that the issue by an airline company of tickets is subject to value added tax where the tickets issued have not been used by passengers and the latter are unable to obtain a refund for those tickets.

[24] F.2.2. In *Meo – Serviços de Comunicações e Multimedia* C-295/17 (ECLI:EU:C:2018:942), the Court of Justice of the European Union ruled, by judgment of 22 November 2018, that

1. Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the predetermined amount received by an economic operator where a contract for the supply of services with a minimum commitment period is terminated early by its customer or for a reason attributable to the customer, which corresponds to the amount that the operator would have received during that period in the absence of such termination – a matter which it is for the referring court to determine – must be regarded as the remuneration for a supply of services for consideration and subject, as such, to value added tax.

2. The fact that the objective of the lump sum is to discourage customers from not observing the minimum commitment period and to make good the damage that the operator suffers in the event of failure to observe that period, the fact that the remuneration received by a commercial agent for the conclusion of contracts stipulating a minimum period of commitment is higher than that provided for under contracts which do not stipulate such a period, and the fact that the amount invoiced is classified under national law as a penalty, are not decisive for classifying the amount predetermined in the services contract which the customer is liable to pay in the event of early termination.

[25] F.2.3. In *Vodafone Portugal* C-43/19 (ECLI:EU:C:2020:465), the European Court of Justice ruled, by judgment of 11 June 2020, that Article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that amounts received by an economic operator in the event of early termination, for reasons specific to the customer, of a services contract requiring compliance with a tie-in period in exchange for granting that customer advantageous commercial conditions, must

be considered to constitute the remuneration for a supply of services for consideration, within the meaning of that provision.

[26] F.3. The cited decisions of the Court of Justice of the European Union have in common with the present case that they concerned an amount of money which constituted the remuneration for an originally agreed service provided for in a contract and which is (at least partly) payable even where the service is not used for reasons attributable to the buyer (purchaser, customer).

[27] This suggests that the 'remuneration' in accordance with the first sentence of Paragraph 1168(1) of the ABGB at issue here is also subject to VAT.

[28] F.4. However, the situations resulting in the cited decisions of the Court of Justice of the European Union differ from the situation in this case, as follows:

[29] F.4.1. In *Air-France v KLM* C-250/14 and *Hop!-Brit Air SAS* C-289/14 (ECLLEU:C:2015:841), the respective airline still owed its customer the air service at the time of its booked departure or during the period of validity of the flight ticket. The service (which was for a specific flight or was owed only within a specific period of validity) could not be provided by the airline only because the customer was in default of acceptance as a result of the passenger not turning up or not cancelling the service during the ticket's period of validity.

[30] In the present case, however, the applicant contractor no longer owed the (outstanding) service once it had been cancelled by the defendant customer (see E.1.). Even if liability to VAT must be assessed, in principle, irrespective of the existence and validity of an underlying contractual relationship […], it is doubtful from an objective standpoint in view of the termination of the contractual relationship – notwithstanding the use of the term 'remuneration' in the first sentence of Paragraph 1168(1) of the ABGB – whether the requirement that there be a direct link between the consideration received and the service provided is fulfilled (see judgment of the Court of Justice in *Meo – Serviços de Comunicações e Multimedia* C-295/17 [ECLI:EU:C:2018:942] paragraph 39 et seq.) and, therefore, whether the applicant contractor is still a 'supplier' and the defendant customer is still a 'customer' within the meaning of Article 73 of the Directive.

[31] F.4.2. The cases *Meo – Serviços de Comunicações e Multimedia* C-295/17 (ECLI:EU:C:2018:942) and *Vodafone Portugal* C-43/19 (ECLI:EU:C:2020:465) related to continuing obligations (whereas the present case concerns a works contract establishing a fixed-term obligation).

[32] It is also clear from both decisions that, although the amount to be paid in the event of the customer's early termination of a service contract with a tie-in period is still, to a certain extent, remunerative, 'the termination of the contract during the tie-in period justifies an amount by way of compensation, in order to recover the costs associated with the terminal subsidies, the installation and activation of the service or other promotional conditions' (C-43/19, paragraph 24) or 'to make good the damage that the operator suffers in the event of failure to

observe that period, […] the remuneration received by a commercial agent for the conclusion of contracts stipulating a minimum period of commitment is higher than that provided for under contracts which do not stipulate such a period' (C-295/17, second answer).

[33] Remuneration of that kind is not applicable to the claim under the first sentence of Paragraph 1168(1) of the ABGB at issue in the present case.

G. […] [Stay of proceedings]

[…]

Vienna, 25 September 2023

[…]