Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
of 19 December 2024[1]

Case C-794/23

Finanzamt Österreich
v
P GmbH

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Reference for a preliminary ruling – Value added tax (VAT) – Services – Incorrect, overstated VAT mentioned on invoices – Invoices issued to non-taxable persons who do not have a right to deduct input tax – Liability for the risk of loss of tax revenue – Identification of invoices posing a risk of loss of tax revenue – Procedural autonomy of the Member States – Burden of proof – Power of financial authorities to make estimates – Criteria for an appropriate estimate)

I. Introduction

1. These proceedings demonstrate that it is sometimes preferable, in the interests of procedural economy, for the Court of Justice to go beyond answering the question expressly asked and attempt to resolve the apparent underlying problem, even if the referring court has not expressly raised it.

2. Following an initial reference for a preliminary ruling, the Court ruled that an invoice for a visit to an indoor playground issued to a final consumer does not give rise to a tax liability if the invoice shows an amount of VAT that is incorrect and too high.[2] In such a case, there was no risk of a loss of tax revenue from an unjustified deduction of input VAT by those customers. However, since the possibility cannot be ruled out that the large number of visitors to the playground might have included a taxable person (entrepreneur) – which means that there could in fact be a risk of loss of tax revenue – the question arises as to how to distinguish between those two situations. That question is all the more apposite given that service-providing undertakings generally do not record the identities of customers – of whom there are more than 20 000 in the present case – in the course of everyday mass trade.

[1] Original language: German.

[2] Judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968).

3. However, since that issue was addressed only in the Opinion,[3] but not in the judgment, the Court is now being asked by the court of next instance in the same national proceedings, how and according to what criteria the two situations are to be distinguished.

II. Legislative framework

A. European Union law

4. The EU legislative framework is laid down in Directive 2006/112/EC on the common system of value added tax ('the VAT directive').[4]

5. Article 193 of the VAT Directive defines who is liable for that tax:

'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 199b and Article 202.'

6. Article 168 of the VAT Directive concerns the scope of the right of deduction and reads as follows:

'In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

(a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person; …'

7. Article 203 of the VAT Directive governs the tax liability resulting from the entering of VAT on an invoice.

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

8. Article 220(1) of the VAT Directive governs the obligation to issue invoices:

'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;

…'

[3] Opinion of Advocate General Kokott in *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:657).

[4] Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) in the version applicable to the year at issue (2019), as most recently amended in that respect by Council Directive (EU) 2018/2057 of 20 December 2018 (OJ 2018 L 329, p. 3).

B. Austrian law

9. Point 1 of Paragraph 11(1) of the Bundesgesetzes über die Besteuerung der Umsätze (Umsatzsteuergesetz 1994 (1994 Federal law on turnover tax); 'the UStG 1994') governs the obligation to issue invoices:

'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.'

10. Paragraph 11(6) of the UStG concerns small-value invoices and provides as follows:

'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.'

11. Paragraph 11(12) of the UStG 1994 concerns tax liability in cases where the tax mentioned on the invoice cannot be justified; that provision reads as follows:

'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 adjust that invoice accordingly in respect of the recipient of the supply of goods or services. In the case of adjustment, Paragraph 16(1) shall apply *mutatis mutandis*.'

III. Facts and preliminary ruling procedure

12. P GmbH is a limited liability company incorporated under Austrian law. It operates an indoor playground. In the year at issue, 2019, P GmbH applied the Austrian standard rate of VAT of 20% to the consideration paid for its services (admission fees to the indoor playground). However, in the year at issue, 2019, those services of P GmbH were subject to the reduced rate of tax of 13% (one of the reduced rates – as provided for in Article 98(1) of the VAT Directive – applicable in Austria in the year at issue).

13. P GmbH issued cash register receipts to its customers when they paid the consideration, which are small-value invoices under Paragraph 11(6) of the UStG 1994 (simplified invoices under Article 238 of the VAT Directive, read in conjunction with Article 226b thereof). P GmbH issued a total of 22 557 invoices in the year at issue, 2019. P GmbH corrected its annual VAT return for the year 2019 in order to be credited for the overpaid VAT by the Finanzamt (Tax Office, Austria; 'the Tax Office'). The Tax Office refused to issue a refund on the grounds that P GmbH had not corrected the invoices and, furthermore, would have been unjustly enriched by a refund of tax that was not legally due.

14. P GmbH brought an action against that decision. The Bundesfinanzgericht (Federal Finance Court, Austria), seised of the action, referred the two questions to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU. In that respect, the Court answered only the first question, holding that Article 203 of the VAT Directive must be interpreted as meaning that a taxable person who has supplied a service and who has stated on the invoice an amount of 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.[5]

15. By the decision now being contested before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the Bundesfinanzgericht (Federal Finance Court) amended the 2019 VAT assessment. The Bundesfinanzgericht (Federal Finance Court) 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. 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 (Federal Finance Court) held that an estimate had to be made. Due to the overwhelming probability that the services supplied by P GmbH were for customers' private use, the Bundesfinanzgericht (Federal Finance Court) 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).

16. The Tax Office lodged an appeal on a point of law (*Revision*) against that decision. It submits that the judgment under appeal deviates from the Court's case-law. It cannot be inferred from the Court's judgment that there has been a split by way of an estimate into final consumers and taxable persons entitled to deduct input VAT.

17. Given 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, in the opinion of the referring court, doubts as to what should apply if even a small proportion of P GmbH's customers were taxable persons. The risk of a loss of tax revenue is therefore not ruled out (in any event not entirely).

[5] Judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968, paragraph 25).

18. In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice under Article 267 TFEU:

'(1) Is Article 203 of the VAT Directive 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 [the VAT Directive], 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?'

19. In the proceedings before the Court of Justice, the Republic of Austria, the Federal Republic of Germany, Portugal and the European Commission submitted written observations. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, the Court did not consider it necessary to hold a hearing.

IV. Legal assessment

A. The questions referred for a preliminary ruling and the course of the investigation

20. The first two questions essentially concern the interpretation of Article 203 of the VAT Directive and the existence of a tax liability resulting from an incorrectly drawn up invoice (mentioning a VAT amount that is too high) and can be answered quite simply (see B below).

21. The third question relates to the issue that is decisive in practice: How should a large number of incorrect invoices (in the present case, a total of 22 557) be dealt with in cases where it can be assumed, based on the type of service, that the vast majority were issued to non-taxable final consumers? Since only invoices issued to taxable persons can pose a risk of loss of tax revenue, it is therefore necessary to clarify the criteria for identifying such invoices. It is only in those circumstances that tax liability may arise under Article 203 of the VAT Directive.

22. Whereas the first request for a preliminary ruling was still based on an assumption that the customers were exclusively final consumers, the second request for a preliminary ruling is based on the fact that a proportion of the invoices were, in any event, also issued to taxable persons who may, on the basis of those invoices, have claimed an input tax deduction that was too high. Following its request for a preliminary ruling, the court of first instance – possibly on the basis of

my Opinion[6] – estimated that proportion (0.5%) and established that there was a tax liability under Article 203 of the VAT Directive for approximately 112 of the 22 557 invoices. The referring court is now seeking to ascertain the criteria to be applied under EU law for the purposes of making such an estimate (see C below).

B. The first and second questions (tax liability under Article 203 of the VAT Directive)

23. The fact that the tax liability under Article 203 of the VAT Directive relates also to VAT which has been separately stated incorrectly (in an excessive amount) on small-value invoices does not appear to be in dispute. That is in line with the Court of Justice's case-law concerning the purpose of Article 203 of the VAT Directive. The purpose of that article is to eliminate the risk of loss of tax revenue which might be entailed by an unjustified deduction being claimed by the recipient of an invoice on the basis of that invoice.[7]

24. It is true that the right to deduct may be exercised only in respect of taxes corresponding to a transaction subject to VAT.[8] However, there is a risk of loss of tax revenue as long as the addressee of an invoice incorrectly mentioning VAT could still use it to exercise the right of deduction under Article 168 of the VAT Directive.[9] That is because it cannot be ruled out that the tax authorities will not be able to determine in good time whether or not substantive considerations preclude the exercise of the formally existing right of deduction.

25. Thus, in cases where VAT is stated incorrectly (in an excessive amount), Article 203 of the VAT Directive seeks a comparable parallelism between the deduction by the *recipient* of the invoice and the tax liability of the *issuer* of the invoice, as would normally exist in the case of a correct invoice between the supplier and the recipient of the supply.[10] According to the wording of Article 203 of the VAT Directive, it is not necessary that a deduction has been made by the recipient of the invoice. It is sufficient that there is a risk of such a deduction being made. Whether the deduction is justified or not is in principle irrelevant.

26. In that regard, Article 203 establishes a strict liability offence. Hence, invoices (including small-value invoices) are covered only if they are issued to a taxable person. This is because, as is apparent from Article 168 of the VAT Directive, it is only taxable persons who have a formal (potential) entitlement to deduct input VAT.

27. However, the specific extent to which a taxable person is entitled to deduct input VAT is, by contrast, a substantive question and depends, for example, on the use of the purchased service. Nonetheless, the type of use does not affect the (abstract) possibility of input VAT deduction and hence also the strict liability under Article 203 of the VAT Directive.

6 Opinion of Advocate General Kokott in *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:657, paragraph 41), in which I had already mentioned the possibility of an estimate.

7 See, expressly, judgments of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968, paragraph 20); of 18 March 2021, *P (fuel cards)* (C-48/20, EU:C:2021:215, paragraph 27); of 8 May 2019, *EN.SA.* (C-712/17, EU:C:2019:374, paragraph 32); of 11 April 2013, *Rusedespred* (C-138/12, EU:C:2013:233, paragraph 24); of 31 January 2013, *Stroy trans* (C-642/11, EU:C:2013:54, paragraph 32); of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraph 35 and 36); and of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 28 et seq.).

8 Judgment of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 13).

9 See, expressly, judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 28 et seq.), with references to the judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 57). See also judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968, paragraph 21).

10 See also, in that respect, my Opinion in *EN.SA.* (C-712/17, EU:C:2019:35, paragraph 31 et seq.), and in *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:657, paragraph 32).

28. Thus, as the Commission asserts, and contrary to the views expressed by Germany and Austria in their written observations, Article 203 of the VAT Directive also covers invoices issued to taxable persons who are not substantively entitled to deduct input VAT on account of the fact that the services are used for private purposes. The same applies to services rendered to taxable persons who, by reason of their tax-exempt output transactions, are not substantively entitled to deduct input VAT.

29. That interpretation is consistent in so far as it relates solely to the status of the invoice recipient (taxable person or non-taxable person). Moreover, it takes into account the nature of Article 203 of the VAT Directive as a strict liability offence. In both cases, as the Court has already pointed out,[11] it cannot be ruled out that the tax authorities will not be able to determine in good time whether there are substantive considerations which preclude a taxable person from exercising the formal right of deduction.

30. I have already explained in detail[12] that – as Germany also argues in contrast to Austria – it is not possible to infer any 'infection effect' from one invoice to another from Article 203 of the VAT Directive. Even if a certain risk cannot be ruled out in individual cases – because the invoice could also have been issued to a taxable person[13] – that does not mean that the tax liability under Article 203 of the VAT Directive then extends to all (in the present case 22 557) invoices.

31. Such a concept of 'infection' is alien to VAT law. The tax liability under Article 203 of the VAT Directive relates – as the Commission also rightly emphasises – to incorrect individual invoices. Moreover, such an 'infection effect' would also be problematic in the light of the principle of proportionality.

32. The first and second questions can therefore be answered as follows. A person (in this case, P GmbH) is not liable for VAT under Article 203 of the VAT Directive in respect of the incorrect invoices it has issued to non-taxable persons, even if it has issued further incorrect invoices to other taxable persons (irrespective of whether they are substantively entitled to deduct input VAT in full, in part or not at all) in relation to which it is then liable for the tax under Article 203 of the VAT Directive.

C. Tax liability under Article 203 of the VAT Directive where a risk of loss of tax revenue cannot be ruled out (third question)

1. General remarks

33. As previously explained, the tax liability under Article 203 of the VAT Directive relates to individual, incorrect invoices issued to taxable persons. The question now concerns 'only' how those invoices are to be identified among a large number of invoices, especially if – as in the present case involving a mass business – the identities of the recipients of the invoices are unknown. Ultimately, it is a question of the burden of allegation and proof in tax proceedings. There are no specific provisions addressing that issue in the VAT Directive. Even Article 273 of

[11] See, expressly, judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 29), with references to the judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 57).

[12] My Opinion in *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:657, paragraph 38 et seq.).

[13] I refer to my example in my Opinion in *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:657, paragraph 39): A self-employed photographer visits that indoor playground with his son to take photographs that he later uses as advertising in his studio.

the VAT Directive (the power of the Member States to introduce further obligations to ensure correct collection and prevent evasion) does not – contrary to what Portugal appears to suggest in its written observations – allow for the inference of any requirements in that regard.

34. However, a closer examination of the VAT Directive reveals that, in particular cases, the directive does allow certain trivial matters to be disregarded. By way of example, under Article 173(2)(e) of the VAT Directive, for the purpose of determining the appropriate input tax deduction apportionment (proportional deduction), insignificant amounts can be treated as nil. Even if that provision is not relevant to the present case, it nevertheless demonstrates that the VAT Directive adopts an assumption that insignificant amounts can potentially be treated as nil when questions arise as to how large numbers of transactions are to be divided into various subtypes. It is likely that assumption also has its basis in the principle of proportionality.

2. Procedural autonomy of the Member States

35. Ultimately, the precise method for identifying invoices posing a risk of loss of tax revenue and those for which such a risk is ruled out remains, however, a question of the burden of allegation and proof under the tax procedure of the respective Member State.

36. In the absence of a corresponding provision in the VAT Directive, the framing of the rules governing the burden of presenting the facts of the claim and the burden of proof falls – as both Germany and the Commission emphasise – within the competence of the Member States (principle of procedural autonomy).[14] However, the specific details of the rules governing the burden of presenting the facts of the claim and the burden of proof must not be less favourable than those in similar domestic situations (principle of equivalence). There are no indications suggesting that that is the case, even though, unfortunately, Austria did not comment on that point in its observations.

37. Furthermore, the detailed rules must not be framed in such a way as to make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).[15] Within the scope of application of the VAT Directive, the latter also means that the Member States are obliged, when exercising that power to frame the rules governing the burden of presenting the facts of the claim and the burden of proof, to comply with EU law and its general principles and, in particular, the principles of proportionality and fiscal neutrality.[16]

38. Administrative procedure under public law (which includes tax law) is usually characterised by the inquisitorial principle. That means that, in principle, the tax authorities carry out an *ex officio* investigation of the facts. In tax law, that is generally supplemented by various duties of cooperation on the part of the taxable person. The less the taxable person complies with its duties of cooperation, the more limited the scope of the Tax Office's duty to investigate.

[14] Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 35); of 6 November 2003, *Karageorgou and Others* (C-78/02 to C-80/02, EU:C:2003:604, paragraph 49); of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 49); and of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 18), on comparable situations regarding the correction of invoices.

[15] Judgments of 9 September 2021, *GE Auto Service Leasing* (C-294/20, EU:C:2021:723, paragraph 59); of 16 July 2020, *UR (VAT liability of lawyers)* (C-424/19, EU:C:2020:581, paragraph 25); of 4 March 2020, *Telecom Italia* (C-34/19, EU:C:2020:148, paragraph 58); of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 54); of 24 October 2013, *Rafinăria Steaua Română* (C-431/12, EU:C:2013:686, paragraph 20); of 21 January 2010, *Alstom Power Hydro* (C-472/08, EU:C:2010:32, paragraph 17); and of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraph 24).

[16] In that sense, see also: judgments of 16 May 2024, *Slovenské Energetické Strojárne* (C-746/22, EU:C:2024:403, paragraph 51 et seq.); of 29 February 2024, *Consortium Remi Group* (C-314/22, EU:C:2024:183, paragraph 84 et seq.); and of 13 October 2022, *HUMDA* (C-397/21, EU:C:2022:790, paragraph 39 et seq.).

However, there is nothing in (either of) the requests for a preliminary ruling that suggests that P GmbH could be accused of having failed, in any way, to fulfil its duties in the present case, which means, in principle, that it is the responsibility of the tax authorities to investigate the facts.

39. If the facts of a case cannot be clarified with sufficient certainty, the rules on the objective burden of proof apply. According to those rules, the Tax Office will normally bear the objective burden of proving facts justifying taxation or an increase in taxation, provided that the taxable person has fulfilled its duties of cooperation, whereas the inability to prove facts justifying a reduced level of taxation operates to the detriment of the taxable person.

40. If, however, incorrect invoices issued to non-taxable persons do not give rise to a tax liability under Article 203 of the VAT Directive, because there is no risk of loss of tax revenue,[17] then it is only incorrect invoices issued to taxable persons that can give rise to a tax liability under Article 203 of the VAT Directive.

41. Consequently, in order to conclude that there is a tax liability under Article 203 of the VAT Directive, the tax authorities must, in principle, determine how many invoices were issued to taxable persons for visiting an indoor playground. However, since tax law is characterised by the administration of very large numbers of transactions, taxable persons and administrative acts (referred to as 'mass procedures'), it is quite common in the Member States[18] for the tax authorities to be authorised to estimate the tax bases in cases where they cannot be determined.

3. Power of the tax authorities to make estimates and EU law

42. As the Commission has also rightly emphasised, EU law does not preclude the making of estimates. However, that power to make estimates must be exercised in compliance with the principles of fiscal neutrality and proportionality.[19]

43. With regard to an estimate of a taxable person's turnover, the Court of Justice has held that[20] 'the VAT Directive and the principles of fiscal neutrality and proportionality must be interpreted as not precluding national legislation …, which authorises tax authorities, in the event of serious differences between declared revenue and revenue estimated on the basis of sector studies, to use extrapolation … in order to determine the amount of turnover achieved by a taxable person'.

44. That is nothing more than an estimate of turnover made because the taxable person's turnover declaration was not credible from the point of view of the tax authority. However, as the Court goes on to explain, that is possible only provided that 'that legislation and its application enable the taxable person, in compliance with the principles of fiscal neutrality, proportionality and the right of defence, to challenge the results obtained by that method, on the basis of all of the evidence to the contrary available to him'.

[17] Judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968).

[18] In Germany, Paragraph 162(1) of the Abgabenordnung (Tax Code) expressly confers upon Member States the power to make an estimate. In Italy, Articles 62-sexies (3) and 62-bis of Decreto legge (Legislative Decree) No 331/93, converted into the Law No 427 of 29 October 1993, allows the overall turnover of an undertaking to be determined by extrapolation (that is, by estimation). In Austria, Paragraph 184 of the Bundesabgabenordnung (Federal Tax Code) provides for a corresponding power to make estimates.

[19] Judgment of 21 November 2018, *Fontana* (C-648/16, EU:C:2018:932, paragraph 37) citing the judgment of 5 October 2016, *Maya Marinova* (C-576/15, EU:C:2016:740, paragraph 44).

[20] Judgment of 21 November 2018, *Fontana* (C-648/16, EU:C:2018:932, paragraph 46).

45. The principle of proportionality prevents the objective (tax collection based on strict liability) from justifying the means (estimation based on an assumption that all invoices were issued to taxable persons).

46. In that respect, the entire context of the case – in the present case, the fact that customers of an indoor playground are only rarely taxable persons within the meaning of VAT law – are of decisive importance. As the Court has already stated, an estimate of turnover must be correct, reliable and up to date.[21] The same applies to estimating the proportion of invoices which pose a possible risk of loss. The estimate must reflect the reality of life and general life experience; for that reason, an estimate of 50%, for example, would appear disproportionate in the present case.

47. The common system of VAT ensures 'complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT.'[22] Consequently, the principle of neutrality under VAT law requires that the undertaking – as a tax collector on behalf of the State – must be exempted in principle from the final burden of VAT,[23] provided that the business activity itself serves (in principle) to realise taxable transactions.[24] That is the situation in the present case.

48. Where incorrectly drawn up invoices mention a VAT amount that is too high, compliance with the principle of neutrality is ensured by the possibility, to be provided for by the Member States, of correcting any tax improperly invoiced, provided that the issuer of the invoice demonstrates that it acted in good faith or where it has, in sufficient time, wholly eliminated the risk of any loss of tax revenue.[25] However, the foregoing would be undermined by an excessive estimate. In a case such as the present one, where general life experience indicates that there will be relatively few taxable persons among the customers of P GmbH, it therefore follows from the principle of neutrality and the principle of proportionality that the tax authorities must also make cautious estimates only.

49. Thus, as the Bundesfinanzgericht (Federal Finance Court) correctly acknowledged in its contested decision – specific criteria for estimating the proportion of invoices that pose a risk of loss of tax revenue can be derived from the type of service and typical customers. In cases involving services that are usually used by taxable persons, a more generous estimate can be made if the issuer of the invoice is unable to provide evidence demonstrating why a certain percentage of the invoices were issued to non-taxable persons. In cases involving services such as those rendered in the present case, which are predominantly provided to non-taxable persons, a more cautious estimate must be made if the tax authorities cannot provide evidence demonstrating why a proportion of the invoices were nevertheless issued to taxable persons.

[21] Judgment of 21 November 2018, *Fontana* (C-648/16, EU:C:2018:932, paragraph 42 – although the Court of Justice uses the wording 'calculate that turnover by extrapolation', that is, in my view, nothing other than a description of an estimate).

[22] Judgments of 28 February 2018, *Imofloresmira – Investimentos Imobiliários* (C-672/16, EU:C:2018:134, paragraph 38); of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 3 March 2005, *Fini H* (C-32/03, EU:C:2005:128, paragraph 25 and the case-law cited therein); and of 14 February 1985, *Rompelman* (268/83, EU:C:1985:74, paragraph 19).

[23] Settled case-law; see, for example, judgments of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 25); and of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 39).

[24] See the judgments of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 51); of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 57); and my Opinion in *Di Maura* (C-246/16, EU:C:2017:440, paragraph 42).

[25] Judgment of 2 July 2020, *Terracult* (C-835/18, EU:C:2020:520, paragraph 28); and of 8 May 2019, *EN.SA.* (C-712/17, EU:C:2019:374, paragraph 33); of 31 January 2013, *LVK* (C-643/11, EU:C:2013:55, paragraph 37); of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 37); of 6 November 2003, *Karageorgou and Others* (C-78/02 to C-80/02, EU:C:2003:604, paragraph 50); and of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 58).

50. It is possible that a subsequently collected random sample – whereby, during the course of a day, all visitors are asked whether they are registered as taxable persons under VAT law – could also serve as evidence to support such an estimate. However, it ultimately amounts to an assessment of the facts and evidence of the specific case, which is a matter for the national court. The assumption made by the Bundesfinanzgericht (Federal Finance Court) in the judgment under appeal, according to which only 0.5% of the services were provided to taxable persons, is, at least in my opinion, not far-fetched and nor does it appear disproportionate.

51. It would also be conceivable to apply a 'safety margin' (for example 5%) in order to rule out any possible risk of loss of tax revenue. However, that safety margin would then also have to factor in the question of who caused the risk 'to be safeguarded against'. More specifically, if the error made in drawing up the invoice was based on incorrect statements made by the tax authorities themselves, or if it resulted from an amendment to case-law that was made only subsequently, it therefore follows that the error, and hence the possible risk of loss of tax revenue, did not fall within the invoice issuer's domain of responsibility. Since the invoice issuer acts only as a collector of a third-party tax on behalf of the State – as the Court correctly describes the situation – it would be inappropriate to apply a safety margin under such circumstances. If, on the other hand, the trader made an error in determining the correct rate of taxation, then the risk of loss of tax revenue could certainly be taken into account by applying a safety margin in the course of making the estimate.

V. Conclusion

52. In the light of the foregoing considerations, I propose that the Court of Justice answer the questions referred by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) as follows:

(1) A person is not liable for value added tax under Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax for the incorrect invoices it has issued to non-taxable persons, even if it has issued further incorrect invoices to other taxable persons, for which it is then liable for the tax under that article. If necessary, the proportion of such invoices is to be determined by means of an estimate.

(2) In that regard, the criteria for estimating the proportion of invoices that pose a risk of loss of tax revenue can be derived from the type of service and typical customers. Similarly, the circumstances giving rise to the error and the way in which the issuer of the invoice was involved in establishing the facts may be relevant criteria in that estimation.