Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

1 August 2025 *

(Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 203 – Incorrect amount of VAT entered on the invoice – Article 238 – Simplified invoicing – Services invoiced to non-taxable persons and to taxable persons who do not have a right to deduct VAT – Obligation to pay the part of the VAT invoiced incorrectly – No risk of loss of tax revenue)

In Case C-794/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 14 December 2023, received at the Court on 21 December 2023, in the proceedings

Finanzamt Österreich

v

P GmbH,

THE COURT (Ninth Chamber),

composed of N. Jääskinen, President of the Chamber, I. Jarukaitis (Rapporteur), President of the Fourth Chamber, and A. Arabadjiev, Judge,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Austrian Government, by A. Posch, J. Schmoll and F. Koppensteiner, acting as Agents,

– the German Government, by J. Möller and P.-L. Krüger, acting as Agents,

– the Portuguese Government, by P. Barros da Costa, C. Bento, R. Laires and A. Rodrigues, acting as Agents,

* Language of the case: German.

– the European Commission, initially by F. Behre and M. Herold, and subsequently by M. Herold, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 December 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 203 and 238 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive (EU) 2018/1695 of 6 November 2018 (OJ 2018 L 282, p. 5, and corrigendum OJ 2018 L 329, p. 53) ('the VAT Directive').

2 The request has been made in proceedings between the Finanzamt Österreich (Tax Office, Austria; 'the tax authority') and P GmbH concerning the tax authority's refusal of an application to adjust P's value added tax (VAT) return on the ground that the invoices P issued featured a VAT amount calculated using the incorrect rate.

Legal context

European Union law

3 Under Article 193 of the VAT Directive:

'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.'

4 Article 203 of the VAT Directive provides:

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

5 Article 220(1) of that directive provides 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;

…'

6 Article 238 of that directive provides:

‘(1) After consulting the VAT Committee, Member States may, in accordance with conditions which they may lay down, provide that in the following cases only the information required pursuant to Article 226b shall be entered on invoices in respect of supplies of goods or services:

(a) where the amount of the invoice is higher than EUR 100 but not higher than EUR 400, or the equivalent in national currency;

(b) where commercial or administrative practice in the business sector concerned or the technical conditions under which the invoices are issued make it particularly difficult to comply with all the obligations referred to in Article 226 or 230.

3. The simplified arrangements provided for in paragraph 1 shall not be applied where invoices are required to be issued pursuant to points (2) and (3) of Article 220(1) or where the taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is due or whose establishment in that Member State does not intervene in the supply within the meaning of Article 192a and the person liable for the payment of VAT is the person to whom the goods or services are supplied.’

Austrian law

7 Paragraph 11(1), (6) and (12) of the Umsatzsteuergesetz 1994 (Law on turnover tax 1994, BGBl. 663/1994), in the version applicable to the dispute in the main proceedings (‘the UStG 1994’), provides 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*.'

8 Paragraph 16(1) of the UStG 1994 provides that:

'When the basis of assessment of a taxable transaction for the purposes of points 1 and 2 of Paragraph 1(1) has changed,

1. the trader who effected that transaction shall correct correspondingly the amount of tax payable in that regard, and

2. the trader receiving the supply must correct correspondingly the deduction made in that regard. Corrections shall be made in respect of the taxable period in which the consideration has been altered.'

9 Paragraph 239a of the Bundesabgabenordnung (Federal Tax Code), in the version applicable to the dispute in the main proceedings, provides:

'In so far as a charge, which, in accordance with the purpose of the provision establishing the charge, is to be borne economically by a person other than the taxable person, has been borne economically by a person other than the taxable person, the following must not take place:

1. crediting of the tax account;

2. repayment, rebooking or transfer of credit balances; and

3. use for the repayment of tax debts;

where this would lead to the unjust enrichment of the taxable person.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 P is a limited liability company governed by Austrian law. P operates an indoor playground. In 2019, P applied VAT at the rate of 20% to the admission fees to that indoor playground. Upon payment of the admission fees, P issued its customers with till receipts, drawn up, on account of their low value, in accordance with the simplified invoicing rules laid down in Paragraph 11(6) of the UStG 1994. P stated the corresponding tax on its VAT return for 2019, but subsequently corrected it on the ground that the admission fees ought to be subject to the reduced rate of VAT of 13%.

11 By decision of 18 January 2021, the tax authority determined the VAT payable by P for 2019 without taking account of that correction. In its decision, the tax authority stated that P had applied VAT at the rate of 20% on revenue derived from admission fees to the indoor playground and that P had entered the amount of that tax on its till receipts. The tax authority refused to correct the rate of VAT after the event, on the grounds, first, that it was not possible to amend the invoices or to send to the customers credit notes corresponding to the difference between the VAT at the rate of 20% and the VAT at the reduced rate and, second, that such a correction, where P's customers had borne VAT at the rate of 20%, would result in the unjust enrichment of P.

12 P brought an action against that decision, claiming that the services had been supplied 'almost exclusively' to individuals who do not have a right to deduct input VAT, with the result that the risk of loss of tax revenue was ruled out and that a correction of the invoices was not necessary.

13 By order of 21 June 2021, the Bundesfinanzgericht (Federal Finance Court, Austria), before which the dispute had been brought, made a request for a preliminary ruling to the Court of Justice in order to ascertain whether Article 203 of the VAT Directive could be applied in that dispute, even though there was no risk of loss of tax revenue.

14 In its judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968), the Court held 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.

15 Following that judgment, the Bundesfinanzgericht (Federal Finance Court), by judgment of 27 January 2023, amended the VAT assessment payable by P for 2019.

16 That court started from the premiss that it was '(almost) exclusively' final consumers, without a right to deduct input VAT, who used the services of P. However, since it could not be ruled out that the customers had, rightly or wrongly, deducted the VAT invoiced by P, that court held that it was necessary to estimate the invoices which were likely to give rise to a VAT debt under Article 203 of the VAT Directive. That court based its assessment on the hypothesis that there was a risk of loss of tax revenue in respect of an estimated 0.5% share of the total turnover of the indoor playground, that is to say, approximately 112 of the 22 557 invoices issued in total by P.

17 The tax authority brought an appeal on a point of law (*Revision*) against the judgment of 27 January 2023 before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). According to the tax authority, that judgment departs from the judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968). The tax authority maintains that it cannot be inferred from that judgment, by which the Court examined the questions submitted to it in the light of the premiss that the service at issue in the main proceedings was supplied exclusively to final consumers who did not have a right to deduct input VAT, that the VAT due could be assessed on the basis of a split by way of an estimate between, on the one hand, final consumers and, on the other, taxable persons who are entitled to deduct input tax.

18 According to the referring court, since the risk of loss of tax revenue was not, in the absence of correction of the invoices, completely eliminated in good time, P could be regarded as wholly liable for the amounts of VAT which were referred to on all the invoices.

19 If, however, the risk of loss of tax revenue ought to be assessed, as suggested by the Advocate General in her Opinion in *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:657), at the level of each incorrect invoice, the referring court asks what criteria should be used to determine, as the case may be by means of an estimate, which invoices feature among those in respect of which such a risk of loss exists.

20 The referring court states that, in that context, it is not clear how the concept of 'final consumers who do not have a right to deduct input VAT', within the meaning of the judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968), is to be understood.

21 In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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 [or her] 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 [8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968)] 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?'

Consideration of the questions referred

The first question

22 By its first question, the referring court asks, in essence, whether 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 using an incorrect rate is liable for the part of the VAT which was incorrectly invoiced to a non-taxable person, even if that taxable person has also supplied similar services to other taxable persons.

23 In that regard, Article 203 of the VAT Directive provides that VAT is to be payable by any person who enters the VAT on an invoice. In accordance with the Court's case-law, the VAT indicated on an invoice is payable by the issuer of the invoice even in the absence of an actual taxable transaction (judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)*, C-378/21, EU:C:2022:968, paragraph 19 and the case-law cited).

24 It is also clear from the Court's case-law that Article 203 of the VAT Directive seeks to eliminate the risk of loss of tax revenue which the right of deduction provided for in that directive might entail. Article 203 therefore applies where VAT has been invoiced incorrectly and there is a risk of loss of tax revenue on account of the fact that the recipient of the invoice in question has a right to deduct such VAT (judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)*, C-378/21, EU:C:2022:968, paragraphs 20 and 21 and the case-law cited).

25 The Court has also held that in a situation in which part of the VAT invoiced was incorrectly invoiced, Article 203 of that directive applies only to the amount of VAT exceeding that which was duly invoiced. In the latter case, there is a risk of loss of tax revenue, since a taxable person who is the recipient of such an invoice might be led to exercise his or her right to deduct VAT without the competent tax authorities being in a position to determine whether the conditions for exercising that right are satisfied (judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)*, C-378/21, EU:C:2022:968, paragraph 23).

26 It follows that Article 203 of the VAT Directive is applicable only where there is a risk of loss of tax revenue, which must be assessed on the basis of a specific invoice and which cannot depend on whether the services at issue of the taxable person concerned were supplied not only to non-taxable persons for VAT purposes, but also to other taxable persons subject to that tax. Accordingly, for the purpose of assessing the existence of such a risk, it is necessary to determine whether the recipient of the given invoice is in fact a taxable person for the purposes of VAT and could, consequently, assert the right to deduct the input tax.

27 In the light of the reasons given, the answer to the first question is 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 using the incorrect rate is not liable for the part of the VAT which was incorrectly invoiced to a non-taxable person, even if that taxable person has also supplied similar services to other taxable persons.

The second question

28 By its second question, the referring court asks, in essence, whether the VAT Directive must be interpreted as meaning that it is appropriate to classify as 'final consumers who do not have a right to deduct input VAT', within the meaning of the judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968), not only non-taxable persons, but also taxable persons who, in a given situation, do not have a right to deduct input VAT.

29 It should be borne in mind that, in that regard, the Court held, in paragraph 25 of the judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968), 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.

30 It is also apparent from the Court's case-law that, as has been recalled in paragraph 24 above, the risk of loss of tax revenue which the obligation laid down in Article 203 of the VAT Directive seeks to eliminate is not, in principle, completely removed as long as the recipient of an invoice incorrectly showing VAT could still use it for the purpose of exercising his or her right of deduction (see, to that effect, judgment of 31 January 2013, *Stroy trans*, C-642/11, EU:C:2013:54, paragraphs 30 to 32), since it is conceivable that complex circumstances and legal relations could prevent the tax authorities from identifying, in sufficient time, the grounds which preclude the exercise of a right to deduct (see, to that effect, judgment of 18 June 2009, *Stadeco*, C-566/07, EU:C:2009:380, paragraph 30).

31 It is therefore necessary to interpret strictly the concept of 'final consumers who do not have a right to deduct input VAT' and to consider that such a risk exists where the recipient of an incorrect invoice is a taxable person, including in the event that that person could have used the supply concerned for private purposes or for other purposes in respect of which VAT is not deductible.

32 In the light of the foregoing, the answer to the second question is that the VAT Directive must be interpreted as meaning that it is appropriate to classify as 'final consumers who do not have a right to deduct input VAT', within the meaning of the judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968), only non-taxable persons. Thus, taxable persons who, in a given situation, do not have a right to deduct input VAT are not covered by that concept.

The third question

33 By its third question, the referring court asks, in essence, whether the VAT Directive must be interpreted as precluding, in the case of simplified invoicing under Article 238 of that directive, a tax authority or a national court from using an estimate in order to determine the proportion of the invoices in respect of which a taxable person who has incorrectly invoiced VAT is liable for that tax under Article 203 of that directive.

34 It is clear from the documents before the Court that the case in the main proceedings relates to a situation in which the volume of invoices issued by the taxable person concerned is very significant, the issue of those invoices having been made in the context of mass market commerce, without the identity of the recipients of those invoices being known.

35 It is therefore necessary to determine the way in which, in such a situation, for the purpose of adjusting the VAT improperly invoiced, invoices for low value in respect of which the taxable person is liable for VAT under Article 203 of the VAT Directive are identified, where the recipients of the supplies and the invoices are both final consumers and taxable persons who have a right to deduct input VAT.

36 As is clear, in essence, from point 33 of the Advocate General's Opinion, the VAT Directive does not govern that question or the question of the burden of proof concerning that identification. Accordingly, it is for the domestic legal system of each Member State to lay down the criteria

according to which it is necessary to determine the cases in which a taxable person is liable for an amount of VAT invoiced incorrectly. That procedural autonomy of the Member States is, however, circumscribed by the principles of equivalence and effectiveness, that is to say, that the abovementioned criteria must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible (see, to that effect, judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraphs 33 and 39).

37 Since the principle of equivalence is not concerned in the present case, it must be borne in mind, as regards the principle of effectiveness, that that principle requires that the national rules relating in particular to the determination of the part of the invoices in respect of which the taxable person concerned, having incorrectly invoiced VAT, is liable for the VAT thus invoiced, do not result in the taxable person being deprived of the possibility of adjusting or refunding the amount of VAT paid in error, since Member States are under an obligation in accordance with EU law if, in particular, there is no risk of a loss of tax revenue for the Member State concerned. It is for the referring court to establish, having regard to all the circumstances of the case in the main proceedings, whether that is so in the present case (see, to that effect, judgment of 13 October 2022, *HUMDA*, C-397/21, EU:C:2022:790, paragraphs 36 and 40).

38 In that regard, as has been observed in paragraph 26 above, the existence of a risk of loss of tax revenue within the meaning of Article 203 of the VAT Directive must be assessed on the basis of each specific invoice, determining whether the recipient of that given invoice is in fact a taxable person for the purposes of VAT.

39 In addition, it is necessary to take into account, in order to ascertain, among the invoices showing the incorrect amount of VAT, the proportion of the invoices issued in respect of other taxable persons, all the relevant circumstances, such as the nature of the service provided, the manner in which that service is supplied and invoiced, and any statistical information concerning the recipients of that service that are available to the supplier. In that regard, the fact that, in the present case, the customers of the taxable person concerned are not often other taxable persons is of particular importance.

40 It should be observed that, as the Advocate General stated, in essence, in points 42 and 43 of her Opinion, EU law does not preclude the possibility of using an estimate to identify the proportion of the invoices incorrectly issued to other taxable persons, in principle, provided that, in the context of such an estimate, the principles of fiscal neutrality and proportionality are observed (see, to that effect, judgment of 21 November 2018, *Fontana*, C-648/16, EU:C:2018:932, paragraphs 36 and 37).

41 As regards, in the first place, the principle of fiscal neutrality, it must be pointed out that the common system of VAT ensures the neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves, in principle, subject to VAT. The tax authorities of a Member State would disproportionately breach the principle of VAT neutrality by leaving the taxable person liable to pay the VAT in respect of which he or she is entitled to obtain a refund, whereas the common system of VAT is intended to relieve the operator entirely of the burden of the VAT due or paid in the course of all his or her economic activities (judgment of 21 March 2024, *Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Possibility of adjustment in the case of incorrect rate)*, C-606/22, EU:C:2024:255, paragraphs 23 and 24).

42 In the case of invoices incorrectly showing an excessive amount of VAT, that principle is complied with by the opportunity, to be provided for by the Member States, of correcting any tax incorrectly invoiced, where the issuer of the invoice has, in sufficient time, wholly eliminated the risk of any loss of tax revenue (see, to that effect, judgment of 2 July 2020, *Terracult*, C-835/18, EU:C:2020:520, paragraph 28).

43 As regards, in the second place, the principle of proportionality, that principle requires, inter alia, that the data used to estimate the number of incorrect invoices issued to taxable persons must be correct, reliable and up to date. Such an estimate can, moreover, give rise only to a rebuttable presumption, which may be rebutted by the taxable person issuing those invoices, on the basis of evidence to the contrary (see, to that effect, judgment of 21 November 2018, *Fontana*, C-648/16, EU:C:2018:932, paragraph 42).

44 In that regard, observance of the taxable person's rights of defence means in particular that, before adopting a measure which will adversely affect a taxable person, he or she must be placed in a position in which he or she can effectively make known his or her views as regards the information on which the authorities intend to base their decision, in particular to challenge the accuracy of the estimate at issue and to explain why the circumstances justify that challenge. The principle of proportionality requires, in addition, that the necessary standard of proof is not excessively high (see, to that effect, judgment of 21 November 2018, *Fontana*, C-648/16, EU:C:2018:932, paragraphs 43 and 44).

45 In the light of the foregoing considerations, the answer to the third question is that the VAT Directive must be interpreted as not precluding, in the case of simplified invoicing under Article 238 of that directive, a tax authority or a national court from using an estimate in order to determine the proportion of the invoices in respect of which a taxable person who has incorrectly invoiced VAT is liable for that tax under Article 203 of that directive, provided that for the purposes of such an estimate, all the relevant circumstances are taken into account, and a taxable person, in compliance with the principles of fiscal neutrality and proportionality and the rights of the defence, from calling into question the results obtained by that method.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **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) 2018/1695 of 6 November 2018,**

   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 using the incorrect rate is not liable for the part of the VAT which was incorrectly invoiced to a non-taxable person, even if that taxable person has also supplied similar services to other taxable persons.

2. Directive 2006/112, as amended by Directive 2018/1695,

must be interpreted as meaning that it is appropriate to classify as 'final consumers who do not have a right to deduct input VAT', within the meaning of the judgment of 8 December 2022, *Finanzamt Österreich (VAT invoiced incorrectly to final consumers)* (C-378/21, EU:C:2022:968), only non-taxable persons. Thus, taxable persons who, in a given situation, do not have a right to deduct input VAT are not covered by that concept.

3. Directive 2006/112, as amended by Directive 2018/1695,

must be interpreted as not precluding, in the case of simplified invoicing under Article 238 of Directive 2006/112, as amended, a tax authority or a national court from using an estimate in order to determine the proportion of the invoices in respect of which a taxable person who has incorrectly invoiced VAT is liable for that tax under Article 203 of Directive 2006/112, as amended, provided that for the purposes of such an estimate, all the relevant circumstances are taken into account, and a taxable person, in compliance with the principles of fiscal neutrality and proportionality and the rights of the defence, from calling into question the results obtained by that method.

[Signatures]