Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 8 September 2022[1]

Case C-378/21

P GmbH
other party:
Finanzamt Österreich

(Request for a preliminary ruling from the Bundesfinanzgericht (Federal Finance Court, Austria))

(Request for a preliminary ruling – Value added tax – Error as to the correct rate – Adjustment of the tax liability – Factual impossibility to correct invoices already issued – Correction of invoices not necessary where the recipients of the supplies are non-taxable persons – No risk of loss of tax revenue – Plea of unjust enrichment)

I. Introduction

1. Value added tax (VAT) law is an area of law which is fraught with risk for taxable persons which are in fact supposed merely to collect such tax from their customers on behalf of the State. If, for example, the taxable person wrongly proceeds on the basis of a tax rate which is too low, it is nevertheless liable for the correct (higher) amount of tax, which it is required to pay to the State. This also applies where it cannot subsequently pass on the higher amount of VAT to its customers for reasons in law and/or in fact.

2. In this request for a preliminary ruling, the Court is now required to rule on the reverse case, in which, for a whole year, the taxable person wrongly took a rate which was too high as the calculation basis and stated it in the invoice and paid it. Is the State entitled to keep that excessive VAT or must it be repaid to the taxable person? After all, the tax did not substantively become chargeable in that amount. On the other hand, the taxable person issued invoices which overstated the VAT and could induce customers to deduct an excessive amount of input tax. Must those invoices therefore be corrected beforehand? Does that also apply where the supplies were made exclusively to final consumers without a right of deduction, with the result that they could not exercise a right to deduct input tax paid in any event?

3. Having regard to the nature of VAT as a tax on consumption, the supplier should in fact reimburse the customer with the overstated VAT paid by him or her. However, if this is not possible in law (for example if a fixed price had been agreed) or in fact (for example because the

[1] Original language: German.

customers are not known by name), the question arises as to who is entitled to remain definitively 'enriched' by the error as to the correct amount of tax – the State or the taxable person that made the error?

II. Legal framework

A. European Union law

4. The legal framework is formed by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'). [2]

5. Article 73 of the VAT Directive concerns the taxable amount and reads as follows:

'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.'

6. Article 78 of the VAT Directive sets out the factors which are to be included in or excluded from the taxable amount:

'The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

…'

7. 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.'

8. Article 168(a) 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;'

9. Article 203 of the VAT Directive regulates the tax liability resulting from the entering of VAT on an invoice.

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

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

10. 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;

…'

B. Austrian law

11. Point 1 of Paragraph 11(1) of the Bundesgesetz 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.'

12. 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*.'

13. Paragraph 239a of the Bundesgesetz über allgemeine Bestimmungen und das Verfahren für die von den Abgabenbehörden des Bundes, der Länder und Gemeinden verwalteten Abgaben (Federal law laying down general provisions and the procedure for the taxes administered by the federal, *Länder* and municipal tax authorities (Bundesabgabenordnung) – Federal Tax Code, 'the BAO') provides as follows:

'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.'

III. Facts and preliminary ruling procedure

14. The appellant before the referring court ('P GmbH') is a limited liability company under Austrian law.

15. It operates an indoor playground. In the year at issue, 2019, P GmbH subjected the consideration paid for its services (admission fees to the indoor playground) to the Austrian standard rate of VAT of 20%. 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 – in Austria in the year at issue).

16. 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, in conjunction with Article 226b thereof). P GmbH issued a total of 22 557 invoices in the year at issue, 2019. The customers of P GmbH during that year were exclusively final consumers without a right to deduct input tax paid.

17. P GmbH corrected its annual VAT return for the year 2019 in order to be credited for the overpaid VAT by the Finanzamt Österreich (Tax Office, Austria 'the Tax Office').

18. The latter refused that correction on two grounds: (1) P GmbH owed the higher VAT as a result of accounting for its invoices without correction; (2) it was not P GmbH but its customers who had paid the VAT. P GmbH would therefore be enriched if the VAT were corrected.

19. P GmbH brought an action against that decision. The Bundesfinanzgericht (Federal Finance Court, Austria), seised of the action, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'(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?'

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

IV. Legal assessment

A. The questions referred and the course of the investigation

21. By its two questions referred, the referring court seeks an interpretation of Article 203 of the VAT Directive. That provision imposes tax liability on any person who enters VAT on an invoice.

22. It is apparent from the questions and the facts communicated that, in the present case, it is ruled out that the customers of P GmbH are entitled to the right of deduction, as they were exclusively final consumers (that is to say, non-taxable persons). In the case where an indoor playground is used in return for consideration, it is also hardly conceivable that a taxable person used the admission ticket sold by P GmbH for the purposes of his or her taxed transactions (see Article 168 of the VAT Directive).

23. However, P GmbH issued 22 557 invoices to what was probably 22 557 different users of the playground in the year in dispute. It is possible that there was a taxable person that used the invoice – rightly or wrongly – to claim a deduction of input tax paid in that regard. Even if that situation is ruled out by the referring court's questions, it is the more relevant situation in practice.

24. For that reason, Article 203 of the VAT Directive will first be interpreted on the premiss that the 22 557 invoices stating excessive tax do not entail a risk of loss of tax revenue (see section B). Next, it will be assumed that a certain risk of loss of tax revenue cannot in fact be ruled out (see section C). This will then be followed by the question as to an adjustment of the tax liability arising from Article 203 of the VAT Directive, whereby the need to correct 22 557 invoices must also be addressed (see section D). Lastly, it will be examined whether the plea of unjust enrichment can be raised against P GmbH if the customers paid the price in full (see section E).

B. Tax liability under Article 203 of the VAT Directive if there is no risk of loss of tax revenue

1. VAT incorrectly stated on an invoice

25. Under Article 203 of the VAT Directive, VAT is payable by any person who enters the VAT on an invoice. However, under Article 193 of the VAT Directive, VAT is already payable by any taxable person carrying out a taxable supply of goods or services. Since that taxable person is obliged under point 1 of Article 220(1) of the VAT Directive to issue an invoice, at least vis-à-vis other taxable persons, that would lead to a second instance of tax liability for one and the same transaction. Accordingly, Article 203 of the VAT Directive must be interpreted strictly.

26. Otherwise, a taxable person that correctly accounts for a taxable supply would be liable for VAT twice: once under Article 203 and once under Article 193 of the VAT Directive. That cannot have been what the legislature intended. Article 203 of the VAT Directive has an independent meaning only if it provides for tax liability that goes beyond Article 193 of that directive. Since the purpose of Article 203 of the VAT Directive is to eliminate the risk of loss of tax revenue[3] (see point 30 et seq. below), it cannot cover the 'normal case' in which a taxable

[3] See expressly, inter alia, judgments of 18 March 2021, *P (Fuel cards)* (C-48/20, EU:C:2021:215, paragraph 27); and of 8 May 2019, *EN.SA.* (C-712/17, EU:C:2019:374, paragraph 32).

person issues a correct invoice. It follows that Article 203 of the VAT Directive covers 'only' wrongly invoiced VAT, that is to say VAT which is not legally due but is nevertheless stated on the invoice.

27. In the present case, the amount of VAT stated on the invoices was too high (due to the application of the standard tax rate instead of the reduced tax rate). The resulting difference was thus wrongly stated, namely overstated, on an invoice. The issuer of the invoice could be liable for that difference under Article 203 of the VAT Directive, if the other conditions are met. The remaining amount is already payable under Article 193 of the VAT Directive and is not in dispute.

2. Concept of 'invoice' within the meaning of Article 203 of the VAT Directive

28. According to the request for a preliminary ruling, the cash register receipts issued are 'small-value' invoices, which, in accordance with Article 238 of the VAT Directive, in conjunction with Article 226b thereof, require fewer details. However, those invoices must also state the VAT amount payable.

29. Such an invoice is an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI, which, under Article 178(a) of the VAT Directive, therefore gives rise to a right of deduction under Article 168(a) thereof. Contrary to the view taken by the Commission, it is irrelevant in that regard whether P GmbH was obliged to issue such invoices to final consumers at all; point 1 of Article 220(1) of the VAT Directive militates against that being the case. Article 203 of the VAT Directive attaches only to the existence of an invoice and, on the basis of its wording, also covers small-value invoices.

30. The fact that the tax liability under Article 203 of the VAT Directive also relates to VAT which has been separately stated incorrectly (in an excessive amount) on small-value invoices is also in line with the Court's case-law to date concerning the purpose of that provision. According to that case-law, the purpose of Article 203 of the VAT Directive 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. [4]

31. The right to deduct may be exercised only in respect of taxes corresponding to a transaction subject to VAT. [5] 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. [6] That is because it cannot be ruled out that the tax authorities will not be able to determine in good time that substantive considerations preclude the exercise of the formally existing right of deduction.

32. Thus, in cases where VAT is stated incorrectly, 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

4 See, expressly, judgments 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, paragraphs 35 and 36); and of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 28 et seq.).

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

6 See, expressly, judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 28 et seq.), referring to the judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 57).

supplier and the recipient of the supply.[7] 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. As Austria also rightly emphasises, it follows that, on the basis of the spirit and purpose of that provision, the latter covers all invoices which could induce the addressee of the invoice to deduct input tax paid. As stated above (point 28 et seq.), that is also the case with regard to small-value invoices.

3. Need for a risk of loss of tax revenue

33. Consequently, the issuer of the invoice is strictly liable for the risk (that is, abstractly) of the recipient of the invoice being able to make an unjustified deduction on the basis of that (incorrect) invoice. There is abstract liability for risk on the part of the issuer of the invoice. That liability also applies in the case of an error as to the correct rate of tax, where, as in the present case, the invoice mentions the statutory rate of tax rather than the reduced rate. However, a condition is that there is a risk of an unjustified (excessive) deduction, as the Commission rightly emphasises.

34. The question therefore arises as to whether Article 203 of the VAT Directive is relevant here. Under Article 168 of the VAT Directive, a deduction is possible only for taxable persons (subject to further conditions). Final consumers do not have a right to deduct input tax paid per se.

35. However, the (abstract) risk of an unjustified deduction by a non-taxable person is close to zero, except in the case of an undertaking in the process of being established. Nonetheless, due to the absence of taxable transactions, the tax authorities will examine such an undertaking's deduction in any event. It is presumably also for that reason that the referring court considers that there *cannot* be a risk of loss of tax revenue in such a situation, as in the present case.

36. If Article 203 of the VAT Directive constitutes a criterion for that risk, but such a risk is excluded per se because the recipients of the supply and addressees of the invoice are exclusively non-taxable persons but final consumers, Article 203 of the VAT Directive cannot apply.

4. Interim conclusion

37. The first question can therefore be answered as follows: if the recipients of the services are final consumers who are not entitled to the right of deduction, VAT is not payable by the issuer of an invoice 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

38. Austria, in particular, disputes the facts communicated by the referring court, according to which there is no risk of loss of tax revenue. Even if it seems plausible that the users of an indoor playground are exclusively final consumers and non-taxable persons for VAT purposes, it nevertheless cannot be ruled out from the outset that, given the number of admission tickets (or invoices), 22 557, there may have been one or more taxable persons among those users.

[7] See also, in that respect, my Opinion in *EN.SA*. (C-712/17, EU:C:2019:35, point 31 et seq.).

39. It is conceivable, for example, that a father visits that indoor playground with his son. If the father is a taxable person (for example a self-employed photographer), there would be at least an abstract risk of that invoice being included in his VAT return – either rightly (he sells the photographs that he took there) or wrongly (they are private photographs) – and thus an excessive deduction could be claimed. In that respect, Article 203 of the VAT Directive would be applicable. Ultimately, however, it is for the referring court to assess whether and to what extent there is an abstract risk to the parallelism of the tax liability of the supplier and the deduction of input tax by the recipient of the supply.

40. Even if a certain abstract risk cannot be ruled out in individual cases, that does not mean that the tax liability under Article 203 of the VAT Directive then extends to all 22 557 invoices. Such a concept of 'infection' – whereby, since it cannot be ruled out that a taxable person received one of those invoices, all the invoices fall under Article 203 of the VAT Directive – is alien to VAT law and, moreover, is not further substantiated by Austria.

41. The tax liability under Article 203 of the VAT Directive relates to the individual incorrect invoice. If necessary, the number of 'invoices posing a risk' in the abstract is to be determined by way of an estimate, which is generally always possible in the law of tax procedure, and the tax liability under Article 203 of the VAT Directive is to be limited to that number. That is also in line with the principle of neutrality, according to which the taxable person, acting as tax collector on behalf of the State, should fundamentally be relieved of the burden of VAT. [8]

42. In the present case, due to the nature of the taxable service (admission to an indoor playground), which is used by taxable persons only in exceptional cases, a very low risk potential can be assumed.

43. The answer to the first question can therefore be supplemented as follows: however, in so far as the addressees of the invoices included taxable persons, the tax liability under Article 203 of the VAT Directive does apply. If necessary, the proportion of such invoices, which establish an abstract risk, is to be determined by means of an estimate.

D. Error as to tax rate and duty to correct invoices

44. In so far as Article 203 of the VAT Directive applies, the question arises as to the possibility to adjust such invoices in order to reduce an excessive tax liability (by virtue of the invoice) to the tax lawfully payable under substantive law (by virtue of the taxable transaction) in accordance with Article 193 of the VAT Directive. The question would arise to the same extent if the Court, contrary to my proposal, were to extend the tax liability under Article 203 of the VAT Directive to the issuance of invoices to non-taxable final consumers.

[8] See, to that effect, 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).

1. Case-law of the Court on the possibility of correction

45. In this regard, the Court has already ruled that the VAT Directive does not contain any provisions relating to the adjustment by the issuer of the invoice of VAT which has been improperly invoiced.[9] Accordingly, so long as that lacuna has not been filled by the EU legislature, it is for the Member States to provide a solution in that regard.[10] However, the Court has developed two approaches for that solution, which the Member States must take into account.

46. Accordingly, in order to ensure neutrality of VAT, it is for the Member States, first of all, to provide for the possibility in their internal legal systems of adjusting *any* tax improperly invoiced where the person who issued the invoice shows that he or she acted *in good faith*.[11]

47. In the Court's view, that precludes, for example, a national rule which excludes an adjustment of the tax after a tax inspection has been initiated.[12] The same applies if the adjustment of the tax liability of an issuer of invoices that has acted in good faith is made dependent on the correction of invoices, which is factually impossible because the addressees of the invoices are not even known by name. Such a condition would be disproportionate.[13]

48. Furthermore, the principle of the neutrality of VAT requires that VAT which has been improperly invoiced can be adjusted where the issuer of the invoice has, in sufficient time, wholly eliminated the risk of any loss of tax revenue; it is *not* possible for such an adjustment to be made conditional by the Member States upon the issuer of the relevant invoice having acted in good faith.[14] In addition, that adjustment cannot be dependent upon the discretion of the tax authorities.[15]

(a) Adjustment of the tax liability in the case of an issuer of invoices that acted in good faith

49. It follows from that case-law that a taxable person that shows that it acted in good faith may adjust the improperly invoiced VAT (that is to say, its tax liability under Article 203 of the VAT Directive) despite the fact that there is still a risk of loss of tax revenue.[16]

[9] See, expressly, judgments of 18 March 2021, *P (Fuel cards)* (C-48/20, EU:C:2021:215, paragraph 30); of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167, paragraph 38); and of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 48).

[10] 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).

[11] Judgments of 18 March 2021, *P (Fuel cards)* (C-48/20, EU:C:2021:215, paragraph 31); of 2 July 2020, *Terracult* (C-835/18, EU:C:2020:520, paragraph 27); of 8 May 2019, *EN.SA*. (C-712/17, EU:C:2019:374, paragraph 33); of 31 January 2013, *Stroy trans* (C-642/11, EU:C:2013:54, paragraph 33); of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 36); and of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 18).

[12] Judgment of 18 March 2021, *P (Fuel cards)* (C-48/20, EU:C:2021:215, paragraph 33).

[13] See, to that effect, in relation to a condition which is impossible to satisfy, judgment of 11 April 2013, *Rusedespred* (C-138/12, EU:C:2013:233, paragraph 34).

[14] Judgments of 2 July 2020, *Terracult* (C-835/18, EU:C:2020:520, paragraph 28); 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).

[15] Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 38), and of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 68).

[16] Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 36), and of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 18).

50. That case-law [17] takes into account the fact that the supplying trader (which also issues the invoice or in some cases must do so – see Article 220 of the VAT Directive) acts merely as a tax collector on behalf of the State. [18] The Commission even refers to such a trader as the 'extended arm of the tax office' in its written submission. If it fulfils that function in good faith, the State, which involved it as a tax collector, must be liable for the consequences of any errors.

51. It is not clear from the request for a preliminary ruling exactly why P GmbH used the wrong rate of tax. Thus, the referring court is required to assess whether, in that respect, the issuer of the invoices in the present case can be presumed to have acted in good faith in that sense. However, it must be borne in mind in that regard that the correct rate of tax sometimes depends on difficult legal questions of delimitation and, in some cases, cannot be determined beyond doubt. In such cases, there is a high risk of an error of law. The more complex the VAT Directive or the national VAT law is, the higher the risk for the taxable person in that regard.

52. Therefore, if the wrong rate of tax was applied merely because of an incorrect legal assessment (error of law), it is my view that the issuer of the invoices can be presumed to have acted in good faith. This might be the case, for example, where the applicable rate of tax is disputed and the taxable person opted to take what subsequently proves to be the wrong view. The situation might be different if the taxable person did not give any consideration whatsoever to the rate of tax or it was clear which rate of tax is applicable. Such an error of law would be neither comprehensible nor explainable, with the result that, in such cases also, I would not presume that the issuer of the invoice had acted in good faith in that sense. The decisive factor is therefore whether a taxable person, acting as tax collector on behalf of the State, can be held responsible for the issuance of the incorrect invoice.

53. Accordingly, if the referring court finds that P GmbH had acted in good faith in that sense when applying the incorrect standard rate of VAT, it does not matter whether the risk of loss of tax revenue has been eliminated. Since the risk of loss of tax revenue results solely from the existence of the incorrect invoices, a correction of the invoices would then also not be necessary for an adjustment of the tax liability.

(b) Adjustment of the tax liability irrespective of the good faith of the issuer of the invoices

54. However, the question as to the correction of the invoices in order to remove the risk of loss of tax revenue arises if the referring court concludes that the taxable person did not act in good faith when issuing the invoices. In that case, the tax liability under Article 203 of the VAT Directive can be adjusted only if the risk of loss of tax revenue has been wholly eliminated in sufficient time.

55. However, as also held by the Court, the measures that the Member States may adopt in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than is necessary to attain such objectives. They may not therefore be used in such a way

[17] The starting point was the judgment of 13 December 1989, *Genius* (C-342/87, EU:C:1989:635, paragraph 18). Since then, that block of text has been repeated time and time again, without, however, there ever really being an explanation as to why and under which conditions a taxable person acting in good faith can be assumed in such a context – see, inter alia, judgments of 18 March 2021, *P (Fuel cards)* (C-48/20, EU:C:2021:215, paragraph 31 and seq.); of 2 July 2020, *Terracult* (C-835/18, EU:C:2020:520, paragraph 27); of 8 May 2019, *EN.SA.* (C-712/17, EU:C:2019:374, paragraph 33); of 31 January 2013, *Stroy trans* (C-642/11, EU:C:2013:54, paragraph 33); and of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380; paragraph 36).

[18] Judgments of 11 November 2021, *ELVOSPOL* (C-398/20, EU:C:2021:911, paragraph 31); of 15 October 2020, *E. (VAT – Reduction of the taxable amount)* (C-335/19, EU:C:2020:829, paragraph 31); of 8 May 2019, *A-PACK CZ* (C-127/18, EU:C:2019:377, paragraph 22); of 23 November 2017, *Di Maura* (C-246/16, EU:C:2017:887, paragraph 23); 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).

that they would have the effect of undermining VAT neutrality, which is a fundamental principle of the common system of VAT.[19] That applies in particular to an abstract strict liability offence (see point 30 et seq. above).

56. Consequently, if reimbursement of the VAT – that is to say, a reduction of the VAT payable under Article 203 of the VAT Directive – becomes impossible or excessively difficult as a result of the conditions under which applications for reimbursement of tax may be made, those principles may require that the Member States provide for the instruments and the detailed procedural rules necessary to enable the taxable person to recover the unduly invoiced tax.[20]

57. However, according to the referring court, there is no risk of loss of tax revenue in the present case. There is then also no need to correct the invoices.

2. Dealing with the factual impossibility of a correction

58. However, in so far as a certain risk does nevertheless exist (see point 38 et seq. above) – which it is for the referring court to assess and, if necessary, determine by means of an estimate – a correction would in principle be necessary in order to eliminate that risk of loss of tax revenue, which results from the existence of those incorrect invoices.

59. In that regard, the referring court raises the question as to whether that principle can be adhered to where a correction of the invoices in question is factually impossible because the addressees of the invoices are not even known by name. To require the issuer of an invoice to do something impossible could constitute a disproportionate requirement. On the other hand, as Austria emphasises, it was the issuer of the invoices which, through its conduct, brought about the risk of loss of tax revenue in the first place.

60. It is my view that, in such cases – where there is a risk of loss of tax revenue and it is factually impossible to correct the wrongly issued invoices – the solution likewise depends on a consideration of the error. That is in line with the case-law of the Court, which protects issuers of invoices that acted in good faith (see point 52 et seq. above), whereas those that do not act in good faith are required to eliminate the risk of loss of tax revenue. If that can be done only by correcting the invoice, the impossibility of doing so is to the issuer's detriment.

61. Since the risk of loss of tax revenue arises from the existence of the incorrect invoices, they must in principle be corrected. If that is not possible, the tax liability under Article 203 of the VAT Directive cannot be reduced. Contrary to the view taken by the Commission, it is irrelevant in that regard whether there was an obligation to issue an invoice in the first place, because what is at issue is the elimination of VAT liability which arose on the basis of an incorrect invoice (see point 25 et seq. above).

[19] Judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 39); see, by analogy, judgment of 19 September 2000, *Schmeink & Cofreth and Strobel* (C-454/98, EU:C:2000:469, paragraph 59 and the case-law cited).

[20] Judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 40); see, to that effect and by analogy, judgment of 15 March 2007, *Reemtsma Cigarettenfabriken* (C-35/05, EU:C:2007:167, paragraph 41).

3. Interim conclusion

62. EU law, in particular the principles of proportionality and neutrality of VAT, requires a possibility to adjust VAT liability, which is configured as an abstract liability for risk under Article 203 of the VAT Directive. The obligation to permit a correction exists irrespective of the elimination of the resulting risk of loss of tax revenue, where the issuer of the invoice had acted in good faith, for example because it had merely made an error of law. If it had not acted in good faith, the risk of loss of tax revenue must be eliminated. For that purpose, the invoice must in principle be corrected. If it is not possible for the issuer of the invoice to do so, that impossibility comes within the scope of the risk assumed by it. In that case, the tax liability under Article 203 of the VAT Directive continues to exist.

E. Plea of unjust enrichment

63. By subquestion 2(b), the referring court seeks to ascertain, in essence, whether an adjustment of the tax liability under Article 203 of the VAT Directive is precluded by the fact that final consumers have borne the excessive VAT as part of the price, with the result that it is ultimately only the taxable person making the supply (in this case, P GmbH) that would be enriched.

64. EU law permits a national legal system (such as Paragraph 239a of the BAO in the present case) to disallow repayment of charges which have been levied but were not due, where to allow such repayment would lead to unjust enrichment of the recipients.[21] However, 'the principle prohibiting unjust enrichment must be implemented in accordance with principles such as that of equal treatment.'[22]

65. However, as the Court has already ruled, enrichment does not already exist where the charge contrary to EU law has been passed on to the final consumer by means of the price. That is because, even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his or her sales.[23]

66. In the present case, an undertaking competing with P GmbH and charging the same price would have been subject to VAT at the rate of only 13/113 of the price and not 20/120 of the price. At the same price, P GmbH had a lower profit margin than a comparable competitor due to its error as to the rate of tax. On the other hand, in order to achieve the same profit margin, P GmbH would have had to charge a higher price due to its error, which in turn would have entailed a competitive disadvantage. That militates against the possibility of unjust enrichment of P GmbH in the present case.

67. As the Court has also stated, a successful plea of unjust enrichment by the Member State requires that the economic burden that the tax unduly paid imposed on the taxable person has been *completely neutralised*.[24]

[21] Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 48); of 10 April 2008, *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraph 41); of 21 September 2000, *Michaïlidis* (C-441/98 and C-442/98, EU:C:2000:479, paragraph 31); and of 24 March 1988, *Commission* v *Italy* (104/86, EU:C:1988:171, paragraph 6).

[22] Judgment of 10 April 2008, *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraph 41).

[23] See judgments of 6 September 2011, *Lady & Kid and Others* (C-398/09, EU:C:2011:540, paragraph 21); of 10 April 2008, *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraphs 42 and 56); and of 14 January 1997, *Comateb and Others* (C-192/95 to C-218/95, EU:C:1997:12, paragraph 29 et seq.).

[24] Judgment of 16 May 2013, *Alakor Gabonatermelő és Forgalmazó* (C-191/12, EU:C:2013:315, paragraph 28). That is conceivable, for example, if the Member State has at the same time implemented a subsidy in respect of the wrongly excessive price. That is not the situation in the present case, however.

68. According to the Court, the existence and the degree of unjust enrichment which repayment of a charge which was levied though not due under EU law entails for a taxable person can therefore be established only following an economic analysis in which all the relevant circumstances are taken into account. [25] The burden of proving unjust enrichment lies with the Member State. [26] In the case of indirect taxes (the same applies to the indirectly levied VAT in the present case), it could not be assumed that there is a presumption that they have been passed on. [27]

69. It must be pointed out that it is for the national court to carry out such an analysis. [28] However, the Court may provide useful guidance in that regard which may be relevant for the purposes of a full consideration of all the circumstances.

70. First, account must be taken of the fact that, in a case like the present one, in which the final consumers are not known as the actual VAT payers, the VAT wrongly levied in an excessive amount 'enriches' either the State or the trader making the supply. It is probably for that reason that the Commission takes the view that, in principle, the tax authorities could not rely on an unjust enrichment of P GmbH. In that respect, Austrian tax law grants the State only a reduced tax claim (that is to say, 13/113 of the price) with regard to the services provided by P GmbH. Under substantive law, the amount in excess of that claim leads to an 'unjust enrichment' of the State. By contrast, under civil law, the person liable to pay the tax was entitled to the full amount of the price negotiated with the final consumers.

71. Second, in the case of services provided to final consumers, it is usually irrelevant how the final price is composed, because those consumers are not entitled to a right to deduct input tax paid. In principle, an error relating to a trader's own basis for calculating the price does not affect – contrary to what the Commission claims – the civil-law claim to payment of the price agreed with the final consumers, if and in so far as the specific amount of VAT has not become a special contractual basis.

72. That conclusion is confirmed by Article 73 et seq. of the VAT Directive. According to that provision, the taxable amount includes everything which constitutes consideration to be obtained by the supplier from the customer. That is the agreed price. In accordance with Article 78(a) of the VAT Directive, the VAT itself does not fall within the taxable amount. According to the concept behind the VAT Directive, VAT is therefore always included, in the correct amount, in the agreed price by operation of law. This was confirmed by the Court only recently – in a VAT fraud case, in fact. [29]

73. However, if – irrespective of the correct mention in the invoice – the VAT is always passed on to the final consumer in the correct amount (Article 73 and Article 78(a) of the VAT Directive), it cannot be said that the final consumer has borne too much VAT and that P GmbH is therefore

[25] Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 49); of 10 April 2008, *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraph 43); and of 2 October 2003, *Weber's Wine World and Others* (C-147/01, EU:C:2003:533, paragraph 100).

[26] That would appear to be what is to be understood by the statements in the judgment of 24 March 1988, *Commission* v *Italy* (104/86, EU:C:1988:171, paragraph 11). The judgment of 6 September 2011, *Lady & Kid and Others* (C-398/09, EU:C:2011:540, paragraph 20) – which refers, in relation to a refusal to reimburse taxes not due, to an exception which must be interpreted narrowly – follows along similar lines. See also judgment of 21 September 2000, *Michaïlidis* (C-441/98 and C-442/98, EU:C:2000:479, paragraph 33).

[27] See, expressly, judgment of 14 January 1997, *Comateb and Others* (C-192/95 to C-218/95, EU:C:1997:12, end of paragraph 25).

[28] Judgments of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 50); of 10 April 2008, *Marks & Spencer* (C-309/06, EU:C:2008:211, paragraph 44); of 21 September 2000, *Michaïlidis* (C-441/98 and C-442/98, EU:C:2000:479, paragraph 32); and of 14 January 1997, *Comateb and Others* (C-192/95 to C-218/95, EU:C:1997:12, paragraphs 23 and 25).

[29] Judgment of 1 July 2021, *Tribunal Económico Administrativo Regional de Galicia* (C-521/19, EU:C:2021:527, paragraph 34). The Court rightly rejected the tax authorities' attempt to add VAT to the agreed (tax-free) price as a form of penalty.

unjustly enriched in the present case if the State repays the tax not legally due. The final consumer already paid the correct amount of VAT (see Articles 73 and 78 of the VAT Directive); it was merely calculated in the wrong amount and stated on the invoice in the wrong amount.

74. In that regard, the Court has already held that, in the required overall assessment, it could be relevant whether the contracts concluded between the parties relate to fixed amounts of remuneration for the services provided or basic amounts increased, where appropriate, by the tax applicable. In the first case – that is to say, in the case of an agreement on a fixed amount – there might be no unjust enrichment of the supplier. [30] I would go one step further and rule out per se the possibility of unjust enrichment of the taxable person making the supply in the case where a fixed amount is agreed vis-à-vis a final consumer and the VAT is passed on. The taxable person making the supply has suffered either a lower profit margin or lower competitiveness in relation to its competitors.

75. Therefore, the fact that the final consumers paid a final price which was calculated incorrectly (because it contained too high a VAT component and too low a profit margin) does not preclude the adjustment of tax liability under Article 203 of the VAT Directive. Unjust enrichment of the taxable person does not follow from that in any event where a 'fixed amount' (fixed price) was agreed. The outcome might be different if a price plus the VAT legally due was agreed. However, that situation can be excluded in the present case.

V. Conclusion

76. Therefore, I propose that the Court answer the questions referred for a preliminary ruling by the Bundesfinanzgericht (Federal Finance Court, Austria) as follows:

(1) If the recipients of the services are final consumers who are not entitled to the right of deduction, value added tax (VAT) is not payable by the issuer of the invoice under Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'). However, in so far as the addressees of the invoices included taxable persons, the tax liability under Article 203 of the VAT Directive does apply. If necessary, the proportion of such invoices is to be determined by means of an estimate.

(2) The principles of proportionality and neutrality of VAT require a possibility to adjust VAT liability, which is configured as an abstract liability for risk under Article 203 of the VAT Directive. The obligation to permit a correction exists irrespective of the elimination of the resulting risk of loss of tax revenue, where the issuer of the invoice had acted in good faith. Acting in good faith exists where the taxable person made an error of law for which it cannot be held responsible. If, on the other hand, it did not act in good faith in that sense, elimination of the risk of loss of tax revenue is a mandatory requirement. For that purpose, the invoice must in principle be corrected. If it is not possible for the issuer of the invoice to do so, that impossibility comes within the scope of the risk assumed by it. In that case, the tax liability under Article 203 of the VAT Directive continues to exist.

[30] See, similarly, judgment of 18 June 2009, *Stadeco* (C-566/07, EU:C:2009:380, paragraph 50).

(3) The fact that the final consumers paid a price which was calculated incorrectly (because it contained too high a VAT component and therefore too low a profit margin) does not preclude an adjustment of tax liability under Article 203 of the VAT Directive. Unjust enrichment of the taxable person does not follow from that in any event where a 'fixed amount' (fixed price) was agreed.