



VAT NEWSLETTER

ECJ: No VAT liability results from showing VAT on invoices to final consumers

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1 Background

Art. 203 of the EU VAT Directive and sec. 14c of the German VAT Act provide that the issuer of an invoice is liable for the VAT he incorrectly shows in his invoice. In its two paragraphs, sec. 14c of the German VAT Act also provides various correction options. These corrective actions require, inter alia, that the issuer of the invoice amends the issued invoices. Particularly in the case of everyday transactions with final consumers, an amendment is often de facto impossible because the issuer of the invoice does not have the contact details of his customers. In this context, the Austrian Federal Fiscal Court referred various questions to the European Court of Justice. On 08.12.2022, the ECJ published its judgment (C-378/21 - P GmbH).

2 Facts

P-GmbH (plaintiff) operates an indoor playground. According to the findings of the referring court, its customers, in the year in dispute, were exclusively final consumers who were not entitled to deduct input VAT. The plaintiff invoiced its customers for the admission fee, showing 20% Austrian VAT. In fact, however, the admission fee was subject to the reduced VAT rate of 13%. The plaintiff amended its VAT return and applied for a VAT refund. The tax office refused the refund. It was of the opinion that the plaintiff owed the higher rate of VAT because he issued the incorrect invoices and did not subsequently correct them. The fact that the customers paid the VAT to the plaintiff and had thus, from an economic point of view, borne the VAT, also spoke against the amendment of the VAT return, given that the plaintiff would be unjustly enriched by the payment of the refund. The Federal Fiscal Court therefore wanted to know from the ECJ whether the issuer of an invoice is liable for the incorrect (too high) VAT, even where there is no risk of loss of VAT due to the



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recipients of the invoices being final consumers with no right to deduct input VAT. The Federal Fiscal Court also sought clarification from the ECJ as to whether the correction of the invoices and a repayment to the customer was necessary.

3 Reasons for the ECJ's decision

The ECJ ruled that the issuer of an invoice is not liable for the incorrect (too high) VAT shown in the invoice if he had issued the invoices exclusively to final consumers who were not entitled to deduct input VAT. The referring Federal Fiscal Court had also previously made this finding. The purpose of Art. 203 of the EU VAT Directive is to counteract the risk of any loss of VAT revenue. Only insofar as such a risk existed could the provision be applied according to its meaning and purpose. If, however, there is no risk of an input VAT deduction being incorrectly claimed, based on the fact that the recipients of the invoices are, from the outset, not entitled to deduct input VAT, there is no abstract risk of a loss of VAT revenue. A VAT liability, pursuant to Art. 203 of the EU VAT Directive, is then ruled out. Thus, according to the ECJ, a correction of the invoices is not necessary.

4 Consequences for the practice

The ECJ's decision also has an impact on the application of sec. 14c of the German VAT Act. In accordance with sec 14c paras. 1 and 2 of the German VAT Act, VAT liability arises even if input VAT deduction is excluded in the individual case (e.g. in cases of distance sales, i.e. supplies to final consumers). Sec. 14c of the German VAT Act is, in this respect, stricter than Union law and is in contradiction to it. The provision must be interpreted in conformity with Union law by reducing the scope of sec. 14c to the effect that the VAT liability does not arise if it is established that a risk of VAT loss has not occurred. Alternatively, an issuer of an invoice can directly refer to the Union law, which for him, is more favourable. The consequence is that the issuer of the invoice is not required to make any corrections: In cases where sec. 14c para. 1 is applicable, he neither has to correct the invoices nor refund the excess VAT amount to the invoice recipient. This is because under German law, repayment is only considered - if at all - as a correction requirement in accordance with sec. 14c of the German VAT Act. However, where no correction is required, repayment cannot be a correction requirement. Also, in cases pertaining to sec. 14c para. 2 of the German VAT Act, an invoice correction is no longer relevant.

With regard to the taxable period, the issuer of an invoice will probably be entitled to a refund for the period in which the invoice was issued, i.e. "retroactively", with the consequence that he will be entitled to interest on VAT refunds in accordance with sec. 233a of the German Fiscal Code. However, all this presupposes that there is no risk of a VAT loss. In many cases, recipients will include not only final consumers but also taxable persons. The issuer of the invoice will therefore usually find it difficult to prove that there is, in fact, no risk of a VAT loss. Here, consideration could be given to determining the proportion of such invoices by means of an estimate, as suggested by Advocate General *Kokott* in her opinion. Alternatively, one could think about a graded burden of proof: In principle, the tax office bears the burden of proof in establishing that VAT is due. If the issuer of the invoice informs the tax office, in accordance with sec. 14c para. 2 sentence 3 – 5 of the German VAT Act, to whom he has issued which invoice (often not possible in the case of simplified invoices for small amounts), the tax office could check as to whether the invoice recipients have made an input VAT deduction. This would allow for results that are in line with the interests of all parties involved. Ultimately, the legislator is called upon to act. Those issuers of invoices affected should consider taking measures, at the end of the year, to prevent the limitation period from expiring.