



## Fiscal Court: Principles of ECJ case P-GmbH applied for the first time – significance of good faith in Art 203 EU VAT Directive

02 | 2024

### 1 Background

If the issuer of an invoice incorrectly or unjustifiably shows too much VAT in its invoice, it is liable for the VAT in accordance with Art. 203 of the EU VAT Directive and sec. 14c of the German VAT Act. This VAT liability can be eliminated by the invoice issuer under the conditions listed in sec. 14c para. 1 sentence 2 and 3 or in sec. 14c para. 2 sentence 3 – 5 of the German VAT Act. In an Austrian case, the ECJ limited the scope of Art. 203 of the EU VAT Directive in accordance with its purpose (ECJ, judgement of 8 December 2022 – C-378/21 – *P-GmbH*, cf. KMLZ VAT Newsletter | 57/2022). Therefore, if there is no risk of a VAT loss due to the invoice recipients not being entitled to claim input VAT deduction (in the case of P-GmbH, these were end consumers) a VAT liability, in accordance with Art. 203 of the EU VAT Directive, does not arise.

### 2 Facts

The subject of the proceedings conducted by KMLZ before the Fiscal Court Cologne was whether the formal postal deliveries of the plaintiff (also called “PZA”-services) were VAT exempt as postal universal services according to sec. 4 no. 11b of the German VAT Act. Based on a binding ruling issued by the competent tax office, the plaintiff partly charged the PZA services, contrary to its own legal view, showing VAT on the invoices to its customers. Later, the tax office partially recognized these “PZA”-services as VAT exempt and assessed the VAT accordingly pursuant to sec. 14c para. 1 of the German VAT Act. The plaintiff and the tax office indisputably established that the plaintiff predominantly provided its services to consumers which were not entitled to claim input VAT deduction (authorities, courts, etc.). Only a very small amount of the services for which VAT was unduly stated in the invoices were rendered to customers entitled to claim input VAT



Dr. Thomas Streit, LL.M. Eur.  
Lawyer

+49 (0) 89 217 50 12-75  
thomas.streit@kmlz.de

deduction. The plaintiff directly invoked Union law, arguing that it was entitled to a VAT refund. On the one hand, there was no risk of a VAT loss being sustained in most cases and on the other hand, the plaintiff acted in good faith.

### 3 Decision of the Fiscal Court Cologne

The Fiscal Court Cologne (Judgment of 25 July 2023 – 8 K 2452/21) fully upheld the lawsuit. It recognized the plaintiff's services as being VAT exempt. A VAT liability, in accordance with sec. 14c of the German VAT Act / Art. 203 of the EU VAT Directive, did not arise. To the extent that the plaintiff issued invoices showing VAT to persons not entitled to claim input VAT deduction, the Fiscal Court Cologne interpreted sec. 14c para. 1 of the German VAT Act in line with the EU VAT Directive. At the very least, Union law was directly applicable in favour of the plaintiff, as it had invoked it. Sec. 14c para. 1 of the German VAT Act / Art. 203 of the EU VAT Directive does not apply if there is no risk of a VAT loss. It was undisputed between the plaintiff and the tax office that the vast majority of the invoices were issued to persons not entitled to claim input VAT deduction (including courts, administrative authorities, arbitrators, etc.). The Fiscal Court Cologne followed the principles of the *P-GmbH* case. The fact that the invoice recipients were not private individuals, but other persons not entitled to claim input VAT deduction, did not justify a different outcome in the view of the Fiscal Court. Since sec. 14c para. 1 of the German VAT Act / Art. 203 of the EU VAT Directive did not apply, the plaintiff also did not need to make any corrections to the invoice recipients: Neither a correction of the invoices, nor repayment of the VAT amount was required. As far as the plaintiff had – in a very limited amount – shown VAT in its invoices to persons entitled to claim input VAT deduction, the Fiscal Court also awarded the plaintiff a VAT refund as it found that the plaintiff had acted in good faith. It relied on the (unlawful) binding ruling issued by the tax office when showing VAT in its invoices and was entitled to do so. According to ECJ jurisprudence, in cases of good faith, no corrections are required to eliminate a VAT liability incurred under Art. 203 of the EU VAT Directive. Although an interpretation of sec. 14c of the German VAT Act in line with the Directive is excluded here, Union law is directly applicable in favour of the plaintiff, which it also invoked. No corrections (invoice corrections vis-à-vis the invoice recipient or repayments) were required from the plaintiff here either.

### 4 Practical advice

The present judgement of the Fiscal Court is – as far as can be seen – the first decision of a German Fiscal Court in which the *P-GmbH* case has been applied to German law. It is consequent to not apply Art. 203 of the EU VAT Directive, even when other persons, who are not entitled to claim input VAT deduction (other than private individuals), receive the invoices. As far as the exclusion of sec. 14c of the German VAT Act in cases of good faith is concerned, this is – to all appearances – also the first decision of this kind taken by a German Fiscal Court. Taxable persons act as VAT collection agents for the state in the field of VAT law. It is consequent to protect a taxable person who only shows VAT in an invoice because the state demands it. Several scenarios are conceivable where such protection of good faith seems appropriate: The German VAT Act unlawfully provides for a VAT liability or a higher VAT rate than appropriate, and the taxable person acts accordingly; the tax administration stipulates in the German VAT Circular or, in individual cases, a VAT liability or a higher VAT rate than would be appropriate; etc. As an example, reference should be made to the "splitting requirement", even though the ECJ has meanwhile clarified that even operating equipment can be leased VAT exempt. Both in cases of no risk of a VAT loss and in good faith, no corrective action is required from the invoice issuer (invoice correction or repayment). Taxable persons who have paid VAT have a claim for reimbursement (plus interest) for the year of invoice issuance. Consideration should be given to filing an objection or amendment request regarding the concerned VAT assessments. An appeal is pending before the Federal Fiscal Court under case no. V R 16/23.