



VAT NEWSLETTER

## ECJ: Excessive VAT shown to final consumers and taxable persons

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### 1 Background

The ECJ has had to address the *P-GmbH* case not just once, but twice. In its first judgment (of 8 December 2022 – C-378/21, see KMLZ VAT Newsletter 57 | 2022), the Court made it clear: An invoice showing excessive VAT issued to final consumers does not give rise to a VAT liability under Art. 203 of the EU VAT Directive / sec. 14c of the German VAT Act. Since final consumers are not entitled to deduct input VAT, there is no risk to VAT revenue – any excessive VAT shown and remitted must therefore be refunded. *P-GmbH*, the operator of an indoor playground in Austria, had applied an excessively high VAT rate in simplified invoices issued to unnamed customers. The referring court (Austrian Federal Finance Court – BFG) and the ECJ had initially assumed that all invoice recipients were final consumers. Following the ECJ ruling, however, the BFG – out of caution – applied a deduction based on estimation. It assumed that 0,5 % of invoice recipients (112 out of 22,557 invoices) were taxable persons entitled to deduct input VAT and found a corresponding VAT liability.

### 2 Request for a preliminary ruling by the Austrian Supreme Administrative Court of 21 December 2023

The BFG's estimate prompted the Austrian tax authority to file an appeal with the Austrian Supreme Administrative Court (VwGH). From the tax authority's perspective, the ECJ's decision in *P-GmbH I* did not cover a scenario in which a taxable person issued invoices, showing excessive VAT, to both final consumers and taxable persons. The VwGH therefore submitted additional questions to the ECJ for clarification.



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### 3 ECJ Judgment of 1 August 2025, C-794/23 (*P-GmbH II*)

The ECJ confirms and builds on its ruling in *P-GmbH I*. It clarifies the following:

- Each invoice must be assessed individually to determine whether it gives rise to VAT liability under Art. 203 of the EU VAT Directive. An invoice issued to a non-taxable person (final consumer) does not trigger such liability, even if the taxable person also provides comparable services to other taxable persons and issues similar invoices to them.
- The term "final consumer" must be interpreted narrowly. It includes only non-taxable persons. Taxable persons who, in individual cases, receive services for private or other purposes that do not entitle them to deduct input VAT do not qualify as final consumers in this context. The decisive factor is the abstract possibility of input VAT deduction, which is considered detrimental.
- In cases involving mass transactions – such as *P-GmbH's* – it is practically impossible to assess each invoice recipient individually. The ECJ therefore explicitly acknowledges the possibility of an estimation but sets certain conditions: The estimate must be based on objective, up-to-date, and verifiable data and must rely on specific indicators such as the type of service provided, the manner in which it was provided, the invoicing method, and any available statistical information about the customer base. Any estimate made by the tax authorities or tax courts may only give rise to a rebuttable presumption. The taxpayer must be given the opportunity to contest the accuracy of the estimate – both factually and legally – before any adverse decision is taken, and to present exonerating evidence. The standard of proof required must not be disproportionately high. Finally, in light of the principle of effectiveness, the ECJ emphasizes that the taxpayer must not be de facto deprived of the opportunity to correct or reclaim overpaid VAT. Rather, EU Member States are obligated to refund such VAT where no risk to tax revenue exists.

### 4 Outlook

As in *P-GmbH I*, the ECJ further strengthens taxable persons' rights in *P-GmbH II*. The German Federal Ministry of Finance (BMF) responded to the first ECJ judgment with a letter dated 27 February 2024, in which it partially restricted the application of sec. 14c of the German VAT Act to invoices issued to final consumers. At the same time, it extended the definition of "final consumers" to include taxable persons acting in a private capacity and explicitly ruled out estimation in mixed cases. The BMF also requires the issuer of the invoice to prove that the recipients were final consumers. In light of the ECJ's findings in *P-GmbH II*, this approach appears too strict. While Member States are generally free to determine their procedural rules, they must nonetheless comply with the EU principles of neutrality, proportionality, and effectiveness. The German legislator, tax administration, and courts will therefore have to find a way to allow invoice issuers, in mixed cases, to claim at least a partial VAT refund without being required to correct the invoices. An estimation conducted with due care – especially in mass low-value transactions – and based on the ECJ's criteria, would be a viable path forward. Moreover, even in cases where invoices with excessive VAT were issued to taxable persons, a VAT refund is not necessarily excluded. Where the invoice issuer acted in good faith, a refund must also be possible without correction of the recipient's invoice (see KMLZ VAT Newsletter 02 | 2024).