

# Indirect Tax Alert

## EU Advocate General finds that legitimate input VAT must be refunded promptly and unconditionally

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### Executive summary

On 19 December 2019, Advocate General (AG) Kokott of the Court of Justice of the European Union (CJEU) issued her Opinion regarding the recovery of Value Added Tax (VAT) during an ongoing tax investigation (Case C-446/18, AGROBET CZ s.r.o.).

Tax investigations can last for many years, and if VAT would not be recoverable during an ongoing investigation, this would have a detrimental effect on the taxpayer's cash flow. The question before the CJEU is whether tax authorities may defer a VAT refund in full, even though only a small part is the subject of an ongoing inspection. According to the AG, Member States do not have the right to defer the assessment and payment of an undisputed part of the reclaimed VAT for an indefinite period of time until the disputed part of the excess VAT claimed has been adequately inspected.

### Detailed discussion

AGROBET is engaged in the import and export of agricultural products. The company had reclaimed VAT on purchases and costs incurred. A part of the AGROBET transactions are under investigation by the Czech tax authorities and that audit may lead to a partial denial of VAT recovery. AGROBET requested to

be paid currently the undisputed part of its reclaimed VAT, but the tax authorities declined on the ground that this excess VAT is indivisible from the total VAT amount reclaimed and related to the tax period as a whole. The question before the CJEU is whether EU tax authorities are allowed to defer the assessment and payment of undisputed excess VAT until all transactions for a given tax period have been adequately inspected, even if it is clear that a large part of the declared tax liabilities and the declared deduction is legitimate.

The AG opined that in accordance with the EU VAT Directive, the right to recover VAT should not be understood in relation to the total amount, but in relation to a transaction. As such, the excess VAT amount is not indivisible from the total VAT amount reclaimed and this argument of the Czech tax authorities must be rejected. Member States may impose reasonable conditions to effectuate the recovery of VAT, but tax authorities may not refuse to refund an undisputed part of the reclaimed VAT solely because another part is still disputed. Excess VAT, which is undisputed and requires no

further inspection, must be paid promptly. According to the AG, there is an encroachment on the fundamental rights of a taxpayer if it is compelled to pre-finance undisputed tax for several years. Such infringement may be justified, but only if it is proportionate, e.g., for the prevention of possible tax evasion, avoidance and abuse.

## Impact

Although an Opinion of the AG is not legally binding, it provides substantial guidance to Member States regarding the application of the EU VAT Directive. Should this Opinion be followed by the CJEU, there would be strong grounds to take the position that during a VAT inspection by any EU tax authority, businesses should be allowed to recover VAT insofar that the input VAT is not related to the ongoing inspection. This position could already be made in pending VAT controversy situations at this time e.g., if VAT refund requests are being blocked or delayed.

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