Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

7 July 2022 (*)

(Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Articles 184 and 185 – Adjustment of deductions – Taxable person who did not exercise their right of deduction before the expiry of a limitation period – No possibility of making that deduction in the context of adjustment)

In Case C?194/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 26 March 2021, received at the Court on 29 March 2021, in the proceedings

Staatssecretaris van Financiën

v

X,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of the Chamber, M. Ileši? and Z. Csehi (Rapporteur), Judges,

Advocate General: T. ?apeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– X, by A.C.P.A. van Dijk, belastingadviseur,

– the Netherlands Government, by M.K. Bulterman, A.M. de Ree and C.S. Schillemans, acting as Agents,

– the Czech Government, by O. Serdula, M. Smolek and J. Vlá?il, acting as Agents,

– the European Commission, by W. Roels and V. Uher, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 184 and 185 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

(OJ 2006 L 347, p. 1), as amended by Council Directive 2010/45/EU of 13 July 2010 (OJ 2010 L 189, p. 1) ('the VAT Directive').

2 The request has been made in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) and X concerning the adjustment of a failure to deduct input value added tax (VAT) on the acquisition of building land.

Legal context

European Union law

3 Article 63 of the VAT Directive provides:

'The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.'

4 Article 135(1)(k) of that directive is worded as follows:

'Member States shall exempt the following transactions:

…

(k) the supply of land which has not been built on other than the supply of building land as referred to in point (b) of Article 12(1)'.

5 Article 167 of that directive provides:

'A right of deduction shall arise at the time the deductible tax becomes chargeable.'

6 Article 168 of that directive provides:

'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;

…'

7 Article 178 of the VAT Directive provides:

'In order to exercise the right of deduction, a taxable person must meet the following conditions:

(a) for the purposes of deductions pursuant to Article 168(a), in respect of the supply of goods or services, he must hold an invoice drawn up in accordance with Sections 3 to 6 of Chapter 3 of Title XI;

…'

8 Under the first paragraph of Article 179 of that directive:

‘The taxable person shall make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen and is exercised in accordance with Article 178.’

9 Article 180 of that directive provides:

‘Member States may authorise a taxable person to make a deduction which he has not made in accordance with Articles 178 and 179.’

10 Article 182 of the VAT Directive provides:

‘Member States shall determine the conditions and detailed rules for applying Articles 180 and 181.’

11 Chapter 5 of Title X of the VAT Directive, entitled ‘Adjustment of deductions’, contains, inter alia, Articles 184 to 186.

12 Article 184 of that directive provides:

‘The initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled.’

13 Article 185 of that directive provides:

‘1. Adjustment shall, in particular, be made where, after the VAT return is made, some change occurs in the factors used to determine the amount to be deducted, for example where purchases are cancelled or price reductions are obtained.

2. By way of derogation from paragraph 1, no adjustment shall be made in the case of transactions remaining totally or partially unpaid or in the case of destruction, loss or theft of property duly proved or confirmed, or in the case of goods reserved for the purpose of making gifts of small value or of giving samples, as referred to in Article 16.

However, in the case of transactions remaining totally or partially unpaid or in the case of theft, Member States may require adjustment to be made.’

14 Article 186 of the VAT Directive provides:

‘Member States shall lay down the detailed rules for applying Articles 184 and 185.’

Netherlands law

15 Article 15 of the Wet houdende vervanging van de bestaande omzetbelasting door een omzetbelasting volgens het stelsel van heffing over de toegevoegde waarde (Law providing for replacement of the existing turnover tax by a turnover tax according to the system of collection of value added tax), of 28 June 1968 (Stb. 1968, No 329), in the version applicable at the material time in the main proceedings (‘the Law on turnover tax’), provides:

‘1. The tax … deductible by the trader shall be:

(a) the tax which, for the period covered by the return, other traders have charged him by means of an invoice issued in accordance with the applicable rules, in respect of supplies of goods and services which they have made to him; … in so far as the trader uses the goods and services for the purposes of taxed transactions. …

4. Deduction of the tax shall be made in accordance with the intended use of the goods and services at the time the tax is invoiced to the trader or at the time the tax becomes chargeable. If it appears, at the time the trader starts to use the goods or services, that he is deducting the applicable tax to an extent which is higher or lower than that to which the use of the goods or services in question entitles him, the excess tax deducted shall be chargeable from that time. The tax which becomes chargeable shall be paid in accordance with Article 14. The amount of tax which could have been deducted and was not deducted shall be refunded to him on request.'

16 Article 12 of the Uitvoeringsbeschikking omzetbelasting (Implementing Decision relating to the Law on turnover tax) of 12 August 1968 (Stb. 1968, No 423), in the version applicable at the material time in the main proceedings, is worded as follows:

'…

2. The adjustment referred to in Article 15(4) of the Law [on turnover tax] shall be made on the basis of the information relating to the taxable period during which the trader started to use the goods or services.

3. In the return for the final chargeable period of a tax year, the adjustment of the deduction shall be made on the basis of the information relating to the entire tax year.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 Company B sold 10 plots of building land to X. The plan was to develop them for leisure purposes by constructing mobile homes with accessories, and subsequently to sell those mobile homes together with the land on which they stood. On or around 20 April 2006, X and B entered into a contract for this purpose under which B would carry out all the development work on its own account and the net proceeds from the sale of the developed plots would be divided between the parties in equal shares.

18 On 20 April 2006, B supplied the plots to X. B invoiced VAT to X for that supply and X did not exercise his right of deduction.

19 Due to economic circumstances, the planned development of the plots was not carried out.

20 On 8 February 2013, X resold two plots to B and invoiced VAT on the selling price. X neither declared nor paid the amount of that tax.

21 On 26 November 2015, the tax authority sent X an adjustment notice relating to the VAT on the price paid by B for the supply of the two plots and collected that VAT.

22 X brought an action against that adjustment before the rechtbank Gelderland (District Court, Gelderland, Netherlands). He argued that, under Article 15(4) of the Law on turnover tax, the adjustment should be reduced by the amount of VAT paid on the supply of those plots in 2006.

23 Following the dismissal of that action, X brought an appeal before the Gerechtshof Arnhem-Leeuwarden (Regional Court of Appeal, Arnhem-Leeuwarden, Netherlands), which upheld X's claims and reduced the amount of the adjustment of 26 November 2015.

24 That court held that Article 15(4) of the Law on turnover tax and Article 184 of the VAT Directive do not limit the scope of the adjustment mechanism to situations where, at the time the goods supplied are first used, their actual use differs from that envisaged at the time of their acquisition. Since, in its view, actual use is decisive for the right of deduction, that court held that the VAT which was invoiced to X when the two plots were acquired in 2006 and which was not deducted at the time could be deducted in full when those plots were first used, for the purposes of taxed transactions, in 2013.

25 The State Secretary for Finance brought an appeal against that judgment before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court, in which he argues that X should have deducted the VAT relating to the supply of the plots in 2006 at the time that tax became chargeable. The State Secretary for Finance maintains that the adjustment mechanism laid down in Article 15(4) of the Law on turnover tax is not intended to grant, after the event, a right to deduct VAT that the trader failed to exercise in the return for the tax period during which the right of deduction arose, that is to say, in accordance with Article 15 of that law, at the time the deductible tax became chargeable or at the time that tax was invoiced to them. He argues that the adjustment mechanism provided for by that provision, read in conjunction with Articles 184 and 185 of the VAT Directive, concerns only situations in which the deduction made is higher or lower than that to which the taxable person was entitled. He submits that, in the present case, adjustment is not justified, since the intended use of the plots for the purposes of taxed transactions at the time of their acquisition corresponds to their actual use at the time they were first used.

26 The referring court has doubts as to how Articles 184 and 185 of the VAT Directive are to be interpreted.

27 Referring inter alia to the judgment of 11 April 2018, *SEB bankas* (C?532/16, EU:C:2018:228, paragraphs 32 and 33), that court notes that the adjustment obligation is defined in Article 184 of the VAT Directive as broadly as possible, in a wording that does not exclude, a priori, any foreseeable situation of undue deductions. Since, according to the Court's case-law, the adjustment mechanism is intended to enhance the precision of deductions so as to ensure the neutrality of VAT, the referring court considers that that objective permits a broad interpretation of Articles 184 and 185 of the VAT Directive, enabling the taxable person, at the time when the goods concerned are first used, to adjust the failure to deduct all or part of the VAT invoiced to them when those goods were acquired, even if that occurs after the expiry of the period laid down by national law for carrying out the initial deduction.

28 The referring court states that, having regard to the relevant provisions of Netherlands law, that broad interpretation does not amount to allowing the right of deduction to be exercised without any temporal limit. That exercise is, in its view, limited to the time the goods or services concerned are acquired or first used. After each of those points in time (i) the six-week limitation period laid down by national law, and (ii) the right of the tax authority to correct, for a period of five years, the amount of VAT due by means of an adjustment notice, would be applicable.

29 However, the referring court asks whether such a broad interpretation is consistent with the Court's case-law which, in its view, appears to limit the scope of Article 184 and Article 185(1) of the VAT Directive to situations where a change in circumstances occurs after the period to which the initial deduction relates. It refers in that regard, in particular, to the judgment of 27 June 2018, *Varna Holideis*

(C?364/17, EU:C:2018:500, paragraph 29 and the case-law cited), and to the judgment of 27 March 2019, *Mydibel* (C?201/18, EU:C:2019:254, paragraphs 26 to 29 and 43).

30 The referring court states, moreover, that such an interpretation does not appear to be reconcilable with the Court's case-law, as follows inter alia from the judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* (C?8/17, EU:C:2018:249, paragraph 36) and from the judgment of 30 April 2020, *CTT – Correios de Portugal* (C?661/18, EU:C:2020:335, paragraph 59); according to which, first, pursuant to the principle of legal certainty, a limitation period cannot be regarded as incompatible with the regime established by the VAT Directive, subject to compliance with the principles of equivalence and effectiveness, and, secondly, the possibility of exercising the right to deduct VAT without any temporal limit would be contrary to that principle, which requires the tax position of the taxable person, as regards their rights and obligations vis-à-vis the tax authority, not to be indefinitely open to challenge.

31 The referring court considers that the Court's case-law has not expressly excluded from the adjustment mechanism cases where the taxable person did not, at the time the goods were acquired, exercise their right to deduct VAT. It takes the view that it would be disproportionate in such a situation to refuse to allow the taxable person to exercise their right of deduction at the time they start to use the goods concerned, where no fraud, abuse of rights or detrimental impact on the treasury has been established.

32 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 184 and 185 of the VAT Directive … be interpreted as meaning that a taxable person who, at the time of acquiring goods or services, has failed to deduct input [VAT]… within the applicable national time limit in accordance with the intended use for tax purposes, is entitled, when an adjustment is made – on the occasion of the subsequent first use of those goods or services – to make that deduction if the actual use at the time of the adjustment does not differ from the intended use?

(2) Is the answer to Question 1 affected by the fact that the failure to make the initial deduction does not involve fraud or abuse of rights and that no detrimental impact on the treasury has been established?'

Consideration of the questions referred

33 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 184 and 185 of the VAT Directive must be interpreted as precluding a taxable person who failed to exercise, before the expiry of the limitation period laid down by national law, the right to deduct VAT relating to the acquisition of goods or services, from being denied the possibility of subsequently making that deduction, by way of an adjustment, at the time when those goods or services are first used for the purposes of taxed transactions, even where no abuse of rights, fraud or loss of tax revenue has been established.

34 The Court has repeatedly held that the right to deduct is an integral part of the VAT scheme and may not, in principle, be limited (judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens* , C?8/17, EU:C:2018:249, paragraph 29 and the case-law cited).

35 According to Article 167 and the first paragraph of Article 179 of the VAT Directive, the right to deduct VAT must in principle be exercised during the same period as that in which it has arisen, namely at the time the tax becomes chargeable. It follows from Article 63 of that directive that the

chargeable event is to occur and VAT is to become chargeable when the goods or the services are supplied (see, to that effect, judgment of 21 October 2021, *Wilo Salmson France*, C?80/20, EU:C:2021:870, paragraph 84 and the case-law cited).

36 Furthermore, the right to deduct is exercisable immediately in respect of all the taxes charged on input transactions (judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C?8/17, EU:C:2018:249, paragraph 29 and the case-law cited).

37 A taxable person may nevertheless be authorised to make a deduction under Articles 180 and 182 of the VAT Directive even if they did not exercise their right during the period in which the right arose, subject, however, to compliance with certain conditions and procedures determined by national legislation (judgment of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C?8/17, EU:C:2018:249, paragraph 35 and the case-law cited).

38 In that regard, the referring court states that the Law on turnover tax does not provide for the possibility for a taxable person to exercise the right of deduction after the expiry of the period for filing the return relating to the period in which that right arose.

39 Nevertheless, according to the referring court, it follows from the general rules of tax procedure that the taxable person may be granted such a possibility, subject to compliance with a period of six weeks for lodging a complaint against the amount they have paid by way of a return. In that case, the trader must lodge a complaint within six weeks from the date of payment of the tax following submission of the corresponding return and, in the event of a refund of VAT, within six weeks from the date of the refund decision.

40 It is apparent from the information provided by the referring court that X, having failed to exercise his right to deduct the VAT on the acquisition of the plots in 2006, did not exercise that right within the prescribed limitation period. It was only during his appeal against the adjustment notice of 26 November 2015 that X sought to exercise the right to deduct that VAT, that is to say, more than nine years after the supply of the plots.

41 It should be noted, in the first place, that the possibility of exercising the right to deduct VAT without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to their rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely (judgments of 8 May 2008, *Ecotrade*, C?95/07 and C?96/07, EU:C:2008:267, paragraph 44; of 12 July 2012, *EMS-Bulgaria Transport*, C?284/11, EU:C:2012:458, paragraph 48; and of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C?8/17, EU:C:2018:249, paragraph 36 and the case-law cited).

42 Thus, the Court has already held that a limitation period the expiry of which has the effect of penalising a taxable person who has not been sufficiently diligent and has failed to claim deduction of the input VAT, by making them forfeit their right to deduct VAT, cannot be regarded as incompatible with the regime established by the VAT Directive, in so far as, first, that limitation period applies in the same way to analogous rights in tax matters founded on domestic law and to those founded on EU law (principle of equivalence) and, second, that it does not in practice render impossible or excessively difficult the exercise of the right to deduct VAT (principle of effectiveness) (judgments of 8 May 2008, *Ecotrade*, C?95/07 and C?96/07, EU:C:2008:267, paragraph 46 and the case-law cited, and of 12 April 2018, *Biosafe – Indústria de Reciclagens*, C?8/17, EU:C:2018:249, paragraph 37 and the case-law cited).

43 In the second place, as regards the adjustment obligation relating to the deduction of VAT provided for in Articles 184 and 185 of the VAT Directive, that obligation is, admittedly, defined broadly inasmuch as ‘the initial deduction shall be adjusted where it is higher or lower than that to

which the taxable person was entitled’. That wording does not exclude, a priori, any foreseeable situation of undue deductions, and the general scope of that adjustment obligation is supported by the express enumeration of the derogations permitted by the VAT Directive in Article 185(2) thereof (judgment of 11 April 2018, *SEB bankas*, C?532/16, EU:C:2018:228, paragraphs 32 and 33).

44 Under Article 185(1) of that directive, such an adjustment must be made inter alia when changes to factors which were taken into consideration for the determination of the amount of such a deduction occurred after the VAT return (judgment of 18 October 2012, *TETS Haskovo*, C?234/11, EU:C:2012:644, paragraph 32).

45 However, the Court has held that the adjustment mechanism is applicable only where there is a right of deduction (see, to that effect, judgment of 30 March 2006, *Uudenkaupungin kaupunki*, C?184/04, EU:C:2006:214, paragraph 37). Articles 184 and 185 of the VAT Directive cannot give rise to a right of deduction (see, by analogy, judgments of 11 July 1991, *Lennartz*, C?97/90, EU:C:1991:315, paragraphs 11 and 12, and of 2 June 2005, *Waterschap Zeeuws Vlaanderen*, C?378/02, EU:C:2005:335, paragraph 38).

46 It follows that the adjustment mechanism provided for by the VAT Directive is not intended to apply where the taxable person failed to exercise the right to deduct VAT and has lost that right as a result of the expiry of a limitation period.

47 Consequently, that mechanism does not apply in circumstances, such as those in the main proceedings, where the taxable person who failed to exercise the right to deduct VAT when the goods on which that right is based were acquired wishes to exercise that right when those goods are first used, in circumstances where the limitation period laid down by national law for exercising that right has expired. It is irrelevant, in that regard, whether or not the first use of those goods differs from that envisaged at the time of their acquisition.

48 That conclusion is not called into question by the principle of fiscal neutrality. It is true that the adjustment is an integral part of the deduction scheme established by the VAT Directive and is intended to enhance the precision of deductions so as to ensure tax neutrality, which is a fundamental principle of the common system of VAT put in place by the EU legislature (judgment of 17 September 2020, *Stichting Schoonzicht*, C?791/18, EU:C:2020:731, paragraph 26 and the case-law cited).

49 However, the principle of fiscal neutrality is not a rule of primary law, but a principle of interpretation, to be applied concurrently with other principles, including the principle of legal certainty (see, by analogy, judgments of 19 July 2012, *Deutsche Bank*, C?44/11, EU:C:2012:484, paragraph 45, and of 9 March 2017, *Oxycure Belgium*, C?573/15, EU:C:2017:189, paragraph 32).

50 Consequently, the principle of fiscal neutrality cannot have the effect of allowing a taxable person to adjust the amount of their deduction entitlement which right they did not exercise before the expiry of a limitation period and which they have therefore lost.

51 As regards the absence of fraud, abuse of rights or detrimental impact on the tax revenue of the Member State concerned, those factors cannot justify a taxable person being able to circumvent a limitation period. Such an interpretation would be contrary to the principle of legal certainty, as was pointed out in paragraph 41 above, which requires the tax position of the taxable person, as regards their rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely.

52 In the light of all the foregoing considerations, the answer to the questions referred is that

Articles 184 and 185 of the VAT Directive must be interpreted as not precluding a taxable person who failed to exercise, before the expiry of the limitation period laid down by national law, the right to deduct VAT relating to the acquisition of goods or services, from being denied the possibility of subsequently making that deduction, by way of an adjustment, at the time when those goods or services are first used for the purposes of taxed transactions, even where no abuse of rights, fraud or loss of tax revenue has been established.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Articles 184 and 185 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2010/45/EU of 13 July 2010,

must be interpreted as not precluding a taxable person who failed to exercise, before the expiry of the limitation period laid down by national law, the right to deduct value added tax (VAT) relating to the acquisition of goods or services, from being denied the possibility of subsequently making that deduction, by way of an adjustment, at the time when those goods or services are first used for the purposes of taxed transactions, even where no abuse of rights, fraud or loss of tax revenue has been established.

[Signatures]

* Language of the case: Dutch.