Provisional text

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 3 March 2020(1)

Case C?791/18

Stichting Schoonzicht

Joined parties:

Staatssecretaris van Financiën

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling — Value added tax — Adjustment of deductions — Capital goods — Difference between intended use and first actual use — Directive 2006/112/EC — Articles 185 and 187 — Applicability)

I. Introduction

1. The present case concerns the way in which an initial deduction of value added tax (VAT) should be adjusted by a trader who changed his intentions as to the use of an apartment complex. The deduction in this case was made while the apartment complex was still under construction. At that time, the trader intended to use it for taxable purposes. However, some of the apartments were subsequently rented out, with the result that the first use of those apartments was tax exempt.

2. Under those circumstances, the Netherlands authorities asked the trader to pay back, in a single step, the entire part of the initial deduction corresponding to the apartments that were subsequently rented out. Indeed, under the national legislation, if it appears, at the time at which the trader starts to use goods for the first time, that that trader has deducted VAT to a greater extent than his or her entitlement based on the use of the goods, the excess of the VAT initially deducted must be adjusted in *one step*.

3. The legal question that arises is whether that legislation complies with Article 187 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (‘the VAT Directive’), (2) according to which the adjustment of deductions made in respect of capital goods is to be carried out in proportionate fractions spread over a period of several years.

II. **Legal framework**

A. **EU law: the VAT Directive**

4. Article 184 et seq. of the VAT Directive concern the adjustment of deductions.

5. Article 184 provides that ‘the initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled’.

6. Pursuant to Article 185 of that directive:

‘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.’

7. Article 186 of the VAT Directive states that ‘Member States shall lay down the detailed rules for applying Articles 184 and 185’.

8. Article 187 of the VAT Directive is worded as follows:

‘1. In the case of capital goods, adjustment shall be spread over five years including that in which the goods were acquired or manufactured.

Member States may, however, base the adjustment on a period of five full years starting from the time at which the goods are first used.

In the case of immovable property acquired as capital goods, the adjustment period may be extended up to 20 years.

2. The annual adjustment shall be made only in respect of one-fifth of the VAT charged on the capital goods, or, if the adjustment period has been extended, in respect of the corresponding fraction thereof.

The adjustment referred to in the first subparagraph shall be made on the basis of the variations in the deduction entitlement in subsequent years in relation to that for the year in which the goods were acquired, manufactured or, where applicable, used for the first time.’

9. Under Article 189 of the VAT Directive:

‘For the purposes of applying Articles 187 and 188, Member States may take the following measures:

…

(b) specify the amount of the VAT which is to be taken into consideration for adjustment;

…’

B. **Netherlands law**

10. The provisions on the adjustment of deductions appear in Article 15(4) of the Wet van 28 juni 1968, houdende vervanging van de bestaande omzetbelasting door een omzetbelasting volgens het stelsel van heffing over de toegevoegde waarde (Law of 28 June 1968, providing for replacement of the existing turnover tax by a turnover tax according to the system of collection of value added tax) (‘OB’) and in Articles 12 and 13 of the Uitvoeringsbeschikking omzetbelasting 1968 (Implementing decision on turnover tax 1968) (‘the Implementing Decision’).

11. Article 15(4) of the OB provides:

‘Deduction of the tax is made in accordance with the intended use of the goods and services at the time when the tax is invoiced to the trader or at the time when the tax becomes chargeable. If it appears, at the time at which the trader starts to use the goods or services, that he is deducting the tax relating to them to an extent which is higher or lower than that to which the use of the goods or services entitles him, the excess 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.’

12. Article 12(2) and (3) of the Implementing Decision is worded as follows:

‘(2) The adjustment referred to in Article 15(4) [of the OB] is made on the basis of the data of the taxable period during which the trader started to use the goods or services.

(3) In the declaration for the final tax period, the adjustment of the deduction is to be made on the basis of the data applicable to the entire tax year.’

13. Article 13 of the Implementing Decision, so far as is relevant here, is worded as follows:

‘(1) In derogation from Article 11, the following are taken into account separately for the purposes of the deduction:

(a) immovable property and rights pertaining to such property;

(b) movable property that the trader writes off in respect of income tax or corporate income tax, or that he could write off were he liable to such a tax.

(2) So far as concerns immovable property and the rights pertaining to such property, adjustment of deductions is to be made during each of the nine tax years following the one in which the trader has started to use the property in question. On each occasion, the adjustment is to be made on one tenth of the input tax paid, account being had of the tax year data contained in the declaration relating to the final taxable period of that tax year.’

III. **Facts, procedure and questions referred**

14. Stichting Schoonzicht, which has its seat in Amsterdam, had an apartment complex built on a plot of land owned by it. The complex comprised seven residential apartments. Construction started in 2013 and the complex was delivered in July 2014.

15. The apartment complex was originally intended to be used for taxable purposes. Accordingly, Stichting Schoonzicht deducted the VAT on that supply in full.

16. Subsequently, from 1 August 2014, Stichting Schoonzicht rented out four of the apartments. It follows from the order for reference that that was the first use of (a part of) the apartment complex and that, contrary to the initial intention, it was VAT *exempt*. The other three apartments remained unoccupied in 2014.

17. For that reason, in accordance with Netherlands legislation, the corresponding part of the initial deduction was adjusted pursuant to Article 15(4) of the OB. That meant that Stichting Schoonzicht owed the part of the VAT corresponding to the four rented apartments, amounting to EUR 79 587. According to the order for reference, the adjustment was made in respect of the third quarter of 2014 (1 July to 30 September 2014) during which the apartment complex was first used.

18. Stichting Schoonzicht paid the VAT and lodged an objection to that self-assessment. It considered that, in the case of capital goods, adjustment in full of the initial deduction at the time when capital goods are first used, as provided for in Article 15(4) of the OB, is contrary to Article 187 of the VAT Directive.

19. That objection was dismissed by the Inspecteur van de Belastingdienst (tax inspector). Stichting Schoonzicht brought an appeal before the Rechtbank Noord-Holland (District Court, North Holland, Netherlands). That court declared the appeal unfounded, after which Stichting Schoonzicht brought a further appeal before the Gerechtshof Amsterdam (Court of Appeal, Amsterdam, Netherlands). That court also held the regime in Article 15(4) of the OB to be compatible with the VAT Directive and declared the (further) appeal unfounded. According to the Gerechtshof Amsterdam (Court of Appeal, Amsterdam), the Netherlands legislature used the option afforded to Member States by Article 189(b) of the VAT Directive to specify the amount of the VAT to be taken into consideration in the adjustment for capital goods. In the view of that court, the single adjustment provided for in Article 15(4) of the OB must be regarded as a ‘pre-adjustment correction’, which precedes the standard adjustment procedure and is not regulated (and therefore not precluded) by the VAT Directive. The VAT Directive does not preclude such a correction since it breaches neither the principle of tax neutrality nor the proportionality principle.

20. Stichting Schoonzicht lodged an appeal in cassation against that judgment before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the referring court.

21. In the main proceedings, Stichting Schoonzicht reiterates the argument that the single adjustment of the initial deduction upon the entry into use of the capital goods is contrary to Article 187 of the VAT Directive. In its view, the adjustment regime in Article 187 of the VAT Directive should be considered independently of what is laid down in Articles 184 and 185 of that directive. Article 187 of the VAT Directive provides for a special regime for capital goods that supersedes the general regime in Articles 184 and 185. The adjustment of the initial deduction for capital goods pursuant to Article 187 must be spread over a number of years and at the end of each adjustment year, only a proportional part of the initial deduction may be adjusted. The adjustment under Article 187 of the VAT Directive relating to the four apartments can be made at the earliest at the time of the declaration concerning the last quarter of 2014, regardless of whether those apartments had been used for the first time during that year. Such an adjustment must then concern only one tenth of the deduction obtained in 2013.

22. The referring court entertains doubts about the compatibility of the ‘first-use full adjustment’ requirement provided for under Netherlands law with Article 187 of the VAT Directive.

23. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) stayed the proceedings and referred the following questions to the Court:

‘(1) Do Articles 184 to 187 of [the VAT Directive] preclude a national adjustment regime for capital goods which provides for an adjustment spread over a number of years, whereby in the year the goods enter into use — which year is moreover the first adjustment year — the total amount of the initial deduction for that capital good is adjusted (revised) in a single step, if, upon the entry into use thereof, it turns out that that initial deduction deviates from the deduction which the taxable person is entitled to apply on the basis of the actual use of the capital good?

If Question 1 is answered in the affirmative:

(2) Must Article 189(b) or (c) of [the VAT Directive] be interpreted as meaning that the single adjustment of the initial deduction in the first year of the adjustment period referred to in Question 1 constitutes a measure which the Netherlands may adopt for the application of Article 187 of [the VAT Directive]?’

24. Written observations have been submitted by Stichting Schoonzicht, the Netherlands and Swedish Governments and the European Commission.

IV. **Analysis**

25. I consider that the national regime at issue is compatible with the VAT Directive. To arrive at that conclusion, I will first make some introductory clarifications about the applicable (or potentially applicable) rules of the VAT Directive (A). I will then conclude that the ‘first-use full adjustment’ requirement does not fall under Article 187 of the VAT Directive but under Articles 184 to 186, with which it complies (B).

A. **Applicable (and potentially applicable) rules of the VAT Directive**

26. Pursuant to Article 167 of the VAT Directive, ‘a right of deduction shall arise at the time the deductible tax becomes chargeable’. In this context, the Court has noted repeatedly that the right of deduction ‘is an integral part of the VAT scheme and in principle may not be limited’. (3) It also held that ‘the deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, provided that his activities are themselves subject, in principle, to VAT’. (4)

27. Article 184 et seq. of the VAT Directive lay down more detailed rules applicable to the right of deduction by setting out the adjustment mechanism. (5) That mechanism ensures that transactions carried out at an earlier stage continue to give rise to the right to deduct only to the extent that they are used to make supplies subject to VAT. (6) In other words, ‘that mechanism … aims to establish a close and direct relationship between the right to deduct input VAT paid and the use of the goods or services concerned for taxable output transactions’. (7)

28. The deduction regime under the VAT Directive comprises general rules (Articles 184 to 186), as well as specific rules that apply to capital goods (Articles 187 to 192).

29. First, as regards the general rules, Article 184 of the VAT Directive states that ‘the initial deduction shall be adjusted where it is higher or lower than that to which the taxable person was entitled’. Article 185(1) further provides that that ‘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’. (8)

30. Pursuant to Article 186, the detailed rules for applying Articles 184 and 185 are for the Member States to define. (9)

31. Second, Article 187 et seq. of the VAT Directive set out specific rules concerning the adjustment of deductions in respect of capital goods. (10) Those specific rules define some aspects of the way in which the adjustment is to be made.

32. For what is relevant here, three aspects should be mentioned.

33. First, the adjustment is to be spread over 5 years, which can be extended up to 20 years for immovable property acquired as capital goods. It follows from the order for reference that the Netherlands chose to apply an adjustment period of 10 years to immovable property acquired as capital goods. That period would thus be potentially relevant with regard to the apartment complex at issue in the main proceedings.

34. Second, according to Article 187(1) of the VAT Directive, the period of adjustment includes the year in which the goods at issue were acquired or manufactured, but the Member States may base the adjustment on a period starting from the time when the goods are *first used*. It follows from the order for reference that the latter option has been chosen by the Netherlands.

35. Third, under Article 187(2), the annual adjustment is to be made only in respect of one fifth of the VAT charged on the capital goods, or, if the adjustment period has been extended, in respect of the corresponding fraction thereof. That corresponding fraction is *one tenth* under the Netherlands regime.

B. **The classification of the ‘first-use full adjustment’ requirement**

36. By the first question, the referring court wishes to ascertain whether the provisions of the VAT Directive relating to the adjustment of deductions preclude the ‘first-use full adjustment’ requirement.

37. Responding to that question requires an examination of whether the ‘first-use full adjustment’ requirement falls under the general regime of adjustment in the VAT Directive (Article 184 et seq.), or under the specific regime (Article 187 et seq.), or potentially under neither of them.

38. Stichting Schoonzicht argues that the general regime in Articles 184 to 186 of the VAT Directive should not apply to the situation at issue because the adjustment concerns immovable goods and falls under Article 187 of that directive, which implies that the adjustment should be spread over 10 years. Because Article 15(4) of the OB requires the corresponding part of the initial deduction to be paid back in a single step, it runs counter to Article 187 of the VAT Directive.

39. The Netherlands and Swedish Governments, as well as the Commission, conclude the contrary. In their view, in principle, the ‘first-use full adjustment’ requirement falls within the general regime of adjustment provided for by the VAT Directive and thus complies with it.

40. I agree with the latter view.

41. It is true that Article 187 of the VAT Directive states that ‘adjustment shall be spread over five [or more] years *including* that in which the goods were acquired or manufactured [or used]’. (11) It is also true that the Member States have an obligation to provide for an adjustment regime for capital goods, (12) as noted by the referring court.

42. Those elements, however, do not answer the question as to how a discrepancy between

the intended use, on the one hand, and the first actual use, on the other hand, should be rectified.

43. Indeed, while the right to deduct an amount of VAT due in respect of goods and services supplied by another taxable person under Articles 167 and 168 of the VAT Directive can be exercised immediately and in full, even if the goods concerned are not used immediately for the purposes of the company's economic activity, (13) the entitlement to deduct exists in so far as those goods and services are used for the purposes of taxed transactions. (14) Indeed, as Advocate General Kokott has put it, 'under Article 167 in conjunction with Article 63 of the VAT Directive, the deduction is normally allowed at the time of acquisition of goods, on the basis of their *intended* use. … The normal condition for this is that the taxable person uses the acquired goods for the purpose of carrying out taxed transactions. According to the case-law, the rules on adjustment are then intended to enhance the precision of deductions by monitoring, after the date of the acquisition of goods, the extent to which the taxable person *actually* uses those goods for deductible purposes'. (15)

44. In the present case, and according to the order for reference, the right to deduct emerged when the corresponding input VAT became chargeable, based on the declared intention of Stichting Schoonzicht (in 2013). However, in my view, the extent of the right to deduct in respect of the four rented apartments was reduced to zero as a consequence of the change in use, which transformed the transaction by Stichting Schoonzicht from an intended taxable one to an actual non-taxable one *prior to the first use* of the goods.

45. As noted above, the specificity of the adjustment regime for capital goods under Article 187 of the VAT Directive consists in the possibility of spreading the adjustment of deductions over a period of several years.

46. That regime relies on the premiss that 'the likelihood of … changes [in use] is particularly significant in the case of capital goods, which are often used over a number of years, during which the purposes to which they are put may alter'. (16)

47. As the Swedish Government and the Commission argue, in principle, that premiss relates to changes in use occurring in the period during which the capital goods are used. It is nevertheless a very different thing to extend that logic to the period *preceding* that use or, more specifically, to the period that starts with the declaration of the intended use and ends with the first taxable period marking the beginning of the actual use.

48. It is true that, under Article 12(2) of the Implementing Decision, the obligation to adjust relates to the first taxable period in which the goods *began to be used* and one has to acknowledge, in that context, that the beginning of the use forms part of the use itself. Thus, one could say that the time of the first use comes within the scope of Article 187 of the VAT Directive. However, it seems reasonable, and rather logical, to place the verification of whether the previously declared *intended* use corresponds to the *actual* use at the moment when that actual use occurs for the first time, because (failing a previous self-correction by that trader where that is possible) verification at an earlier stage would be somewhat challenging, if possible at all.

49. That conclusion is supported by the need to ensure respect for the principle of tax neutrality, in both of its aspects, as generally understood.

50. First, according to one aspect of that principle, the trader should be relieved of the VAT burden 'inasmuch as the purpose of the economic activity itself is to achieve sales revenue that is (in principle) subject to tax'. (17) Conversely, in my view, if it appears that the trader starts using the goods for a *non-taxable* transaction, contrary to the previously declared intention, it means that when the goods entered into use, the previously existing reason justifying the trader being relieved

of the VAT burden simply disappeared.

51. Applying the above to the present case, it appears that the right to deduct emerged when Stichting Schoonzicht became liable for the input VAT and the intended use of those goods was declared taxable. However, when that intention changed, leading to a tax-exempt transaction, there was no longer any reason for that trader to be relieved of the deducted tax. The reason for the deduction ceased to exist upon (or even before (18)) the beginning of the actual use.

52. According to its second aspect, the principle of tax neutrality also 'precludes economic operators who effect the same transactions being treated differently in respect of the levying of VAT'. (19) Indeed, that facet of the principle of tax neutrality 'precludes treating similar supplies …, which are thus in competition with each other, differently for VAT purposes'. (20)

53. As regards the present case, I am of the view that if the position of Stichting Schoonzicht were accepted, the resulting situation would run counter to the abovementioned second aspect of the principle of tax neutrality.

54. Indeed, as contemplated by the referring court and argued by the Netherlands and Swedish Governments, as well as by the Commission, such an outcome would confer an unjustified financial advantage upon a trader who declares that the given capital goods would be used for taxable purposes, hence maintaining at his or her disposal the funds corresponding to the initial deduction, even though neither the first actual use nor subsequent use during the adjustment period would entitle that trader to any such deduction. In other words, fixing the analysis to the time of the declared intention, irrespective of the first actual use, would mean that the Member State, in effect, would be financing such a trader, who would only have to pay the funds back in proportionate fractions over the applicable adjustment period of several years. (21)

55. Conversely, a trader making exactly the same non-taxable use of similar capital goods would not obtain such financial advantage if, *ab initio*, he or she abstained from making any deduction based on his or her *ab initio* intention to use the capital goods for non-taxable purposes.

56. The first actual use of the capital goods is the same in the case of both of these hypothetical traders, but they would receive very different VAT deduction treatment based merely on the difference between their declared (and presumably bona fide) intentions as to the use of the goods concerned. In all other respects, their situations are the same.

57. I am of the view that the VAT deduction treatment in both cases should also be the same.

58. It follows from Article 15(4) of the OB that the Netherlands legislation aims at eliminating the undesirable result described above by requiring that the extent of the right to deduct be brought into line with the situation as it exists as at the time of first actual use (after which the adjustment regime for capital goods is triggered). In doing so, that legislation contributes, in my view, to maintaining tax neutrality in both meanings explained above. That seems to be a fortiori the case given that the legislation works both ways: not only to the 'detriment' of a trader whose intention changes from taxable to non-taxable use, but also to the advantage of a trader whose intention changes from non-taxable to taxable use.

59. For those reasons, I am of the view that the situation at issue in the main proceedings does not fall under (and thus is not incompatible with) Article 187 et seq. of the VAT Directive.

60. That conclusion is not contradicted by the order adopted by the Court in *Gmina Mi?dzyzdroje*, in which the Court stated that Article 187 of the VAT Directive applies 'in cases of adjustment of deductions … where goods the use of which is not eligible for deduction are then put

to a use which is eligible'. (22) The Court added that Article 187 of the VAT Directive 'would preclude a system permitting the adjustment of deductions over a period of less than five years and therefore also preclude a system of one-off adjustment … which would allow for the adjustment to be made during a single tax year'. (23)

61. The facts of that case, as further described in the order, (24) demonstrate that those statements were made in a context in which the goods at issue had already entered into use. Only then did the change in use (or in the intention as to that use) occur. That differs, however, considerably from the situation at issue in the main proceedings. I thus consider that Article 187 of the VAT Directive does not apply to the case at hand.

62. The next question that arises is whether the situation at issue falls under Article 184 et seq. of that directive.

63. I think that it does.

64. In *SEB bankas*, the Court interpreted the general adjustment regime under the VAT Directive rather broadly. It stated that the wording of Article 184 'does not exclude, a priori, any foreseeable situation of undue deductions'. (25) It interpreted that provision as applying to a 'situation in which a deduction has been made when there was no right of deduction' as that scenario came 'within the scope of the first situation envisaged in Article 184 of the VAT Directive, namely that in which the initial deduction made is higher than that to which the taxable person was entitled'. (26)

65. The present case clearly represents a 'situation of undue deduction' within the meaning outlined by the Court in *SEB bankas*. It is true that that case concerned a situation in which a deduction had been made although no right of deduction existed *ab initio*. In the present case, the right of deduction emerged, but for the reasons explained above, it subsequently extinguished in respect of the four apartments. That being said, once it is accepted that Articles 184 to 186 of the VAT Directive govern situations where it is necessary to correct a deduction unduly made, as the Court did in *SEB bankas*, then the same conclusion must also apply to situations in which a pre-existing right of deduction in effect reduces to zero before the goods at issue are first used.

66. I consider that the situations in *SEB bankas* and in the present case represent two variations of the same problem: how to correct a deduction granted when that deduction should never have been (*SEB bankas*), or should no longer be (*in casu*), granted. For that reason, I am of the view that the solution adopted by the Court in *SEB bankas* should be applied in the present case to conclude that the situation at issue falls under, and is compliant with, the general regime of adjustment of deductions governed by Articles 184 to 186 of the VAT Directive.

67. For the reasons explained above, I also conclude that the 'first-use full adjustment' requirement provided for under the national legislation at issue does not fall under Article 187 et seq. of the VAT Directive, but falls under, and is compliant with, Articles 184 to 186 of that directive.

C. **Second question referred**

68. Since I am of the view that the relevant provisions of the VAT Directive do not oppose the national adjustment regime at issue, there is no need to answer the second question posed by the referring court.

V. **Conclusion**

69. In the light of the considerations above, I suggest that the Court reply to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

A national adjustment regime for capital goods which provides that in the year in which the goods enter into use the total amount of the initial deduction may be adjusted in a single step if, upon entry into use, it turns out that that initial deduction deviates from the deduction to which the taxable person is entitled on the basis of the actual use of the capital goods, does not fall under Article 187 et seq. of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, but falls under Articles 184 to 186 of that directive. Those provisions do not oppose such a national adjustment regime.

1 Original language: English.

2 OJ 2006 L 347, p. 1, as amended.

3 See, for instance, judgments of 21 March 2000, *Gabalfrisa and Others* (C?110/98 to C?147/98, EU:C:2000:145, paragraph 43 and the case-law cited), and of 30 September 2010, *Uszodaépít?* (C?392/09, EU:C:2010:569, paragraph 34 and the case-law cited).

4 Judgment of 3 October 2019, *Altic* (C?329/18, EU:C:2019:831, paragraph 26 and the case-law cited). See also judgments of 18 October 2012, *TETS Haskovo* (C?234/11, EU:C:2012:644, paragraph 27 and the case-law cited), and of 17 October 2018, *Ryanair* (C?249/17, EU:C:2018:834, paragraph 23 and the case-law cited).

5 Judgment of 15 December 2005, Centralan Property (C?63/04, EU:C:2005:773, paragraph 57). See also order of 5 June 2014, *Gmina Mi?dzyzdroje* (C?500/13, EU:C:2014:1750, paragraph 24 and the case-law cited).

6 See, for example, judgments of 13 March 2014, *FIRIN* (C?107/13, EU:C:2014:151, paragraph 50 and the case-law cited), and of 16 June 2016, *Mateusiak* (C?229/15, EU:C:2016:454, paragraph 28 and the case-law cited).

7 Ibid.

8 Judgments of 16 June 2016, *Mateusiak* (C?229/15, EU:C:2016:454, paragraph 29 and the case-law cited), and of 16 June 2016, *Kreissparkasse Wiedenbrück* (C?186/15, EU:C:2016:452, paragraph 47).

9 Accordingly, the Court stated that while ‘the provisions of Articles 184 and 185 …, set down an obligation to adjust unauthorised VAT deductions … they do not, however, provide for the manner in which such adjustments are to be made’, except, as regards capital goods. Judgment of 11 April 2018, *SEB bankas* (C?532/16, EU:C:2018:228, paragraph 26).

10 The concept of capital goods is to be defined by the Member States. See Article 189(a) of the VAT Directive. Under Article 190 of the VAT Directive, ‘for the purposes of Articles 187, 188, 189 and 191, Member States may regard as capital goods those services which have characteristics similar to those normally attributed to capital goods’.

11 Emphasis added.

12 See, in this sense, order of 5 June 2014, *Gmina Mi?dzyzdroje* (C?500/13, EU:C:2014:1750, paragraphs 24 and 27 and the case-law cited).

13 Judgment of 22 March 2012, Klub (C?153/11, EU:C:2012:163, paragraph 45).

14 Judgment of 22 October 2015, *Sveda* (C?126/14, EU:C:2015:712, paragraph 18 and the case-law cited). See, however, specific situations dealt with, for example, in the judgments of 8 June 2000, *Schloßstraße* (C?396/98, EU:C:2000:303, paragraph 42 and the case-law cited); of 8 June 2000, *Breitsohl* (C?400/98, EU:C:2000:304, paragraph 41), or of 28 February 2018, *Imofloresmira - Investimentos Imobiliários* (C?672/16, EU:C:2018:134, paragraph 42). In the latter judgment, the Court stated that ‘a taxable person retains the right of deduction where that right has arisen, even if that taxable person could not, for reasons beyond its control, use the goods or services giving rise to the deduction in the context of taxed transactions.’

15 Opinion in *Mateusiak* (C?229/15, EU:C:2016:138, point 24 and the case-law cited). See also Opinion of Advocate General Kokott in *TETS Haskovo* (C?234/11, EU:C:2012:352, points 27 and 28 and the case-law cited).

16 Judgment of 30 March 2006, Uudenkaupungin kaupunki (C?184/04, EU:C:2006:214, paragraph 25), concerning the equivalent provision — Article 20 — of the Sixth Directive.

17 Opinion of Advocate General Kokott in *AGROBET CZ* (C?446/18, EU:C:2019:1137, point 57 and the case-law cited).

18 It follows from the order for reference that the four apartments at issue were rented out from August 2014. Subject to verification by the referring court, I find it hard to imagine that the taxable or non-taxable nature of the transaction would somehow crystallise only on the first day of the rental (that is, the actual use) as I would assume that the necessary contracts (revealing the nature of the transaction) were likely to have been prepared beforehand.

19 Opinion of Advocate General Kokott in *AGROBET CZ* (C?446/18, EU:C:2019:1137, point 57 and the case-law cited).

20 See, for instance, judgments of 9 March 2017, Oxycure Belgium (C?573/15, EU:C:2017:189, paragraph 30 and the case-law cited); of 27 June 2019, Belgisch Syndicaat van Chiropraxie and Others (C?597/17, EU:C:2019:544, paragraph 28 and the case-law cited); and of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C?715/18, EU:C:2019:1138, paragraph 36 and the case-law cited).

21 I wish to stress very clearly that there is no evidence or even a hint at any irregularity in the present case. However, in general and beyond the facts of the present case, one cannot overlook the incentive for abuse that could be created by the possibility of paying back the amount corresponding to the undue deduction in instalments upon a declaration of a (fictitious) intention.

22 Order of 5 June 2014 (C?500/13, EU:C:2014:1750, paragraph 23). That case concerned legislation providing, like in the present case, for an adjustment period of 10 years for immovable property acquired as capital goods, running from the point when the goods are first used. Gmina Mi?dzyzdroje paid VAT on goods and services supplied in connection with works on a sports hall that it owned. In the course of those works, it considered changing the system of the management of that property and leasing it to a commercial company. It then sought to deduct in *one step* the VAT paid, as the use of the sports hall at issue changed from non-taxable to taxable. That was refused by the tax authorities, which considered that the situation was governed by the regime implementing Article 187 of the VAT Directive.

23 Order of 5 June 2014, *Gmina Mi?dzyzdroje* (C?500/13, EU:C:2014:1750, paragraph 27).

24 See the presentation of the facts in the order of 5 June 2014, *Gmina Mi?dzyzdroje* (C?500/13, EU:C:2014:1750, paragraphs 10 and 12, especially paragraph 12 *in fine*, ‘except that no one-tenth adjustment could be made in respect of the hall in 2010 for activities not conferring entitlement to deduction’).

25 Judgment of 11 April 2018 (C?532/16, EU:C:2018:228, paragraph 33).

26 Judgment of 11 April 2018, *SEB bankas* (C?532/16, EU:C:2018:228, paragraph 34).