Case C-791/18

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

17 December 2018

Referring court:

Hoge Raad der Nederlanden

Date of the decision to refer:

14 December 2018

Applicant:

Stichting Schoonzicht

Other party to the proceedings:

Staatssecretaris van Financiën

Subject of the action in the main proceedings

The main proceedings concern the deduction of VAT owed by Stichting Schoonzicht upon the delivery of an apartment complex. More specifically, in dispute is whether the initial deduction may be adjusted in a single step when, at the time at which the complex was first used, it emerged that it deviates from the deduction which Stichting Schoonzicht is entitled to apply.

Subject matter and legal basis of the request for a preliminary ruling

This request under Article 267 TFEU concerns the question of whether the 'single adjustment' of the initial deduction as provided for under Netherlands law is contrary to the EU law adjustment procedure whereby the adjustment is spread over a given period.

Questions referred

1. Do Articles 184 to 187 of the 2006 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 2006 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 2006 VAT Directive?

Provisions of EU law cited

Articles 184 to 187 and 189 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the 2006 VAT Directive').

Provisions of national law cited

Article 15(4) of the Wet op de omzetbelasting 1968 (Law on turnover tax 1968; 'OB') and Articles 12 and 13 of the Uitvoeringsbeschikking omzetbelasting 1968 (Implementing decision on turnover tax 1968).

Brief outline of the facts and the procedure in the main proceedings

1 Stichting Schoonzicht ('the party concerned') built an apartment complex comprising seven apartments on a plot of land belonging to it, which was delivered in July 2014. As the complex was originally intended for taxable purposes, the party concerned deducted in full the VAT owed on that delivery. Subsequently, however, from 1 August 2014, it rented out four of the apartments applying an exemption from turnover tax. For that reason, the deduction it had initially applied was adjusted pursuant to Article 15(4) OB, meaning that it still owed the part of the VAT to be calculated for those apartments over the third quarter of 2014, amounting to EUR 79 587. The party concerned paid that amount on declaration.

2 The party concerned made an objection to that self-assessment. It considers that, in the case of capital goods, adjustment of the entire initial deduction at the time at which that capital good was first used, as provided for in Article 15(4) OB, is contrary to Article 187 of the 2006 VAT Directive. That objection was dismissed by the Inspecteur van de Belangendienst (tax inspector). The party concerned subsequently brought an appeal against that dismissal before the Rechtbank Noord-Holland (District Court, North Holland). The Rechtbank declared that

appeal unfounded, after which the party concerned brought a further appeal before the Gerechtshof Amsterdam (Court of Appeal; 'the Gerechtshof'). The Gerechtshof held that the regime of Article 15(4) OB fell within the scope of the 2006 VAT Directive and consequently declared the further appeal unfounded.

3 The party concerned lodged an appeal in cassation against that judgment before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands; 'the Hoge Raad'). That court decided to refer questions to the CJEU for a preliminary ruling.

Principal arguments of the parties to the main proceedings

4 In the main proceedings, the party concerned reiterates the argument put forward before the Gerechtshof, according to which single adjustment of the initial deduction in response to the entry into use of capital goods is contrary to Article 187 of the 2006 VAT Directive. According to the party concerned, the adjustment regime of Article 187 of the 2006 VAT Directive should namely be considered in isolation, separate from what is set out in Articles 184 and 185, and therefore also separate from the detailed rules for applying those articles laid down by Member States in accordance with Article 186. This would be a special regime for capital goods, superseding the general regime of Articles 184 and 185. There is no room, then, for single adjustment of the entire initial deduction, as is provided for in Articles 184 and 185, upon the entry into use of a capital good. On the contrary, the adjustment of the initial deduction for capital goods pursuant to Article 187 must mandatorily be spread over a number of years. At the end of each adjustment year, only adjustment of a proportional part of the initial deduction may take place. Given that the Netherlands legislation provides for an adjustment period of 10 years, it is one tenth in this case.

5 This plea is directed against the finding of the Gerechtshof that the adjustment regime of Article 15(4) OB falls within the scope of the 2006 VAT Directive. According to the Gerechtshof, the Netherlands legislature has used the possibility afforded to Member States by Article 189(b) of the 2006 VAT Directive to specify the amount of the VAT to be taken into consideration in the adjustment for capital goods. The single adjustment provided for in Article 15(4) OB must, in the view of the Gerechtshof, be regarded as a 'pre-adjustment correction', for which the 2006 VAT Directive contains no provisions. In the view of the Gerechtshof, the 2006 VAT Directive does not preclude such an adjustment, given that the result thereof – having regard to the subsequent adjustment period – is not in breach of the principle of tax neutrality and/or the proportionality principle.

Brief outline of the reasons for the referral

6 According to the Hoge Raad, the position of the party concerned is supported by the wording of Article 187 of the 2006 VAT Directive, which can indeed be construed as meaning that adjustment, in a 10-year adjustment period, can in the first year consist only in one tenth of the VAT on the capital good. Moreover, that

wording leaves no doubt as to the mandatory nature of Article 187, from which it may be concluded that the Member States have no scope to deviate from that provision.

7 Contrary to the position of the party concerned, it can be argued that the adjustment regime of Article 187 of the 2006 VAT Directive can equally be construed as a supplementary regime which must be interpreted in conjunction with Articles 184 to 186. In this connection, the Hoge Raad notes that the adjustment in general and the spreading thereof for capital goods are aimed at increasing the precision of the deduction and thereby ensure neutrality of taxation. According to the Hoge Raad, those objectives do not seem to preclude a national adjustment regime in which the entire initial deduction is adjusted upon the entry into use of a capital good.

8 Next, the Hoge Raad notes that it is inherent to spread adjustment that deviations can arise either at the beginning of the adjustment period or in the course of that period. When the former occurs – as in the case at hand – if the deduction is not corrected in a single step, a financing advantage would arise for the party concerned. Conversely, that approach would lead to a financing disadvantage for a taxable person who, unlike the party concerned, did not deduct any VAT during the acquisition of a capital good but turns out to have a right to full deduction only upon entry into use. That approach would not be in line with the abovementioned objectives of accurate deduction and neutral taxation.

9 The Netherlands adjustment regime, by contrast, takes the time of entry into use as the assessment date. If it turns out that the actual use at that time deviates from the initially intended use, the deduction is corrected in a single step. According to the Hoge Raad, there is no question here of a regime prohibited by EU law involving a definitive adjustment in a single step, given that, upon a change of the use in one of the subsequent adjustment years, a corresponding adjustment of the deduction still takes place.

10 That regime appears more apt at meeting the objectives of the adjustment regime. From this, the Hoge Raad concludes that it is all the more reason not to consider Article 187 of the 2006 VAT Directive in isolation, but to read it in conjunction with Articles 184 to 186, and accordingly interpret that article as meaning that it does not preclude the Netherlands adjustment regime. According to the Hoge Raad, it is not beyond all reasonable doubt, however, that that is the correct interpretation. It is for those reasons that the Hoge Raad refers the first question for a preliminary ruling.

11 Should the first question be answered in the affirmative, the question arises as to whether the Netherlands ‘single adjustment’ is accepted as a measure whereby the amount of the VAT to be taken into consideration is specified, within the meaning of Article 189(b) of the 2006 VAT Directive. If that is not the case, the question remains as to whether it is permitted under Article 189(c). First of all, the question arises as to whether adjustment without that measure would lead to an unjustified

advantage for the party concerned. If so, the question is then whether the 'single adjustment' can be regarded as an appropriate measure to prevent that. As the interpretation of these provisions is not beyond doubt and the CJEU has not yet had the opportunity to interpret Article 189(b) and (c) of the 2006 VAT Directive, the Hoge Raad refers the second question for a preliminary ruling.