**Case C-194/21**

**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:**

29 March 2021

**Referring court:**

Hoge Raad der Nederlanden (Supreme Court of the Netherlands)

**Date of the decision to refer:**

26 March 2021

**Appellant:**

Staatssecretaris van Financiën

**Respondent:**

X

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**Subject matter of the main proceedings**

The issue in the main proceedings is whether, on the basis of Netherlands tax law, X is entitled to deduct the turnover tax charged to him by B on the supply of two plots of land in 2006, which X did not deduct at the time despite their taxable purpose, from the turnover tax payable on the supply of those two plots of land to B in 2013.

**Subject matter and legal basis of the request**

The 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 (‘the VAT Directive’) and, in particular, whether those provisions may be interpreted as meaning that, where a taxable person has failed to deduct input tax within the applicable national time limit, he is entitled to make that deduction when an adjustment is made.

The request for a preliminary ruling is made pursuant to Article 267 TFEU.

**Questions referred for a preliminary ruling**

1. Must Articles 184 and 185 of the VAT Directive 2006 be interpreted as meaning that a taxable person who, at the time of acquiring goods or services, has failed to deduct input tax ('the initial deduction') 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?

**Provisions of European Law relied on**

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1): Article 12(1)(b); Article 12(3); Article 135(1)(k); Articles 167, 168, 178, 179, 180, 182, 184, 185, 186 and 188

**Provisions of national law relied on**

Wet op de omzetbelasting 1968 (Law on turnover tax of 1968) (*Stb*. 1968, 329): Article 11(1)(a)(1); Article 15

Uitvoeringsbeschikking omzetbelasting 1968 (Implementing Decision on turnover tax of 1968) (*Stcrt*. 1968, 169): Article 12(2) and (3)

**Succinct presentation of the facts and procedure in the main proceedings**

1 The main proceedings concern an appeal in cassation against a judgment of the gerechtshof Arnhem-Leeuwarden (Arnhem-Leeuwarden Court of Appeal) of 5 February 2019, on X's appeal against a judgment of the rechtbank Gelderland (Gelderland District Court) of 2 November 2017.

2 X purchased ten plots of land from B. B supplied the plots on 20 April 2006. The intention was that the plots would be developed for recreational purposes by the building of mobile homes with accessories. The mobile homes together with the ground on which they stood were subsequently to be sold.

3 B charged X turnover tax in respect of that supply. X did not deduct that turnover tax.

4 Due to economic circumstances, the intended development of the plots did not get off the ground. On 8 February 2013, X supplied B with two of the ten plots of

land in return for payment. X charged B turnover tax on that payment. X did not submit a tax return for that turnover tax.

5 The turnover tax referred to in paragraph 4 was retrospectively levied from X by an assessment dated 26 November 2015. X objected to this, taking the view that, pursuant to Article 15(4) of the Law on turnover tax of 1968, the retrospective assessment should have been reduced by a proportionate amount of the turnover tax referred to in paragraph 3.

**Essential arguments of the parties in the main proceedings**

6 The **staatssecretaris van Financiën** (State Secretary for Finance) submits that X should have deducted the input tax in the period in which the turnover tax relating to the supply of the plots in 2006 became chargeable in accordance with the use for tax purposes which the plots had at that time.

7 After all, the adjustment mechanism laid down in Article 15(4), second to fourth sentences, of the Law on turnover tax of 1968 is not intended to enable the deduction of the turnover tax which the trader failed to deduct when submitting a return for the period concerned.

8 According to the State Secretary for Finance, the adjustment mechanism laid down in the aforementioned statutory provision, read in conjunction with Articles 184 and 185 of the VAT Directive, concerns only cases in which the initial deduction is higher or lower than that to which the taxable person was entitled. Since, in the present case, the intended purpose of the two plots when they were purchased corresponds to their actual use after they were taken into use, there is no need for an adjustment.

9 **X**'s reasoning is not provided.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

10 According to the referring court, there is uncertainty as to whether a taxable person who has failed to make a timely deduction of turnover tax is entitled to make that deduction through the adjustment mechanism provided for by the Law on turnover tax of 1968 and the VAT Directive, if it transpires that the original intended purpose and the actual use of the items when they were first taken into use are the same, and that the national time limit on the exercise of the right of deduction has expired. It is of the view that the answer to that question cannot be clearly deduced from the wording of Articles 184 and 185 of the VAT Directive. In its view, those provisions can be interpreted in two ways.

***First view: broad interpretation***

11 The broad interpretation entails interpreting the adjustment mechanism provided for in Articles 184 and 185 as meaning that an adjustment made when goods or services are first put to use amounts to the correction of an omission made in respect of the deduction at the time of the acquisition of those goods or services, irrespective of the nature of that omission.

12 Allowing the taxable person to make good errors in the initial deduction in respect of goods or services not put to use immediately after their acquisition when they are subsequently put to use, even if this is after expiry of the national time limit on the initial deduction, ensures – in line with the principle of fiscal neutrality – that the amount of the deduction accurately reflects the actual use of that good or service.

13 Such an interpretation has two dimensions.

14 First, it ensures that a taxable person who deducts the VAT that he was charged on the acquisition of goods or services despite their exempt purpose, cannot use those goods or services for exempt purposes without incurring a VAT charge (see judgment of 11 April 2018, *SEB Bankas*, C-532/16, EU:C:2018:228, paragraph 39).

15 Second, it ensures that a taxable person who fails to deduct, in whole or in part, the VAT he was charged when he acquired the goods or services, is not faced with the cost of the VAT when he actually starts to use those goods or services for (exclusively) taxable purposes.

16 Furthermore, the referring court stresses that the Court of Justice did not expressly exclude from the adjustment mechanism the case where the taxable person, at the time of acquiring the goods or services, failed to exercise the right of deduction to which he was entitled at that time. In its view, it appears disproportionate, in cases where there was an inadvertent failure to make an initial deduction, and no fraud or abuse of rights are involved and no detrimental effects for the treasury have been established, not to permit that taxable person to make the deduction when the goods or services are first put to use (judgment of 30 April 2020, *CTT – Correios de Portugal*, C-661/18, EU:C:2020:335, paragraph 56).

***Second view: narrow interpretation***

17 The referring court points out that the broad interpretation set out above is not in line with the case-law of the Court of Justice, according to which it follows from a combined reading of Articles 184 and 185(1) of the VAT Directive that it is appropriate to apply those provisions where an adjustment proves to be necessary following a change in one of the factors used to determine the amount to be deducted, and that the amount of that adjustment must be calculated in such a way that the final amount to be deducted corresponds to that to which the taxable

person would have been entitled if that change had initially been taken into account (see, inter alia, judgment of 27 June 2018, *Varna Holideis*, C-364/17, EU:C:2018:500, paragraph 29 and the case-law cited). The Court of Justice seems thereby to be limiting the scope of Articles 184 and 185(1) of the VAT Directive to cases where there has been a change of circumstances after the period of the initial deduction.

18 In addition, the broad interpretation appears to be at odds with the case-law of the Court of Justice, according to which an insufficiently diligent taxable person who fails to deduct VAT in good time – that is, within the applicable time limit – may be penalised by the loss of the right of deduction (judgment of 1 October 2020, *Vos Aannemingen*, C-405/19, EU:C:2020:785, paragraphs 22 to 24). If the deduction is nonetheless granted, there may be a breach of the principle of legal certainty which requires that a taxable person's tax position – in particular his rights and obligations towards the tax authorities – should not be left uncertain for an indefinite period of time.