EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

taxud.c.1(2016)923028 – EN

Brussels, 10 February 2016

VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 897

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Commission**
REFERENCES:	**Articles 143(1)(f), (fa), (g), (h), (i) and 151**
SUBJECT:	**VAT exemptions on acquisitions made under diplomatic and consular arrangements, by the European Institutions, by international organisations and by armed forces**

1. INTRODUCTION

Article 151 of the VAT Directive[1] provides for exemptions on the supply of goods or services to certain persons and organisations, as these transactions are treated as exports. Similar exemptions for the importation of goods to those same persons and organisations are included in Article 143 of the VAT Directive.

The Commission services are frequently asked about different issues related to these exemptions, questions that come from taxable persons making the supplies, beneficiaries of those supplies and also from Member States having to apply the exemptions.

For that reason, it has been considered convenient to draft a comprehensive Working paper that would provide complete guidance on the application of the abovementioned exemptions.

2. SUBJECT MATTER

Article 151 of the VAT Directive grants an exemption for the supply of goods or services under diplomatic and consular arrangements, to European Institutions as covered by the Protocol of 8 April 1965 on the privileges and immunities of the European Communities ("the PPI"), to recognised international bodies subject to certain limits and conditions and to armed forces under certain given circumstances. Similar provisions are included in Article 143 of the VAT Directive regarding the importation of goods.

As common rules have not been adopted yet in that regard, these exemptions are subject to the limitations laid down by the Member State hosting those eligible for exemption ("host Member State").

These exemptions have been included in the VAT Directive to enable Member States to honour certain commitments made under international law, such as the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations ("the Vienna Convention") or the North Atlantic Treaty.

The first element that has to be studied in order to analyse the different features of these exemptions is the subjective element, that is to say those that can benefit from exemption upon importation of goods and acquisition of goods and services ("eligible individuals/bodies").

Under this point it should also be analysed whether the exemption can only be applied to direct supplies to the eligible individuals/bodies or whether it could be extended to supplies by subcontractors or other persons to a contractor who later transfers the goods or passes on the services to the eligible individuals/bodies.

It is also necessary to consider, as the second objective element, whether all acquisitions of goods and services by eligible individuals/bodies could benefit from exemption or whether the exemption is only granted when acquisitions are made for certain activities of

[1] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

these individuals/bodies. We will also address which authorities are competent to impose limits and conditions to the exemption and to verify that all the requirements have been fulfilled.

Finally, we will have a look at the formal requirements to be met and the procedure to be followed in order to obtain the exemption.

The references made in this Working paper to provisions of Article 151 of the VAT Directive should be understood as also made to the equivalent provisions to be found in Article 143 of the VAT Directive.

3. THE COMMISSION SERVICES' OPINION

3.1. Individuals/bodies eligible for exemption

In this point we will first analyse one by one the points included in Article 151(1) of the VAT Directive to later address some common issues.

3.1.1. Diplomatic and consular arrangements

An exemption granted for goods or services supplied under diplomatic and consular arrangements can be found in Article 151(1)(a) of the VAT Directive.

The features of this exemption have not been the subject of much discussion but were addressed during the 102nd meeting of the VAT Committee[2] when discussing the status of the Sovereign Order of the Knights of Malta ("Order of Malta"). There it was stated that the objective of this exemption is to allow Member States to honour commitments made under international law, notably the Vienna Convention, which covers diplomatic missions or consular representations of sovereign subjects of international law but can be extended to other entities, notably bodies which are granted a particular status by the United Nations.

The decisive element for the exemption to be granted to a body with a particular status is, as pointed out on that occasion, that relations effectively corresponding to diplomatic relations in the sense of the Vienna Convention have been established with the host Member State and that the representatives of such a body have been granted full diplomatic status.

It should be noted that Article 151(1)(a) of the VAT Directive only requires that goods and services are supplied under diplomatic and consular arrangements. Thus, although diplomatic status is a requirement it is not necessary that the person eligible for exemption is accredited as a diplomat within the Member State where the supply is made.

Therefore, the exemption applies not only when supply is made to persons who are accredited as diplomats within the Member State where the supply is made, but also when goods or services are supplied to diplomats accredited to another Member State.

[2] Working paper No 837.

If that were not the case, then a diplomat accredited to one Member State could only benefit from exemption in the case of acquisitions of goods and services made within that Member State, and would have to bear the cost of VAT when purchasing goods and services in other Member States. That would be contrary to the principles of the internal market.

When acquiring goods and services in Member States other than that to which a diplomat is accredited the diplomat will have to provide the supplier with a VAT exemption certificate that confirms that the supply qualifies for exemption.

3.1.2. European Institutions

Article 151(1)(aa) of the VAT Directive provides for an exemption on the supply of goods and services to the European Institutions and bodies set up by them to which the PPI applies. This enables exemption for goods or services acquired for the official use of these bodies.

Therefore, bodies such as joint undertakings benefit from the exemption whenever the two conditions abovementioned are applicable to them: they have to be set up by the European Institutions and they are covered by the PPI. That is the case, for instance, of the Innovative Medicines Initiative Joint Undertaking (IMI) or the ARTEMIS Joint Undertaking. However, other joint undertakings such as the European Research Infrastructure Consortium (ERIC) or the European grouping of territorial cooperation (EGTC) are not covered by the PPI, so the exemption in Article 151(1)(aa) of the VAT Directive is not applicable to them. Nevertheless, they could benefit from exemption if they qualify as international bodies and fulfil the other requirements laid down in Article 151(1)(b) of the VAT Directive as explained in section 3.1.3.

The scope of the exemption granted to European Institutions and bodies set up by them would be then delimited by the PPI and the agreement with the Member State hosting the individual institution or body.

3.1.3. International bodies

An exemption is also granted for goods or services supplied to other international bodies. The exemption which can be found in Article 151(1)(b) of the VAT Directive has been the subject of much discussion.

Context

It is worth mentioning first of all that the terms "international bodies" and "international organisations" should be considered as synonymous for the purposes of the VAT Directive.

Article 151(1)(b) of the VAT Directive has its precedent in Article 15(10) of the Sixth VAT Directive[3], which granted an exemption in similar terms but referring to "international organisations" instead of "international bodies". The same comparison could

[3] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ L 145, 13.6.1977, p. 1).

be made between Article 143(1)(g) of the VAT Directive and Article 14(1)(g) of the Sixth VAT Directive.

As stated in the third recital of the preamble to the VAT Directive, the recast of the structure of the Sixth VAT Directive was done in order to ensure that the provisions were presented in a clear and rational manner and amendments to the wording were not, in principle, intended to bring about material changes in existing legislation.

It is clear that the replacement of the term "organisations" with the term "bodies" in the English language version was not made with the intention to change the scope of the exemption. This is also confirmed by the fact that the term has not changed in other language versions such as the French or the German ones.

Therefore, the scope of the exemption remains unaltered and continues to cover the same entities.

Conditions for international bodies to benefit from the exemption

Three conditions have to be met in order for the exemption in Article 151(1)(b) of the VAT Directive to apply:

– The body to which the goods or services are supplied needs to qualify as an international body (objective condition).

– It has to be recognised as an international body by its host Member State (subjective condition). Even if a body qualifies as an international body, it is entirely left for the Member State concerned to decide whether or not, for the purposes of VAT, such recognition is to be given. The fact that the host Member State recognises an organisation as an international body does not make up for the first condition, which should be assessed independently. Therefore, even with that recognition the exemption should be denied whenever the organisation does not fulfil the conditions for being considered an international body under the VAT Directive.

– A convention, although not necessarily a traditional convention under international law, which lays down limits and conditions is required (objective condition).

These three conditions were analysed during the 98th meeting of the VAT Committee[4].

Finally, it should be noted that the VAT exemption for goods and services purchased by an international body can only be a consequence of the creation of such an international body, but it cannot be the objective of its creation. Therefore, no VAT exemptions should be included in the act creating such a body.

Notion of international bodies

It must be clear that not all organisations will qualify as international bodies under the VAT Directive. The notion of international bodies was first discussed during the 43rd meeting of the VAT Committee[5], leading to guidelines being drawn up[6].

4 Working paper No 752.

It was concluded that to qualify as such an international organisation would have to be set up by at least two States recognised by the European Union or by an existing international organisation (possibly acting jointly with other international organisations or States) and have legitimate objectives that are jointly pursued and essentially non-economic in nature.

The fact that the organisation has legal personality or constitutes an organisation within the meaning of international law was not found decisive in this regard.

That is consistent with the concept of taxable person within the VAT Directive, which does not require that an entity has legal personality in order to be regarded as a taxable person, it being sufficient for the entity to have a clearly defined organisational, administrative and financial independence.

With regard to the international conventions setting up an international body for the purposes of the VAT Directive, it was also agreed that it is sufficient for States and international organisations to agree to set up an organisation, even if this is not based on a traditional convention under international law, provided that it is clearly established that the subjects of international law concerned consented to be bound.

Status as an international body

On occasion, questions are raised as to whether one or the other entity would and could qualify as an international body.

This has for example come up with regard to the European Research Infrastructure Consortium (ERIC) for which the implications of the VAT exemptions have previously been analysed in the VAT Committee[7]. The legal framework laying down the requirements and procedures for and the effects of setting up an ERIC was created by Council Regulation (EC) No 723/2009 ("the ERIC Regulation") and has its legal basis in Article 187 TFEU.

An entity would need to be recognised as an international body for VAT purposes by its host Member State in order for it to be set up as an ERIC. Therefore, once set up ERICs benefit from the exemptions in Article 151(1)(b) of the VAT Directive, as long as the goods or services acquired by them respect the limits and conditions laid down by the conventions or agreements establishing the ERIC in question, and are acquired to be used for the objectives that constitute the purpose of that ERIC.

The VAT Committee also analysed in its 102nd meeting[8] the qualification as international bodies of another type of consortium, the European groupings of territorial cooperation (EGTCs). In this case it was agreed, through the drawing up of guidelines[9], that for an EGTC to be qualified as an international body, an assessment would have to be made on a case-by-case basis, taking into account all the features of the EGTC in question. As a class or category, EGTCs could not be regarded as international bodies as they may be set up

5 Working paper No 176.
6 Guidelines of the 43rd meeting of the VAT Committee (Document No XXI/567/95).
7 Working papers No 612 and No 800.
8 Working paper No 834.
9 Guidelines of the 102nd meeting of the VAT Committee (Working paper No 858 FINAL).

without the participation of two States and/or existing international bodies, their membership can include private bodies and their objectives may also cover economic activities being carried out.

The possibility of setting up consortiums similar to ERICs in the field of security and defence has also been discussed[10]. On that occasion, it was stated that for that to be possible it would first be necessary to find an appropriate legal basis as Article 187 TFEU only provides for research activities. If such a legal basis were to be found, then it would be necessary for that type of consortium to fulfil the same conditions as any other international organisations.

Entities not qualifying as international bodies

The concept of international body does not include sovereign States for which the VAT Directive does not provide any legal basis to exempt[11], a view that has been endorsed by the VAT Committee[12].

It does not cover private entities, nor are non-governmental organisations (NGOs) or, in general, entities open to private participation covered, as they do not fulfil the abovementioned requirements for qualifying as international organisations. An exception has been made for the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies ("Red Cross"). The Red Cross must be considered, in view of its special mandate, to be an intergovernmental organisation that qualifies as an international body within the meaning of the VAT Directive[13].

That is based on the fact that the Red Cross has a special international mandate that can only be fulfilled if its working principles of impartiality, independence and neutrality are respected. That particular status separates it from private entities or other NGOs which cannot, in any case, be granted the exemption provided for in Article 151(1)(b) of the VAT Directive. This is confirmed by the discussion had on the Order of Malta whose status, despite it also being involved in humanitarian actions, was not found to be comparable to that of the Red Cross[14].

3.1.4. Members of international bodies

Article 151(1)(b) of the VAT Directive also allows members of international bodies eligible for exemption to benefit from the VAT exemption for their acquisitions of goods or services. It is necessary to clarify whether the term "members" refers to members of the staff of the international body or to those bodies that have set up the international organisation.

The wording of the VAT Directive refers to members of such bodies, without further precision. Therefore, it is not possible to infer neither from that wording nor from its context that the expression "members" refers to the members of staff. The view of the

10 Working paper No 853.
11 Working paper No 705.
12 Guidelines of the 94th meeting of the VAT Committee (Working paper No 714 FINAL).
13 Working paper No 647 REV.
14 Working paper No 837.

Commission services is that this must rather be taken to refer to the entities that make up such bodies.

That seems to find support in the fact that in Article 151(1)(c), (d) and (e) of the VAT Directive it is clearly specified that the VAT exemption shall apply to armed forces or the civilian staff accompanying them. Therefore, if the legislator had wanted with the exemption in Article 151(1)(b) to target the members of the staff of international organisations, it should have used a similar formula.

In the case of ERICs in particular, Article 9(1) of the ERIC Regulation refers to the entities that make up the ERIC as members of the body. There is no reference in that regard to members of staff.

It must be concluded that the reference to "members" is in fact intended to cover the entities that have been setting up the international organisation. In that capacity those entities could benefit from the exemption for their acquisitions of goods and services provided, however, that the rest of the conditions that we will analyse later are fulfilled. There is no legal basis to deny the VAT exemption for those entities.

Conversely, the lack of a provision such as that included in Article 151(1)(c), (d) and (e) where specific mention is made of the civilian staff accompanying the armed forces, makes it difficult to extend application of the exemption in Article 151(1)(b) of the VAT Directive, foreseen to benefit international bodies and their members, to members of staff of such bodies.

In the case that privileges are granted by the host Member State to members of the staff of an international body, those privileges cannot find their legal basis in the VAT Directive. However, Member States may provide, outside the VAT system, for a mechanism of compensation of the amount levied as VAT[15].

It must be clear, though, that not all acquisitions of goods or services by members of an international body can benefit from a VAT exemption. The VAT Committee agreed guidelines[16] clarifying the conditions that have to be fulfilled for their acquisitions to benefit from the VAT exemption. Even though the guidelines refer to ERICs they could be applied in equal measure to all other international bodies. The conditions that an acquisition of goods or services by a member of an international body must fulfil in order to benefit from a VAT exemption, are as follows:

(a) the convention or agreement setting up the international body provides for its members to benefit from the exemption granted to the international body;

(b) the acquisition of goods or services made by the member respects the limits and conditions laid down in the convention or agreement setting up the international body;

(c) the goods or services acquired by the member are necessary for the international body to fulfil the objectives assigned to it and intended for the exclusive use in achieving the tasks that constitute the purpose of that international body;

15 For further details, see section 3.2.6 of this Working paper.
16 Guidelines of the 101st meeting of the VAT Committee (Working paper No 828 FINAL).

(d) those goods or services are not shared in use with other bodies or used for tasks of the international body other than those constituting its purpose.

It was also agreed that with a view to ensuring the correct and straightforward application of those exemptions as required under Article 131 of the VAT Directive, only goods or services allocated directly for the exclusive use in achieving the tasks that constitute the purpose of the international body, without any further processing, could benefit from exemption. Therefore, the exemption does not cover cases in which goods or services used by the members of the international body are handed over to that body only indirectly.

In particular, in the case of ERICs it was also discussed whether the representing entities to which Article 9(4) of the ERIC Regulation refers could benefit from the VAT exemption in their acquisitions of goods or services. That possibility was rejected as those entities cannot become members of the ERIC[17], so they could not benefit in their acquisitions of goods or services from the VAT exemption unless those acquisitions were made in the name and on behalf of the ERIC[18].

3.1.5. Armed forces

The VAT Directive does not provide for a VAT exemption in regard to defence-related activities. However, it includes a VAT exemption for armed forces of a State party to the NATO Treaty ("NATO forces") under certain given circumstances[19] and for UK forces when stationed in the island of Cyprus. The aim of these exemptions is, once again, to allow Member States to honour certain commitments, and they only apply to the extent required for such commitments to be honoured. An analysis of the overall treatment of defence-related activities was discussed at the 104th meeting of the VAT Committee[20].

<u>NATO forces taking part in the common defence effort</u>

Article 151(1)(c) of the VAT Directive grants an exemption to supplies of goods or services to NATO forces or the civilian staff accompanying them or for supplying their messes or canteens but only if all of the following conditions are met:

– The supply has to take place within a Member State which is a party to the NATO Treaty. No exemption could be granted if the goods or services are supplied within a Member State which is not part of that Treaty.

– It has to be intended for armed forces (or civilian staff accompanying them or for supplying their messes or canteens) of a State that is a party to the NATO Treaty but which is different from that where the supply of goods or services take place. The armed forces of the Member State in which the supply takes place cannot benefit from the VAT exemption. The armed forces do not have to be from a Member State - they can also be from a third country.

17 Working paper No 800.
18 See guidelines of the 101st meeting of the VAT Committee (see footnote 16).
19 Working papers No 554 and No 785.
20 Working paper No 853.

– The armed forces must be taking part in the common defence effort. The presence of the armed forces should therefore be related to activities linked to the objectives set out in the NATO Treaty. If the presence of armed forces is based on a bilateral agreement without it being derived from the NATO Treaty itself, with the armed forces not taking part in the common defence effort, no VAT exemption could be granted.

When the supply of goods or services is made not within a Member State, but to another Member State, then it is Article 151(1)(d) of the VAT Directive which applies. In the view of the Commission services, the conditions that have to be met in order to benefit from the VAT exemption are the following ones:

– The supply has to be made to the armed forces (or civilian staff accompanying them or for supplying their messes and canteens) of a State party to the NATO Treaty other than those of the Member State to which the supply is made, as is also the case when supplied within a Member State. It is not needed either in this case that the armed forces are from a Member State. They can be from a third country.

– The armed forces must also be taking part in the common defence effort.

– It is not, in this instance, required that the supply is made from a Member State that is a party to the NATO Treaty. In any case, it should be done to a Member State that is indeed a party to that Treaty. This is not explicitly mentioned in the VAT Directive, unless we understand the expression "other than the Member State of destination itself" as referring to "State which is a party to the North Atlantic Treaty", but as a condition this is the reading required to create a level playing field with purchases made within a Member State that have to fulfil the said requirement.

The exemption would apply no matter whether the NATO forces are stationed, visiting or simply passing through another Member State than their own.

The conditions for those exemptions to apply have also been analysed on two separate occasions[21], most recently paying close attention to the conclusions of the Court of Justice of the European Union (CJEU) in *Able UK*[22].

It should be noted that the exemptions in Articles 151(1)(c) and 151(1)(d) apply to acquisitions of goods or services by NATO forces and not for NATO itself. The acquisitions of goods or services by NATO are exempted according to Article 151(1)(b), as those of any other international organisation, so the limits and conditions can be different from those applicable in the case of NATO forces.

<u>Armed forces of the United Kingdom stationed in the island of Cyprus</u>

Article 151(1)(e) of the VAT Directive provides for an exemption on "*the supply of goods or services to the armed forces of the United Kingdom stationed in the island of Cyprus pursuant to the Treaty of Establishment concerning the Republic of Cyprus, dated 16 August 1960, which are for the use of those forces, or of the civilian staff accompanying them, or for supplying their messes or canteens*".

[21] Working papers No 554 and No 785.
[22] CJEU, judgment of 26 April 2012 in case C-225/11 *Able UK*.

These exemptions are subject to the fulfilment of the limits and conditions laid down by the said Treaty of Establishment.

Other than that, the terms of this exemption do not need further explanations or clarifications in the view of the Commission services.

3.1.6. Diplomats and international organisations hosted by a State outside the EU

As diplomats and international organisations are not in all instances hosted by a Member State, it is also necessary to establish to which extent exemption may apply.

Diplomats

In the case of diplomats, Article 151(1)(a) of the VAT Directive refers to the supply of goods or services under diplomatic and consular arrangements, but makes no reference to whether or not the diplomat has to be accredited to a Member State.

Therefore, in the view of the Commission services, a VAT exemption could be granted to the acquisitions of goods or services by a diplomat accredited to a third country, whenever the agreement between the Member State where the supply of goods or services takes place and the third country to which the diplomat is accredited foresees that possibility.

In any case, no VAT would be charged in the case that the goods acquired by the diplomat are exported outside of the EU or when the rules on the place of supply of the services acquired point to a place outside the EU, for the same reasons as those given when talking about international organisations (see below).

International organisations

Article 151(1)(b) of the VAT Directive grants an exemption for the supply of goods or services made to international bodies recognised as such by the public authorities of the host Member State. Therefore, when the State hosting the international organisation does not belong to the EU, then the exemption in Article 151(1)(b) cannot be applied to its acquisitions of goods and services.

However, that does not mean that goods or services supplied to an international organisation hosted by a third country by a supplier established in the EU will necessarily be subject to VAT.

Regarding acquisitions of goods, if those goods are sent to the third country where the international organisation is hosted, then those supplies could be exempted according to Article 146 of the VAT Directive.

Regarding acquisitions of services, it should be noted that an international organisation would normally qualify as a non-taxable person. Therefore, the supply of services would be taxed in the place where the supplier is established, that is to say the Member State of the supplier, according to Article 45 of the VAT Directive.

However, we should bear in mind that Articles 46 to 59 of the VAT Directive lay down particular rules for the supply of certain services. The application of these rules would in practice imply that most of the services supplied to an international organisation

established outside the EU would not be taxed within the EU. In addition, Article 59a of the VAT Directive allows Member States to consider that, for services that fall under the general rule in Article 45, the place of supply would be situated outside the EU if the effective use and enjoyment of the services takes place outside the EU.

Nevertheless, if the goods acquired by an international organisation hosted by a third country remain within the EU, or in the case of services whose place of supply is in the EU and which are effectively used and enjoyed there, resulting in the supply being subject to VAT, no VAT exemption could be granted according to Article 151 of the VAT Directive.

That would not be the case when the international organisation hosted by a third country has an office in one or more Member States. In that case, the acquisitions of goods and services made by those offices could benefit from the exemption in Article 151 of the VAT Directive, whenever an agreement has been signed between the international organisation and the Member State where the office of the international organisation is located, granting the exemption and establishing limits and conditions to that exemption, as that office could then be seen as a fixed establishment for VAT purposes.

3.1.7. Contractors and subcontractors of eligible individuals/bodies

The exemptions in Article 151 of the VAT Directive only apply to supplies made directly to eligible individuals/bodies, and do not extend back down the supply chain. Therefore, supplies made by subcontractors to the contractors of eligible individuals/bodies would need to be taxed according to the normal rules.

This is in line with the ruling of the CJEU in *Velker International Oil Company*[23]. That case related to what is now Article 148 of the VAT Directive, but some of the conclusions drawn are also relevant when it comes to Article 151.

Scope of the exemption

The CJEU first stated that exemptions have to be interpreted strictly as they constitute an exception from the general rule that the tax is levied on all goods and services supplied for consideration by a taxable person, in particular when the provisions at issue constitute exceptions to the rule that transactions taking place within the territory of a Member State are subject to VAT.

The CJEU noted that, in the case of exports, the exemption applies exclusively to the final supply of goods exported by the seller or on his behalf. Therefore, the exemption laid down in Article 15(4) of the Sixth VAT Directive applied only to the supply of goods to a vessel operator who was to use those goods for fuelling and provisioning and could not be extended to the supply of those goods effected at a previous stage in the commercial chain.

In the view of the CJEU the extension of the exemption to stages prior to the final supply of the goods to the vessel operator would require Member States to set up systems of supervision and control in order to satisfy themselves as to the ultimate use of the goods supplied free of tax. Far from bringing about administrative simplification, such systems

[23] CJEU, judgment of 26 June 1990 in case C-185/89 *Velker International Oil Company*.

would amount to constraints on the Member States and the traders concerned which it would be impossible to reconcile with the "correct and straightforward application of such exemptions" prescribed in Article 131 of the VAT Directive.

Even though the CJEU was referring in this case to what is now Article 148 of the VAT Directive, the same reasoning applies to transactions covered by Article 151 of the VAT Directive as they are also transactions treated as exports. Therefore, that exemption only applies in the case of acquisitions of goods or services made directly by the eligible individual/body, and cannot be extended to supplies made to the contractors of such individuals/bodies.

The recent ruling of the CJEU in *Fast Bunkering Klaipeda*[24] confirms this view. In that case, it was clearly stated once again by the CJEU that "*the exemption laid down in Article 148(a) of Directive 2006/112 applies only to the supply of goods to a vessel operator who will use those goods for fuelling and provisioning and cannot, therefore, be extended to the supply of those goods effected at a previous stage in the commercial chain*"[25].

In that case, the CJEU added that "*It follows that the uniform application of Article 148(a) of Directive 2006/112 could not be guaranteed, without compromising the objective of administrative simplification mentioned in paragraph 28 of the present judgment, if that provision were to be interpreted as applying to supplies of goods made to economic operators which are not the operators of vessels used for navigation on the high seas, but which acquire them for the purposes of the exclusive use by such operators, even if that use is known and duly established and evidence confirming this is submitted to the tax authority in accordance with the legislative provisions.*

…

It follows from the foregoing that the exemption provided for in Article 148(a) of Directive 2006/112 is, in principle, not applicable to supplies to intermediaries acting in their own name, even if, at the date on which the supply is made, the ultimate use of the goods is known and duly established and evidence confirming this is submitted to the tax authority in accordance with national legislation"[26].

However, in the given case, the fuel was invoiced by the provider to an intermediary acting in his own name who later invoiced that fuel plus his commission to the operator of the vessel. Nevertheless the fuel was supplied directly by the provider to the operator. The provider only invoiced the intermediary once the fuel was in the fuel tanks of the operator and therefore the transfer of ownership to the intermediary was taking place, at the earliest, at the same time as when the operator was actually entitled to dispose of the fuel, in fact, as if he was the owner.

Thus, the intermediary only had formal ownership of the fuel. The power to actually dispose of the fuel was transmitted directly from the provider to the operator. Therefore, the CJEU concluded that under such circumstances, there was no supply of fuel to the

[24] CJEU, judgment of 3 September 2015 in case C-526/13 *Fast Bunkering Klaipeda*.
[25] *Fast Bunkering Klaipeda*, paragraph 27.
[26] *Fast Bunkering Klaipeda*, paragraphs 44-46.

intermediary acting in his own name as the fuel had in fact been supplied directly to the operator of the vessel by the provider who could therefore benefit from the exemption.

Therefore, the conclusion reached in *Velker International Oil Company* that the exemption applies only to the supply of goods to a vessel operator who will use those goods for fuelling and provisioning and that it cannot be extended to the supply of those goods made at a previous stage in the commercial chain, remains then unaltered. Only when supply is made directly by a provider to the eligible individual/body, the exemption in Article 151 can be applied.

This same conclusion was reached previously[27] when analysing whether supplies of goods or services to representing entities appointed by the members of an ERIC could benefit from VAT exemption. It was concluded that those entities could not benefit from the VAT exemptions in Article 151 of the VAT Directive, not even if the goods and services were acquired with a view to be handed over to the ERIC as an in-kind contribution.

The only possibility for entities other than the eligible bodies and their members to benefit from the abovementioned exemptions would be for the goods or services to be acquired by the entity in the name and on behalf of the eligibly body, which implies that the invoice is issued in the name of the eligible body, the purchase is administered by the said body, and provision is made for the purchase in the budget of that eligible body.

Alternative basis on which to exempt

The exclusion from the exemption of supplies made by subcontractors to contractors of eligible individuals/bodies cannot be circumvented invoking the rule in Article 164 of the VAT Directive.

Article 164 of the VAT Directive provides for an optional exemption which may be applied to the intra-EU acquisition, importation and supply of goods with a view to their exportation from the EU as they are or after processing and to related services.

It should be noted that Article 164 specifically refers to goods "with a view to their exportation" and "export" rather than to transactions "treated as exports". The aim of the provision is to release traders engaged in exportation from the payment of input/import VAT related with to-be-exported goods, as the payment and subsequent deduction may cause cash-flow difficulties for traders, but it is not intended to be applied in situations that are treated as exports but where the goods remain within the EU.

This interpretation is consistent with the *acquis* of the CJEU that the terms used to specify the exemptions under the VAT Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all supplies of services for consideration.

Therefore, taking into account the purpose of Article 164 of the VAT Directive and the guidance of the CJEU on the interpretation of the exemptions, it should not be possible to apply Article 164 in conjunction with Article 151.

[27] Working paper No 800, see section 3.2.

3.2. Transactions that can and cannot benefit from the exemption

3.2.1. Acquisitions under diplomatic and consular arrangements

The Vienna Convention grants diplomats exemption from all duties and taxes, personal or real, national, regional or municipal, except indirect taxes of a kind which are normally incorporated in the price of goods and services.

VAT is covered by the privileges afforded to diplomats under the Vienna Convention. That is confirmed by the exemption granted in Article 151(1)(a) of the VAT Directive.

The VAT Directive does not provide for limitations to this exemption, nor have common tax rules been adopted at EU level. The exemption shall instead be subject to the limitations laid down by the Member States having accredited the diplomat or consular official (the host Member State). Therefore, limitations and conditions laid down by one Member State can be different from those applicable in another Member State.

One condition that could be applied for exemption to be granted could be that of reciprocity or other restrictions could also be imposed. With regard to means of transport, it is often a condition that the means of transport is not resold within a certain period. If the means of transport is nevertheless sold, VAT will be due. In any case, it is a question that falls under the remit of the host Member State to decide.

It should be noted that the limitations and conditions laid down by Member State A for diplomats accredited to that Member State A, shall apply irrespective of where the acquisitions of goods and services are made. Therefore, the same limits and conditions apply whether the diplomat acquires goods and services in Member State A or in any other Member State. On the other hand, Member State A cannot apply its limits and conditions to acquisitions of goods and services made in Member State A by a diplomat accredited to Member State B. In that case the limits and conditions laid down by Member State B are the ones that will apply.

For applying the exemption it is necessary that the supply is made to the diplomat or the diplomatic mission. It does not cover goods or services supplied with a view to be used for purposes other than those covered by the Vienna Convention, such as goods or services acquired with a view to be used, for instance, by the employer of a diplomat (the Ministry of Foreign Affairs) in his own country. In that case, the supply would not qualify for the exemption in Article 151(1)(a) of the VAT Directive.

3.2.2. Acquisitions by European Institutions

Article 151(1)(aa) of the VAT Directive grants an exemption to the European Institutions and bodies set up by them "*within the limits and under the conditions of that Protocol (PPI) and the agreements for its implementation or the headquarters agreements, in so far as it does not lead to distortion of competition*".

Article 3 of the PPI states that "*the governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the Union*

makes, for its official use, substantial purchases the price of which includes taxes of this kind"[28].

From this we infer that there are three limits to applying this exemption:

– The goods and services have to be acquired for the official use of the Institutions. Official use could be defined as any use by which the functioning of the EU Institutions is secured or which is necessary to carry out EU policy.

– The purchase has to be substantial. This implies that the purchase has to exceed a certain amount to benefit from the exemption. The threshold has to be fixed in an agreement on implementing the PPI between the European body and its host Member State. If no such agreement exists, the threshold would be set by the host Member State unilaterally. The threshold can be determined by reference to the total amount of the invoice, the amount of the tax or the amount of the purchase excluding the tax. In that regard, it is important to stress the fact that the applicable threshold is the one fixed by the Member State hosting the institution and not the one where the supply of goods or services takes place.

– The VAT exemption cannot be applied in cases where it could lead to distortion of competition. That must be evaluated by reference to the activity in question. Such evaluation should take account of the entire national market and not relate to any local market in particular. It should encompass not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical[29].

3.2.3. Transmission of goods or services acquired exempt of VAT

The host Member State may lay down conditions and limitations for the eligible body to benefit from the VAT exemptions provided for in Article 151 of the VAT Directive. We have already seen in section 3.2.1 that, in the case of diplomats, a condition could be that the goods acquired with exemption of VAT may not be transmitted to a third person within a certain period of time.

Even in cases where such a condition is not included in the agreement with the host Member State, the VAT exemption cannot be applied when goods or services are acquired by the eligible body with a view to transmit them to other persons or bodies. The goods or services acquired have to be used for the purposes that constitute the objective of the international body, which is not the case when the acquisition is made only with a view for the goods or services to be transmitted to another person or body. Therefore, if that is the case, the application of the VAT exemption should be denied to the eligible body for those acquisitions.

The fact that goods and services may later be transferred does not in itself impede the application of the VAT exemption, as long as they have effectively been used by the eligible body for the tasks that constitute its purpose during a reasonable period of time. It is only when the use of those goods or services by the eligible body has been incidental or

[28] The second paragraph of Article 3 of the PPI covers supplies of services in the same way as supplies of goods (CJEU, case C-191/94 *AGF Belgium*, paragraph 34 and operative part, point 3).

[29] See in particular the decision of the CJEU in case C-288/07 *Isle of Wight Council and Others*.

merely nominal to serve as a bridge for the later transmission that the application of the VAT exemption to acquisitions made by the eligible body could be put into question.

3.2.4. Acquisitions made with funds granted by the European Institutions

The exemptions provided for in Article 151 of the VAT Directive cannot be granted just because of the source by which a supply of goods or services is financed. To benefit from exemption, it is necessary that the goods or services are actually supplied to an eligible body.

The fact that an acquisition of goods or services is made by a beneficiary of EU funds, so that the said acquisition is financed by EU funds, does not mean that supply is made to the EU. Therefore, those acquisitions cannot be qualified as acquisitions made by European Institutions nor can they, unless made by another eligible body, benefit from the exemptions in Article 151 of the VAT Directive.

Beneficiaries of EU funds need to pay VAT on their purchases according to the normal rules. The same applies to other situations where funding is given, for example pursuant to an international agreement[30].

3.2.5. Transactions for which taxes have to be paid outside the EU

The exemption in Article 151 of the VAT Directive only covers VAT incurred within the EU. Where the place of supply of the goods and services purchased by diplomats or international organisations is outside the EU and no VAT is due to be paid within the EU, exemption under Article 151 of the VAT Directive could not be evoked in regard to the acquisitions made by the eligible individual/body, even if hosted by a Member State.

If indirect taxes are to be paid on the goods or services in the third country, the eligible individual/body would have to pay those taxes, unless there is an agreement with that country which relieves the individual/body in question of such taxes. The eligible individual/body does not have the possibility of asking for a reimbursement from the host Member State through the EU VAT system.

3.2.6. Transactions for which a tax exemption is granted under an international agreement

International agreements signed by Member States can include clauses granting exemption from taxes for the acquisition of goods or services or for the importation of goods. Member States are bound by these agreements and could be held liable under international law if they do not fulfil the obligations assumed under the agreement.

In the 94th meeting of the VAT Committee[31] it was analysed whether those obligations undertaken by Member States in international agreements could lead to an exemption from VAT when that possibility was foreseen in the agreement.

30 For more, see section 3.2.6 of this Working paper.
31 Working paper No 705.

In that regard guidelines were agreed[32] stating that, without prejudice to Article 351 TFEU, where an international agreement provided for an exemption from VAT, such an exemption could only be granted within the VAT system if there was a legal basis in the VAT Directive or if such a basis was provided for through the procedure laid down in Article 396 of the VAT Directive.

Therefore, apart from those cases, the only way for Member States to fulfil their commitments made through an international agreement would be to provide, outside the VAT system, for a mechanism for compensation of the amount levied as VAT. Such a mechanism would however need to comply with the basic principles of the internal market, so the reimbursement cannot be limited to tax incurred in the Member State concerned but would have to cover similar cost incurred in respect of goods or services bought in other Member States even if there would be no corresponding revenues to fund the reimbursement. This is necessary to avoid for such reimbursement to qualify as state aid. It also cannot lead to a reduction in the VAT base used for the calculation of own resources.

It is worth mentioning at this point that Member States cannot unilaterally provide for additional incentives to eligible bodies beyond the ones laid down by the VAT Directive. Member States have to apply these exemptions according to the wording of the VAT Directive without possibilities to deviate. Only in the cases foreseen in the VAT Directive, exemption will apply subject to the limits and the conditions set by the host Member State. Member States cannot exclude from the exemption cases provided for in the VAT Directive, nor can they extend the scope of the exemption to cases not covered by the VAT Directive.

If Member States would like to provide for additional incentives, that would have to be done outside the VAT system as mentioned before.

3.3. Formal requirements and procedure

3.3.1. Use of the VAT and/or excise duty exemption certificate ("exemption certificate")

An eligible body, when it fulfils all the conditions to benefit from the VAT exemption provided for in Article 151(1) of the VAT Directive, would be granted such an exemption not only when it acquires goods and services in its host Member State, but also when acquiring goods or services in another Member State, even if the Member State is not a member of the eligible body. The same applies to those individuals who may be eligible for exemption.

Article 51(1) of the VAT Implementing Regulation provides that in order to confirm that a transaction qualifies for exemption under Article 151 of the VAT Directive, it is necessary to use the exemption certificate set out in Annex II of the said Regulation. Use of that exemption certificate is required whenever the recipient of a supply of goods or services is established within the EU but not in the Member State in which the supply takes place.

Therefore, the exemption certificate serves as confirmation that the individual or the organisation is eligible for exemption and that the supply falls within the limits and meets with the conditions laid down in the agreement with the host Member State. It must be

[32] Guidelines of the 94th meeting of the VAT Committee (Working paper No 714 FINAL).

used where the place of supply of the goods or services is located in a Member State other than that where the eligible individual/body is located. For goods or services supplied within the Member State where the individual/body is located, it must be used but only if the Member State in question has decided to avail of the exemption certificate for local acquisitions.

The exemption certificate would be normally filled by the individual or organisation themselves but must be signed by the competent authorities of the host Member State. If an organisation has been authorised by the host Member State, but only in those cases, it may sign the certificate itself. Such an authorisation could only be given for the purchases that are made for official use.

Several questions relating to the use of the exemption certificate were discussed during the 98th meeting of the VAT Committee, leading to the publication of guidelines[33].

Requirements of the certificate

Article 51(1) of the VAT Implementing Regulation establishes that the certificate that serves to confirm that the transaction qualifies for the exemption is the one included in Annex II of the said Regulation. Therefore, the use of that document is compulsory, and cannot be replaced by any other document. Nor should previous versions of that document in use before the approval of the VAT Implementing Regulation be accepted.

It is possible for Member States to include slight adaptations of that document in order to make it operational. Nevertheless, the versions used by Member States must respect the full content of the certificate in Annex II of the VAT Implementing Regulation, without omissions, and be similar in appearance.

In addition, for the certificate to be accepted by the authorities where the supply of goods and services take place, it has to be duly filled and stamped (unless the recipient of the goods or services has been dispensed by the authorities of its host Member State). If that is not the case, the exemption could be denied.

In that regard, it could be advisable to agree on the setting up of an electronic form for common use by Member States, facilitating the tasks of the authorities that have to check that the certificate fulfils all conditions required to grant the exemption. Setting up such an electronic form would not imply the implementation of an electronic procedure; it would be simply a tool that could be used in the procedures already established by Member States.

If Member States consider that the implementation of an electronic form could be useful, the matter could be raised with the SCAC Committee to work on it.

Competent authorities to sign

One of the issues that were discussed was that of the competent authorities to validate the exemption certificate. It was agreed that the only authorities that are competent to stamp the certificate and to set the limits and conditions of the VAT exemption are those of the host Member State of the individual or the body eligible for exemption, irrespective of

[33] Guidelines of the 98th meeting of the VAT Committee (Working paper No 767 FINAL).

where the goods or services are used. That is the only way to guarantee that VAT exemptions are applied in a harmonised way within the internal market.

In the case of diplomats, the host Member State is the Member State to which the eligible person is accredited as a diplomat. That is the Member State that should lay down the conditions and limitations for the VAT exemption and that would sign the certificate to confirm that the supply qualifies for exemption. In the case of armed forces qualifying for exemption, the host Member State is that in which those armed forces are stationed. In the case of an international body, the host Member State is that designated as such by the international convention establishing the international body or by the headquarters agreement.

Multiple establishments

It was also discussed what happens when the eligible body has multiple establishments in different Member States. The view taken was that in those cases we should distinguish whether or not the establishment is an independent entity and whether the acquisition is made directly by the establishment or whether it is centralised[34].

If the establishment is an independent entity and the acquisition of goods and services is made directly by that establishment for its own needs or to comply with the tasks entrusted to it, then the competent authorities to validate and stamp the exemption certificate and to apply the limits and conditions for the exemption are those of the Member State where the establishment has its seat. If, on the other hand, the purchase is centralised by the headquarters with a view for the goods or services acquired later to be distributed among its delegations, the competent authorities to validate the certificate and to apply limits and conditions for the exemption are the ones of the host Member State of the eligible body itself.

Should the establishment not be an independent entity then the competent authorities for validating and stamping the exemption certificate will always be the ones hosting the eligible body.

Acquisitions made by NATO forces

In the case of NATO forces, the use of the exemption certificate would be necessary when the armed forces are stationed within the EU but in another Member State than that where the supply takes place. That would be the case, for instance, where armed forces of a NATO State (B) stationed in Member State (C) are visiting Member State (A) during a NATO exercise as part of the common defence effort, and they acquire goods and services taxable in that Member State (A).

There could perhaps in this situation be doubts about the Member State having to sign the exemption certificate, that is to say as to which is the Member State hosting these forces. It could be thought that the host Member State is the Member State to which the forces belong (B), the Member State where the forces are stationed (C), or the Member State where on-going exercises take place (A).

[34] Working paper No 755.

In our view, the Member State whose authorities are competent to sign the exemption certificate, is that where these NATO forces are stationed (C), and not the Member State to which the forces belong (B) nor the Member State in which the exercise takes place (A) (unless that is also where the forces are stationed). Those are also the authorities that have to confirm that the supply complies with all conditions required to benefit from the exemption. It may be that at the moment of the supply, they will not be in a position to certify that fact. If so, the NATO forces would not be able to provide an exemption certificate to the supplier at the moment of the supply and so the supplier will charge VAT to them.

In cases where direct exemption applies, Member States should not refuse the exemption just on account of that fact. This situation is explained later when referring to the modalities of exemption (section 3.3.2) and, in particular, to the direct exemption.

When NATO forces are stationed in a third country outside the EU, the exemption would still apply. However, no exemption certificate could be issued and stamped by the host Member State as, in this case, the host is a third country. That is also the case where the armed forces of a Member State (B) which is part of NATO, although not stationed in another Member State (C), are visiting Member State (A) during a NATO exercise taking part in the common defence effort, and they acquire goods and services taxable in Member State (A), or any other Member State (D) for that matter. In that situation, those armed forces are not hosted by any Member State so there would be no host Member State to stamp the certificate. Therefore, in these cases, the Member State where the supply takes place would have to decide, in accordance with Article 131 of the VAT Directive, which are the requirements that the supplier would have to meet in order to exempt the supply of goods or services, in order to ensure the correct and straightforward application of the exemption and prevent any possible evasion, avoidance or abuse. It could even decide to make use of the exemption certificate but would then need to adapt its use as there would be no host Member State to stamp that certificate[35].

<u>Acquisitions by members of international bodies</u>

In the case of acquisitions of goods or services made by the member of an international body later to be delivered to this body as an in-kind contribution, problems could arise. This issue was discussed in the 101st meeting of the VAT Committee[36], leading to guidelines that state that when goods or services are acquired by a member of an international body in a Member State other than that in which the international body is established, and the transaction fulfils all the conditions for benefiting from VAT exemption under Articles 143(1)(g) or 151(1)(b) of the VAT Directive, the exemption certificate should specify that the goods or services are acquired by the member but for the sole purpose of the international body.

3.3.2. Modalities of the exemption

The exemption should, as a rule, be granted as a direct exemption. However, Article 151(2) of the VAT Directive establishes that in cases where goods are not dispatched or transported out of the Member State in which the supply takes place, and in the case of services, the exemption may be granted by means of a refund of the VAT.

[35] For more details in these particular cases see Working paper No 785, section 3.2.2.
[36] Working paper No 800.

It is the Member State in which the supply takes place, and not the host Member State of the diplomat, the organisation or the armed forces, that decides on the method of exemption applicable.

Direct exemption

When a certificate is needed because the recipient of the goods or services is established in a Member State other from that where the supply takes place, it should be noted that according to Article 51(3) of the VAT Implementing Regulation "*where direct exemption is applied in the Member State in which the supply takes place, the supplier shall obtain the certificate referred to in paragraph 1 of this Article from the recipient of the goods or services and retain it as part of his records. If the exemption is granted by means of a refund of the VAT, pursuant to Article 151(2) of Directive 2006/112/EC, the certificate shall be attached to the request for refund submitted to the Member State concerned*".

Therefore, where direct exemption applies, the exemption certificate should be submitted by the eligible individual/body to the supplier. This should be done before the supply is made although there are cases where it is impossible for the eligible individual/body to submit the certificate beforehand. In those cases the supplier will charge VAT when the supply takes place, as the certificate is the only guarantee he has in order to be sure that the transaction qualifies for exemption. This situation was discussed during the 98th meeting of the VAT Committee[37], leading to guidelines[38] where it was agreed that once the duly filled certificate is delivered to that supplier by the recipient, the supplier should be entitled to make the necessary adjustments subject to the general limits and conditions laid down by the legislation of the Member State concerned regarding correction or modification of invoices.

Thus, when a certificate is needed and direct exemption applies, and the certificate cannot be submitted to the supplier before the supply is made, once the eligible individual/body has the certificate duly filled it should be submitted to the supplier. The supplier should then rectify the invoice and his VAT return if necessary, and refund the VAT to the eligible individual/body.

There is no legal basis for Member States to refuse adjustment, and with that the exemption, just because the supplier receives the certificate after having supplied the goods or services. The adjustment by the supplier may however be made conditional on the tax being refunded to the recipient of the goods or services, to avoid any unjustified advantage.

Where the method to apply is direct exemption, the recipient of the supply will have to ask the supplier for rectification of the invoice and refund of the VAT paid once he has the exemption certificate. If the recipient instead asks for a refund from the Member State concerned, that request could be denied by the Member State on the basis that the request has not followed the procedure established. The amount of VAT paid cannot be recovered directly from the tax authorities; it has to be resolved between the parties involved in the transaction.

[37] Working paper No 755, see section 3.3.
[38] Guidelines of the 98th meeting of the VAT Committee (Working paper No 767 FINAL).

Refund

In the case that the Member State where the supply takes place has established that the exemption shall be granted by means of a refund in accordance with Article 151(2) of the VAT Directive, the eligible body/individual must submit a request asking for the refund to that Member State where the supply took place. According to Article 51(3) of the VAT Implementing Regulation, the request must be accompanied by the VAT exemption certificate duly filled and stamped by the competent authorities of the host Member State, unless that individual/body has been dispensed of the requirement of the stamp by the host Member State.

3.3.3. Issue of exemption certificate

Before use, the exemption certificate must be stamped by the competent authorities of the host Member State of the eligible individual/body. Where, in case of supplies taking place in a Member State other than that where the recipient is located, the host Member State has not issued a certificate although asked to do so the eligible individual/body will have to pay VAT to the supplier.

In the case of direct exemption the eligible individual/body would then not be able to ask the supplier to rectify the invoice, as referred to in section 3.3.2, as he cannot provide the supplier with proof that the transaction qualifies for exemption. In the case that the applicable procedure is refund, the application could then be denied as the certificate duly stamped cannot be attached to the request for refund as required by Article 51(3) of the VAT Implementing Regulation. Therefore, the eligible individual/body could not recover the VAT paid within the VAT system.

If the Member State where the supply takes place has an obligation to remit or refund the VAT to the eligible body due to an agreement, such as the PPI, the obligation under the agreement will persist even though it can only be fulfilled outside the VAT system.

When such an obligation does not exist due to an agreement, then the Member State where the supply takes place would not remit or refund the VAT to the eligible body. That could imply an obstacle for the eligible body for acquiring goods and services in Member States other than its host Member State, favouring domestic purchases over purchases made in other Member States, with detrimental consequence for the internal market.

Insofar as the conditions for exemption are met, issue of the exemption certificate constitutes an obligation for the authorities of the host Member State, according to Article 51(2) of the VAT Implementing Regulation. Having in mind the consequences for the proper functioning of the internal market, a systematic and repeated practice of a Member State in this regard could constitute an infringement.

In that regard, guidelines were agreed stating that the Member State concerned should notify the recipient of its decision to approve or refuse validation of the exemption certificate within a period not exceeding three months from the date on which the fully completed exemption certificate was presented for stamping to the host Member State[39].

[39] Guidelines of the 98th meeting of the VAT Committee (Working paper No 767 FINAL)

3.4. Other related issues

3.4.1. Economic activities

The implications of economic activities being carried out by international bodies were discussed during the 98th meeting of the VAT Committee[40].

International bodies are governed by public international law. They are not usually involved in economic activities and therefore, they would, as a starting point, be regarded as a non-taxable person. When carrying out an activity or transaction, they would also be treated as a non-taxable person whenever they carry them out as a public authority, according to the first subparagraph of Article 13(1) of the VAT Directive. That would be the case when the activity or transaction is carried out under the special legal regime applicable to the international body.

However, when the treatment as non-taxable persons would lead to significant distortions of competition, the international body should be regarded as a taxable person (second subparagraph of Article 13(1)). They should also be regarded as taxable persons, in any event, in respect of the activities listed in Annex I of the VAT Directive, provided that those activities are not carried out on such a small scale as to be negligible (third subparagraph of Article 13(1)).

An international body cannot be regarded as acting as a public authority when it acts under the same legal conditions as those applicable to private traders. In these cases it shall be seen as a taxable person.

It should also be noted that Article 13(2) of the VAT Directive allows Member States to regard international bodies engaged in certain exempted activities, whilst not acting as a public authority, as if they were engaged in those activities as a public authority.

Therefore, the treatment of the international bodies results in three categories of activities: outside the scope of VAT, within the scope of VAT but exempted and, finally, taxed.

When international bodies engage in economic activities, they are captured by the concept of taxable person, as the decisive element to be regarded as such is the activity carried out by an entity and not its status.

The main consequence of considering an international body as a taxable person in regard of certain activities is that it would not benefit from the exemption in Article 151(1) of the VAT Directive for the acquisitions of goods or services made for those activities. That exemption does not apply to supplies of goods or services that serve as input for the economic activities of an international body.

Therefore, when international bodies acquire goods or services to be used in the tasks that constitute their objectives, they will benefit from a VAT exemption in regard to those acquisitions. However, when acquiring goods or services to be used in tasks which are not part of their objectives and, in particular for economic activities, international bodies cannot benefit from the exemptions in Article 151 of the VAT Directive.

[40] Working paper No 754.

In the case of economic activities, no VAT exemption could be applied, neither to the input (goods or services acquired by the international body) nor to the output (goods or services supplied by the international body).

The qualification of individual activities or transactions carried out by an international body shall be dependent on the situation, and subject to the assessment of the Member State where the place of supply is[41].

3.4.2. VAT identification number

The VAT identification number serves, for the supplier of services, as a means to establish whether a customer is a business and identify where the customer is established.

International bodies eligible for the exemption in Article 151 of the VAT Directive will not in most cases be carrying out economic activities. Therefore, they will not be taxable persons acting as such (business), but rather non-taxable legal persons (final consumers).

When an international body carries out an economic activity it could be in possession of a VAT identification number. As in most cases they are not involved in economic activity, it is however more likely that the international body has no such number.

It should be noted that as a result of Article 3(1)(a) of the VAT Directive, intra-EU acquisitions of goods by individuals/bodies are not subject to VAT where the supply of such goods within the territory of the Member State of acquisition would be exempt pursuant to Article 151 of the VAT Directive. Therefore, individuals/bodies whose acquisitions are exempt under Article 151 will not be registered for VAT purposes on account of those acquisitions.

If as a result of carrying out economic activities an international body is nevertheless attributed a VAT identification number, there may be need to take account of Article 43 of the VAT Directive.

3.4.3. Invoice

For supplies covered by the exemption under Article 151 of the VAT Directive, there should be no need to include a VAT identification number in the invoice, and the absence of such number could not be invoked to deny the application of the exemption.

As in the case of any other exemption, according to Article 226 of the VAT Directive, the invoice issued will need to include a reference to the applicable provision of the VAT Directive, or to the corresponding national provision, or any other reference indicating that the supply is exempt.

3.4.4. Right to deduct of the supplier

Even though the supply of goods or services to an eligible individual/body is exempted, that does not imply that the right of deduction of the supplier is affected by that. Article 169(b) of the VAT Directive establishes that the taxable persons shall be entitled

[41] Guidelines of the 98th meeting of the VAT Committee (Working paper No 769 FINAL).

to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of transactions which are exempt pursuant to Article 151 of the VAT Directive.

However, it should be noted that if the supply of goods or services carried out within a Member State were to be exempted without right of deduction, because it is an activity in the public interest, or the activity falls under Article 135 of the VAT Directive, or because it is made by a company under the special scheme for small enterprises or for any other reason, then the supply would not give rise to the right to deduct even when made to an international organisation. In this case, Article 169(b) could not be invoked to grant the right to deduct to the supplier.

This follows from the ruling of the CJEU in *Eurodental*[42]. In the view of the CJEU, exemptions such as the ones referring to activities in the public interest are of a specific nature, while the exemption on intra-EU supplies (or in the case of exports, to which exemptions in Article 151 are assimilated) is of a general nature. Therefore, exemptions such as the ones in Article 132 of the VAT Directive take precedence over those in Article 151. That is confirmed by the fact that Article 169(c) of the VAT Directive expressly grants the right to deduct in respect of some transactions included in Article 135(1) where the customer is established outside the EU or where those transactions relate directly to goods to be exported out of the EU. That provision would have no purpose if the exemptions provided for in Article 135 were already covered by Article 169.

In addition, granting the right to deduct to those transactions would run counter to the principle of fiscal neutrality, as the same transactions would give rise to deduction when supplied to eligible bodies while they would not when supplied to other persons.

Therefore, when the transaction is exempted without right to deduct when supplied to other persons, it cannot give right to deduct when supplied to bodies included in Article 151 of the VAT Directive.

That implies that the supplier would include the VAT paid by him among his costs, so that VAT would be hidden in the invoices issued to the eligible body. In that regard we would like to stress that Article 3 of the PPI, when talking about the obligation of the governments of the Member States to take the appropriate measures to remit or refund the amount of indirect taxes, states that that would be made wherever possible.

The CJEU stated in *Commission vs Belgium*[43] that "*indirect duties may be regarded as being included in the price of purchases made by the Communities within the meaning of the second paragraph of Article 3 of the Protocol only when they are foreseeable and their amount may be calculated in advance with a certain degree of precision, in order that the national authorities may be able to remit or refund them at the request of the Community institutions*". When VAT is hidden in the invoice, these conditions mentioned by the CJEU do not seem fulfilled.

[42] CJEU, judgment of 7 December 2006 in case C-240/05 *Eurodental*.
[43] CJEU, judgment of 26 October 2006 in case C-199/05 *Commission vs Belgium*.

In addition, as the CJEU also stated in *Commission vs Belgium*[44], even though referred to a direct tax, "*On the other hand, where the regional tax is passed on by an increase in the amount of the rent, it also falls within the scope of the parties' freedom of contract, since the definition of the content of a contract, including the determination of an element of the contract such as the amount of the rent, requires the consent of the parties. Moreover, in the latter case the regional tax imposed on owners would not necessarily be passed on by them automatically and in its entirety to the tenants*".

Therefore, when VAT is borne as a cost by the supplier, who might pass it on to the eligible body in the invoice issued to it, the limits established by the expression "wherever possible" in the PPI would apply, so no VAT would be reimbursed, neither to the eligible body, nor to the supplier.

4. DELEGATIONS' OPINION

Delegations are invited to express their views on this matter raised by the Commission services and, in particular, on the following points:

– Do Member States agree that, to benefit from the VAT exemption provided for in Article 151(1)(d) of the VAT Directive, the supply of goods or services has to be made to a Member State that is a party to the NATO Treaty?

– Do Member States agree that Article 164 of the VAT Directive cannot be applied in conjunction with Article 151?

– Do Member States agree that the setting up of an electronic form of the VAT exemption certificate for common use by Member States would facilitate the tasks of the authorities in charge of checking those certificates, so that the matter could be raised with the SCAC to work on it?

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[44] CJEU, judgment of 22 March 2007 in case C-437/04 *Commission vs Belgium*.