 getValue added tax committee
(article 398 of directive 2006/112/EC)
working paper no 837

question
concerning the application of eu vat provisions

origin: cyprus
references: articles 143(1)(f) and (g) and 151(1)(a) and (b)
subject: sovereign order of the knights of malta
1. **INTRODUCTION**

With a view to determining the remit of any exemption to be granted, Cyprus is looking to clarify the status of the Sovereign Order of the Knights of Malta (hereinafter "Order of Malta").

The questions submitted to the VAT Committee and the analysis done by Cyprus, are attached in annex.

2. **SUBJECT MATTER**

It is often tradition in international relations for tax exemptions to be granted. Whilst, in general, the VAT Directive\(^1\) does not cater for VAT exemption in such situations there are nevertheless instances where an exemption is envisaged.

That is for example the case with goods imported "under diplomatic and consular arrangements" or "by international bodies ... recognised as such by the public authorities of the host Member State, and to the members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements" for which an exemption is provided for under Article 143(1)(f) and (g) of the VAT Directive.

It is also the case where, for example, goods or services are supplied "under diplomatic and consular arrangements" or "to international bodies ... recognised as such by the public authorities of the host Member States, and to the members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements" and where an exemption applies under Article 151(1)(a) and (b) of the VAT Directive.

The question is whether and under which conditions the Order of Malta could possibly benefit from any of those exemptions.

3. **THE COMMISSION SERVICES’ OPINION**

It appears that Cyprus, having already concluded diplomatic relations with the Order of Malta, is negotiating a cooperation agreement under which tax privileges are envisaged. Given its special status as a sovereign entity under international law, this raises the question whether and to which extent the Order of Malta may benefit from exemption under the VAT Directive.

3.1. Who is the Order of Malta?

As an entity the Order of Malta is, according to its official website\(^2\), both religious and sovereign. It was created in the Middle Ages but is still active today where it devotes much of its time to humanitarian and philanthropic work.

The status of the Order of Malta is debatable. It does not constitute a state, but describes itself as a sovereign subject of international law, with its own constitution, passports, stamps, and public institutions, but no territory of its own. It does have its own government and magistrate though.

This has by some been described as a "functional sovereignty" because the Order of Malta does not have all that pertains to sovereignty, such as territory.

In its capacity, the Order of Malta is recognised by the United Nations which has granted it status as permanent observer, although it is not classified as an "intergovernmental organisation" but rather as one of the "other entities having received a standing invitation to participate as observers" alongside the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies (hereinafter "Red Cross")\(^3\). The Order of Malta also maintains diplomatic relations with States around the world many of which reciprocate by accrediting ambassadors to it and with international organisations.

3.2. When may there be basis for exemption to be given?

With regard to international relations, the VAT Directive provides for exemption only in some given instances. That is for example the case where goods or services are being supplied under diplomatic and consular arrangements or to international bodies when recognised as such. Those transactions are, subject to certain conditions, treated as exports and exempted from VAT. That is mirrored by similar exemptions where goods are instead imported.

For supplies the exemption, as it can be found in Article 151 of the VAT Directive, was first included in the Sixth VAT Directive\(^4\). It was based on the Commission’s proposal\(^5\) which in its Article 16(12) provided for exemption of "Supplies of goods and services to diplomatic and consular missions accredited to each Member State, or to international organisations recognised as such by the host Member State".

The explanatory memorandum to that provision was quite laconic, saying only that "The majority of the transactions listed require no commentary since these are exemptions which already exist in the Member States. This is the case as regards the supplies by way of export set out in paragraphs 1, 2 and 3 and the transactions of a like nature covered by paragraphs 4, 5, 6, 7, 8, 9, 11 and 12".

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The Commission’s proposal also, in its Article 15(6), included an exemption for importations when made "under diplomatic and consular arrangements, which qualify for exemption from customs duties or would qualify therefor if they were imported from a third country" and "by international organizations recognised as such by the public authorities of the host country, in accordance with the terms of headquarters agreements". That exemption can now be found in Article 143(1)(f)-(i) of the VAT Directive.

Also with this provision, the explanatory memorandum was brief, just saying that "Paragraphs 1, 2, 3, 6, 7, 8, 10 and 11 require no special explanation, whereas the other paragraphs merit further comment".

The Court of Justice of the European Union (CJEU) has only had one occasion to pronounce itself on the exemptions granted in the context of international relations. That was in the Able UK case which dealt with the exemption afforded to the armed forces of a NATO country under Article 151(1)(c) of the VAT Directive.

In that case, the CJEU reiterated that "according to settled case-law, VAT exemptions, which include that provided for by Article 151(1)(c) of the VAT Directive, must be interpreted strictly, since they constitute exceptions to the general principle that such tax is to be levied on each service supplied for consideration by a taxable person (see, to that effect, inter alia, Case C-116/10 Feltgen and Bacino Charter Company [2010] ECR I-0000, paragraph 19 and the case-law cited)."

It also accepted, as argued by the Commission, that "it appears that the objective pursued by the Union legislature in adopting that provision must (...) be understood, as the Commission argued, as being to allow the Member States to honour certain commitments made under the auspices of NATO. Nothing in the documents in the case that have been submitted to the Court indicates that the interpretation of Article 151(1)(c) outlined (...) is required so that such commitments can be honoured".

The Commission services believe that the reasoning applied by the CJEU in arriving at this decision, is equally valid for all of the exemptions provided for under Article 151 of the VAT Directive.

3.2.1. Exemption granted under diplomatic and consular arrangements

With regard to transactions made under diplomatic and consular arrangements, an exemption is provided for under Articles 143(1)(f) and 151(1)(a) of the VAT Directive respectively.

The objective of this exemption is to allow the Member States to honour commitments made under international law, notably the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations (hereinafter "the Vienna Convention").

The Vienna Convention is aimed at contributing "to the development of friendly relations among nations, irrespective of their differing constitutional and social systems". The

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6 CJEU, judgment of 26 April 2012 in case C-225/11 Able UK.
purpose of the privileges and immunities granted under the Convention "is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States" or "of functions by consular posts on behalf of their respective States".

The Vienna Convention, having "in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations", defines the framework for relations between independent countries. It traditionally covers diplomatic missions or consular representations of sovereign subjects of international law but could be extended to other entities, notably bodies which are granted a particular status by the United Nations. Should representatives of such a body have been granted full diplomatic status by a Member State hosting them, the Commission services believe that, as the VAT Directive stands, the exemption provided for in Articles 143(1)(f) and 151(1)(a) of the VAT Directive shall apply, subject to the limitations laid down by the host Member State.

The Order of Malta is such an entity and if full diplomatic status is conferred on representatives of that entity by the Member State hosting them, the exemption could therefore apply. For that requirement to be met, it is not sufficient for there to be official relations with the Member State in question. In order for exemption to apply, relations must have been established between the host Member State and the Order of Malta which effectively correspond to diplomatic relations in the sense of the Vienna Convention.

3.2.2. Exemption granted to international bodies

As regards transactions to international bodies recognised as such by their host Member State, an exemption is provided for under Articles 143(1)(g) and 151(1)(b) of the VAT Directive respectively.

This exemption has as its objective to allow the Member States to honour commitments associated with international bodies that are set up by a traditional convention under the 1969 Vienna Convention on the Law of Treaties or otherwise clearly established as subjects of international law. That often includes exemptions thus avoiding taxes being financed by all members whilst benefiting the few.

It is commonly accepted that to be regarded as an international body and qualify for exemption, an organisation must have been 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. An organisation is often set up by convention but there is no requirement for it to be based on a traditional convention under international law (negotiation of a text, signing and/or ratification).

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10 With regard to their status in international law, what are the essential elements of an international body was first discussed in relation to the Conference on Security and Cooperation in Europe (CSCE) set up under the United Nations Organization (Working paper No 176).
11 This was acknowledged by the VAT Committee in its guidelines of the 43th meeting.
The concept of an international body does not include sovereign States for which the VAT Directive does not provide any legal basis to exempt. That view has been endorsed by the VAT Committee.

Whilst as an entity it is a subject of international law, the Order of Malta cannot be seen as meeting the conditions for being regarded as an international body. That is also acknowledged by Cyprus which however believes that the Order of Malta compares to the Red Cross on which, as a result of its specific sui generis status, the treatment as an international body is conferred.

Similarly to the Red Cross, the Order of Malta conducts humanitarian actions throughout the world. It is also recognised by the United Nations and has been given status as permanent observer. Against that background it is advocated as appropriate to treat it as an international body.

In regard to the Red Cross, the view taken was that, although any VAT exemption must be interpreted strictly, it did not follow that the Red Cross could be excluded by the concept of "international body" within the meaning of the VAT Directive. Given that, according to settled case-law, the EU's powers must be exercised in compliance with international law and taking into account the particular status of the Red Cross and its unique role, it was concluded that, based on its sui generis status, it had to be regarded as an international body.

Other entities around the world, such as the Order of Malta, may be involved in humanitarian actions but that does not, however, mean that their status is necessarily comparable to that of the Red Cross. Account must be taken of the composition and status of the entity in question.

The Order of Malta describes itself as a sovereign subject of international law. Its status has been the subject of much discussion, mainly focussed on whether as an entity it can be seen as sovereign. What seems to be generally accepted, though, is that it is a subject of international law.

Contrary to the Red Cross, the Order of Malta is however not founded by an international agreement. It is rather so that it has existed as a sovereign entity, possessing the character of a State, long before its counterpart was founded. That detracts from it being regarded as an international body.

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12 This was discussed in relation to the case where, as part of a programme for assistance, goods are imported or goods or services are purchased by the government of a country providing such funding (see Working paper No 705).

13 See guidelines of the 94th meeting of the VAT Committee (Working paper No 714).

14 The particular case of the Red Cross was discussed at the 90th meeting of the VAT Committee (Working paper No 647 Rev).

15 See for example: http://www.ilsa.org/jessup/jessup13/Order%20of%20Malta.pdf
http://library.gayhomeland.org/0010/EN/EN_Souvereignty_and_international_Law_G_S_Sainty.htm

16 Ibid.
Nor is it in general so that the Order of Malta is recognised as such whilst for the Red Cross, the States that are signatories of the 1949 Geneva Conventions\(^\text{17}\) have formally recognised its existence and the international mandates entrusted to it by international humanitarian law.

On 24 August 1994, the General Assembly of the United Nations adopted Resolution 48/265 conferring observer status on the Order of Malta: "Considering the long-standing dedication of the Sovereign Military Order of Malta in providing humanitarian assistance and its special role in international humanitarian relations, Desirous of enhancing cooperation between the United Nations and the Sovereign Military Order of Malta, (1) Decides to invite the Sovereign Military Order of Malta to participate in the sessions and the work of the General Assembly in the capacity of observer; (2) Requests the Secretary-General to take the necessary action to implement the present resolution". As such, it features amongst other entities having received a standing invitation to participate as observers.

Whilst in that respect it could possibly be argued that the status of the Order of Malta compares to that of the Red Cross that does not find support in the Commission's general policy towards it.

The financial rules applicable to the general budget of the Union leave it to the Commission to implement it\(^\text{18}\). In Article 58(1)(c)(ii), it is specified that it may do so indirectly by "entrusting budget implementation tasks to ... (ii) international organisations and their agencies". Article 43 of the detailed rules for the implementation of the Financial Regulation\(^\text{19}\) in setting out the bodies covered, grants a special status to the Red Cross. Under that provision, the Commission may also decide to assimilate other non-profit organisations to international organisations but no such status has been bestowed on the Order of Malta nor are there any plans to do so.

As an entity not meeting with the usual requirements of being an international body, describing itself as sovereign, it could perhaps be argued that its sui generis status is comparable to that of a sovereign State. In the absence of a territory or a population of its own, the Commission services would not, however, qualify the Order of Malta as such.

### 3.3. Conclusion

When the Red Cross can be said to qualify for exemption, that results from its specific status and is based on a cluster of features which allow the Red Cross to be treated as an international body. From this, it is not possible to derive general criteria which could be used in support of conferring a similar treatment on the Order of Malta.

Whilst the Order of Malta is not meeting with the necessary requirements for it to be regarded as an international body and thus cannot benefit from exemption under Articles 143(1)(g) and 151(1)(b) of the VAT Directive, an exemption could, pursuant to


Articles 143(1)(f) and 151(1)(a), apply in regard to representatives of the Order of Malta but only if relations corresponding to diplomatic relations pursuant to the Vienna Convention have been established with the host Member State and full diplomatic status has been granted to those representatives.

4. **DELEGATIONS' OPINION**

Delegations are invited to express their views on the matter raised by Cyprus and the observations made by the Commission services.

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ANNEX

Question from Cyprus

Subject Matter: Question to VAT Committee concerning the application of EU VAT provisions – Draft Cooperation agreement between the Sovereign Order of the Knights of Malta and the competent authorities of the Republic of Cyprus

In connection with the negotiation of a Cooperation agreement with the Sovereign Order of the Knights of Malta (hereafter Order of Malta), I would kindly ask you to confirm the compatibility of articles 143(1)f,g and 151(1)b with provisions of the abovementioned agreement granting tax privileges.

According to the article 143(1)f of the VAT Directive, Member States shall exempt “the importation, under diplomatic and consular arrangements, of goods which are exempt from customs duties”.

Additionally, point (g) of the same article provides for the exemption of “the importation of goods by international bodies, other than those referred to in point (fa), recognized as such by the public authorities of the host Member State, or by members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;

(b) the supply of goods or services to international bodies, other than those referred to in point (aa), recognized as such by the public authorities of the host Member States, and to members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;

Article 151 stipulates that Member States shall exempt the supply of goods or services to international bodies, other than those referred to in point (aa), recognized as such by the public authorities of the host Member States, and to members of such bodies, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;

In parallel, article 128(1) of the Regulation 1186/2009EC provides that nothing in this Regulation shall prevent the Member States from granting:

(a) Relief pursuant to the Vienna Convention

(b) Relief under the customary privileges accorded by virtue of international agreements or headquarters agreements to which either a third country or an international organization is a contracting party, including the relief granted on the occasion of international meetings;

(c) Relief under the customary privileges and immunities accorded in the context of international agreements concluded by all the Member States and setting up a cultural or scientific institute or organization under international law;

(d) Relief under the customary privileges and immunities accorded in the context of cultural, scientific or technical cooperation agreements concluded with third countries;
(e) Special relief introduced under agreements concluded with third countries and providing for common measures for the protection of persons or of the environment;

(f) Special relief introduced under agreements concluded with adjacent third countries, justified by the nature of the frontier-zone trade with the countries in question;

(g) Relief in the context of agreements entered into on the basis of reciprocity with third countries that are Contracting Parties to the Convention on International Civil Aviation (Chicago 1944) for the purpose of implementing Recommended Practices 4,42 and 4,44 in Annex 9 to the Convention (eighth edition, July 1980).

According to article 128(2), where an international convention not covered by any of the categories above, to which a Member State intends to subscribe, provides for the grant of relief, that Member State shall submit a request to the Commission for the application of such relief, supplying the Commission with all the necessary information.

As the exemption would apply to excise duties as well as to VAT, we turn to the VAT Committee to have a discussion on the VAT treatment within the Cooperation agreement with the Order of Malta.

**Information relating to the status of the Order of Malta**

The Order of Malta has about 13,000 members; 80,000 permanent volunteers; and 20,000 medical personnel including doctors, nurses, auxiliaries and paramedics in more than 120 countries while at the same time is world famous for his humanitarian and philanthropic work. Its goal is to assist the elderly, handicapped, refugees, children, homeless, those with terminal illness and leprosy in all parts of the world, without distinction of race or religion.

The Order of Malta has a special status under international law, namely, it does not constitute a state, but can be nevertheless characterized as a sovereign entity under international law. The Order is issuing its own international passports for travel, postal stamps, along with its formal insignia. It is recognized by the UN as it holds observer status at the United Nations. It maintains diplomatic relations with at least 104 States (including the Republic of Cyprus as from April 2012) and with international organizations. The Order maintains diplomatic missions around the world and many of the states reciprocate by accrediting ambassadors to the Order. You may find attached a list of states with which the Order of Malta has signed Cooperation Agreements*.

This special status of the Order is recognized by many States and is characterized by the literature as "functional", since it aims to cover functional needs and activities of the Order, ensuring the fulfilment of its mission and objectives as a humanitarian agency.

Cyprus, as a state that has concluded diplomatic relations with the Order of Malta, accepts its special status as a sovereign entity under international law.

As referred in the working paper WP647 REV, which deals with the VAT exemption of a similar organization the Red Cross, Member States, have a different approach towards the specific subject. The Commission Legal Service, in an analysis with regard to the VAT

* No such list was attached to the question transmitted by Cyprus.
exemption of Red Cross states that, although any VAT exemption must be interpreted strictly, it does not follow that the Red Cross can be excluded by the concept of ‘international bodies’. According to settled case law, the Communities powers must be exercised in compliance with international law. It is quite likely that the European Court of Justice if called to give an opinion would take account of the quite specific sui generis status that these bodies enjoy in international law and that according to the most enlightened doctrine, grants them a functional international legal personality.

Similarly to the Red Cross, the Order of Malta as already mentioned has an observer status in the UN, has diplomatic relations with 104 states and conducts humanitarian actions worldwide. Therefore, we are of the opinion that in view of its special international contribution, the Order of Malta may be considered as an international body within the meaning of article 151.

Nevertheless we are open and seek confirmation as to whether, this could grant this body the exemption from VAT provided for in articles 143 and 151 of the VAT Directive.