The Association of Golf Course Owners – Abbotsley Golf Club – St. Neots PE19 6XN
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South Region: Ross Noades

Fighting for fair VAT and tax in golf for 20 years

The Upper Tribunal, Tax and Chancery Chamber,
45 Bedford Square
London WC1B 3DN

FAO Mrs. B. Barlow,
Clerk to the Upper Tribunal

May 29th 2013

Dear Sirs,

Re The Association of Golf Course Owners ("AGCO") and Bridport & West Dorset Golf Club v HMRC FCT/74/2011

We write further to David Weight's email of 16 April and Mrs Barlow's letter of 28 February 2013. We apologise for the delay in responding. We have been seeking the advice of Tax Counsel, Jeremy Woolf, from Pump Court Tax Chambers, on the issues raised and considering the merits of participating in the proceedings in the light of his advice and therefore write accordingly.

In the light of the advice, we accept that we cannot be added as an intervener. However, your letter of 28 February 2013 would appear to accept that we could be added as a party. HMRC's letter of 15 March 2013 would also appear to accept that we can be joined on that basis. We would therefore like to be added as an appellant. In this regard we observe that rule 9(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules states that: "The Tribunal may give a direction adding a person to the proceedings as a respondent". This suggests that the Tribunal does have discretion to add a person who wants to oppose an appeal as a respondent. The Upper Tribunal Rules are slightly

broader, because rule 9(3) of the Tribunal Procedure (Upper Tribunal) Rules enables a person to be added as a "party" rather than just as a "respondent". This is no doubt a reflection of the fact that a person opposing a taxpayer's appeal to the First-tier Tribunal may be an appellant in the Upper Tribunal. We should possibly mention that the Rules of the Social Entitlement Chamber of the First-tier Tribunal about adding parties are in similar terms and were drafted at the same time as the Upper Tribunal Rules. We also observe that under the old rules of the VAT and duties Tribunal VISA was added as a party in *Barclays Bank v Customs & Excise* (VAT decision 7911) (1992).

The Association accepts that the United Kingdom can properly exempt charges that are paid by full members of a members' golf club in order to play golf. The reason why the Association is anxious to be added as a party is that it considers that it is significant that a large number of golf courses make individuals associate members on payment of a nominal fee, green fees then being paid every time the individual plays. The "membership" is therefore a device that is being used to secure exemption. We would suggest that in such cases it is also appropriate that the fees being paid should also be regarded as "additional income" for the purpose of article 134 of the Directive because the fees are being sought with a view to reducing the charges made to full members.

In this regard it is interesting to observe that in *Fletcher v Income Tax Comr* [1972] AC 414 the Privy Council considered that the "hotel members" should not be regarded as members for the purposes of the mutuality principle in direct taxation. Lord Wilberforce at p 424 observed that:

> "The matter may be looked at in another way. Originally the club had the ordinary characteristics of a club: like the Carlisle & Silloth Golf Club, the members paid subscriptions and sold tickets to visitors, including guests in hotels. Undoubtedly at this stage they, as a group, were trading, for profit, with the visitors and guests. Then, when the beach hotels took over the payment of subscriptions, and paid them on behalf of the guests,

> the position was held, by the Income Tax Board, to be the same: their Lordships consider this decision to have been correct. The ordinary members as a group were trading, for profit, with the hotels. Was then a radical transformation brought about in 1963 when the hotels became subscription paying members - paying (in addition to the house count charge) £1 10s. per annum and entitled each to one vote? In their Lordships' opinion so to conclude would amount to a distortion, if not a mockery, of the mutuality principle. The hotels may have become members in 1963; but side by side with their membership there continued the pre-existing relationship with the ordinary members which was essentially a trading relationship, similar to that with outside visitors. What is, and always has been, of significance is not the fact of membership or non-membership but the nature of the transactions: if these were trading transactions, the addition of membership makes no difference: see *IRC v Ayrshire Employers Mutual Insurance Association Ltd* (1946) 27 TC 331.- the converse case: and p. 347 *per* Lord Macmillan".

We also consider that it is interesting to observe that when considering the cost sharing exemption, in what is now article 132(f) of the 2006 VAT directive, Advocate General Mischo in (Case C8/01) *Taksatorringen v Skatteministeriet* [2006] STC 1842 considered that the reason why providing the exemption to such groups does not cause a distortion of competition is that they operate on a fundamentally different basis to a profit making organisation. The cost sharing group can only recharge its costs. The Advocate General observed that providing exemption to such a grouping was unlikely to cause a distortion of competion because their business structure was likely to give them a competitive advantage irrespective of the exemption. He observed at p 1858:

> "127. In order to achieve their aim, and as their structure reflects, these groups are intended to have a captive customer base, namely their members.

> 128. Plainly, this is a most unusual market in the context of an ideal conceptualisation of the notion of competition. If one accepts a situation in which certain operators, namely groups, carry on business without any view of gain, what is the place of an independent operator seeking to generate profits?
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> 129. As mentioned above, such an operator can hope to enter the market and to remain there only if he is able to offer services at a lower price than groups that are prohibited from making a profit".
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> 130. Admittedly, the possibility cannot be entirely excluded that these groups might operate in a cumbersome and inefficient manner and provide their services at a high price, albeit invoiced at cost-price and even though their overheads are spread over a large number of transactions. What the legislature intended to avoid, in my opinion, was a situation in which such groups would nevertheless be able to exclude all competition by reason of the exemption from VAT set out in art 13A(1)(f) of the Sixth Directive.
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> 131. But if, independently of all questions of taxation or exemption, these groups are assured of retaining their members' customer base because they carry out their operations efficiently, it could not be suggested that it is the exemption from which they benefit that closes the market to independent operators.
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> 132. In my view, it is in this way that the condition requiring the absence of a risk of distortion of competition laid down under art 13A(1)(f) of the Sixth Directive should be understood. I suggest that this analysis reflects, *mutatis mutandis*, the provisions of art 81 EC, and to which Taksatorringen rightly refers.

Similar considerations apply when considering a club rendering services to full members. However, different considerations apply to arrangements of the type that the Association is concerned with. This reasoning supports the view that such income should be regarded as additional income. We should also observe that we can also see that different considerations may apply to organisations acting on philanthropic principles. However, members' golf clubs are not acting on that basis.

As we mentioned in our original application, one other issue that we would wish to raise is the issue of costs. No order for costs was made in *Barclays Bank v Customs & Excise* (VAT decision 9059) (1992) where the Tribunal considered it appropriate to make an advance ruling on costs that VISA, the added party, should neither be liable or subject to a costs order. We consider that it would be appropriate for such an order to be made in this case. The letter from HMRC of 15 March 2013 correctly highlights that the only role the Association will be able to play in the reference is to participate in the oral hearing for a maximum of 30 minutes. On this basis the costs that the other parties will be incurring on account of its presence should not be significant. The Association considers that it is in the public interest that it should be permitted to raise these points. While we would in any event suggest that it would be inappropriate in the light of the above and its limited involvement in the appeal, because it is an organisation with limited resources it would also be a matter of considerable concern to it if a significant adverse costs order might be made against it.

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Please note that we will be writing under separate cover from Cambridge Meridian on the basis that the partners of that business no longer see the need to apply to be a party.

Yours faithfully

Vivien Saunders

Vivien Saunders
for and on behalf of the Association of Golf Course Owners (1993)