Association of Golf Course Owners – complaint re distortion of competition – VAT in sport

1. INTRODUCTION

The Complaint concerns the different VAT treatment of the United Kingdom's member-owned golf clubs and proprietary golf clubs and the distortion of competition caused which has severely damaged the latter. Member-owned golf clubs are considered to be non-profit making and their members enjoy VAT exempt membership subscriptions. Membership, as such, is not defined and membership can include anyone paying a nominal fee without the traditional rights of a member. Proprietary golf clubs are considered to be profit-making and their members and customers have to pay VAT at the standard rate in addition to their membership fee. This has created such distortion of competition in terms of pricing that much of the proprietary golf sector in the United Kingdom has virtually collapsed financially, with most golf courses worth less than their build costs and less than undeveloped farmland.

The legislation relating to the VAT exemptions in sport is set out in the Principal VAT Directive, (Council Directive 2006/112/EEC), Title IX, Chapters 1 and 2, Articles 131 to 134, and 135 1(l) and the legislation regarding distortion can be implied within those chapters and also from the preamble to the Principal VAT Directive items (4) and (7) and from case law. Our Complaint is that the United Kingdom Government is in breach of the anti-distortion philosophy, aims and provisions of the preamble paragraphs (4) and (7) in its interpretation of the Articles 131 to 134. Article 135 1(l) deals with the exemption for interests in land.

The corresponding provisions in UK domestic law are set out in Group 10 of Schedule 9 to the Value Added Tax Act 1994; we complain that the introduction of the expressions "eligible body" and "commercial influence" introduced by the Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999 restrict the VAT exemption to certain non-profit making organisations in a way which is not permitted by Article 133 or 134 of the Principal VAT Directive. In addition these provisions relating to "commercial influence" are linked to the definition of "sports land" which is an interpretation from Article 135 1(l) specifically included in UK domestic legislation to maintain the different VAT treatment of member-owned golf clubs and proprietary golf clubs.

The provisions which amended Group 10 of Schedule 9 of the Value Added Tax Act 1994 through the Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999 were specifically as a result of two VAT cases relating to proprietary golf clubs – Abbotsley Golf and Squash Club VAT case (LON/96/148 decision 15043), and the Chobham Golf Club VAT case (LON/96/833, decision 14367).

2. LEGISLATION – ARTICLE 131 to 134, and ARTICLE 135

Articles 131 to 134 of the Principal VAT Directive (Council Directive 2006/112/EEC) deal with various exemptions "in the public interest" (the heading of chapter 2) and the exemption for sport is in Article132 (1)(m) which is identical to Article 13A(1)(m) of the Sixth VAT Directive. Although our complaint deals with issues before 2006 we will refer to the provisions of the Principal VAT Directive throughout.

Article 131 states:

"The exemptions provided for in Chapters 2 and 9 shall apply without prejudice to other Community provisions and in accordance with conditions which Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

Chapter 2

Exemptions for certain activities in the public interest

Article 132(1) provides that

"Member States shall exempt the following transactions: …

(m) the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education."

The application of Article 132 is subject to Articles 133 and 134 which provide that

"Member States may make the granting to bodies other than those governed by public law of each exemption provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1) subject in each individual case to one or more of the following conditions:

(a) the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT."

Article 134 provides that:

"The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT."

[Thus Article 133 provides options for not granting the exemption and Article 134 mandatory reasons for not granting the exemptions]

Chapter 3

Exemptions for other activities

Article 135 provides:

1. Member States shall exempt the following transactions:

This includes:

(l) the leasing or letting of immovable property.

2. Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1.

3. LEGISLATION - the VALUE ADDED TAX ACT 1994

The Principal VAT Directive, in relation to the sports exemption, has been transposed into the UK domestic law in Group 10 of Schedule 9 to the Value Added Tax Act 1994, which deals with "Sport, sports competitions and physical education".

Item 3 of the Group reads as follows:

"The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part."

Item 3 must be read with Notes, as follows:

"(1) [immaterial]

(2) An individual shall only be considered to be a member of an eligible body for the purpose of Item 3 where he is granted membership for a period of three months or more.

(2A) Subject to Notes (2C) and (3), in this Group 'eligible body' means a non-profit making body which—

(a) is precluded from distributing any profit it makes, or is allowed to distribute any such profit by means only of distributions to a non-profit making body;

(b) applies in accordance with Note (2B) any profits it makes from supplies of a description within Item 2 or 3; and

(c) is not subject to commercial influence.

(2B) For the purposes of Note (2A)(b) the application of profits made by any body from supplies of a description within Item 2 or 3 is in accordance with this Note only if those profits are applied for one or more of the following purposes, namely—

(a) the continuance or improvement of any facilities made available in or in connection with the making of the supplies of those descriptions made by that body;

(b) the purposes of a non-profit making body.

(2C) In determining whether the requirements of Note (2A) for being an eligible body are satisfied in the case of any body, there shall be disregarded any distribution of amounts representing unapplied or undistributed profits that falls to be made to the body's members on its winding-up or dissolution."

(3)In Item 3 a "non-profit making body" does not include—

(a)a local authority;

(b)a Government department within the meaning of section 41(6); or

(c)a non-departmental public body which is listed in the 1993 edition of the publication prepared by the Office of Public Service and Science and known as Public Bodies.

(4)For the purposes of this Group a body shall be taken, in relation to a sports supply, to be subject to commercial influence if, and only if, there is a time in the relevant period when–

(a)a relevant supply was made to that body by a person associated with it at that time;

(b)an emolument was paid by that body to such a person;

(c)an agreement existed for either or both of the following to take place after the end of that period, namely–

(i)the making of a relevant supply to that body by such a person; or

(ii)the payment by that body to such a person of any emoluments.

(5)In this Group "the relevant period", in relation to a sports supply, means–

(a)where that supply is one made before 1st January 2003, the period beginning with 14th January 1999 and ending with the making of that sports supply; and

(b)where that supply is one made on or after 1st January 2003, the period of three years ending with the making of that sports supply.

(6)Subject to Note (7), in this Group "relevant supply", in relation to any body, means a supply falling within any of the following paragraphs–

(a)the grant of any interest in or right over land which at any time in the relevant period was or was expected to become sports land;

(b)the grant of any licence to occupy any land which at any such time was or was expected to become sports land;

(c)the grant, in the case of land in Scotland, of any personal right to call for or be granted any such interest or right as is mentioned in paragraph (a) above;

(d)a supply arising from a grant falling within paragraph (a), (b) or (c) above, other than a grant made before 1st April 1996;

(e)the supply of any services consisting in the management or administration of any facilities provided by that body;

(f)the supply of any goods or services for a consideration in excess of what would have been agreed between parties entering into a commercial transaction at arm's length.

(7)A supply which has been, or is to be or may be, made by any person shall not be taken, in relation to a sports supply made by any body, to be a relevant supply for the purposes of this Group if–

(a)the principal purpose of that body is confined, at the time when the sports supply is made, to the provision for employees of that person of facilities for use for or in connection with sport or physical recreation, or both;

(b)the supply in question is one made by a charity or local authority or one which (if it is made) will be made by a person who is a charity or local authority at the time when the sports supply is made;

(c)the supply in question is a grant falling within Note (6)(a) to (c) which has been made, or (if it is made) will be made, for a nominal consideration;

(d)the supply in question is one arising from such a grant as is mentioned in paragraph (c) above and is not itself a supply the consideration for which was, or will or may be, more than a nominal consideration; or

(e)the supply in question–

(i)is a grant falling within Note (6)(a) to (c) which is made for no consideration; but

(ii)falls to be treated as a supply of goods or services, or (if it is made) will fall to be so treated, by reason only of the application, in accordance with paragraph 9 of Schedule 4, of paragraph 5 of that Schedule.

(8)Subject to Note (10), a person shall be taken, for the purposes of this Group, to have been associated with a body at any of the following times, that is to say–

(a)the time when a supply was made to that body by that person;

(b)the time when an emolument was paid by that body to that person; or

(c)the time when an agreement was in existence for the making of a relevant supply or the payment of emoluments,

if, at that time, or at another time (whether before or after that time) in the relevant period, that person was an officer or shadow officer of that body or an intermediary for supplies to that body.

(9)Subject to Note (10), a person shall also be taken, for the purposes of this Group, to have been associated with a body at a time mentioned in paragraph (a), (b) or (c) of Note (8) if, at that time, he was connected with another person who in accordance with that Note–

(a)is to be taken to have been so associated at that time; or

(b)would be taken to have been so associated were that time the time of a supply by the other person to that body.

(10)Subject to Note (11), a person shall not be taken for the purposes of this Group to have been associated with a body at a time mentioned in paragraph (a), (b) or (c) of Note (8) if the only times in the relevant period when that person or the person connected with him was an officer or shadow officer of the body are times before 1st January 2000.

(11)Note (10) does not apply where (but for that Note) the body would be treated as subject to commercial influence at any time in the relevant period by virtue of–

(a)the existence of any agreement entered into on or after 14th January 1999 and before 1st January 2000; or

(b)anything done in pursuance of any such agreement.

(12)For the purposes of this Group a person shall be taken, in relation to a sports supply, to have been at all times in the relevant period an intermediary for supplies to the body making that supply if–

(a)at any time in that period either a supply was made to him by another person or an agreement for the making of a supply to him by another was in existence; and

(b)the circumstances were such that, if–

(i)that body had been the person to whom the supply was made or (in the case of an agreement) the person to whom it was to be or might be made; and

(ii)Note (7) above were to be disregarded to the extent (if at all) that it would prevent the supply from being a relevant supply, the body would have fallen to be regarded in relation to the sports supply as subject to commercial influence.

(13)In determining for the purposes of Note (12) or this Note whether there are such circumstances as are mentioned in paragraph (b) of that Note in the case of any supply, that Note and this Note shall be applied first for determining whether the person by whom the supply was made, or was to be or might be made, was himself an intermediary for supplies to the body in question, and so on through any number of other supplies or agreements.

(14)In determining for the purposes of this Group whether a supply made by any person was made by an intermediary for supplies to a body, it shall be immaterial that the supply by that person was made before the making of the supply or agreement by reference to which that person falls to be regarded as such an intermediary.

(15)Without prejudice to the generality of subsection (1AA) of section 43, for the purpose of determining–

(a)whether a relevant supply has at any time been made to any person;

(b)whether there has at any time been an agreement for the making of a relevant supply to any person; and

(c)whether a person falls to be treated as an intermediary for the supplies to any body by reference to supplies that have been, were to be or might have been made to him, references in the preceding Notes to a supply shall be deemed to include references to a supply falling for other purposes to be disregarded in accordance with section 43(1)(a).

(16)In this Group–

“agreement” includes any arrangement or understanding (whether or not legally enforceable);

“emolument” means any emolument (within the meaning of the Income Tax Acts) the amount of which falls or may fall, in accordance with the agreement under which it is payable, to be determined or varied wholly or partly by reference–

(i)to the profits from some or all of the activities of the body paying the emolument; or

(ii)to the level of that body’s gross income from some or all of its activities;

“employees”, in relation to a person, includes retired employees of that person;

“grant” includes an assignment or surrender;

"officer", in relation to a body, includes–

(i)a director of a body corporate; and

(ii)any committee member or trustee concerned in the general control and management of the administration of the body;

"shadow officer", in relation to a body, means a person in accordance with whose directions or instructions the members or officers of the body are accustomed to act;

"sports land", in relation to any body, means any land used or held for use for or in connection with the provision by that body of facilities for use for or in connection with sport or physical recreation, or both;

"sports supply" means a supply which, if made by an eligible body, would fall within Item 2 or 3.

(17)For the purposes of this Group any question whether a person is connected with another shall be determined in accordance with section 839 of the Taxes Act (connected persons) F6.]

These provisions relating to "commercial influence" can be summarised as follows:

- If a body is "subject to commercial influence" any supplies it makes which would be exempt under Article 132(1)(m) are standard-rated.
- There is a relevant supply by an associated person and payments (emoluments) to that associated person
- A relevant supply includes the grant for use of any sports land or right over the land or a licence to occupy sports land or land that is expected to become sports land
- Emoluments include salaries, fees, share of profits
- A person associated with the body includes someone who gives directions to the officers or members of the body or his relative or business partner

4.VALUE ADDED TAX (SPORTS, SPORTS COMPETITIONS and PHYSICAL EDUCATION) ORDER 1999

The provisions relating to "eligible body", "commercial influence" and "sports land" were introduced as amendments into the VAT Act 1994 specifically as anti-avoidance provisions to maintain the different VAT treatment for proprietary and member-owned golf clubs. The changes were described as anti-avoidance by Customs & Excise. This followed from two unsuccessful challenges by HM Customs and Excise in 1997 against the owners of two proprietary golf clubs and courses. UK domestic tribunals had accepted that the members of non-profit making golf clubs, with licenses to occupy proprietary golf courses, were entitled to enjoy VAT exempt membership fees and the owners were entitled to receive payment for letting (licensing) the golf course to the members' club. Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999 – (Document E)

The two cases which accepted these as bona fide arrangements were: Abbotsley Golf and Squash Club VAT case (LON/96/148 decision 15043), and the Chobham Golf Club VAT case (LON/96/833, decision 14367). Abbotsley established that the license arrangement and club structure was bona fide and Chobham reinforced the non-profitmaking structure of the club. It was accepted that both of these proprietary clubs had adopted this structure, not for any artificial tax avoidance, but to allow themselves to compete, without distortion, by enabling their customers to enjoy the same VAT exempt status as members of a members' club. The club structure complied with the requirements of the English Golf Union. Abbotsley judgment (Document F)

Customs and Excise openly referred to proprietary clubs as being guilty of tax avoidance and put out papers to advise member-owned golf clubs how to change, if necessary, their constitutions to ensure that they did not fall within the commercial influence rules.

To put these rules in context, Customs and Excise/HMRC maintains that a golf club such as Sunningdale Golf Club with £1.3 million of visitors fees, advertising widely, and with an individual green fee in excess of £300 per round is not subject to commercial influence. (Sunningdale Golf Club is the example of a non-profit making golf club used by the Chancellor of the Exchequer, George Osborne.) (See accounts and publicity material of Sunningdale Golf Club – Document G)

The Chancellor of the Exchequer, the Rt Hon George Osborne, wrote to Home Secretary, Theresa May:

"Owners of proprietary golf courses, like any other business, can withdraw profits for their personal gain. Whereas any surplus generated by Members clubs must be reinvested into the provision of the golfing facilities and cannot be distributed as income to its members. If clubs such as Queen's, the MCC and Sunningdale Golf Club are set up as non-profit making clubs, the exemption will apply to the provision of sports facilities to their members." (Copy letter – Document H)

A surplus, of course, is the money left from the money supplied by the members into their own kitty and if not fully used is carried over as a surplus. Of course it is not taxable. But the profit derived from substantial visitors' fees is entirely different. The Mintel Report 2009 put the number of visitor green fee rounds in the UK at 27.8 million for 2009, equally distributed between member-owned and proprietary clubs. It is a substantially higher proportion of the golf trade in the UK than in the rest of Europe. The Sports Marketing Surveys Inc reported total membership fees in GB and I as €1.5 billion and in the Rest of Europe, €2.8 billion. But in visitors' green fees the figures were €807 million for GB and I and €591 million for the Rest of Europe. The business of green fees and trading for profit is substantially higher in the UK.

But the UK Government chooses to look at the constitution and its stated aims and not the clear aims to make profit which can be implied from behaviour, finances and the official reports from the European Golf Association, Mintel and Sports Marketing Surveys Inc.

As another example, the Royal Lytham and St. Anne's Golf Club, which regularly hosts the Open Championship, has a 16 bedroom hotel as part of its operation and charges £357 for a 1 night golf break, with 2 rounds of golf or £397 for a Saturday. The green fee, without accommodation, is £180

or £270 on a Saturday. Despite the overall profit making aims it is classified as non-profit-making with VAT exempt membership subscriptions. (See Document I)

Thus all the evidence points to the way in which member-owned (non-profit making) clubs operate in a way one would attribute to a commercial, profit making club. All such fees are generated to reduce the subscriptions of the members of the club members.

5. DISTORTION OF COMPETITION – OUR CASE

Our case is that we have established that there is such serious distortion between the VAT treatment of member-owned golf clubs and proprietary golf clubs that many proprietary owned golf clubs have collapsed financially.

- We have complained about the different VAT treatment of member-owned golf clubs and proprietary golf clubs since 1993.
- We have provided evidence of this distortion since 1993.
- We have demonstrated that member-owned golf clubs, classified as non-profit making, trade in an identical commercial way to proprietary clubs, and use the profit derived to reduce and subsidise their members' fees.
- We have demonstrated that it is mandatory for proprietors of golf clubs to allow their members to form a non-profit members' club on their premises in order for the golfers to be affiliated to National Governing Bodies of golf and that as such the experience of a golfer who belongs to a proprietary golf club is identical to that of the member of a member-owned club
- We have demonstrated that the golf clubs classified and accepted by HMRC as non-profit making take a variety of forms, with clubs with shareholders who are not members, members who are not shareholders, clubs with associate members who have no interest in the funds of the golf club or vote or traditional membership rights, clubs which have been set up as public companies with tradable shares accepted as non-profit making clubs.
- We have demonstrated that almost every member-owned club has a substantial business in visitors' fees and other business activities, with the sole aim of reducing the membership fees by way of a covert distribution.
- We have demonstrated that many proprietary clubs do not make a profit and we have demonstrated that several proprietors have no actual aim to make a profit.

Our supporters being proprietary golf clubs joined together to support a VAT action, Chipping Sodbury Golf Club and others MAN/2008/0270, appeal date 28th May 2012. The judges made a finding of fact that there is distortion between proprietary golf clubs and member-owned golf clubs. Paragraph 55 and 56 makes this finding of fact. Please note that the rest of the decision relating to the claims by proprietary clubs is irrelevant. All we sought was this finding of fact which we achieved. (Document J)

A copy of the witness statement of Vivien Saunders in the Chipping Sodbury case, referred to in the judgment, is enclosed (without the exhibits) (Document K)

6. DISTORTION OF COMPETITION – THE UK GOVERNMENT'S CASE

The UK Government appears to accept that there is distortion of competition between member-owned golf clubs and proprietary golf clubs. But even with the finding of fact of distortion from Chipping Sodbury HMRC and the Treasury have asked us if we can provide evidence of the distortion!

We refer to a letter from David Gauke, Treasury Secretary, Philip Dunne MP following a request from Graham Pain of Cleobury Manor Golf Club, which refers to the Chipping Sodbury case and still refers to needing evidence of distortion. (Document L)

The UK Government refuses to address the distortion by reducing or eliminating it and refers to Article 133 of the Principal VAT Directive, which gives the options for eliminating distortion.

The Chancellor of the Exchequer, George Osborne, and the Treasury Secretary, David Gauke, have both referred to the provisions of Article 133 to say that the European Commission envisages that there will be distortion of competition between the two types of clubs and tolerates the distortion.

We refer to a letter from George Osborne to Foreign Secretary, William Hague, in which he refers to the European Commission permitted distortion and tolerating distortion. (Document L)

7. OUR RESPONSE TO THIS

Our response is that the UK Government refuses to adhere to the principles set out in the preamble to the principal VAT Directive, paragraph (4) to minimise or eliminate distortion of competition and paragraph (7) to address fiscal neutrality.

Paragraph (4) reads:

"The attainment of the objective of establishing an internal market presupposes the application in member States of legislation on turnover taxes that does not distort conditions of competition or hinder free movement of goods and service. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT) such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national of Community Level."

Paragraph (7) reads:

"The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain."

We complain that the UK Government refuses to eliminate distortion of competition and ensure fiscal neutrality in golf [sport] because removing exemptions is seen as political suicide. Sport in the UK is standard rated at 20%. The UK Government has refused to apply Reduced Rate VAT (in the UK 5%) to sport, permitted at Annex III of VAT Directive 2006/112/EC, item 14.

8. THE GOVERNMENT RESPONSE

On the question of paragraph (4) and the elimination of distortion the UK Government simply persists with the argument that Article 133 envisages distortion.

On the question of paragraph (7) and fiscal neutrality, the UK Government's position is that fiscal neutrality only applies to different services and not to the rights of different taxpayers. Thus they refer to fiscal neutrality in terms of different forms of gaming machines (the Rank case) but refuse to accept that suppliers should be protected by the fiscal neutrality provisions. They persist with delaying over any removal in sport while waiting for the Isle of Wight cases re distortion in car parking.

9. OUR RESPONSE TO THIS!

We have expressed the following argument to HMRC in relation to fiscal neutrality.

We have referred to Paragraph 30 of the Canterbury Hockey Club C-253/07 judgment which recites that the principle of fiscal neutrality is inherent in the common system VAT, recording: the principle of fiscal neutrality "precludes in particular, economic operators who effect the same transactions being treated differently in respect of the levying of VAT".

The Canterbury Hockey Club judgment refers to **Gregg v Commissioners of Customs and Excise** C-216/97

Paragraph 20: The principle of fiscal neutrality precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. It follows that that principle would be frustrated if the possibility of relying on the benefit of the exemption provided for activities carried on by the establishments or organisations referred to in Article 13A(l)(b) and (g) was dependent on the legal form in which the taxable person carried on his activity.

The Canterbury Hockey Club judgment refers to In Case C-283/95, **Karlheinz Fischer v Finanzamt Donaueschingen**, paragraph 27:

"In that regard, it must be pointed out that the exemptions provided for by Article 13(B) are to be applied in accordance with the principle of fiscal neutrality inherent in the common system of VAT (see, to that effect, Case C-45/95 Commission v Italy [1997] ECR I-3605, paragraph 15). That requirement also applies when the Member States exercise their power under Article 13(B)(f) to lay down the conditions and limitations of the exemption. In according that power to the Member States, the Community legislature did not authorise them to undermine the principle of fiscal neutrality which underlies the Sixth Directive."

We served notice on the Attorney General and the Solicitor to HMRC of our intention to refer this issue to the European Commission on 13th October 2013 to comply with pre-action protocol. They have not responded to these arguments with any suggestion of discussion or concessions. The pre-application letter, Part Four, relates to our request for the European Commission to start infraction proceedings against the UK. (Document M – referred to elsewhere).

10. NON-PROFIT MAKING ORGANISATIONS

We claim that the United Kingdom is totally out of step with other Member States in their interpretation of a non-profit making organisation (NPO).

We say that the UK Government confuses the meaning of a non-profit making organisation – just using the words of the constitution – with a public benefit organisation (PBO). The former Health Minister, Andrew Lansley, and other ministers have written that "non-profit making organisations like charities deserve public support". They appear to confuse the wording of "non-profit making" as implying some form of philanthropy which is akin to a charity and falls just short of charitable status.

In terms of a sports club one might envisage a non-profit making organisation as a club in which parents run the club for their children, earning money from outside fundraising, carrying out the coaching, umpiring, providing transport and generally promoting the furtherance of the sport. Or one might envisage skilled past players and coaches giving their time freely for the furtherance of sport for less skilled players. That is the perception of a non-profit making sports oganisation and would have some degree of philanthropy. It would have an element of benefit for others.

The United Kingdom Treasury and politicians appear to be totally confused about the nature of a non-profit making organisation in sport – particularly in golf. In member-owned golf clubs the clubs operate to take in money for purely selfish reasons to subsidise their own hobby and with no element or motive of doing good for others.

The interpretation of a "non-profit making organisation" is apparently the responsibility of each Member State. In the UK the term "non-profit making organisation" is not based on a specific structure, as in some countries, but on the organisation's constitution and its aims. In the UK "non-profit making" does not imply philanthropy or public benefit. Evidence from the The Johns Hopkins Comparative Nonprofit Sector Project spanning some 15 years shows the wide disparity in the meaning of "non-profit making". The European Commission White Paper on Sport suggested the need for a common definition of "non-profit making" to produce parity between Member States. The interpretation in the UK is simply based on the constitution of the organisation and its underlying stated aims. Following the introduction of provisions from the VAT Sports Order 1999 Customs and Excise advised golf clubs how to retain their eligible body status.

To repeat the words of the Chancellor of the Exchequer: "If clubs such as Queen's, the MCC and Sunningdale Golf Club are set up as non-profit making clubs, the exemption will apply to the provision of sports facilities to their members." That is despite the £1.3 million of visitors' fees earned by Sunningdale to subsidise the members' fees.

The case on which HMRC relies in relation to constitutions of organisations in the UK is the Bell Concord Educational Trust Ltd Case 1989. This dealt with an educational trust and the way in which the Trust took in money from outside and retained surpluses. The judgment referred to the constitution as evidence of the non-profit making aims of the Trust, but with the caveat that it should not be more widely used outside the context of charities. It has been used to classify the very

wealthy golf clubs as non-profit making, whatever their clear intent in making substantial profits from outsiders to subsidise the fees of their members. (Bell Concord decision Document N)

The underlying interpretation of what is "non-profit making" used by the UK Government is related to the constitution of the organisation. However, where in 1997 the clubs of Abbotsley and Chobham were found to have perfectly bona fide members' clubs operating on their premises, Customs and Excise refused to look at the constitution. The Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999 in bringing in the terms "eligible body" and "commercial influence" the alters this interpretation based on the constitution to continue the distortion between proprietary and member-owned golf clubs!

The UK Government has also repeatedly referred to the decision in the case of **Kennemer Golf & Country Club v Staatssecretaris van Financiën** (Case C-174/00)

However, in paragraph 5 of that judgment it refers "it may be noted that in most of the language versions the concept of a non-profit making organisation refers explicitly to one which does not aim to make a profit."

We say that in the UK there is no mention of organisations which do not aim to make a profit and that golf clubs in the UK clearly aim to make profits from non-members to subsidise the members in the cost of their hobby.

(It should be noted that the issue of visitors' fees in golf clubs is far greater in the United Kingdom than in the rest of Europe. The Sports Marketing Surveys Inc. Report, February 2013 and accepted and commissioned by Europe's governing bodies of sport reported that in 2012 the total visitors' green fees in Great Britain and Ireland was €807.38 million compared with €591.82 million for the Rest of Europe. The report showed that the average visitor green fee income for clubs in Great Britain and Ireland for 2012 was €260,000. It is assumed that this is also the UK figure. Mintel reported 27.8 million rounds of visitors' green fees in the UK in 2009. The income from non-members is substantial and clearly profit motivated.) Extracts from this survey – Document O

Paragraph 24 of Kennemer referred to the option of removing the VAT exemption through the provisions of Articles 13A(2)(a) and 13A(2)(b) of the Sixth Directive – now Article 133 of the Principal VAT Directive.

Paragraphs 47 and 53 refer to the possibility of looking at the way in which NPO's operate and for some NPOs to benefit from the exemption and others not.

The UK Government refuses to address the distortion caused by the VAT exemption being granted to very commercial member-owned golf clubs in competition with proprietary clubs.

11. MAKING PROFITS

The two types of golf clubs – member-owned and proprietary – trade and operate in the UK in a way which is identical or very nearly identical to the other.

In terms of making profits from green fees this was dealt with in terms of income tax/corporation tax just over 100 years ago and the judgment from that case still stands as the law. It is recited as such in HMRCs Manuals.

The leading case on corporation tax on visitors' fees, Carlisle and Silloth Golf Club v. Smith (Surveyor of Taxes) at (1912) 2 K.B. 177 and C.A. (1913) 3 K.B. 75. described the actions of a member-owned golf club taking visitors' fees as a trade, producing a taxable profit, and equated the business of the club to that of a golf course proprietor who had set out a links open to the public. The two types of clubs were likened to each other 100 years ago. This case is recited by HMRC as current law.

This is an extract from the decision in the Court of Appeal: (copy judgment enclosed)

Buckley LJ

"For the determination of this case, it is only necessary to say that the club as an association (like the proprietary owner of a golf links) is receiving payments from third parties, and that balance of profits or gains after debiting against those receipts such sum as may be proper by way of expenditure is a profit going into the pocket of the club in respect of which it is assessable."

Kennedy LJ

"It is not, therefore the common case of a golf club which admits to the use of its accommodation players who are introduced by a member or are approved by the club committee and who, upon such introduction or approval, and upon payment according to the rules of the club, are admitted to the privileges of members, according to the rules of the club, for some specified period. It is not necessary to decide the point, but in such a case, I am inclined to think the persons to whom such privileges are accorded might fairly be regarded as becoming for the time, members of the club, subscribing to its funds. But upon the facts appearing in the case, it appears to me that this club is really carrying on the business of supplying to the public for reward a recreation ground fitted for the enjoyment of the game of golf, and that the receipts derived from this business are in the nature of profits and gains in respect of which it is liable to assessment for Income Tax."

We claim that this set out firstly, that the club carried on a trade and made a profit and that is how golf clubs still act, but even more commercially, secondly, that the issue of distortion and members' clubs and proprietary clubs acting in the same way was dealt with in 1913 and thirdly, that the UK Government is wrong to persist with the pretence that members' golf clubs don't aim to make a profit and are non-profit making. The Carlisle and Silloth judgment – Document P

12. THE CONTINUING DISTORTION IN SPORT

It is our case that the UK Government is wrong to refuse to address the clear distortion in golf within the UK and has given a wrong interpretation to non-profit making organisations as applied to sport.

The UK Government has acknowledged at various times that there is an obligation to remove the distortion but has always refused to.

In 1993 the UK Government prepared to grant the exemption to sport from Article 13 of the Sixth Directive. The Association of Golf Course Owners (formed specifically to combat the VAT distortion and still working at it 20 years later) protested at the distortion it would cause. We exhibit some of that early correspondence (Document Q)

Following AGCO's protests the UK Government made a concession and tried to reduce the distortion by limiting the exemption to members of a members' club where there was a members' club. We refer to the letter from the Paymaster General, Sir John Cope, in 1994 to Mr. Richard Salt, proprietor of Horsley Lodge Golf Club in Derbyshire which explains this as aiming to reduce distortion. Thus at golf clubs membership fees were VAT exempt and green fees attracted VAT at the standard rate. This was supposed to be anti-distortion measure to protect us in part. (Document R)

Despite many requests and observations Customs and Excise/HMRC have always refused to define what is meant by a member of a members' club. In terms of corporation tax where someone is an associate member without the full membership rights – votes, rights to the accounts, a share if appropriate, right to stand for office, right to attend the AGM – the associate member or limited member is deemed to be an outsider for corporation tax purposes and tax is payable on their fees. A recent letter from Mr. Edward Troup, Tax Assurance Commissioner and Second Permanent Secretary, confirms this within corporation tax. (Document S)

In 1994 we specifically pointed to this error in VAT legislation and the failure to define a member. We pointed out that without any such definition it would be possible for a member-owned club to charge a visitor a nominal £1 and make him a member. At a bona fide racquet club it is customary for members to pay a small membership fee and a court fee each time they play. It was patently obvious to us that the failure to define a "member" left it open for a golf club to charge the nominal £1 and then take all green fees VAT exempt. Our correspondence from 1994 shows this. It was open to abuse and has been abused. One man reported how he was asked to pay £5 for a club tie, wear it whenever he visited the golf club, and his green fees were then VAT exempt.

Despite this, HMRC failed to address this abuse. In 2010 they gave a specific ruling in relation to Didsbury Golf Club, copy enclosed, confirming that a golfer could pay an associate membership fee to a members' club, with no real membership rights and then benefit from VAT exempt green fees. (Document T)

The accountants involved in the Didsbury GC decision, PKF, are also the accountants for Sunningdale Golf Club (where several classes of members are simply associates) and England Golf. England Golf acted to publicise this membership VAT "scam" throughout UK golf. The clubs will, of course, see no obligation to pay corporation tax on the fees from these limited members. The Didsbury ruling has allowed golf clubs to adopt the £1 life associate member to turn standard rated green fees into exempt memberships.

In 1995 Customs and Excise invited the Association of Golf Course Owners to give evidence to support Customs claim against Norwich City Council that the sports fees at a local council centre should be standard rated because to allow them to be VAT exempt would cause distortion with proprietary/commercial concerns with which they competed. In the end we did not have to give

evidence of the distortion but it does display a realisation that distortion should be removed. (Document U)

13. BRIDPORT and WEST DORSET GOLF CLUB FTC/74/2011

In the recent case of HMRC v Bridport and West Dorset FTC/74/2011 heard in the European Court of Justice on October 2nd – judgment due – 458 golf clubs claimed a refund of VAT of over £115 million on their visitors' fees from 1st January 1990. Their claim was that the visitors' fees were such a crucial part of their income that they should not fall within Article 134 (b) and thus be standard rated as additional income in competition to commercial concerns.

It is presumed that they have also claimed that the UK law wrongly transposes Article 132 1(m) in that the exemption should be to persons, without the limitation of members.

The Association of Golf Course Owners (1993) and Cambridge Meridian Golf Club applied to the Upper Tribunal to be joined in as a party to at least make a written representation to the European Court. Our application, drafted and presented by Tax Counsel, was rejected by the Hon. Mrs. Justice Proudman DBE (copy enclosed). Being the parties who are on the receiving end of the distortion of competition it is regrettable that our case has never been heard. (Document V)

We believe that HMRC will have fought this case on the issue of green fees as additional income without appreciating that the original division of membership fees and green fees was seen as a way of reducing the distortion and to protect owners of proprietary clubs.

Our very simple question, which may be simplistic, concerns Article 134 (b).

Article 134 provides that:

"The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT."

Why on earth is anyone concerned whether additional income under Article 134 (b) is in direct competition with commercial enterprises subject to VAT if they aren't concerned with the core income being in competition?

14. THE UNDERLYING DISTORTION IN VAT IN SPORT

We repeat that we believe that the United Kingdom is totally out of step with other Member States in attributing to Sunningdale Golf Club (the Chancellor's example of a golf club) and similar golf clubs the status of a non-profit making organisation. The heading to Chapter 2 – Article 132 to 134 – is that these are ***Exemptions for certain activities in the public interest.***

The club does not act in the public interest as a form of Public Benefit Organisation (PBO). There is no element of philanthropy.

Sunningdale GC took £1.3 million of visitors' fees in 2011 solely to benefit their 588 full members to the tune of about £2,000 per head. These are not members' guests; they are visitors/strangers most with no links to members. This is clearly a distribution – covert or overt.

The club has over 1,000 members in all categories of whom just 34 are juniors under 18, i.e. just 3%. In addition the club has 63 lady members who are simply associates with none of the traditional rights of members, i.e. no shares, votes and so on. In effect these associate members have exactly the same membership rights as members at a proprietary club. The same applies to Sunningdale's working class, artisan men members with their own clubhouse and limited rights.

It would appear that the organisation as such does not operate for the public interest.

As to the activity being in the public interest we question whether it is any more in the public interest for members of Sunningdale Golf Club, ranked number 3 in England, to enjoy VAT exempt golf than for the casual, less well-to-do golfer participating at a proprietary golf centre. The owners of Abbotsley and Cambridge Meridian [complainants 2 and 3] question why it is more an activity in the public interest for Sunningdale's wealthy members to enjoy VAT exempt golf than Abbotsley's less affluent members.

Equally we question whether the activity of a gentlemen member at Sunningdale, playing snooker VAT exempt, is any more in the public interest than the city centre youngster enjoying snooker at a commercial snooker hall and paying VAT.

The Chancellor also gave Queen's as an example of a non-profit making club with the members entitled to VAT exempt membership subscriptions. Queen's is the most elite of racquet clubs in London. (The Chancellor does see sport at the elite end!) Queen's differs from Sunningdale in that the club is only open for sport to members and their bona fide guests. It isn't pay for play like Sunningdale and UK members' golf clubs.

But as an activity why is it any more an activity in the public interest for the wealthiest individuals in London to enjoy their squash, tennis, racquets and real tennis VAT exempt, than it is for the members of Abbotsley Golf and Squash Club who have modest means. Queen's members enjoy VAT exempt squash. Abbotsley members pay VAT.

15. THE MEANING OF NON-PROFIT MAKING ORGANISATIONS

We repeat our contention that the UK is totally out of step with other Member States in attributing to a golf club like Sunningdale the status of a non-profit making organisation. Or if it is right to class it as non-profit making we say the UK is wrong not to stop the obvious distortion of competition.

We believe that the legislation from the Principal VAT Directive, Article 131 to 134, should be viewed as a whole, comparing how sport, Article 132 1 (m), is dealt with as against the other exemptions. We believe it throws light on the correct interpretation of a non-profit making organisation.

We assert that in the original legislation and with the original six Member States there must have been an assumption that the non-profit making organisation in sport had to have a philanthropic public benefit type of organisation. We believe the legislators must have had in mind a type of sports organisation that worked in the interests of other people and the furtherance of sport. We don't hold ourselves out as experts in the law of other Member States, but we do know sport inside out!

We say that the interpretation of a non-profit making organisation must be read in conjunction with the title of Chapter 2 and be in the public interest.

We say examination of Article 132 (1) demonstrates the thought process of including items for the exemption.

a) postal services

b) hospital and medical care

c) medical and para-medical services

d) supply of human organs and blood

e) dental services

f) membership fees of certain groups

g) welfare and social services

h) protection of children

i) education for children and young people

j) private tuition for school or university

k) supply of staff by religious institutions

l) supply of services to members with a common interest

m) the supply of certain services closely linked to sport

n) the supply of certain cultural services

o) fundraising for organisations in b, g, h, I, l, m and n

p) transport for the sick or injured

q) public radio – other than commercial services

A Two public services are exempt:

(a) and (q) – in other words, public postal services and public broadcasting. (We think there have been questions concerning distortion between public and private postal services.0

B The following services are exempt for a variety of suppliers, i.e. public bodies or comparable bodies providing similar services:

(b) (g) (h) (i) (n) (p) – in other words services for hospital and medical care, services for welfare and social security, the protection of children, provision of young person's education, certain cultural services and transport for the sick and injured by authorised bodies.

In other words, distortion is eliminated where a comparable service is provided.

C The following services are exempt for all suppliers:

(c) (d) (e) (j) – in other words, services for medical and paramedical care, supply of human organs, dentistry, and private tuition.

There is no element of distortion.

D Two other services specifically refer to memberships of groups and the exemption is limited in that the exemption is not to be granted if it is likely to cause distortion of competition:

(f) and (l) – in other words for groups sharing expenses, or for non-profit making organisations with aims of philanthropy etc.

E There are only two references to "non-profit making organisations". The first is item (l) with reference to non-profit making organisations with the aims of a political, trade union, religious, patriotic, philosophical, philanthropic or civic nature. It refers specifically to the exemption not being granted if likely to cause distortion.

Item (m) - the exemption for sport stands alone. The exemption is only given to non-profit making organisations. It is the only subsection, other than postal services, where there is seemingly no protection against distortion. It doesn't fall within B, with the exemption being available to comparable bodies. It doesn't fall within C being available to all suppliers. Nor does it apply to D where there is specific reference to the elimination of distortion. Sport does not have the protection afforded in E where there is the other reference to non-profit making organisations, setting out their motives and eliminating distortion.

It is our contention that the drafting of the original VAT law relating to non-profit making organisations relating to sport had no concept of the structure and nature of sports clubs and absolutely no concept that this exemption was given where there might be distortion. We maintain that the original French law and the concept of a non-profit making organisation within sport would have seen it as automatically philanthropic in nature. The 1901 law of associations in France, the ASBL status in Belgium and Luxembourg, and the Italian regulations from the Civil Code of 1942 and the Constitution of 1948 would certainly not have agreed with the Chancellor of the Exchequer in giving Sunningdale Golf Club the status of a non-profit organisation and an activity in the public

interest. We understand that both the Netherlands and the Federation of Germany drew a line for classification as non-profit making organisations where an organisation had a modest level of trade with outsiders. We understand that the Netherlands had a limit of XXX florins after which it was no longer non-profit making and we think this may have emerged in Kennemer. We don't hold ourselves as any form of experts in this but there is a wealth of information on the interpretation of non-profits (NPO) and Public Benefit Organisations (PBO) and the interpretation in different countries and in sport. See a sample of the work from International Center for Not-for-Profit Law (ICNL) Document W

At least Belgium, Luxembourg and the Netherlands have seen the light of day and have adopted Reduced Rate VAT for category 14, i.e. use of sports facilities!

Our contention is that the reason there is no mention of distortion or protection against distortion for the sports exemption in (m) is that the legislators had no concept of a non-profit sports organisation being anything other than run for philanthropic principles and the furtherance of sport. We maintain that there was an underlying assumption that any such organisation would automatically fall within the description of being in the public interest and couldn't possibly compete against commercial concerns.

16. THE UNITED KINGDOM'S OBLIGATION TO REMOVE THE DISTORTION

We complain that the United Kingdom has failed to remove the distortion and to ensure that there is fiscal neutrality.

17. VAT DISTORTION THROUGH THE 1990S

In 1994 it was clear that the UK Government was refusing to address the VAT distortion in golf clubs. The attempts to minimise the distortion by relating the VAT exemption to memberships of a non-profit making members' club were clearly flawed and it was obvious that any member-owned club could use the scam of a £1 membership fee and VAT exempt green fee. Some mooted this from the word go.

As added distortion the member-owned golf clubs were able to claim large refunds of VAT on subscriptions going back to 1st January 1990. This meant that golf clubs achieved refunds of up to £300,000. They were allowed VAT refunds on the fees of associate members – like the lady members from Coombe Hill, Notts, Sunningdale, Walton Heath, Richmond and so on. The ladies hadn't been considered as members previously but in terms of VAT refunds were considered as members. The whole thing was flawed. They still aren't considered members at three of these clubs.

It was soon an evident disaster for proprietary clubs having to charge VAT on subscriptions. With some goods it is not clear to the purchaser whether he or she is paying VAT. The consumer doesn't question it. But with golf club subscriptions the VAT has to be shown separately and that is the case to this day.

Thus it is apparent to the member of a proprietary club that he pays VAT and members at members' clubs don't. The reason for this is to do with the collection of affiliation fees for county unions and

the National governing bodies. The proprietary club could then and can now only pass this on VAT exempt to a customer if it is shown separately after the membership fee, the VAT and the total, i.e. shown as a VAT exempt disbursement.

So the VAT difference was obvious to the customer and many objected. “Why should we pay VAT?”

In addition proprietary clubs suddenly had to charge higher fees than comparable and neighbouring members’ clubs.

18. GOLF DEVELOPMENT – MEMBERS AT PROPRIETARY COURSES

Many, if not most, of the proprietary clubs had been built between 1988 and 1994 in response to the Report of the Development Council of the Royal and Ancient Golf Club of St. Andrew’s (amateur golf’s world governing body). Their report “A Survey to assess the demand for and supply of golf and golf facilities between now [1989] and AD2000” assessed that there was a need for 700 new golf courses by 2000.

The newly built golf courses were often seen as having inferior golf courses to members’ courses – just because it takes anything up to 30 years for trees to grow and a course to mature.

Golf proprietors were desperate (and still are) to be able to compete on a level playing field by being able to offer their members VAT exempt subscriptions and stop the distortion.

The experience of a golfer at a proprietary club is identical to that of the member at a members’ owned club, other than the paying of VAT. The experience of a member of a members’ club is identical to that of a commercial concern in their trading with outsiders.

The membership experience of a golfer at a proprietary club is identical to that of the member at a members’ club because, in part, because of the rules of the National Governing Bodies of Golf.

This is why:

- The national governing bodies of golf require the owners of golf courses to have bona fide, democratic, member operated clubs for the golfers who play golf at their courses.
- The constitutions of those member-operated clubs have to have constitutions laid down the by national governing bodies
- Those clubs are the parties that are affiliated to the national governing bodies and operate the handicap system, run competitions and have votes at regional/county/national level
- Many aspects of running these clubs are compulsorily taken out of the hands of the owners and passed to the members’ club
- The members’ clubs have to have relationships with the owners that allow them to use the course on designated days and provide that the owner must give free rounds of golf to members of other clubs and organisations
- Thus the operation of such clubs is completely bona fide and compulsory under the rules of governing bodies recognised as National Governing Bodies (NGBs) by the UK Government

- These members' clubs are unquestionably non-profit making in accordance with the constitutions set by the NGBs
- Golf course owners are treated by the NGBs as simply the landowners and in effect have to give licences to these clubs for their golf.

This requirement of having the affiliated members' club at a proprietary golf course in England is set out clearly in PMB/JH/20.04.94, referred to in Appendix D of the 1999 EGU constitution as "Rules of Affiliation for Member Clubs". This document had 4 parts, namely Part 1: Mandatory Conditions, Part 2: Provision of Information, Part 3: Rules which must be included in the constitution of a club and Part 4: Guidance Notes. In essence no proprietary golf course in England could function properly without complying with the rules of the National Governing Body. That document is shown as Document X

In effect it is mandatory in England to have the structure of a members' club at a proprietary golf course. The relationship is well-known to HMRC. The documents in Document X were produced to the Commissioners by the complainants in this current dispute. They were also exhibited in the VAT Tribunals of Abbotsley Golf & Squash Club Ltd (LON/96/148 decision 15043), Chobham Golf Club (LON/96/833, decision 14367) and the Chipping Sodbury and others case (MAN/08/270). The documents are current evidence in HMRC's VAT dispute with Hennerton Golf Club.

It means, very simply, that the experience of a member of a proprietary golf club is identical to that of a members' owned golf club, with identical committees, competitions, matches, voting, representation to county and England Golf. The VAT treatment, however, is entirely different and we say offends against the Preambles (4) and (7) to the Principal VAT Directive and the case law, philosophy and underlying principle of fiscal neutrality and removal of distortion.

19. ABBOTSLEY AND CHOBHAM

In 1994/5 two golf clubs, Abbotsley and Chobham, formalised the club arrangement and the licence from owner of the golf course to the members' club. The constitutions of the clubs, complying with the requirements of the English Golf Union, made it clear that the clubs were non-profit making and independent of the owners. They had to comply with the English Golf Union requirements. It was mandatory.

The grant of a licence from the landowner to the club was not for any purpose of tax avoidance. There was no financial benefit to the landowner. The whole purpose of the licence was to enable the members of the club to have membership fees without the addition of VAT and thus to avoid the clear distortion arising where members of member-owned golf clubs pay no VAT on subscriptions and members of proprietary clubs do. The UK Government was not prepared to stop the distortion of VAT and something had to be done.

The club and licence arrangements were simply to allow the fees of golfers at proprietary clubs to enjoy VAT exempt golf, lowering their subscriptions in line with competitors. It was never a question of the golf course owner escaping accounting for VAT on monies received, but of enabling him to fight the distortion which the UK Government refused, and continues to refuse, to eliminate.

Customs and Excise challenged both clubs in 1997 and lost. Abbotsley Golf and Squash Club VAT case (LON/96/148 decision 15043), and the Chobham Golf Club VAT case (LON/96/833, decision 14367).

Abbotsley established that the license arrangement and club structure was bona fide and Chobham reinforced the non-profitmaking structure of the club. It was accepted by the tribunals that both of these proprietary clubs had adopted this structure, not for any artificial tax avoidance, but to allow themselves to compete, without distortion, by enabling their customers to enjoy the same VAT exempt status as members of a members' club. The Abbotsley judgment is enclosed together with notes from Customs and Excise about the case. (Document F)

20. VALUE ADDED TAX (SPORT, SPORTS COMPETITIONS and PHYSICAL EDUCATION) ORDER 1999

In 1997 the UK Government set about stopping this arrangement which the tribunals had accepted were perfectly bona fide arrangements. The first attempt to stop the arrangement was the amended Value Added Tax (Sport, Sports Competitions and Physical Education) Order 1998 (SI 1998 – 764) which was abandoned when it became clear that commercially driven, supposedly non-profit making members' clubs would be caught in the VAT net.

This 1998 draft order was amended to become the Value Added Tax (Sport, Sports Competitions and Physical Education) Order 1999, (SI 1999 no. 1994) coming into force on January 1st 2000. The Minutes of The First Standing Committee on Delegated Legislation, October 1999, which considered the order, gives an insight into the issue of distortion in golf. (Document Y) It referred entirely to golf. The Paymaster General, Dawn Primarolo, explained:

"The order puts a stop to tax avoidance by commercially driven sports clubs, while fully safeguarding the position of genuine non-profit-making clubs. The avoidance exploits a difference in the VAT treatment of the two sorts of sports clubs, which derives from European law and to which hon. Members may wish to return when discussing the order.

"Until 1994, the United Kingdom treated all subscriptions to sports clubs as taxable at the standard rate but, in response to a legal challenge by the Central Council of Physical Recreation, the previous Government agreed that EC law was being wrongly applied and introduced an exemption for subscriptions to not-for-profit members' clubs. Since then, some profit-making clubs--notably golf clubs--have contrived schemes to avoid having to charge VAT by setting up non-profit-making clubs within the club, which they control and from which they extract profits.

"It may have come to the notice of members of the Committee that we attempted to tackle that avoidance in an earlier order laid at Budget time last year that followed the Government's anti-avoidance procedure. I must be honest with the Committee and say that we did not apply the order because we realised that it would have had an accidentally adverse effect on genuinely not-for-profit clubs, which would not have been acceptable. Since then, we have spent a long time talking to affected parties to ensure that the wording of the provision is precise and correct. The resulting order has taken some time to draw up because, following correspondence from hon. Members about their golf clubs or golf clubs in their constituencies, I thought it right to make every effort to ensure that the order is correct, so extensive consultation was undertaken."

Despite the acceptance by tribunals that the arrangements and club structures were bona fide the arrangements were expressed as avoidance and the whole issue was related to golf clubs. It was

recorded that the 1998 version was amended, principally because the influential member-owned golf clubs with extensive trading in green fees, risked being caught in the VAT net. We will produce evidence of the size of that green fee income from the influential clubs in question.

21. THE VAT SPORTS ORDER 1999 DEBATE

At that time it was a Labour Government. The committee minutes refer to Opposition MPs from the Conservative Party and Liberal Democrats objecting to the distortion in golf clubs and insisting that something should be done. Politicians involved, including the Paymaster General, undertook to eliminate or reduce the distortion. Fifteen years later they have done nothing, despite a change of Government.

A copy of the Debates Minutes goes to the heart of our complaint about the ongoing distortion. One Shadow Government says it must be addressed. When brought to power they ignore previous promises.

This shows amongst other things:

- It was an anti-avoidance measure and it related solely (or almost solely) to golf
- The acceptance by politicians – then Opposition, now in Government – of the distortion
- The statement by the Paymaster General that she had listened to comments from MPs about their golf clubs and clubs in their constituencies and therefore they had abandoned the 1998 provision for fear of catching members' clubs
- That they would continue to discuss the issues of distortion – which they never have done
- That the only sport involved was golf and only golf was consulted

The Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999 was duly passed and incorporated into amendments to the VAT Act 1994.

22. THE EFFECT OF THE VAT SPORTS ORDER 1999

When transposed into the UK domestic law this has been a disaster for proprietary golf clubs. It has forced golf course owners to abandon any concept of a members' club at their golf courses with the members enjoying VAT exempt membership fees. It has returned the VAT distortion to the position it was in 1995 with the worsened effect of standard rate VAT now being 20%.

Several golf courses continued to have a members' club with VAT exempt membership fees. In some cases Customs and Excise accepted the situation and then reneged on their tacit acceptance of the club arrangement. One was Tickenham Golf Club, owned and run by AGCO Deputy Chairman, Andrew Sutcliffe. Clubs, including Abbotsley, were threatened with being bankrupted if they continued with such an arrangement. The owner at Abbotsley leased her golf course in 1999 to a commercial party and ceased trading for fear of being bankrupted and victimised. She took back the lease in 2010.

Any club owner licensing their course to the members' club has had any such arrangement stopped. We know of two golf clubs presently facing serious actions from HMRC to stop any such arrangement.

23. SPORTZ ACADEMY (POTTERS BAR) LTD

The same rules were seemingly applied to two fitness centres. This is the position of Sportz Academy (Potters Bar) Ltd. The company was set up in 1997 as a health and fitness club with advice and by a firm of accountants, solicitors and VAT specialists. The Club, so the owner says, was set up as the majority of fitness centres at the time as exempt from VAT as set out in Article 13 of the Sixth Directive. This gave certain exemptions from VAT to sports clubs, and "more importantly made the club competitive with local authority facilities, offering the same product VAT exempt". It meant that as a non-profit making organisation the club was able to exempt membership subscriptions from VAT. In 2007, after a 3 year review by HMRC they came to the opinion that the club did not qualify under the VAT (Sports, Sports Competitions and Physical Education) Order 1999 which came into force on January 1st 2000. HMRC then issued an assessment for the gross VAT and penalties, calculated on turnover backdated 6 years. This was contrary to all the written advice the Club obtained from the accountants, solicitors and VAT experts who had advised and set up the club originally. Faced with such a heavy assessment in excess of £1.4 million and not being able to afford to fund a defence the club was put into liquidation. Subsequently HMRC, through its appointed liquidator, has been pursuing the director of Sportz Academy (Potters Bar) Ltd personally through the courts for the outstanding assessment.

It is our claim that the United Kingdom in adopting the Value Added Tax (Sports, Sports Competitions and Physical Education) Order 1999 into the VAT Act 1994 has transposed the European Legislation in a way it is not entitled to do. It came into force on January 1st 2000. We say that the provisions of the VAT Act 1994 relating to "eligible body", "commercial influence" and "sports land" are not allowed and for that reason we ask that the European Commission takes infraction proceedings against the United Kingdom.

23. GOVERNMENT ADVICE TO GOLF CLUBS

In preparation for the VAT Sports Order coming into force by January 1st 2000 Customs and Excise put out advisory documents to sports clubs and particularly to golf clubs advising them how to comply with the new regulations. They referred to proprietary golf clubs as being guilty of forms of tax avoidance and led national governing bodies of golf to believe proprietary clubs had acted improperly.

Customs and Excise gave written advice to the English Golf Union for them to pass on to member-owned golf clubs to explain the new rules and give examples of clauses on non-distribution and winding-up to ensure they were not caught in the VAT net. It was clear that Customs and Excise were determined to ensure that Sunningdale Golf Club (again the Chancellor's example of a non-profit making golf club) could not be seen as "subject to commercial influence". (Document Z)

At the same time as proprietary clubs were accused of tax avoidance the Inland Revenue refused, and has always refused, to apply the corporation tax rules relating to the tax due on visitors' fees at these same golf clubs. There was a clear intention, which remains to the present time, to produce tax advantages, through VAT and tax, at influential member-owned golf clubs. Those of more modest means – the man in the street – pays VAT at golf centres that pay tax.

As the Chancellor of the Exchequer says – the European Commission envisages distortion between the two types of golf club and tolerates it. In effect the UK tax authorities have been determined to advise members' golf clubs how to achieve this.

24. STRUCTURE OF GOLF CLUBS

HMRC has always stated that it is not possible under European Union law to grant the exemption for sport to proprietary clubs. HMRC/Customs and Excise have allowed some proprietary clubs to be treated as non-profit making and to give VAT exempt memberships to their shareholders/members. Several golf clubs which are public companies have been considered as non-profit making, where shareholders are companies, shares are bought or traded as investments and shareholders receive dividends/benefits by way of reduced subscriptions. These are by definition proprietary clubs granted the VAT exemption for sport. Other clubs set up as limited companies with unequal shareholdings have been treated as non-profit making and the "members" given VAT exempt subscriptions. In each of these cases there is not a one member, one share policy and there are members who are or are not shareholders, and shareholders who are or are not members. I believe there are many such clubs.

Three companies which are structured like this in adjoining counties to the first and second Complaints are: Biddenham Golf Club Ltd – 003307940 – Bedfordshire: Kenwick Park Golf Club Ltd – 02600768 – Lincolnshire: The Northampton Golf Club Ltd – 00184909 – Northamptonshire. Biddenham Golf Club at Stagsden, for example, has an 18 hole course plus a commercial par 3 course and driving range and operates as a commercial business, but with VAT exempt subscriptions for members.

Our claim is that HMRC has granted an exemption for VAT to these proprietary clubs for membership fees.

Coombe Hill Golf Club – Coombe Hill Holdings Ltd in Surrey, is typical of a members' clubs with a shareholding structure. There are some 1,300 shareholders, many of whom don't belong as members. There are numerous shareholders are not members and many members who are not shareholders. It appears from the shareholding records that lady members cannot have shares. The non-shareholding members don't have the same rights to vote. This kind of structure is commonplace and again it is hard to see the structure of the club. (Document AA)

There is not a clear cut difference between members' clubs and proprietary clubs.

25. THE ACTION WE ASK THE EUROPEAN COMMISSION TO TAKE AGAINST THE UK

Our first part is the UK's refusal to eliminate the distortion of competition and to ensure there is fiscal neutrality.

Our second part is that the VAT Act in referring to and defining "eligible body", "commercial influence" and "sports land" and the way in which they are incorporated into the UK VAT law is incorrect and not permitted. And we ask the European Commission to take infraction proceedings against the United Kingdom to rectify this.

26. ELIGIBLE BODIES, COMMERCIAL INFLUENCE AND SPORTS LAND

The terms "eligible body", "commercial influence" and "sports land" have been incorporated into the VAT Act as a result of the Abbotsley and Chobham cases and to ensure that members of a members sports club operating on commercial owned land do not get VAT exempt sport. To repeat, any such arrangement between club and owner is to eliminate or minimise distortion in pricing and not tax avoidance or evasion.

These terms were clearly intended as anti-avoidance provisions within Article 131 which states:

"The exemptions provided for in Chapters 2 and 9 shall apply without prejudice to other Community provisions and in accordance with conditions which Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

Our claim is that the "commercial influence" rules cannot remove the exemption and we rely on paragraphs in the decision in Case C-8/81 **Becker v Finanzamt Münster Innenstadt** [1982] ECR 53, i.e.

"A Member State may not rely, as against a taxpayer who is able to show that his tax position actually falls within one of the categories of exemption laid down in the directive, upon its failure to adopt the very provisions which are intended to facilitate the application of that exemption."

The "commercial influence" and "eligible body" provisions have meant that the VAT exemption has been removed from members of bona fide non-profit making organisations, being the members' clubs operating at proprietary courses.

These two terms have effectively redefined "a non-profit making organisation". Although Member States can seemingly make their own definition of what is non-profit making we believe that the rule in Becker (and other cases) applies and they cannot actually eliminate the exemption in this way.

The UK has also through the "commercial influence" provisions attempted to use the provisions of Article 133 (a) which states, "the bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied".

Our comment on this is that the "commercial influence" provisions make no reference to any ***aims to make a profit.*** In relation to member-owned golf clubs, with which we suffer the distortion, the

aims of the association are taken from the constitution and rules of the club with no reference to whether the club actually makes a profit. The UK relies on the Bell Concord definition of only looking at the constitution to see the aims and objects. And yet in the case of "commercial influence" and eligible bodies the UK has moved away from this to ensure the distortion continues.

We say that the UK is not entitled to use the "commercial influence" and "eligible bodies" rules as removing the exemption under Article 133 (a) because that clearly refers to the aims of the body. In a membership structure like the "banned" Abbotsley one, the aim of the members' club was certainly not to make a profit. Abbotsley, and other such clubs, complied with all the conditions (a) to (d) in Article 133 better than almost any traditional UK golf club with their profit making green fee businesses.

We also say that the "commercial influence" regulations and definition removes the exemption in a way not permitted within the provisions of Article 133 (a) because it refers to the application of any profits, not the aim of making any profits. Organisations such as the members' clubs at proprietary courses have no right within the provisions to demonstrate that the body is non-profit making and there is a presumption against the taxpayer.

The ruling in the Canterbury Hockey Club Case, Case C-253/07 makes particular reference to just this situation. Paragraph 39 of the judgment reinforces the position that a member state can only make the exemption subject to the conditions set out in Article 13A(2) of the Sixth Directive (now Article 133 of the Principal VAT Directive,) i.e. whether they aim to make a profit, are managed voluntarily, the pricing policy and distortion. It doesn't permit other ways of removing the exemption. The bona fide members' club operating at a commercially owned course fulfils those requirements in exactly the same way as a traditional members' club. In fact they are even more non-profit making and even more voluntarily run.

Paragraph 39 of the Canterbury ruling clearly states: "Since that provision [i.e. Article 13A(2)] does not lay down restrictions as regards recipients of the services in question, the Member States have no power to exclude a certain group of recipients of those services from the benefit in question."

We say that the "commercial influence" and "eligible body" provisions in the VAT Act have excluded a group of recipients, - i.e. all the golfers who play at members' clubs at proprietary courses – from the exemption.

We say that paragraphs 28 to 31 of the Canterbury judgment clearly reinforce our contention that the Value Added Tax (Sport, Sports Competitions and Physical Education) Order 1999, is ultra the European Legislation and should never have been passed.

Paragraph 31 "In order to ensure the effective application of the exemption under Article 13A(1)(m) of the Sixth Directive, that provision must be interpreted as meaning that services supplied in connection with, among others, sports practised in groups of persons or within organisational structures put in place by sports clubs are, generally, eligible to benefit from the exemption under that provision. It follows that, to determine whether supplies of services are exempt, the identity of the material recipients of those services and the legal form under which they benefit from them are irrelevant."

27 SPORTS LAND

The UK's commercial influence rules also relate to sports land. There is no mention of sports land or

the relationship of sport to land in the Chapter 2 exemptions. The exemptions for land are set out in Chapter 3 as "exemptions for other services" and we assert that the issues of the exemptions for sport and land are separate. Article 135 provides:

1. Member States shall exempt the following transactions:

This includes:

(l) the leasing or letting of immovable property.

Paragraph 2 provides that Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1. Clearly Member States have differences in land law and conveyancing. But we say that the definition of "sports land" brought within Article 135 has been worked in conjunction with Articles 132 to 134 and this is not permitted. It should simply reflect different land law systems in Member States and not be used to affect sport. In the Abbotsley case Customs and Excise in effect tried to change the whole interpretation of a license as opposed to a lease, and overturn centuries of English land law. A license is, by its nature, non-exclusive. Customs tried to fight the Abbotsley case on that basis. The interpretation of sports land in Article 135 is a throwback to that decision.

We assert that Articles 132 to 134 do not permit including a condition to eliminate or restrict the sports exemption by reference to any lease or licence of land. This provision of sports land has effectively caused such widespread distortion in the whole field of sport in the UK that the European Commission should take infraction proceedings against the UK over this. Where a sports club (not golf) hires a sports pitch from a school or leisure centre the letting is usually VAT exempt. Where a sports club hires it from commercial leisure centres VAT applies. This applies to the detriment of children playing football and has produced a disgracefully contrived form of distortion which is again aimed at the elite end of UK Sport.

To repeat, the Chancellor of the Exchequer in writing of sports clubs chose Sunningdale, Queen's and the MCC. This is the most elite aspect of UK Sport.

Sunningdale leases their land from St. John's College, Cambridge University. The sports land rules don't appear to impinge on them.

Walton Heath Golf Club in Surrey boasts that at one time they had 24 member who were Members of Parliament and 21 in the House of Lords. They boast to having had more Prime Ministers as members of Walton Heath than any other golf club. Walton Heath still gives a £700 deduction in subscriptions to Members of Parliament. Some MPs list this benefit. Walton Heath, despite taking over £600,000 a year in visitors' fees is still classed as a non-profit making members' club with VAT exempt membership fees. But on the sports land issue, the club does not own the land on which the course plays. Neither does it have a lease. It has a license. Sports land doesn't apply other to clubs such as these. Sports land is only contrived to continue the distortion in sport and protect old traditional and rather wealthy clubs!

<u>To summarise</u>:

We say that the terms “eligible body” and “commercial influence” and their definitions are not permitted as reasons to remove the exemption within Article 133 (a) because there is no mention of any aim to make a profit nor do they comply with any requirements on distribution.

They fall outside the judgments in Canterbury and Becker

The incorporation of “sports land” from Article 135 shouldn’t be brought back into Chapter 2 and linked to Articles 132 to 134. It is a separate exemption from Chapter 3.

28. DISTORTION OF COMPETITION

This association and individual proprietary golf clubs have demonstrated the commercial nature of members’ golf clubs with which we compete since 1993. We have shown repeatedly that they trade against us in precisely the same way. All advertising on the Internet shows the huge trade for visitors’ fees, hotel accommodation, weddings, conferences and almost any trade they can pull through the doors.

To summarise:

- The Mintel Report of 2009 put the number of visitors’ rounds paying green fees in the UK in 2009 as 27.8 million. This is distributed fairly evenly between member clubs and proprietary clubs.
- The Sports Marketing Surveys inc Report of February 2013, commissioned and approved by the European Governing bodies of golf, found that the average visitor fee income at a golf course in Great Britain and Ireland for 2012 was €260,000 per club per annum. We assume the figure for the UK is the same as for GB & I. (Document O)
- In the case of HMRC v Bridport and West Dorset FTC/74/2011 heard in the European Court of Justice (decision awaited) 458 clubs are claiming back a combined total of £115.4 million in VAT refunds on green fees since 1st January 1990. This is the official figure from HMRC. In total there are over 1,000 such claims. This demonstrates the huge level of their trading income since 1990, which we have estimated in green fees to be in the region of £3 billion to £3.5 billion. The green fee income is vast.
- If Bridport and the other clubs win their case for a refund of VAT and for future green fees to be VAT exempt it will effectively wipe out proprietary golf clubs. If they lose, these clubs will simply adopt the Didsbury philosophy of the £1 life associate member and the VAT exempt green fee.
- One ruling brought in from the VAT Sports Order 1999 is that entries to open competitions at member-owned non-profit making clubs are VAT exempt. This means that many golf clubs simply run open competitions day in, day out and turn their visitors’ green fees into competition fees. At a proprietary club the competition fee is only exempt if all the entrance fees are redistributed in prizes.
- In our application relating to alleged State Aid through the Community Amateur Sports Club scheme we demonstrated that of the 600 or so member-owned golf clubs that had joined CASC more than eighty had a thriving business for wedding receptions and even licenses to hold civil ceremony marriage ceremonies at their premises.

- We are also able to show that at least 12 member-owned golf clubs have hotel accommodation (dormy houses) on site to attract revenue from non-members. Royal Lytham & St. Anne's GC with a 16 bedroom hotel appears to be the largest. They clearly charge VAT on this; that is not the issue. The issue is the way in which these supposedly non-profit making members' clubs trade against us.
- We are attaching a summary of the top 100 golf clubs in the UK with green fees under £100, (so the likes of Sunningdale, Walton Heath and the Berkshire don't fall in this. They are far costlier.) Of those 100, two are Trust courses at St. Andrew's, one is owned by England Golf. Of the other 97, – ninety of these clubs are member-owned, with VAT exempt membership fees and presumably asking for refunds on VAT on green fees. Only 7 of the 100 are proprietary courses. This explains the distortion. (Document BB)
- As for membership, it is clearly impossible for a proprietary club charging 20% VAT to compete against a members' club with no VAT. Added to that, many of them operate an associate membership scheme. Some proprietary clubs, mostly very top end, simply add VAT and charge more. With average or more modest clubs this makes them totally uncompetitive and numbers reduce. Most proprietors have to compete in the market place against members' clubs, matching their prices and accounting for VAT. Thus their facilities are probably not as good, their staffing reduced and service sometimes less good.
- Added to that, HMRC routinely waives all the corporation tax from green fees at members' clubs because they are so influential. (See our separate claim that this is State Aid.) And with 80% business rate relief for many of these clubs under the CASC scheme (see our other claim that this is State Aid.) that most proprietary clubs in the UK have been destroyed.

28. LINKED CLUBS/COMPANIES – THE CASC SCHEME AND MINIMISING TAX

The whole rationale for the VAT Sports Order 1999 is to stop any link between the land owners and the members' club. Any way of having a members' golf club on a proprietor's land with a license fee has been seen as avoidance.

We have made a separate complaint of alleged State Aid in terms of the Community Amateur Sports Club scheme, which gives some 600 golf clubs (amongst 6000 other sports clubs) rate relief and corporation tax concessions. The clubs have to be non-profit making, but, of course, within golf operate commercially with their green fee income, accommodation, weddings, conferences and so on.

Following a consultation period, finishing on August 12th 2013, the UK has proposed new arrangements to permit more sports clubs to fall within the conditions, for their tax relief and rates subsidies. One of the approved proposals for this is to permit non-profit making golf [sports] clubs to form subsidiary companies through which they can their catering, or other commercial concerns, keeping each below the VAT threshold and then being allowed to pass money from the subsidiary company back to the club with no tax liability. The proposal is that the money can even be passed from one to the other as a form of Gift Aid.

Thus the UK sees permitting non-profit making members' clubs as being entitled to avoid tax legitimately with their blessing and advice, while ensuring that proprietary golf clubs cannot in any way permit their members to enjoy VAT exempt membership subscriptions.

29. THE POSITION OF PROPRIETARY GOLF COURSES

In 1989 The Development Council of the Royal and Ancient Golf Club of St. Andrew's (amateur golf's world governing body) produced a report "A Survey to assess the demand for and supply of golf and golf facilities between now [1989] and AD2000". It was supported by the UK's Central Council of Physical Recreation and the Government. The report assessed that there was a need for 700 new golf courses in the United Kingdom. Farmers were encouraged to diversify their land and planning permissions were readily granted.

It has been suggested that too many new courses were built in this period and that the financial difficulty now experienced is a result of over-supply. Evidence disproves this. We have taken the figures for the new courses built between 1989 and 1994 (matured in 1996)

From 1989 to 1996 the increase in courses in England was 438 and the increase in membership 231,795 i.e. an average of 529 per club. In Scotland the increase in courses was 95 and in members 57,764, giving an average per new club of 608. In Wales the increase in courses was 28 and the increase in members 33,864, giving an average of 1,209 golfers per new course. For Ireland as a whole the increase in courses was 83 and the increase in golfers 67,361, giving an average of 812. It is believed this is the same for Northern Ireland. (Figures from the European Golf Association www.ega-golf.ch) This demonstrates that the new courses built before the VAT "explosion" were viable and competitive.

The difficulty experienced is because member-owned golf clubs have been relieved from charging VAT, their corporation tax has been systematically waived and many have been given 80% business rate relief, typically saving £30,000 to £55,000 per annum.

Golf proprietors protested that the UK Government was set on protecting member-owned clubs, however commercial their aims, and ensuring proprietary clubs suffered distortion.

30. DISTORTION – ALMOST UNIQUE TO GOLF

The UK Government's attitude to proprietary golf clubs is shown in a letter from the Department for Culture Media and Sport, personally signed by Tony Banks, Minister for Sport, to Sir Patrick Cormack MP under reference C98/28053/09755. The letter was responding to protests about VAT distortion. The Minister made a handwritten, signed postscript which read, "I'm receiving 100's of similar letters – often the writers are not assisting their case by being bloody rude! TB". (Document CC)

That is how the UK Government sees owners of proprietary golf clubs fighting for survival – bloody rude!

The issue of distortion of competition through the UK's interpretation of VAT in sport only seems to apply to golf. We assume that is why the Minister of Sport wasn't interested in it. Ministers of Sport

have never been interested in it. If they don't play golf they have no understanding of the issue. And if they do play golf they tend to play at courses with the VAT exemption!

Similarly in 2011 we wrote to Lord Sebastian Coe about VAT distortion in sport. We hoped the issue of distortion might be assisted by the Olympics. Lord Coe did not respond. We wrote again in 2013 and asked him to deal with it as part of the Olympic legacy. He didn't respond. We don't believe he was discourteous; we just think he is not aware of VAT distortion in sport because it only applies in golf. In 2011 we wrote to Baroness Campbell, also a member of the House of Lords and the Head of UK Sport. Baroness Campbell did not respond. Again, we don't believe this was discourteous, just that she, even as the Head of UK Sport, has no concept of VAT distortion in sport because it only applies in golf.

The reason why golf is so different from other sports is that in other sports – certainly all ball games – the court or pitch is virtually identical. Players visit other clubs to play matches or competitions. In golf, the courses are all different and one of the pleasures is for golfers to be able to visit other courses. Where this was once traditionally only as a members' guest, golf clubs now cash in on their quality and hospitality to attract money from outside.

In other sports where there are member-owned clubs and commercial ones the commercial ones are usually larger and with more elaborate facilities. In golf, most of the proprietary clubs – except at the very top end – are newer courses, with fewer facilities, often struggling to keep abreast of their nearest member club competitors.

31. VALUE OF GOLF COURSES

As a result of the distortion in competition the value of golf courses in the UK has been destroyed. We are attaching as a separate document a case study of the value of golf courses in Cambridgeshire and Hertfordshire. In effect all those proprietors who bought or built golf courses before 1996 have seen their previously successful destroyed. Most are worth far less than undeveloped farmland and certainly far less than the current build cost. They are worth less than turning the clubhouse into a house with the course as farmland or parkland. (Document DD)

By contrast over that time, from 1995 to the present date, the Land Registry House Price index shows that houses are worth an estimate 3 times their value then. The Land Registry Index only started in 1995. From the mid-1980s the rise has been far greater. The cost of farmland in some areas has increased from £2,000 per acre when some of these courses were built to approaching £10,000 per acre now.

In terms of business rates, this is a measure from the Valuation office of HMRC showing the value of rents for properties. Over the period since 1990 most golf clubs have had their rateable value increased fourfold. HMRC through the VOA thinks that a golf course which cost £1.4 million to build 20 years ago has increased in value by a factor of 4, i.e. to £5.6 million. In reality the golf club is probably simply worth the £1.4 million it cost to buy 20 years ago or far less.

None of these golf course owners deserve to have had their businesses destroyed in value.

These businesses were viable, successful and increasing in value until the VAT distortion, plus forgiveness of corporation tax for members' clubs, made them uncompetitive. It is not a question of too many golf courses; it is a question of too many member-owned golf courses trading commercially in a market where they have a substantial trading advantage.

For those proprietors buying their golf courses after 1995 there might be an element of caveat emptor; they could have known they were going into a distorted market. But even so, after 18 years many have seen the price of the golf course collapse. Several have been turned back into farmland or collapsed completely.

32. CLAIM RELATING TO DISTORTION AND FISCAL NEUTRALITY 2000

As soon as the VAT (Sports, Sports Competitions and Physical Education) Order 1999 came into force on January 1st 2000 it was obvious that there was no opportunity in any way for a proprietor to be able to enable his golfers to have VAT exempt membership fees.

Abbotsley Golf and Squash Club Ltd and Cambridge Meridian Golf Club made claims to the Tax Adjudicator that Customs and Excise and the Inland Revenue were failing to deal with them fairly and impartially. The wording of the Taxpayers' Charter, brought in in 1991 referred to the obligation for the tax authorities to deal with taxpayers fairly and impartially. Abbotsley and Cambridge Meridian complained that VAT was not being applied fairly between them and member-owned clubs which traded for profit. They referred to distortion and claimed there was an obligation to remove the distortion. They complained that there should be fiscal neutrality (but didn't know of that actual phrase at that time). The complaint simply confirmed that there is no way of comparing one taxpayer with another, and no way of complaining that another taxpayer is not paying enough VAT or tax. The only result from this was that the Inland Revenue changed the wording of the Taxpayers' Charter to remove any suggestion of fairness and impartiality!

It has never been possible to take HMRC to a tribunal to deal with the distortion. Our complaint is not that we pay too much VAT but that our competitors pay too little. Hence the somewhat contrived case of Chipping Sodbury, with its aim of getting the finding of fact of distortion. Even that has meant absolutely nothing because the UK Government simply says that Europe envisages and tolerates distortion over VAT in sport.

33. CANTERBURY HOCKEY CLUB CASE, CASE C-253/07

On the face of it the Canterbury Hockey Club Case seems unimportant to proprietary golf. But the judgment throws light on interpretation of membership and VAT exemptions. (Document EE) But more important to us is that HMRC has made an interpretation relating to Canterbury which relates to golf in isolation to the other 117 sports concerned with the VAT exemption.

The case concerned the affiliation fees payable by the Canterbury Men's and Ladies' Hockey Clubs to England Hockey. The facts were that England Hockey did not charge affiliation fees per person but per team. The UK Government challenged this on the basis that the fees were not charged to "persons" and tried to extract VAT. This is substantially different to England Squash that charges a fee "per court", i.e. on a facility rather than numerically related to people. Basically the Canterbury

Hockey Club, like most hockey clubs, has parents as members who don't play competitively, people who play occasionally and umpire or coach and the players who play in the teams. So charging per team amounted to the equivalent of perhaps each team being assessed as perhaps 16 people. Thus a club with 6 teams would be assumed to have, say, 96 people and vice versa.

The European Court's ruling was that the fees payable by a club like this were VAT exempt because the ultimate beneficiaries are the people playing hockey. In this case, of course, the funds from which the fees were paid belonged collectively to the members.

Paragraph 35 from Canterbury: "Therefore, the reply to the first question referred must be that Article 13A(1)(m) of the Sixth Directive is to be interpreted as meaning that, in the context of persons taking part in sport, it includes services supplied to corporate persons and to unincorporated associations, provided that – which it is for the national court to establish – those services are closely linked and essential to sport, that they are supplied by non-profit-making organisations and that their true beneficiaries are persons taking part in sport."

HMRC consulted with other Government Departments and made a clear ruling that the affiliation fees payable to National Governing Bodies (NGB) by proprietary, commercial clubs were not VAT exempt because the benefit is for the business rather than the individual. The notes relating to that consultation, the ruling and guidance notes are attached. (Document FF)

34. RELATIONSHIP OF CANTERBURY HOCKEY TO GOLF

In golf the issue of the affiliation fees to England Golf (the NGB) and county golf unions is a complex one.

The rules and constitution of England Golf which are identical to the former English Golf Union are specific in what they say, but muddled in terms of liability.

A golf club has to pay a fee based on a headcount of members on June 30th in the previous year. The fee is due on January 1st. Thus for 2013 the club had to take a headcount of its members on 30th June 2012 and pay a fee based on that headcount.

In the case of proprietary clubs which opened for business in the period from 1998 onwards in the first year of operation the club had to pay for the number of members who joined in that year. Thus the club at Cambridge Meridian [Complainant 3] opened for business on April 1st 1994. In April/May 1994 the owners were required to pay an affiliation fee for every golfer who joined for the year 1994. In April 1995 they attempted to collect for 1995. By 1996 the Cambridgeshire Golf Union and the English Golf Union required the payment of the affiliation fees, based on a headcount, before the owners could collect and not knowing whether they could collect.

The 2012 Constitution of England Golf is clear and has been identical in meaning since 1999:

"2. Annual Affiliation Fees

2.1 Each Affiliated Club shall pay such annual affiliation fees to the Company as decided by the Company. Such annual affiliation fees shall be payable once per calendar year and shall be collected on a per capita basis for every playing member irrespective of membership category as at 30th June in the preceding calendar year. Such annual affiliation fees will normally be invoiced to playing members as a disbursement. Failure by a Playing Member to pay such annual disbursement shall not exonerate his or her Affiliated Club from its obligation to pay the annual affiliation fee for that Playing Member."

The liability for making the payment is that of the club and England Golf confirms that the liability is that of the business – the proprietor of the club

- Owners of golf clubs are forced to pay before they can collect the fees
- Owners of golf clubs are forced to pay without knowing whether the golfer will pay
- Owners of golf clubs are usually forced by counties to return the numbers on the headcount in July or August in the year before the year to which the fee relates
- Owners are forced to pay for members who may have left the club before the year to which the fee relates
- Many golfers refuse to pay the affiliation fee which relates to England Golf because they do not see it as a benefit
- England Golf persists in telling golf club owners to collect the fees as VAT exempt disbursements
- Clearly the money golf club owners are forced to pay on the headcount cannot ever match the amount collected
- The liability for paying the fee is clearly that of the business and not the customer

In 2000 Customs and Excise made a concession to say that proprietary golf club owners could collect the affiliation fees from their golfers as VAT exempt disbursements even though the liability was that of the golf club owner and not the golfer and even though it has always been a problem as to how to deal with the extra payments which have not been collected.

The difference, of course, is that where a member-owned club has to pay the fees they are paying them from the VAT exempt membership subscriptions they receive and the golfer does have a share in the kitty of the club. In the case of a proprietary golf club the owner has to make up any shortfall from his own funds, on which he has to account for VAT. Thus for a members' club to send in £5,000 they have to collect £5,000. A proprietor has to earn £6,000, account for £1,000 of VAT and then be left with £5,000.

Following the decision in Canterbury and the rulings set out in HMRC notes it was clear that the fees payable by commercial clubs should be standard rated for VAT. The beneficiary is the company. The liability is the company. It is not a question of the proprietary club simply acting as an agent to collect the fees. It is a question of the company being liable. Proprietary clubs asked England Golf to account for the VAT element of the fees.

We referred the matter to HMRC.

They made a ruling, a copy of which we enclose. The ruling from HMRC is that the fees which are the liability of proprietary golf clubs are VAT exempt because they take the view that the golfer – our customer – is the ultimate beneficiary. We have repeatedly explained that we have to pay for people from whom we cannot collect. We asked how this relates to their guidance notes over the Canterbury Hockey Club and the fact that fees to Governing Bodies payable by commercial sports are not VAT exempt. A copy of the correspondence is included (Document GG)

Their first quote is:" it therefore followed that in determining whether the supplies were exempt the identity of the material recipients of the services and the legal form under which they benefited was irrelevant. What was crucial was whether the services were closely linked and essential to sport and whether the "true beneficiaries" of the services taking part in sport."

This means that the business of the club, which is liable for the fee, charges his customer a contribution to the fee exempt of VAT. HMRC say it is because the beneficiary is the person playing sport. But with our own membership fees we still have to charge VAT.

Their second point is: "Whilst supplies to most commercial bodies (such as professional football clubs and similar) continue to fall outside the scope of the exemption, we take the view that in relation to both non-profit making and proprietary golf clubs the predominant beneficiary is the person taking part in sport (the member) and therefore the conditions of the exemption are met."

We specifically asked HMRC whether they had consulted the other 117 sports in the UK which are the subject of VAT exemptions and HMRC confirmed that they had taken golf in isolation to other sports.

We therefore wish to place on record that the United Kingdom has ruled that it can make regulations and apply exemptions to golf in isolation to all other 117 recognised sports.

35. IS A MANDATORY LEVY ESSENTIAL AND VAT EXEMPT IF THE CUSTOMER REFUSES TO PAY?

We will be referring the following point to a domestic VAT tribunal. Many of the golf members at a golf club do not want to support the work of England Golf. That is perhaps because they don't play competitively, perhaps they don't want a golf handicap; they may not be English; they may object to the policies of England Golf. They may object to the cost of the affiliation process. They may refuse to pay. They quote their human rights not to join. The club owner has to pay for them. Ditto at a members' club but at least the fee comes from the members' kitty in which he has a share. Other golfers will have been on the headcount on June 30th in the previous year and have left and refused to pay if asked.

In effect there are many golfers who say "I do not want to pay this fee". In that position we, as the owners of the club are forced to pay for him. The England Golf rules are clear. The constitution states, as do county golf unions:

"Failure by a Playing Member to pay such annual disbursement shall not exonerate his or her Affiliated Club from its obligation to pay the annual affiliation fee for that Playing Member."

Article 134 of the PVD says: the services shall not be granted exemption ……..

(a) where the supply is not essential to the transactions exempted.

The UK domestic law reads:

"The supply by an eligible body to an individual, except, where the body operates a membership scheme, an individual who is not a member, of services closely linked with and essential to sport or physical education in which the individual is taking part."

We say that where a customer or member says "No, I don't want this service and I am not paying for it" he is saying that it isn't essential. The simple fact is that many golfers do not want to pay for the activities of England Golf and county golf unions. "I don't consider it essential and I don't want it."

We will be seeking a ruling domestically, unless Europe can address this, that it is incorrect to consider that a mandatory, per capita affiliation levy, whether to England Golf or a men's county golf union, payable by or on behalf of an individual golfer cannot be considered to be "essential to sport or physical education in which the individual is taking part" if the individual golfer does not want the service, does not see it as "essential" to his enjoyment or participation in golf, refuses to pay for the service, or has stopped participating before the year to which the fee relates, and that as such it cannot be VAT exempt if some other party, whether a commercial club or an eligible body, is forced to pay the mandatory fee on his behalf for a service he doesn't deem to be essential, doesn't want or has ceased to use. (Articles 132 and 134 of the Principal VAT Directive, and Item 3, Group 10, Schedule 9 VATA 1994.) HMRC made this decision in paragraph 3 of their letter of July 24th 2013 and in their email of 13th September 2013. (Document HH)

36. THE CONCESSION FOR TREATMENT OF AFFILIATION FEES AS VAT EXEMPT

Bewdley Pines Golf Club, one of the AGCO supporters, asked for a refund of VAT from England Golf on their affiliation fees, on the basis that they should in fact have passed them on to golfers as VAT exempt disbursements even though the liability was that of their business.

The response from the HMRC Tax Avoidance and Partial Exemption team, reference LC/TAPE/S1137/705064072 dated 29th August 2013, states: "This treatment has to date been allowed by concession, currently incorporated within Notice 701/45 at paragraph 3.6.2 but as it does not fulfil the requirements of Article 79(c) of Council Directive 2006/112 it follows that the concession is ultra EU Law and will be withdrawn."

He pointed out that there is no appeal to a VAT tribunal on the subject of concessions and it could only be dealt with by an application for a judicial review. We say, and so did he, that the regulations on VAT exempt disbursements are clear and no concession could apply.

Proprietary golf clubs have been asking for the removal of this concession since 2000 on the basis that we could not deal with the accounting aspects of treating something as a VAT exempt disbursement but being liable for the fee and any shortfall. We therefore publicised this to proprietary golf clubs. The removal of the concession would relieve us for the complexity of collecting and paying fees to England Golf. In under an hour, with pressure from England Golf, HMRC retracted the comment made by the Tax Avoidance Team.

We therefore ask that the European Commission instructs the United Kingdom to remove this concession as it does not comply with Article 79(c).

37. FINALLY ON THE VAT SPORTS ORDER 1999

In order to show the distortion caused by the VAT Sports Order 1999 and the references to Sports Land, eligible body and commercial influence we are including the decision from the case of Gracehill Golf Course, one of the AGCO courses in Northern Ireland. In Northern Ireland they also have to contend with courses in the Irish Republic, where they enjoy Reduced Rate VAT on sport.

It is worth comparing the result in the Gillan and Gillan T/A as Gracehill Golf Course case to that of Abbotsley to see the way in which the VAT Sports Order 1999 and the amendments to the VAT Act have produced distortion in golf [sport]. (Document II)

38. RESOLUTION

HMRC has clearly made a ruling in relation to the affiliation fee issue and their interpretation of the Canterbury Hockey Club case in relation to golf only. Proprietary clubs would welcome the removal of the VAT exemption for golf alone.

We are, however, aware that there is distortion in other sports but not so marked. As proprietary golf clubs between us we also operate snooker, swimming, fitness, squash, table tennis, tennis, pool and archery. In view of the Sportz Academy (Potters Bar) Ltd case and other fitness centres, they and we would welcome the removal of the VAT exemption from the whole of sport.

We don't believe that the United Kingdom Government would be prepared to remove the VAT exemption voluntarily; it would be political suicide.

If required to remove the VAT exemption because of the distortion we believe that the United Kingdom would then adopt the Reduced Rate of 5%. But we are not concerned about that; we just want the distortion removed.

If the law is to continue as it is then we suggest that HMRC must make a sensible definition of a member to avoid the scam/sham of the £1 life associate member

The Concession regarding collection of affiliation fees should be removed

38. SUMMARY

We therefore ask the European Commission to take infraction proceedings against the United Kingdom on the grounds and for the reasons in this report. We ask that action is taken to remove the distortion over the VAT treatment of golf in the United Kingdom.