Date March 30, 2011
Subject Golf courses – distortion of competition

Dear Sir / Madam,

This letter intends to outline the unfair competition between so-called "not for profit" clubs and commercial courses based on the same EU VAT legislation.

EU VAT legislation

Article 132(m) of the 6th Directive states that Member States shall exempt certain services related to sport supplied by non-profit-making organisations to persons taking part in sport. Despite this apparently straightforward article, in practice article 132 is currently being interpreted in different ways. For example:

- Most Tax Authorities read the clauses which advise that exemptions for VAT can only be applied to non-profit-making organisations and they are using this to rule out any exemptions being applied to the commercial golf courses.
- Others, i.e. those who are providing commercial golf facilities, read the clause which states that where a transaction is in direct competition to that of a commercial enterprise exemption should not be granted.
- In addition, Tax Authorities are granted power to make exemptions subject to conditions to ensure that commercial companies are not disadvantaged.

Based on these examples, one should conclude that the business of golf courses is treated very differently when it comes to VAT. In this respect it should be noted that VAT-exemptions rules are to be implemented very strictly. The reason for this is that VAT-exempt companies should not compete with VAT-taxable companies if they operate in the same line of business.

Member States may therefore make the exemption subject to the condition that they must not cause distortion of competition to the disadvantage of commercial companies subject to VAT (Article 133 (d) of the 6th Directive). In addition to this, the exemption shall not be granted for the supply of goods or services rendered with a basic purpose to obtain additional income which are in direct competition with the services of the commercial companies subject to VAT (Article 134 (b) of the 6th Directive).

Last but not least, Article 132 (1o) + (2) of the 6th Directive allows Member States to limit so-called fund-raising activities in case these cause distortion of competition.

Furthermore, the EU law offers the possibility to apply a reduced VAT-rate for using sporting facilities. This a very appropriate instrument to limit the differences between the VAT-exempt and VAT-taxable exploitation of a golf course. VAT-taxable courses can deduct the input VAT (mostly based on the standard rate) and charge the lower VAT-rate on the outgoing services. All EU-countries can apply this lower rate and include this rate in the local VAT-legislation.

Current situation

At the moment, we seem to be in the situation where the commercial golfing sector in most EU-countries feels that the administration of VAT is carried out in an unfair way. This is substantiated by the argument that golfing facilities, both "not for profit" clubs and commercial courses, operate in a similar way and in essence provide the same services to the general public.

Despite the similarity of the services, commercial golf courses are obliged to charge VAT on the outgoing services, where "not for profit" clubs are in principle exempt from VAT. Hence, both "not for profit" clubs and commercial courses have the same objective: servicing golf players on their courses. In order to do so, access is provided to the course, as well as to practice facilities and catering services are provided in the club house. Furthermore, most courses offer corporate golf days, corporate memberships and rent the facility to others.

The fact that most of the "not for profit" clubs also offer these services to third parties means that they are therefore commercially involved. However, the profit gained by "not for profit" clubs is supposed to be exclusively for their own benefit and to be re-invested in the course for the benefit of the members, whereas commercial courses are intended into remit this profit to their shareholders. The fact that commercial courses will (have to) re-invest profits to their businesses as well, makes this an invalid argument to make a distinction between the two types of golf courses. This distinction supports the distortion of competition.

Distortion in practice

In most EU-countries commercial course have to charge the high VAT-rate on the services rendered on their golf courses. VAT-rates up to 20-25% are very common and result in equal increases of the respective prices. Although VAT-taxable courses can deduct the input VAT, the VAT-burden on the outgoing services is not eliminated.

On top of this, the applicable VAT-rates throughout the EU vary enormously. The various VAT-regimes therefore also avoid a fair and uniform system for golf courses offering similar services cross border. Apart from the golf courses and its players, this disturbs the business of tour operators as well. Packages offered to the customers vary as a result of the different VAT-regimes throughout the EU enormously and can even put certain countries out of business.

Solution

An option to avoid this distortion could be the situation in The Netherlands. Although the Dutch VAT legislation makes a distinction between VAT-exempt "not for profit" clubs and VAT-taxable commercial courses, there are two important elements making the difference. First of all, "not for profit" clubs are limited in offering VAT-exempt services to third parties and obliged to charge VAT on these services when exceeding a certain threshold (Article 132 (2) of the 6th Directive). This limits the disadvantage of competition between both types of golf courses.

Furthermore, the Dutch legislator has applied the reduced VAT-rate for using sporting facilities. As a result, commercial courses are able to deduct 19% input VAT and are able to charge the lower VAT-

rate of 6% on most of the services rendered. Clearly this levels out the advantage of "not for profit" clubs compared to commercial courses. A VAT-system similar to the Dutch system will certainly contribute to a fair competition between the golf courses. In this respect it should noted that apart from The Netherlands, a lower VAT-rate for using sporting facilities has also been applied in Belgium, Finland, Greece, Luxembourg, Poland and Sweden.

In addition to the Dutch situation one may consider another solution. Distortion of competition will also be avoided if both commercial courses and "not for profit" clubs are subject to a similar set of VAT-rules. In other words, if the "not for profit" clubs may not apply the exemption and are also obliged to charge VAT on their services (and deduct input VAT), distortion will be eliminated.

Conclusion

We believe that the current regulations on VAT are not only unfair but very likely illegal and Legislation from the European Union forbids Governments to give parts of an industry an advantage over others in the same industry, but this appears not to apply in the Golf Business.

At this moment both "not for profit" clubs and commercial courses offer identical services, rendered to similar type of golf players/companies and intend to make a profit to reinvest in their courses. EU-legislation does not allow treating similar commercial businesses differently. EU-countries should therefore avoid the distortion of competition between golf courses, both within the EU-countries as well as cross-border. EU VAT-law provides many options to do so.

Should you have any questions or remarks, please do not hesitate to contact me.

With kind regards,

Lodewijk Klootwijk,
Director
European Golf Course Owners Associaiton