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Tax Opinion Letter

About the Author

Dale Heider is a licensed, practicing tax attorney, with 25 years of experience, including IRS Appeals Division. For clarification or questions regarding this opinion letter, feel free to contact Dale at 303-221-2775.

Purpose

The purpose of this Opinion Letter is to provide privately owned or managed golf course owners, managers and their tax preparers with a credible position to take advantage of a federal tax credit for the purchase or lease of a golf cart which has been adapted to use for players with a mobility impairment.

Background

In July 1990 Congress passed the Americans With Disabilities Act, (ADA) which is designed to, (among other things), prevent individuals who are disabled from being discriminated against in the equal enjoyment of certain public accommodation facilities, such as golf courses. Shortly after the ADA became law, (in November, 1990) Congress passed a new tax law which created a federal tax credit for expenditures which provide access to disabled individuals. The credit was designed for eligible small businesses to reduce the effective cost of complying with the ADA.

To clarify the requirements of the ADA, the law delegates authority to a body called the "Architectural and Transportation Barriers Board" also known as the "Access Board". The Access Board then issues guidelines which outline the changes needed to comply with the ADA for architectural and transportation barriers that inhibit handicapped individuals' access. These

guidelines are later incorporated into Federal Regulations via the Federal Register and officially released by the Department of Justice (DOJ).

To date, not all forms of access barriers to handicapped persons have been covered by DOJ Regulations. Consequently, the only sure way for a handicapped individual to force access to facilities covered by the ADA is to file suit in a federal court, or file a complaint with the DOJ.

Golf courses are one of the areas not yet covered by a specific DOJ Regulation, and thus there have been questions as to whether or not a golf course is required to comply with ADA, and provide specialized golf carts for disabled golfers. Once it is established that modified golf carts

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are required by the ADA, the federal tax credit applicable to costs used to acquire such a cart should be allowed on that year's federal income tax return, for those golf course businesses which are subject to federal income tax.

Adaptive Golf Carts Are Required by the ADA

Title III of the ADA applies to “public accommodations and services operated by private entities”. Section 301(7) defines “public accommodations” in subsection (L) as “a gymnasium, health spa, bowling alley, **golf course**, or other place of recreation”. 42 U.S.C. Sec. 12181 (7)(L). (Emphasis added)

In 2004, the Access Board issued Recreation Guidelines which included a section on golf courses. The Guidelines required golf courses to permit golfers who could not walk, to drive golf carts anywhere on the course, including tees and greens. However, since the Access Board only has jurisdiction over the already “built environment” and not over “free-standing equipment”, it could not require adaptive golf carts. That regulatory authority resides exclusively within the DOJ.

In 2008, the DOJ announced that it would not be issuing a specific regulation on adaptive golf carts because it was “free-standing equipment”, and therefore an existing regulation was adequate to address the issue. (73 FR 34518) In this regulation, the DOJ stated: “If a person with a disability does not have full and equal access to a covered entity’s services because of the lack of accessible equipment, the entity **must provide** that equipment, unless doing so would be a fundamental alteration or would not be readily achievable.” (Emphasis added) Thus, under current DOJ explanations, adaptive golf carts are required by the ADA. The Disability Rights Section of the DOJ conducts random audits for ADA compliance of various public facilities across the country. In every case where such a golf course was audited, the DOJ ordered that an adaptive golf cart be acquired.

The Department of the Interior (DOI) National Park Service, issued a clarification letter on October of 2007 which stated that “ we believe that public entities, which rent golf carts, **must provide modified carts to golfers with disabilities** for the same rental fees charged for conventional carts.” (Emphasis added) The Department of Defense (DOD) issued a Policy

Letter on April 1, 2008 which mandated that golf courses operated by the armed services offer modified carts for use by disabled players.

Two federal court cases have ruled on the issue of whether the ADA required modified carts at private courses open to the public. In the first case, *Dorsey v. American Golf Corporation*, 98 F. Supp. 812, 817 (E.D. Mich. 2000) the court found that a disabled golfer stated a valid claim of a violation of the ADA by a golf course management corporation that failed to provide specialized golf carts for disabled persons. (The case was settled without a final judgment.) In the second case, *Celano et al v. Marriott International, Inc.* 2008 WL 239306, 2008 Dist. LEXIS, three disabled golfers brought an ADA action against Marriott for failure to provide adaptive golf carts at four golf courses it owned and twenty it managed. The three disabled golfers won on a

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Summary Judgment motion. Marriott's actions were found to be discriminatory under the ADA for failure to make reasonable accommodations, and was ordered to install two adaptive golf carts at each of its twenty-four locations.

Law Allowing Tax Credits for ADA Expenditures

Section 44 of the Internal Revenue Code (IRC) allows for a "disabled access credit" for eligible small businesses in the amount of fifty percent (50%) of the eligible access expenditures for the taxable year that exceed \$250, but not to exceed \$10,250, IRC Sec. 44(a). To qualify, the small business must:

- a) Not have gross receipts in excess of one million dollars (\$1,000,000) during the taxable year, (reduced by returns and allowances, IRC Sec. 44(d)(5)); IRC Sec.44(b)(1)(A), **OR**
- b) Does not employ more than thirty (30) full-time employees during the taxable year, IRC Sec. 44(b)(1)(B) defined as 30 or more hours worked per week for 20 or more calendar weeks in the taxable year, IRC Sec. 44(b)(2).

"Eligible access expenditures" is defined as amounts paid or incurred by an eligible small business for the purpose of enabling the small business to comply with applicable requirements of the ADA. IRC Sec. 44(c)(1). The term "eligible access expenditures" includes amounts paid or incurred to acquire or modify equipment or devices for individuals with disabilities, IRC Sec. 44(c)(2)(D), or to provide other similar equipment, IRC Sec. 44(c)(2)(E). A further requirement is that the expenditure be "reasonable", IRC Sec.44(c)(3), and that no credit shall be allowed for such amount under any other provision of the chapter, and no increase in adjusted basis, IRC Sec. 44(d)(7).

Tax Credit for Golf Carts

As of this writing, the Department of the Treasury has not issued regulations under IRC Section 44. In the absence of regulations, a practitioner must rely upon similar statutes and regulations, other similar IRS rulings, and at last resort – common sense.

One helpful document is the IRS' Form 8826 "Disabled Access Credit", (revised December 2006). The General Instructions under 8826 "Eligible Access Expenditures" states: For purposes of the credit, these expenditures are amounts paid or incurred by eligible small business **to comply with applicable requirements** under the Americans With Disabilities Act of 1990 (Public Law 101-336) as in effect on November 5, 1990. "Eligible access expenditures include amounts paid or incurred: "4. To acquire or modify equipment of devices for individuals with disabilities." "Eligible expenditures must meet those standards issued by the Secretary of the Treasury as agreed to by the Architectural and Transportation Barriers Board and set forth in regulations."

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To further clarify the tax credit issue, a request has been submitted to the IRS National Associate Office to issue an "Information Letter" on the topic. An Information Letter may be issued where the taxpayer's inquiry indicates a need for general information, and the IRS concludes that such general information will help the taxpayer. An Information Letter is advisory only and has no binding effect on the IRS.

Conclusion & Opinion

It is clear from the Department of Justice Proposed Regulations, (09/30/2004) the Department of Justice Audits, (various dates) the Department of Interior Opinion, (10/03/2007) the Department of Defense Policy Letter, (04/01/2008) Federal Court Decisions and the Access Board Guidelines, (10/03/2002) that **adaptive golf carts are required under the ADA**, not only for publically owned and operated courses, but also for privately owned or managed courses which are open to the public.

The ADA mandate to acquire these types of carts for courses that are privately owned or managed and open to the public, provides a clear basis for qualifying these private entities to utilize the Disabled Access Credit described in Internal Revenue Code Section 44.

It is my opinion that private golf course entities which purchase or lease adaptive golf carts for the disabled, and who otherwise qualify under IRC Sec. 44, will not be successfully challenged by the IRS for the amount of the credit claimed, if properly calculated.

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Questions & Answers

1. Who may be eligible to take the Disabled Access Credit?

- Privately owned golf courses open to the public.
- Privately owned golf clubs that regularly allow the public to use their facilities.
- Private golf course management companies for any golf course.

AND

- Net annual sales (gross receipts less returns and allowances) of not more than \$1,000,000; **OR** 30 or fewer “full-time employees”. “Full-time employees”: 30 hours for 20 or more weeks.

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2. How do I compute the Credit?

(See IRS Form 8826) For Example:

Eligible access expenditures (One golf cart)	\$10,500
Deduct minimum amount	\$ <250>
Subtract minimum amount from expenditure	\$ 10,250
Maximum amount of credit @ 50%	\$ 5,125

3. How do I deduct the remaining cost?

After taking \$5,125 as a credit, the remaining cost, (\$10,500 – \$5,125) \$5,375 may be depreciated as an ordinary business expense using regular and/or bonus depreciation.

4. What will happen if my private course for public use, or my private management company, fails to acquire an adaptive golf cart?

Your company would be at risk to becoming a Defendant in a federal lawsuit filed by an aggrieved Disabled Plaintiff, or the subject of a complaint filed with the Department of Justice.

5. If I lose, what will happen?

If you lose in federal court, you would be ordered to buy an adaptive cart, and pay the Disabled Plaintiff’s attorney’s fees. If the DOJ brings and wins a case, you will be ordered to buy an adaptive cart, and may pay a fine of \$50,000 for a first-time offense, \$100,000 for a second.

6. Can I contact the author of this opinion letter for further clarification?

Yes, call Dale Heider, Esq. at 303-221-2775 (office).

End
