

## Developments relating to yacht-leasing models in Malta

*Anthony Galea, managing director at Vistra Malta, and Alison Vassallo, partner at Fenech & Fenech Advocates, outline some pertinent developments in the application of new leasing models in Malta, applying on or after 1 November, 2018.*

On 1 March 2019, the Maltese authorities published new, much anticipated guidelines that outline the manner in which the place of supply of yachts is to be taxed. These guidelines apply to leases commencing on or after 1 November 2018 and pave the way for the application of new leasing models offering owners and lessees concrete workable solutions.

During a press conference held at the Malta Chamber of Commerce, Enterprise and Industry on 20 March, 2019, the Minister for Finance, Edward Scicluna, explained that over the past few months a series of in-depth discussions had been held between the authorities and the Commission that addressed the concerns raised by the European Commission in its Letter of Formal Notice of March 2018. He stated that an agreement was then reached that once the guidelines had come into force, further action by the Commission would cease.

As a starting point, we must clarify that the guidelines address the aspects

of the new leasing models that required interpretation in so far as the use and enjoyment principle is concerned. The new leasing models themselves are, in reality, simply operational leases that are formulated in accordance with best practices to ensure they are properly drawn up and in line with EU interpretations and ECJ judgements.

The use of the guidelines requires the existence of a Maltese company which must be in possession of a Maltese VAT number. General principles relating to intra-community supplies and importations at the time of acquisition of the yacht by the lessor, and place of supply rules at the time of the supply of the yacht to the lessee by the lessor, will still apply.

The new models will require operational leases to be contracted by the lessor and the lessee while the yacht is in Malta for any period of time. It is expected these leases would range from five to ten years, which is usually the



term after which a person acquiring a yacht would normally consider changing it.

The lease instalments will reflect the value fixed by the lessor and the lessee for the use and enjoyment of the yacht each year. This depends on the intended use of the yacht and is an arbitrary commercial exercise. What the parties need to respect is the general 'arm's-length' rule, so the value of the lease cannot be lower than the depreciation of the yacht each year. VAT would be due on the monthly instalments paid by the lessee to the lessor in Malta.

The new guidelines address how the supply of yachts is to be taxed and how the principle of effective use and enjoyment found under Article 59a of the VAT Directive is to be applied in practice. While the previous guidelines provided for a schedule of deemed percentage of use of yachts within EU waters based on their type and size, the new guidelines contemplate a system of actual use and enjoyment of yachts based on distances travelled, which means clients must monitor and record the actual use of the yacht. If the lessor can prove that the yacht has been used and enjoyed by the lessee outside EU waters on the basis of available records, logbooks and records of GPS coordinates, adjustments can be made to the VAT returns as explained in the guidelines so that VAT during this period may be abated accordingly.

Discussions with the VAT department indicate that the authorities will adopt a strong stance to ensure the guidelines are implemented correctly and with the utmost transparency. To this end, a number of anti-avoidance measures

will be adopted, such as the filing of an annual return in relation to the calculations made by the lessor to arrive to the declared tax charge. Furthermore, the authorities will each year expect to see a realistic percentage of use and enjoyment of the yachts in EU waters, subject to exceptions such as where the lessors can demonstrate that the yacht spent the year outside the EU, as would be the case for yachts navigating in the Pacific while undertaking a voyage around the world.

A leasing arrangement may be terminated by the passage of time (expiry) or by the parties in accordance with the terms of the lease agreement; for example, by the sale or total loss of the yacht. In such cases, the possession of the yacht would revert back to the lessor who would be free to contract a new lease or to sell it. Alternatively, the lease may be renewed. It is also possible for the lessee to consider purchasing the yacht prior to the termination of the lease or on its expiry.

In the latter scenario, if the yacht is sold to the lessee in Malta at its market value, a VAT-paid certificate can be requested from the VAT department. The Maltese authorities will to this end verify that all transactions occurred on an 'arm's-length' basis, that all VAT due in Malta has been paid and that the yacht was sold at its correct market value. We expect the Maltese authorities to allow the market and the parties themselves to regulate their relationship in accordance with Maltese and EU regulations. It remains open to advisors to guide clients to ensure these options are workable and make commercial and legal sense. **AG & AV**