

Tax Agency
Central Direction of Legislation
Indirect taxation Sector
VAT Office
Rome,

MYBA THE WORLDWIDE
YACHTING ASSOCIATION
92-120 AVENUE DONADEI
LAURENT DU VAR – FRANCE
(EE)

Prot.

Object : Juridical consultancy N. 954-20/2016
Association MYBA THE WORLDWIDE YACHTING ASSOCIATION
Request made on March 24th 2016

With the request of juridical consultancy specified above, regarding the interpretation of art. 2, of Presidential Decree N. 633/1972, we have been asked the following

QUESTION

The claimant association asks about the correct application of VAT to a specific part of the consideration paid in relation to charter contracts signed for yacht charters between owners and their clients in the format adopted by the same MYBA association and commonly used by the major international brokers.

The aforementioned standard charter contract provides for the charterer to transfer to the owner, in addition to the price agreed for the charter of the yacht including her crew, an additional amount, called “APA” (Advance Provisioning Allowance), representing an advance payment for the running costs which will be incurred during the charter period.

The MYBA standard contract provides for the owner to charge to his client, at cost, all the “operating” costs actually incurred on account of the latter and not included in the charter fee.

These “operating” costs represent the variable part of the charter fee and include e.g. transfers ashore, fuel for the engines and the main generators, fuel for tenders and the other means of transport used for water sports, food and beverages for the client and his guests, berthing fees and other port dues, including pilots’ fees, local taxes, divers’ fees, customs duties and any other costs for waste disposal, water and electricity supply, maritime agents’ fees, when necessary, personal laundry service, communications and internet connections for the client and his guests, the costs to hire or buy any special equipment made available on board at the client’s specific request.

The management of the APA is regulated by the MYBA standard contract, with the following procedure:

- prior to the departure of the charter the client, within the dates and on the designated account indicated in the charter contract, and normally held by the broker, transfers together with the price of the charter, an “advance payment for future costs” of about 20-30 percent of the price agreed for the charter, so that the Captain, during the charter, may meet all the “operating” costs connected to the yacht;
- the advance payment (APA), is later transferred by the broker and/or by another agent indicated by the contract (the stakeholder) directly to the Captain, or to the owner for onward transmission to the Captain of the yacht prior to the beginning of the charter. The owner never acquires these funds with definitive effect. These funds are at the exclusive disposal of the Captain to be managed on behalf and in the sole interest of the client, to meet any operating costs associated with the cruise;
- during the charter, the Captain, upon the instructions of the client, or in respect of any purchases directly related to the proper running of the charter (e.g. purchases of fuel, beverages, etc.) may, on his own initiative, arrange purchases from different providers. During the charter the Captain shall however inform the client, at regular intervals, of the operating costs paid by using the APA. The client is contractually also bound to make additional payments to the APA if the funds should not be enough to meet the remaining operating costs of the charter;
- at the end of the charter, the Captain provides to the client a detailed account of all the “operating” costs paid using to the APA, with as many supporting receipts as possible. In case the aforementioned funds are not sufficient to meet all the costs incurred, the client will pay to the Captain the balance, otherwise the Captain and/or the broker will return to the client any surplus funds.

That said, the claimant association asks which is the correct tax regime, for VAT purposes, applicable to the abovementioned sums.

INTERPRETATIVE SOLUTION INDICATED BY THE TAX-PAYER

The claimant association, on the basis of art. 2, paragraph 3, lett. a), of Presidential Decree N. 633/1972, considers that the transfer of the sums of the so-called APA, from the client to the owning Company, is an operation falling outside the scope of application of VAT and, as such, does not entail for the owner any obligations to issue an invoice, to register and to declare, for lack of the objective conditions for the application of the tax.

OPINION FROM THE TAX AGENCY

In order to define the matter highlighted by the claimant, we consider it helpful to recall art. 2 of Legislative Decree N. 171 of 2005, providing for the commercial use of the yachts. In particular, letter a) of paragraph 1 provides that a yacht is considered used for commercial purposes when it is used for lease and charter activities.

Regarding the specific regulation of the charter contract of yachts we have to refer to articles 47, 48 and 49 of the same Legislative Decree N. 171.

On the basis of the wording of the aforementioned articles, a charter agreement is a contract by which a party (the lessor), in consideration of an agreed charter fee, undertakes to make available to another party (charterer) a yacht for a fixed period of time to be spent for recreational purposes in sea areas or in inland waters at his choice, stationary or in navigation, at the conditions stipulated by such contract.

Hence, a yacht charter is a legal transaction defined by Law N. 172 of 2003; however, we must consider that the aforementioned sources of law are limited to certain aspects and do not provide for an exhaustive regulation.

Consequently, problems may arise regarding the burdens and the obligations of the parties, their respective responsibilities and the extent of the same.

In this respect, it appears to be useful to refer to the most frequently used forms of charter contracts and to the provisions of art. 49 of the aforementioned Italian Recreational Craft Code which, regarding the variable costs of a time charter, draws on the principles stated by art. 387 of the Italian Code of Navigation, expressly imposing certain obligations on the charterer.

On these grounds, considering the representations of the claimant association and on the basis of the wording of clause 8 of the MYBA standard charter agreement, we are of the opinion that the portion of the funds of the APA which are advanced by the charterer to the Captain of the yacht, represent the advance coverage of those “operating” costs representing the variable part of the cost of the charter and serve to cover various costs that arise in relation to the navigation and the parking of the chartered vessel, as well as the costs incurred for the personal needs (food, beverages, transports, etc.) of the charterer during the charter.

The MYBA contractual provisions and the guidelines for the Captains issued by the same claimant association are clear in establishing not only that (also from a financial point of view) the APA funds are not acquired by the owner, as they are normally transferred directly by the broker or the stakeholder to the Captain (and also in cases where they pass through the owner’s accounts, they are still financial transfers aimed at transferring the funds to the Captain), but also in establishing the direct responsibility of the Captain towards the charterer in respect of the management of these funds which therefore, from a juridical point of view, represent sums falling within the legal sphere of the charterer, entrusted to the Captain, intended to be used for the purchase of what the charterer requests for himself and for his guests, as well as for the aforementioned “operating” costs.

In light of the above, in our opinion, the specific sums relating to the APA, which pursuant to the above regulation comprise obligations clearly placed on the charterer, to satisfy navigational needs – such as the provision of fuel, water and lubricating oils necessary for the functioning of the propulsion machinery and any auxiliary equipment on board, as well as the expenses related to the commercial use of the yacht, including anchorage and canal costs – are included in the scope of a bilateral juridical relationship within which the aforementioned sums are part of the actual price of the services provided by the owner.

It follows, that such sums have to be considered as part of the charter price and, as such, to be included in the relevant taxable basis.

In particular, it is pointed out that the “operating” costs for the consumption of goods, typically fuel and lubricating oils, which are the variable part of the charter fee and which, for logical and economic reasons as well as for the abovementioned juridical reasons, even if at the expense of the charterer, necessarily:

- a) are bought by the owner and intended to blend with what is already on board,
- b) are determined, for the purpose of being charged to the charterer, on the basis of the effective consumption,
- c) are charged to the charterer on the basis of an ex-post calculation, possible only once the data of the effective consumption is available,
- d) contribute to form the total cost of the charter charged by the owner to the charterer.

In fact, the variable part of the charter price, on the basis that it is proportionate to the extent of the consumption (typically fuel and lubricating oils) which is measurable only once the data on the effective consumption is known, may be quantified only once the yacht has finished the charter, because only

when the yacht docks into the re-delivery port can the effective consumption be determined on the basis of an ex-post calculation.

According with the operating rules of the APA, as soon as the consumption is determined, the owner charges to the charterer this variable part of the charter price, which the Captain can financially settle by using the APA funds under his management.

For these reasons, only at the completion of the charter, under a strict timeline, it is possible to:

- quantify the variable part of the charter price which, as it is linked to the actual consumption of fuel and lubricating oils, is “anchored to factual elements not yet carried out and thus not knowable by the parties” (similarly Ministerial Circular May 21-st 2013, N. 16/E) until the end of the charter,
- financially settle this variable part of the charter price.

Finally, we point out that the part of the APA funds used by the Captain, under specific request of the charterer, to buy goods and services for personal use – suitable to meet the charterer’s and his guests’ personal needs, as for example food and beverages for their consumption or other personal services – which do not present any link with the enjoyment of the chartered yacht and for her navigation or parking, provided that they are properly documented, can be considered outside the scope VAT.

On these grounds, we believe that, for VAT purposes,

- in the relationship between the Owner and the charterer, at the moment of the transfer to the Captain, the APA funds, even when they pass through accounts held by the owner but intended to be in any case transferred to the Captain, remain within the charterer’s legal sphere, although under the Captain’s management and, as they do not constitute payment for any sale of goods or provision of services are not relevant for VAT purposes, as per art. 2, paragraph 3, letter a) of Presidential Decree N. 633/1972, insofar as they amount to a “mere financial transfer”,
- the specific sums of the APA, which, as per the abovementioned legal provisions, constitute obligations expressly stated to be borne by the charterer, to satisfy the navigation needs – such as the provision of fuel and lubricating oils necessary for the functioning of the machinery and any auxiliary equipment on board, as well as the expenses related to the commercial use of the yacht, including anchorage and canal costs – are included in the scope of a juridical bilateral relationship within which the aforementioned sums are part of the actual price of the services provided by the owner,
- the assessment of this variable part of the charter price which is linked to the actual consumption of fuel and lubricating oils, is “anchored to factual elements not yet carried out and thus not knowable by the parties” until the end of the charter, correctly charged by the owner to the charterer ex post on the basis of the actual consumption and by the latter financially settled through the APA made available to the Captain, must be considered as an integral part of the charter price and, as such, to be included in the relevant tax basis,
- the fiscal relevance of this higher price (which in any case can be determined only on the basis of an ex post report) will be determined on the basis of the effective use, recorded in a detailed report prepared by the Captain and countersigned by the charterer at the end of the charter.

It must be noted, on this matter, that the European Court of Justice, by decision C-419/02 of 2006, pointed out that prepayments paid for goods referred to in general terms in a list which may be altered at any time by agreement between the buyer and the seller do not have to be considered for the purpose of the immediate payment of the VAT.