

TD 2014/D12 - Income tax: is Bitcoin a CGT asset for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997 (ITAA 1997)?

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This document has been finalised by TD 2014/26.

! There is a Compendium for this document: **TD 2014/25EC** .

! You can access a guidance paper that has been issued with this draft Determination. The guidance paper provides an overview of the tax treatment for transactions associated with crypto-currencies, specifically Bitcoin. Where other crypto-currencies have the same characteristics as Bitcoin, the information in the guidance paper applies equally to the taxation treatment for other crypto-currencies.



Draft Taxation Determination

Income tax: is Bitcoin a CGT asset for the purposes of subsection 108-5(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)?

1 This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

Ruling

1. Yes. Bitcoin is a 'CGT asset' for the purposes of subsection 108-5(1) of the ITAA 1997.

Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

3. While the ATO view will have application for periods prior to its publication, the ATO will not generally apply compliance resources to past year cases in relation to taxpayers who have behaved in a bona fide manner and made a genuine attempt to understand and satisfy their obligations.

Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.***

Explanation

What is Bitcoin?

4. This Draft Taxation Determination is part of a suite of determinations issued by the Commissioner on Bitcoin. Accordingly, a detailed description of Bitcoin is contained in Draft Taxation Determination TD 2014/D11 *Income tax: is Bitcoin a 'foreign currency' for the purposes of Division 775 of the Income Tax Assessment Act 1997 (ITAA 1997)?*

Is Bitcoin a 'CGT asset'?

5. The term 'CGT asset' is defined in subsection 108-5(1) of the ITAA 1997 as:

- (a) any kind of property; or
- (b) a legal or equitable right that is not property.

Is Bitcoin 'any kind of property'?

6. In *Yanner v. Eaton*¹ (*Yanner*) the High Court accepted that property refers not to a thing but to a description of a legal relationship with a thing; and, more specifically, to the degree of power that is recognised in law as permissibly exercised over the thing. Noting the difficulties in determining what is meant by 'property' in a thing, their honours quoted Professor Gray who stated '[a]n extensive frame of reference is created by the notion that 'property' consists primarily in control over access'.²

¹ (1999) 201 CLR 351 at 365-7 [17]-[19].

² *Ibid* at 366 [18].

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7. There is no single test nor a single determinative factor for identifying a proprietary right.³ Courts have emphasised different characteristics in different circumstances.⁴ One formulation that has been applied in Australia is the ‘Ainsworth test’ – which asks whether a right is definable, identifiable and capable of assumption by third parties, and permanent or stable to some degree.⁵ However, courts have also focused on factors such as excludability (whether it is possible to exclude others from the right in question),⁶ commercial value (whether something is treated in commerce as a valuable proprietary right),⁷ and enforceability of the right against third parties generally.⁸ Accordingly, in determining whether something amounts to property it is necessary to weigh up a range of factors, and to treat none as definitive.

8. In the case of Bitcoin, the relevant relationship in the nature of property that must be considered is the relationship between:

- (a) the object or thing, bitcoin, being the digital representation of value constituted by three interconnected pieces of information (a Bitcoin address; the Bitcoin holding or balance in that address; and the public and private keypair associated with that address),⁹ and
- (b) the bundle of rights (hereafter referred to as ‘Bitcoin holding rights’) ascribed to a person with access to the bitcoin under the Bitcoin software and by the community of Bitcoin users.

9. The most important of these Bitcoin holding rights are the rights of control over one or more bitcoins in the holder’s Bitcoin wallet, for example, the capacity to trade a bitcoin for other value or use it for payment. These rights, however, do not amount to a chose in action as a Bitcoin holding does not give rise to a legal action or claim against anyone.

³ See, for example, Meagher, Heydon and Leeming, *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* (4th ed, 2002) at [4-015] (identifying various characteristics of proprietary rights, but remarking that it is “incorrect to assume that unless all these characteristics are present there cannot be ‘property’”).

⁴ For one commentator’s summary of some of the main approaches, see Moses, “The Applicability of Property Law in New Contexts: From Cells to Cyberspace” (2008) 30 *Sydney Law Review* 639 at 647-652.

⁵ *National Provincial Bank Ltd v. Ainsworth* [1965] AC 1175 at 1247-8, approved in, for example, *R v. Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342.

⁶ See, for example, *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 at 272; *Potter v. Commissioners of Inland Revenue* (1854) 156 ER 392 at 396.

⁷ See, for example, *Halwood Corporation Ltd v. Chief Commissioner of Stamp Duties* (1992) 33 NSWLR 395 at 403.

⁸ See, for example, *Wily v. St George Partnership Banking Ltd* (1999) 84 FCR 423 at 426.

⁹ See Taxation Determination TD 2014/D11 for further explanation of these Bitcoin concepts.

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10. However, there are other factors that support the conclusion that Bitcoin holding rights are proprietary in nature. The most compelling is that bitcoins are treated as valuable, transferable items of property by a community of Bitcoin users and merchants. There is an active market for trade in bitcoins and substantial amounts of money can change hands between transferors and transferees of bitcoins.¹⁰ *Armstrong DLW GmbH v. Winnington Networks Ltd*¹¹ and other English and Australian cases¹² evidence a judicial willingness to regard property that is valuable in commerce as property for the purposes of law.

11. Bitcoin holding rights involve an inherent excludability because the Bitcoin software restricts control of a bitcoin holding to the person in possession of the relevant private key. As the Bitcoin software prescribes how the transfer and trade of bitcoins can occur and transactions are verified through the Bitcoin mining process, Bitcoin holding rights are definable, identifiable by third parties, capable of assumption by third parties, and sufficiently stable as per the Ainsworth test.

12. In weighing all these factors it is considered that Bitcoin holding rights amount to property within the meaning of paragraph 108-5(1)(a) of the ITAA 1997. As such, a person holding a bitcoin is considered to hold a 'CGT asset' for the purposes of that provision.

13. Apart from a dealing in individual bitcoins it is possible for there to be a dealing relating to the Bitcoin wallet (which would necessarily be a dealing in each and every bitcoin in the wallet and the private key), or just in the private key. Rights may exist in relation to either. Bitcoin wallet rights are essentially the same as the Bitcoin holding rights but represent a more extensive interest, the whole (the wallet) including the lesser (individual bitcoins). Rights in the private key would fall short of 'property' for the purposes of paragraph 108-5(1)(a) of the ITAA 1997. However, the law of confidential information would point to the existence of an equitable right in relation to the private key, enforceable by a court, which would then give rise to a CGT asset for the purposes of paragraph 108-5(1)(b) of the ITAA 1997. Dealings in relation to either the wallet or the private key are therefore capable of amounting to CGT events that happen to CGT assets.

14. While it is not necessary for the purposes of this tax determination to decide whether the wallet is an item of property distinct from the individual bitcoins or merely their aggregation, more probably it is the latter. A disposition of the wallet would be considered, in normal circumstances, to be identical with a disposition of the bitcoins in it. On the other hand, confidential information in relation to the private key is probably an item distinct from the bitcoins. The distinction is thought to be unlikely to have practical significance in normal circumstances.

¹⁰ These factors were influential in the English case of *Armstrong DLW GmbH v. Winnington Networks Ltd* [2012] 3 WLR 835 at 848 [49] which held that European Union Allowances (EUAs) constitute intangible property. EUAs possess similar characteristics to Bitcoin in that they are entirely electronic, tradeable and can involve substantial amounts of money being exchanged. However, EUAs are a creature of statute and this fact was a significant factor in the reasoning of the court, whereas Bitcoin is created by software.

¹¹ *Ibid* at 852 [58].

¹² See, for example, *Halwood* (1992) 33 NSWLR 395 (dealing with transferrable floor space) and the cases listed in Moses, "The Applicability of Property Law in New Contexts: From Cells to Cyberspace" (2008) 30 *Sydney Law Review* 639 at 650 n 75 (dealing with export quotas, licences and similar interests).

CGT consequences of disposing of Bitcoin

15. The disposal of Bitcoin to a third party gives rise to CGT event A1 under subsection 104-10(1) of the ITAA 1997. A taxpayer will make a capital gain from CGT event A1 if the capital proceeds from the disposal of the bitcoin are more than the bitcoin's cost base. The capital proceeds from the disposal of the bitcoin are, in accordance with subsection 116-20(1) of the ITAA 1997, the money or the market value of any other property received (or entitled to be received) by the taxpayer in respect of the disposal. The money paid or the market value of any other property the taxpayer gave in respect of acquiring the bitcoin will be included in the cost base of the bitcoin in accordance with subsection 110-25(2) of the ITAA 1997.

16. However, section 118-20 of the ITAA 1997 reduces any capital gain made by a taxpayer by an amount that is included in the taxpayer's assessable income under another provision of the tax law, for example, ordinary income under section 6-5 of the ITAA 1997.

17. Under subsection 118-10(3) of the ITAA 1997, a capital gain made from a personal use asset (a CGT asset used or kept mainly for personal use or enjoyment)¹³ is disregarded if the first element of the cost base is \$10,000 or less.¹⁴ In addition, any capital loss made from a personal use asset is disregarded under subsection 108-20(1) of the ITAA 1997.

18. This Draft Tax Determination is not intended to define the circumstances in which Bitcoin would be a personal use asset. Bitcoin is not kept or used for personal enjoyment. Bitcoin that is kept or used mainly for the purpose of profit-making or investment, or to facilitate purchases or sales in the course of carrying on business is not used or kept mainly for personal use. Bitcoin that is kept or used mainly to make purchases of items for personal use or consumption ordinarily will be kept or used mainly for personal use. Other categories of use conceivably could exist; taxpayers in these cases should seek private rulings.

¹³ As per paragraph 108-20(2)(a) of the ITAA 1997.

¹⁴ Section 108-25 of the ITAA 1997 may apply where a taxpayer disposes of number of bitcoins separately for the purposes of trying to obtain the personal use asset exemption in section 118-10 of the ITAA 1997.

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Appendix 2 – Your comments

19. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

20. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	3 October 2014
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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TD 2014/D11; TD 2014/D13; TD 2014/D14;
GSTR 2014/D3; TR 2006/10

Subject references:

- Bitcoin
- Digital currency
- Property
- Intangible property
- CGT asset

Legislative references:

- ITAA 1997 6-5
- ITAA 1997 104-10(1)
- ITAA 1997 108-5(1)
- ITAA 1997 108-5(1)(a)
- ITAA 1997 108-5(1)(b)
- ITAA 1997 108-20(1)
- ITAA 1997 108-20(2)(a)
- ITAA 1997 108-25
- ITAA 1997 110-25(2)
- ITAA 1997 116-20(1)
- ITAA 1997 118-10
- ITAA 1997 118-10(3)
- ITAA 1997 118-20

Case references:

- Yanner v. Eaton (1999) 201 CLR 351
- National Provincial Bank Ltd v. Ainsworth [1965] AC 1175
- R v. Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327
- Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141
- Potter v. Commissioners of Inland Revenue (1854) 156 ER 392
- Halwood Corporation Ltd v. Chief Commissioner of Stamp Duties (1992) 33 NSWLR 395
- Wily v. St George Partnership Banking Ltd (1999) 84 FCR 423
- Armstrong DLW GmbH v. Winnington Networks Ltd [2012] 3 WLR 835

Other references:

- Meagher, Heydon and Leeming, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (4th ed, 2002)
- Moses, 'The Applicability of Property Law in New Contexts: From Cells to Cyberspace' (2008) 30 *Sydney Law Review* 639 at 647-652

ATO references

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