

TD 2014/26 - Income tax: is bitcoin a 'CGT asset' for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997 ?

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Taxation Determination

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

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If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

Ruling

1. Yes. Bitcoin is a ‘CGT asset’ for the purposes of subsection 108-5(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).¹

Date of effect

2. This Determination applies to years of income commencing both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

¹ All legislative references in this Determination are to the ITAA 1997 unless otherwise indicated.

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3. While the ATO view set out in this Determination will have application for periods prior to its publication, the ATO will not generally seek to apply compliance resources to applying this view in income years commencing before 1 July 2014 in relation to taxpayers who can show that they have made a genuine attempt to determine the tax treatment of bitcoin, and have then adopted a consistent position regarding the tax treatment of bitcoin in those years.

Commissioner of Taxation

17 December 2014

Appendix 1 – Explanation

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

What is Bitcoin?

4. This Determination is part of a suite of Rulings² issued by the Commissioner on Bitcoin. Accordingly, a detailed description of Bitcoin is contained in TD 2014/25.

Is bitcoin a 'CGT asset'?

5. The term 'CGT asset' is defined in subsection 108-5(1) 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*³ (*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'.⁴

7. There is no single test nor a single determinative factor for identifying a proprietary right.⁵ Courts have emphasised different characteristics in different circumstances.⁶ 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.⁷ However, courts have also focused on factors such as excludability (whether it is possible to exclude others from the right in question),⁸ commercial value (whether something is treated in commerce as a valuable proprietary right),⁹ and enforceability of the right against third parties generally.¹⁰

² See Taxation Determinations TD 2014/25 *Income tax: is bitcoin a 'foreign currency' for the purposes of Division 775 of the Income Tax Assessment Act 1997?*; TD 2014/27 *Income tax: is bitcoin trading stock for the purposes of subsection 70-10(1) of the Income Tax Assessment Act 1997?*; TD 2014/28 *Fringe benefits tax: is the provision of bitcoin by an employer to an employee in respect of their employment a property fringe benefit for the purposes of subsection 136(1) of the Fringe Benefits Tax Assessment Act 1986?* and Goods and Services Tax Ruling GSTR 2014/3 *Goods and services tax: the GST implications of transactions involving bitcoin.*

³ (1999) 201 CLR 351 at 365-7 [17]-[19].

⁴ *Ibid* at 366 [18].

⁵ 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'').

⁶ 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.

⁷ *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.

⁸ 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.

⁹ See, for example, *Halwood Corporation Ltd v. Chief Commissioner of Stamp Duties* (1992) 33 NSWLR 395 at 403.

¹⁰ See, for example, *Wily v. St George Partnership Banking Ltd* (1999) 84 FCR 423 at 426.

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),¹¹ 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 bitcoin 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.
10. However, there are other factors that support the conclusion that Bitcoin holding rights are proprietary in nature. The most compelling is that bitcoin are treated as valuable, transferable items of property by a community of Bitcoin users and merchants. There is an active market for trade in bitcoin and substantial amounts of money can change hands between transferors and transferees of bitcoin.¹² *Armstrong DLW GmbH v. Winnington Networks Ltd*¹³ and other English and Australian cases¹⁴ 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 bitcoin 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). As such, a person holding a bitcoin is considered to hold a 'CGT asset' for the purposes of that provision.

¹¹ See TD 2014/25 for further explanation of these bitcoin concepts.

¹² 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.

¹³ *Ibid* at 852 [58].

¹⁴ See, for example, *Halwood Corporation Ltd v. Chief Commissioner of Stamp Duties* (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).

13. Apart from a dealing in individual bitcoin 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 bitcoin). Rights in the private key would fall short of 'property' for the purposes of paragraph 108-5(1)(a). 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).¹⁵ 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 Determination to decide whether the wallet is an item of property distinct from the individual bitcoin 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 bitcoin in it. On the other hand, confidential information in relation to the private key is probably an item distinct from the bitcoin. The distinction is thought to be unlikely to have practical significance in normal circumstances.

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). 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), 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).

16. However, section 118-20 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 6-5.¹⁶ See further the discussion at paragraphs 22 to 25 of this Determination.

17. Under subsection 118-10(3), a capital gain made from a personal use asset (a CGT asset used or kept mainly for personal use or enjoyment)¹⁷ is disregarded if the first element of the cost base is \$10,000 or less.¹⁸ In addition, any capital loss made from a personal use asset is disregarded under subsection 108-20(1).

¹⁵ This view is consistent with the view in TD 2000/33 that know-how is not a CGT asset but a right in relation to know-how is a CGT asset.

¹⁶ Accordingly, for example, where bitcoin is trading stock of a business (see TD 2014/27) any capital gain made on the disposal of the bitcoin is disregarded by an amount that is included in the assessable income of the business under section 6-5.

¹⁷ As per paragraph 108-20(2)(a).

¹⁸ Section 108-25 may apply where a taxpayer disposes of number of bitcoin separately for the purposes of trying to obtain the personal use asset exemption in section 118-10.

18. This Determination is not intended to define the circumstances in which bitcoin would be a personal use asset. The inherent nature of bitcoin means that it is generally either used as a means of exchanging it for something of value, or it is kept as a speculative investment. Whether or not bitcoin is used or kept mainly for personal use or enjoyment will depend on the particular facts and circumstances of each case. Relevant considerations include the purpose for which the bitcoin was acquired and kept, as well as the nature of the property acquired when the bitcoin is disposed of (for example, whether the bitcoin is used to purchase an investment).¹⁹

19. 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. 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. Other categories of use conceivably could exist; taxpayers in these cases should seek private rulings.

20. An example of where bitcoin would be considered to be a personal use asset is where an individual taxpayer purchased bitcoin from a Bitcoin exchange and uses the bitcoin to make online purchases for their personal needs, for example clothing or music. If the bitcoin were instead purchased to facilitate the purchase of income producing investments, they would not be personal use assets.

21. Another example of where bitcoin would not be a personal use asset is where an individual taxpayer mines bitcoin and keeps those bitcoin for a number of years with the intention of selling them at opportune times based on favourable rates of exchange.

Gains instead assessable as ordinary income?

22. Whether a gain on the disposal of bitcoin that are not personal use assets is included in a taxpayer's assessable income as a capital gain or as ordinary income will depend on all the facts and circumstances of the case. In the case of an isolated transaction that is not carried out as part of a business operation, the Commissioner considers that a gain will generally be ordinary income where the intention or purpose of the taxpayer in entering into the transaction was to make a profit or gain, and the transaction was entered into in carrying out a commercial transaction.²⁰

¹⁹ In *Favaro v. Federal Commissioner of Taxation* [1996] FCA 877 Branson J at 15, in concluding that the Italian currency was not 'used or kept primarily for personal use' under the predecessor provision to subsection 108-20(2)(a), section 160B of the *Income Tax Assessment Act 1936*, took into account the fact that the Italian currency was exchanged into Australian dollars and invested.

²⁰ See paragraph 6 of Taxation Ruling TR 92/3 *Income tax: whether profits on isolated transactions are income*.

23. Factors considered relevant to determining whether an isolated transaction amounts to a commercial transaction are listed at paragraph 49 of TR 92/3. Applying these factors to a Bitcoin scenario, of particular relevance, is the amount of money involved in the mining (or acquisition) and disposal of the bitcoin, the magnitude of the profit sought or obtained, the length of time the bitcoin is held before disposal and whether that bitcoin has no other immediate use other than as an object of trade.²¹

24. Accordingly, for example, where a taxpayer mines a small amount of bitcoin as a hobby and after two years decides to sell the bitcoin for a small profit in order to purchase a more stable investment item, the gain will be assessed under the CGT provisions, not as ordinary income. Further, as the bitcoin were used to purchase an investment, the capital gain will not be disregarded under subsection 118-10(3) because the bitcoin will not be personal use assets.

25. If, on the other hand, a taxpayer acquires bitcoin with the purpose of profiting from it upon a commercial transfer, a gain made on its disposal will be assessable under section 6-5 and any capital gain arising under CGT event A1 will be correspondingly reduced under section 118-20.

²¹ Paragraph 49 of TR 92/3 explains that the nature of the property acquired and disposed of is a relevant factor. For example if the property has no other use other than as the subject of trade, a conclusion that the property was acquired for the purpose of trade and, therefore, the transaction was commercial in nature, would be readily drawn. See *Edwards (Inspector of Taxes) v. Bairstow and Anor* [1956] A.C. 14; *Hobart Bridge Co. Ltd. v. Federal Commissioner of Taxation* 82 CLR 372. The former case involved the issue of whether the acquisition and disposal of a spinning plant amounted to an adventure in the nature of trade. Viscount Simonds found ' that the nature of the asset lent itself to commercial transactions. And by that I mean, what I think Rowlatt J. meant in *Leeming v. Jones* [1930] 1 KB 279 that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.'

References

Previous draft:

TD 2014/D12

Related Rulings/Determinations:

TR 92/3; TD 2000/33; TR 2006/10;
 TD 2014/25; TD 2014/27; TD 2014/28;
 GSTR 2014/3

Subject references:

- bitcoin
- CGT asset
- digital currency
- intangible property
- property

Legislative references:

- ITAA 1936 160B
- ITAA 1997
- 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
- TAA 1953

Case references:

- Armstrong DLW GmbH v. Winnington Networks Ltd [2012] 3 WLR 835
- Edwards (Inspector of Taxes) v. Bairstow and Anor [1956] A.C. 14
- Favaro v. Federal Commissioner of Taxation [1996] FCA 877; 96 ATC 4975; (1996) 34 ATR 4975
- Halwood Corporation Ltd v. Chief Commissioner of Stamp Duties (1992) 33 NSWLR 395
- Hobart Bridge Co. Ltd. v. Federal Commissioner of Taxation (1951) 82 CLR 372; (1951) 9 ATD 273; 5 AITR 184
- Leeming v. Jones [1930] 1 KB 279
- Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141
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- Potter v. Commissioners of Inland Revenue (1854) 156 ER 392
- R v. Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327
- Wily v. St George Partnership Banking Ltd (1999) 84 FCR 423
- Yanner v. Eaton (1999) 201 CLR 351

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- Moses, 'The Applicability of Property Law in New Contexts: From Cells to Cyberspace' (2008) 30 Sydney Law Review 639

ATO references

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