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## CRYPTOCURRENCY AND TAX IN SOUTH AFRICA

Patricia Williams & Rob Hare



# CRYPTOCURRENCY AND TAX IN SOUTH AFRICA: TOPICS

- **Rob:**
  - Income tax and capital gains tax (**CGT**)
  - Withholding taxes: dividends tax, interest and royalties
- **Patricia:**
  - Value-added tax (**VAT**)
  - Securities transfer tax (**STT**)
  - Other relevant taxes

# CRYPTOCURRENCY: INCOME TAX AND CGT

- **Developments to date:**
  - SARS Media Release (6 April 2018)
  - Draft Taxation Laws Amendment Bill (**Draft TLAB**) (16 July 2018)
  - Draft Response Document on Draft TLAB (**Draft Response Document**) (in response to various comments on the Draft TLAB) (12 September 2018)

# CRYPTOCURRENCY: INCOME TAX AND CGT

- **SARS Media Release**
  - Crypto earnings are / always have been subject to income tax and CGT in South Africa
  - Normal income tax and CGT rules flexible enough to apply to crypto transactions
  - Onus on taxpayers to declare crypto transactions
  - Usual interest and penalties apply for non-disclosure / non-compliance
  - Existing “Voluntary Disclosure Programme” can be used to apply for waiver of penalties (not any unpaid tax itself, or interest thereon)
  - Usual channels available for formal SARS guidance on tax consequences cryptocurrency transactions

# CRYPTOCURRENCY: INCOME TAX AND CGT

- **SARS Media Release cont...**
- **SARS has confirmed that basic income tax and CGT principles apply**
  - Cryptocurrencies regarded as assets of an intangible nature, not currency
    - Proposed treatment of cryptocurrencies as “financial instruments” (see below)
  - At broadest level, tax treatment of crypto similar to shares
  - However, similarity breaks down on a detailed comparison
- **Buying and selling cryptocurrency**
  - For purposes of trading – income tax treatment; or
  - For purposes of investing, i.e. as a capital asset – CGT treatment
  - Depends on intention when buying, holding and selling, and detailed facts (**no “fruit” from the “tree” – is CGT ever applicable?**)
  - CGT rate lower than income tax rate, thus, CGT treatment desirable



# CRYPTOCURRENCY: INCOME TAX AND CGT

- **Draft TLAB**

- Cryptocurrencies to be included in definition of “financial instrument” for income tax purposes.
- Principles under the SARS media release mentioned above should broadly still be applicable.
- No definition for cryptocurrency proposed for income tax (or VAT, see below).
- Proposed changes are new inclusions, and no detailed guidance (beyond the original SARS Media Statement) has been provided yet.

# CRYPTOCURRENCY: INCOME TAX AND CGT

- **Draft TLAB cont...**
  - If proposals become law it could affect the income tax and CGT treatment of cryptocurrencies in the following ways (not an all inclusive list):
    - Trading stock write-down allowances no longer available
    - Market value of cryptocurrency held and disposed of as capital assets will need to be calculated in accordance with particular rules
    - Certain exemptions or relief from CGT will not be applicable (including no “personal use asset exclusion” for individuals)
    - Research and development allowances no longer claimable

# CRYPTOCURRENCY: INCOME TAX AND CGT

- **Exchanging crypto for non-cash items**

- So-called “barter” or “exchange” transactions
- E.g. other cryptocurrencies on an exchange, retail items, etc.
- Taxable “amounts” not limited to cash, can be assets with money value as well
- Both parties “sell” or “dispose of” an asset
- Both parties receive an asset in return
- Both parties subject to income tax or CGT on value of asset received, depending on intention and facts (i.e. trading vs. investing)
- Both parties may claim “expense” of asset sold / disposed of by them as tax deduction or base cost in respect of the asset received by them, again depending on intention and facts (i.e. trading vs. investing)



# CRYPTOCURRENCY: INCOME TAX AND CGT

- **Mining**

- SARS Media Statement provides very little guidance
- No other specifically relevant changes / commentary in Draft TLAB or Draft Response Document
- Appears to assume crypto earned from mining automatically acquired for trading purposes and therefore subject to income tax
- Sales of mined crypto will be subject to income tax or CGT, again depending on intention and facts
- Lots of case law on trading vs. investing / capital intention

# CRYPTOCURRENCY: INCOME TAX AND CGT

- **Example 1.1: I buy 1 Bitcoin for R100**
  - If I buy the Bitcoin for purposes of trading
    - I can claim the R100 as a tax deduction (normal rules of deductibility apply)
  - If I buy the Bitcoin for purposes of investing (i.e. as a capital asset)
    - I can claim the R100 as my “base cost” in that Bitcoin if I sell it later (see below)
- **Example 1.2: I sell the above Bitcoin later in the year for R1,000**
  - If I sell the Bitcoin for purposes of trading
    - Income tax on R900 (i.e. R1,000 less the R100 tax deduction claimed)
  - If I sell the Bitcoin for purposes of investing (i.e. as a capital asset)
    - CGT on R900 (i.e. R1,000 less the R100 claimed as “base cost” of that Bitcoin)

# WITHHOLDING TAXES

- **Dividends tax, withholding tax on interest and withholding tax on royalties**
  - No current withholding taxes because crypto returns currently do not qualify as dividends, interest or royalties
  - However, this may change if more complex cryptocurrencies emerge

# VAT

- **SARS Media Release**

- “The 2018 annual budget review indicates that the VAT treatment of cryptocurrencies will be reviewed. Pending policy clarity in this regard, **SARS will not require VAT registration as a vendor** for purposes of the supply of cryptocurrencies.”
- Implicit conclusion that SARS will currently not treat transactions involving cryptocurrencies as a “supply” for VAT purposes.

# VAT

- **Draft TLAB**

- Proposes that cryptocurrencies must be included in the definition of “financial services” under the VAT Act
- Cryptocurrency will then be considered an exempt supply for VAT purposes
- Seems positive at first glance – not required to register as VAT vendor
- However, the negative consequences of this proposal include-
  - Fully “taxable” enterprises would be converted to “mixed” supplies, if the enterprise accepts cryptocurrency as a form of payment (which presumably will become an economic necessity); this gives rise to VAT apportionment issues, including VAT leakage.
  - No guidance proposed on meaning of cryptocurrency under VAT Act (or Income Tax Act)

# VAT

- **Draft Response Document**

- Example (p33): *“Vendor making 100 per cent taxable supplies who chooses to accept cryptocurrencies as a form of payment and then on-sells such cryptocurrency, will now no longer be making 100 per cent taxable supplies and will no longer be entitled to full input tax credits. The vendor will now also be making exempt supplies and will need to apportion input tax credits.”*
- SARS recognises VAT leakage in above example.
- However, current view is that usual provisions of the VAT Act relating to mixed supplies and apportionment must simply be applied.



# STT AND OTHER TAXES

- **STT**
  - “Securities” for STT purposes are shares, depository receipts or members interest (excluding the debt portion of a share linked to a debenture)
  - Therefore no STT on cryptocurrencies
  - No other specifically relevant changes / commentary in Draft TLAB or Draft Response Document
- **Other taxes**
  - Currently no other relevant transaction taxes

# ATTRACTING CRYPTO AND CRYPTO EXCHANGES TO SA: INCOME TAX AND CGT

- **R&D tax deduction / allowance:** Tailor existing R&D tax deduction / allowance to crypto research, or develop new tax deduction / allowance – no longer applicable if Draft TLAB changes become law, would need carve-out
- **CGT “safe haven” rules:** Increase certainty by introducing “safe haven” rules for CGT treatment (similar to shares, e.g. where crypto is held for x no. of years)
- **Clarify treatment on involuntary disposals / exchanges of crypto:** E.g. the fork between Bitcoin and Bitcoin Cash
- **Special “VDP” programme or amnesty:** Encourage continued support for crypto by introducing special “VDP” programme or amnesty for crypto earnings to date

# ATTRACTING CRYPTO AND CRYPTO EXCHANGES TO SA: WITHHOLDING TAXES

- First question is whether any of the withholding taxes (dividends tax / interest / royalties) will be applicable
- Depends on whether equity- or debt-like cryptocurrencies emerge
- Potential application of withholding tax on royalties may be interesting
- If we want to encourage offshore crypto investments into SA exchanges, we might want to consider a “holiday” on any applicable withholding taxes for a few years

# ATTRACTING CRYPTO AND CRYPTO EXCHANGES TO SA: VAT, STT AND OTHER TAXES

- **VAT:** General approach is to treat cryptocurrencies as being a “financial service” – exempt from VAT unless a zero-rated cross-border transaction (currently suggested in the Draft TLAB, although this has issues for merely using cryptocurrency as a form of payment)
- **STT / other transaction taxes:**
  - A regime based on transaction taxes may actually be most favourable, if combined with exemption from income tax / CGT
  - Given that taxing non-residents on digital assets with no or limited physical presence is in any event problematic, this regime may be favourable
  - **Example:** 6% transaction tax on trades on SA crypto exchange, no other taxes applicable



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# **CRYPTOCURRENCY AND TAX IN KENYA**

Alex Mathini





# CRYPTOCURRENCY AND TAX IN KENYA: OVERVIEW

- Citibank 2018 Survey - Kenya ranked as the 5<sup>th</sup> highest bitcoin holder per capita in the world at 2.3% of the GDP or USD 1.6 billion. Nigeria was ranked 3<sup>rd</sup> while South Africa took the 6<sup>th</sup> place.
- The Central Bank of Kenya (CBK) says it should not “be held liable for any losses” incurred by consumers using digital currencies to settle transactions, as the digital currency is not legal tender in Kenya.
- No guidance from the Kenya Revenue Authority (KRA) on the taxation of cryptocurrency in Kenya and so basic tax principles are likely to apply.

# CRYPTOCURRENCY AND TAX IN KENYA: INCOME TAX

## Kenyan income tax principles

- Income subject to tax in Kenya if accrued in or derived from Kenya.
- **Income subject to tax in Kenya includes:**
  - business profits
  - gains from services rendered (employment, consultancy, professional and management services)
  - Interest and dividends
  - right for use or occupation of property (rents, royalties etc)
  - capital gains on the transfer of property

# CRYPTOCURRENCY AND TAX IN KENYA: INCOME TAX

## Kenyan income tax implications: is cryptocurrency an asset (property) or currency?

**Revenue transactions** - a person who engages in the business of buying and selling of cryptocurrency will be subject to income tax on the gains thereof if the income thereof is deemed to have been accrued in or derived from Kenya.

**Capital transactions** – a company who acquires cryptocurrency for speculation purposes will be subject to capital gains tax on the gains made on a sale however if it involves the frequent trading of the cryptocurrencies, capital gains will not be chargeable as it will be classified as trading income:

- since the current CGT rules defines **property in the case of companies** widely to include generally any property but in the **case of individuals as only real property (land) and marketable securities (shares)**. For individuals, it would depend whether crypto-currencies can be classified as marketable securities (shares);
- however, the property has to be **situate in Kenya**. The issue would thus be whether cryptocurrency would be deemed situate in Kenya, considering the virtual nature of cryptocurrency and the anonymity of transactions generally.

# CRYPTOCURRENCY AND TAX IN KENYA: VAT

## Applicability of VAT

VAT is charged on the **supply of goods and services** other than an exempt supply, made in Kenya by a person **in the course or furtherance of a business**

Cryptocurrencies would not constitute goods under the current VAT definition.

**Goods** are defined as **tangible moveable and immovable property and includes electrical or thermal energy, gas and water but does not include money**

# CRYPTOCURRENCY AND TAX IN KENYA: VAT

## Applicability of VAT

- **Services** means *anything that is not goods or money*.
  - **Money** is defined as *(a) any coin or paper currency that is legal tender in Kenya; (b) a bill of exchange, promissory note, bank draft, or postal or money order; (c) any amount provided by way of payment using a debit or credit card or electronic payment system*

**Supply of services** is defined to include (amongst others) the grant, assignment, or surrender of any right and the making available of any facility or advantage. Would not fit within the exemption of financial services.

It is thus possible that dealing in cryptocurrency could be deemed a supply of service. A person trading in cryptocurrency would thus need to be VAT registered if he meets the VAT registration thresholds (KES 5 million over 12 months) and would require to charge VAT. Issues of imported services would need to be considered.

It is also possible that cryptocurrencies are classified as money when used as a way of payment using any crypto-enabled debit or credit cards or electronic payment system and thus not chargeable to VAT

This is an issue that is not free from doubt.

# CRYPTOCURRENCY AND TAX IN KENYA

## Withholding taxes

Withholding taxes are unlikely to apply with respect to persons dealing in cryptocurrency, either as in the business or as speculators, as cryptocurrency would not attract dividends, interest or royalties.

However, where loans or debt instruments are provided in the form of cryptocurrency, any crypto-interest payable on the loans could be subject to withholding tax.

Moreover, management fees paid for certain cryptocurrency services such as the management of crypto wallets could also be subject to withholding tax.



# CRYPTOCURRENCY AND TAX IN KENYA: OTHER TAXES

## Excise duty

- Levied on **excisable goods** manufactured in Kenya or imported into Kenya and on **excisable services** supplied in Kenya
- E.g. Excise duty applies to fees charged for money transfer services by cellular phone service providers, banks, money transfers agencies and other financial service providers shall be 10% of their excisable value.
- Currently, cryptocurrencies would not be subject to excise duty

## Stamp duty

- Payable on instruments relating to property situated in Kenya.
- Nominal stamp duty may be chargeable on instruments such as agreements for the sale and purchase of cryptocurrency, debt instruments for crypto-loans, if any.
- Otherwise not subject to stamp duty.

# CRYPTOCURRENCY AND TAX IN KENYA: INCOME TAX

## Other cryptocurrency activities

### Exchange services

- Fees paid to resident operators of cryptocurrency exchanges could also be subject to VAT.

### Mining

- would attract income tax in Kenya if such service providers are conducting business in Kenya.
- fees and commissions thereof would be subject to VAT. However, this could be a challenge for certain cryptocurrency systems where the fees are paid using newly created cryptocurrencies automatically generated by the systems.
- Withholding tax an issue as the tax is required to be made by the person making the payment.

# CRYPTOCURRENCY AND TAX IN KENYA: KENYA AS A HAVEN?

- Could take some time if at all considering no guidelines are yet to be issued from any regulator.
- CBK also seems to frown on cryptocurrencies.
- Tax guidelines would be very useful to clarify the tax treatment. Currently, KRA has no position on taxation of cryptocurrencies.
- Tax incentives could also be introduced.



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## CRYPTOCURRENCIES

Uganda's Tax Regime

Daniel Gantungo



# OVERVIEW

- **Introduction**
- **Tax Regulation**
- **Type of Crypto business taxable**
- **Income Tax**
- **Value Added Tax**
- **Stamp Duty**



# INTRODUCTION

- **Cryptocurrencies are digital assets designed to work as a medium of exchange that uses cryptography to secure the transactions so as to control the creation of additional units, and to further verify the transfer of assets.**
- **Cryptocurrencies' unique qualities such as:**
  - Absence of a physical form
  - Not “legal tender”
  - Hasn't been characterised/defined by the central Bank or Tax authority

# TAX REGULATION

**The challenge of tax regulators is to fit cryptocurrencies transactions into the existing bodies of law and redefine or extend the laws to incorporate cryptocurrencies – impeding factor is the anonymity of the transactions.**

# TYPE OF CRYPTOCURRENCY BUSINESS TO BE CONSIDERED FOR TAXATION

## TYPE OF BUSINESS

- Receiving cryptocurrency for another transmission (i.e money transfers)
- Storing or acting as custody of cryptocurrency on behalf of others (i.e forex trading)
- Buying and selling cryptocurrency as part of a business/investment
- Performing Exchange Services as a customer business
- Controlling, administering or issuing a cryptocurrencies

## TYPE OF TAXES

- Income Tax ,Capital Gains Tax (CGT) Withholding Tax (WHT)
- Value Added Tax(VAT)
- Stamp Duty Tax

# INCOME TAX

## BUSINESS INCOME

- **How is the income derived? From a revenue or capital nature.**

### Section 18(1)(a)

“...the amount of any gain, as determined under Part VI of this act which deals with gains and losses on disposal of assets, derived by a person on the disposal of a business asset...whether or not the asset or debt was on revenue or capital account..”

- **Where transaction allows for gain or loss on disposal of assets, CGT shall be applicable.**
- **CGT gain would be applicable to companies –all assets are business assets**
- **CGT would be applicable to individuals if they are in the habit of buying and selling cryptocurrency as business.**

### Section 18(c)

“Gross proceeds derived from the disposal of trading stock?”

Similar to taxing a foreign exchange currency trader?

# PROPERTY INCOME

## Section 20(1)(a)

Property income means: ... any dividends, interest, annuity, natural resource payments, rents, royalties and any payment derived by a person from the provision, use, or exploitation of property.

## Section 20(1)(d)

“...any other income derived by a person including winnings derived from sports betting and pool betting, but does not include any amount which is business, employment or exempt income.”

Where Cryptocurrency is considered as property, there shall be a tax levied on their sale.

Would be taxable as property income -exploits or uses property and derives dividends, interest or royalties.

Exemptions under the ITA should be relevant where organisations exempt from tax trade property under cryptocurrencies.

# WITHHOLDING TAX

## Section 118A(ITA)

“..a resident who pays management or professional fees to a resident person shall withhold tax on the gross amount...”. This tax would apply to payments made to resident custodians of cryptocurrency. The rate is 6%.

## Section 118B(ITA)

“ a resident person who purchases an asset from a non-resident person shall withhold tax on the gross amount paid..”. The rate is 10%. This tax is applicable to purchases of crypto currencies by a person resident in Uganda from a non-resident.



# VALUE ADDED TAX

- The VAT Act defines money to include an investment article and an item of numismatic interest. It is possible that cryptocurrency would fall within the definition either as an investment article or an item of numismatic interest. Therefore the sale of cryptocurrency would under the supply of services. (Section 18 VAT Act).
- Section 18
  - (1) “ A taxable supply is a supply of goods or services, other than an exempt supply, made in Uganda by a taxable person for consideration as part of his or her business...”
  - (2) “A supply is made as part of a person’s business activities if the supply is made by him/her as part of, or incidental to, any independent economic activity he/she conducts, whatever the purposes or results of that activity.”
  - (3) “the business activities of an individual do not include activities carried on by him or her only as part of his/her hobby or leisure activities.”
  - (4) “A supply is made for consideration if the supplier directly or indirectly receives payment for the supply, whether from the person supplied or any other person, including any payment wholly or partly in money or **kind**.”

# VALUE ADDED TAX

Tax chargeable on taxable supplies of goods and services made in Uganda unless they are exempt services. The supply should be part of a person's business activities.

- Tax payable by person making the supply
- Virtual Currency services can be considered a taxable supply of a service under **Section 11** of the VAT Act;

“ Except as otherwise provided under this Act, a supply of services means a supply which is not a supply of goods or money, including;...the **making available of any facility or advantage...**”

# VALUE ADDED TAX

**Cryptocurrency trading makes available a facility or an advantage for others in the form of income, investment etc. The rate applicable is 18% of the value of the supply.**

# STAMP DUTY

**Stamp duty payments shall be applicable on the instruments of transfer of cryptocurrency to another person. The instrument can be an agreement. The stamp duty payable shall be 1.5% of the value of the transaction.**



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