



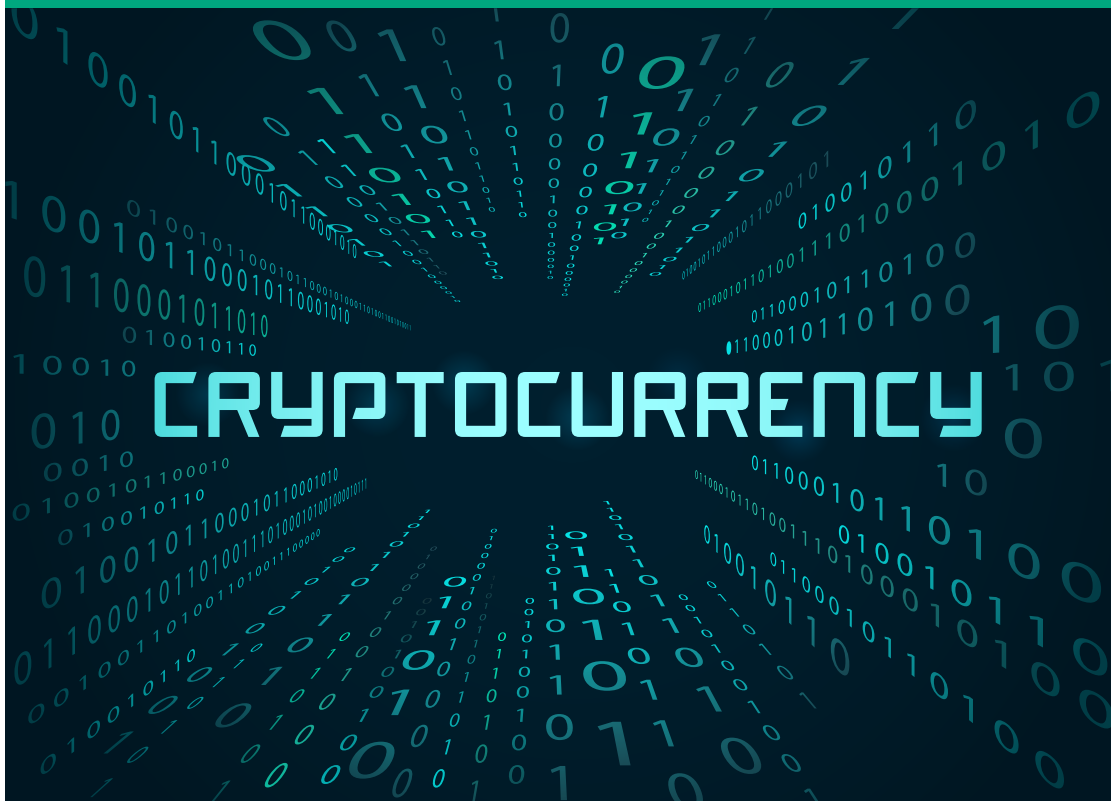
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# Cryptocurrencies: Tax Position in Ireland



## Introduction

Cryptocurrencies (also known as virtual currencies<sup>1</sup>) (e.g. Bitcoin, Ethereum, Ripple) are a relatively new and evolving area. These currencies are digital representations of value that do not have the legal status of currency and are neither issued nor guaranteed by a

central bank or public authority. They have, however, proved popular with investors, leading to the growth of a “Bitcoin bubble”. As of 24 May 2018, there were 1,623 cryptocurrencies available online.<sup>2</sup> Ireland has its own cryptocurrency, named “IrishCoin”, which was conceived with the Irish tourism space in mind.

<sup>1</sup> The European Central Bank (ECB) defines a virtual currency as “a digital representation of value, not issued by a central bank, credit institution or e-money institution, which in some circumstances can be used as an alternative to money”: ECB, “Vertical Currency Schemes – A Further Analysis” (Frankfurt: ECB, February 2015).

<sup>2</sup> See <https://coinmarketcap.com/all/views/all/>.

The buying and selling of cryptocurrencies is not currently regulated either at European Union level or domestically in Ireland.<sup>3</sup> The Fifth EU Anti-Money Laundering Directive will introduce measures to mitigate some of the money-laundering and terrorist-financing risks presented by cryptocurrencies.

This article will examine the current tax treatment of cryptocurrencies in Ireland and consider the published legal position in a number of other jurisdictions.

## Ireland: Commentary on Taxation of Cryptocurrencies

On 15 May 2018 Revenue published an eBrief on the tax treatment of cryptocurrency transactions (“the eBrief”).<sup>4</sup> Before this eBrief, no official guidance had been published in Ireland clarifying how cryptocurrencies would be treated for Irish tax purposes.<sup>5</sup> The eBrief notes that the treatment of income received from/charges made in connection with activities involving cryptocurrencies will depend on the activities and the parties involved. Each case must be considered on the basis of its own individual facts and circumstances. The eBrief also states that “no special tax rules for cryptocurrency transactions are required”.

Before the eBrief was published, the main sources of guidance on the taxation of cryptocurrencies were the pronouncements of the then Minister for Finance (Michael Noonan TD). In December 2013, in response to a parliamentary question relating to the legality and potential tax treatment of Bitcoin, he remarked that Revenue had advised him that the use of cryptocurrencies presents a

challenge to tax administrators throughout the world. He stated that “regarding the possible use of cryptocurrencies (including Bitcoin) to circumvent taxes, the Revenue Commissioners and tax administrations in other countries are actively monitoring developments”.<sup>6</sup>

In relation to the tax treatment of cryptocurrencies, the then Minister stated:

“Because Bitcoin is a combination of some factors that constitute a commodity and some that constitute a currency, the implications for taxation are varied.

If Bitcoins are received as payments in commerce, then the same rules in place for payments received in other foreign currencies also apply. If speculation on Bitcoin occurs, the taxation rules that would apply to any gain are applicable.”<sup>7</sup>

It is clear, therefore, that the current view of Revenue is that when considering the tax treatment of transactions involving cryptocurrencies, one has to have regard to the basic principles of Irish tax law.

## Other Jurisdictions: Comparators

The approach taken by a number of tax authorities in relation to the tax treatment of virtual currencies echoes the economic and/or legal characterisation of such currencies and those have clearly shaped the contents of the eBrief.

### United Kingdom

In the UK, HMRC has stated<sup>8</sup> that “[c]ryptocurrencies have a unique identity

3 In response to a parliamentary statement on the risks associated with Bitcoin and whether regulation of the industry was necessary, on 31 January 2018 the Taoiseach, Leo Varadkar TD, said that “it is a matter for the Central Bank of Ireland and one which is addressed through European regulations”.

4 Revenue eBrief No. 88/2018, “Taxation of Cryptocurrency Transactions” (May 2018).

5 The Department of Finance published a discussion paper in March 2018 titled “Virtual Currencies and Blockchain Technology”, but this did not deal specifically with the Irish tax treatment of virtual currencies.

6 See <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2013121000054>.

7 See <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/takes/dail2014120200057?opendocument&highlight=bitcoin>.

8 HMRC, Revenue and Customs Brief 9 (2014), “Bitcoin and Other Cryptocurrencies”.

and cannot therefore be directly compared to any other form of investment activity or payment mechanism” and that the tax treatment of any transaction involving the use of cryptocurrencies needs to be “looked at on a case-by-case basis taking into account the specific facts”, each case being “considered on the basis of its own individual facts and circumstances”.

HMRC cites the example of a transaction that is so highly speculative that it may not be taxable (the corollary of which is that none of the losses would be relievable) and refers specifically to gambling or betting wins (which are not taxable) and losses (which are not available for offset against other taxable profits).

In reality, given the implicit value in cryptocurrencies such as Bitcoin, it may be difficult to argue that such an activity is purely speculative. Such a determination will probably arise only where taxpayers make a claim for losses or seek to argue that they should not be liable for tax on profits.

HMRC remarks that transactions that are subject to tax (such as a sale or disposal of Bitcoin) need to be analysed in the same way as any other transaction, broadly, by reference to the nature of the activities (to determine whether the receipt or expenditure is income or capital) and the status of the parties (to determine whether income tax, capital gains tax or corporation tax is in point).

HMRC states that “[f]or the tax treatment of virtual currencies, the general rules on foreign exchange and loan relationships apply. We have not at this stage identified any need to consider bespoke rules.” Although these statements are made in the context of a discussion on corporation tax, they are largely understood to be a statement of HMRC’s general approach (and not restricted to corporation tax).

## Australia

The Australian Taxation Office regards transacting with Bitcoin as “akin to a barter arrangement”,<sup>9</sup> its view being that Bitcoin is neither money nor a foreign currency.

## Canada

The Canada Revenue Agency does not regard digital currency as legal currency (even though it refers to digital currency as “virtual money”). It considers that “[w]here digital currency is used to pay for goods or services, the rules for barter transactions apply” (a barter transaction being one where “two persons agree to exchange goods or services and carry out the exchange without using legal currency”).<sup>10</sup>

## Ireland: Tax Treatment of Acquisition, Disposal and Receipt of Cryptocurrencies

As the tax treatment of cryptocurrencies is not specifically legislated for, one has to look to both basic tax principles and the eBrief to determine the tax treatment that should apply.

### Corporation tax (trading) or capital gains tax (non-trading)?

If a company is acquiring and selling cryptocurrencies, the first question will be to determine whether it is engaged in a trade of cryptocurrency trading. To the extent that a company is engaged in buying and selling cryptocurrencies as part of its trade, it will be subject to corporation tax at the rate of 12.5% under Schedule D, Case I.<sup>11</sup>

Irish tax legislation defines a “trade” as including “every trade, manufacture, adventure or concern in the nature of a trade”, which is not the most helpful definition. Furthermore, Irish tax legislation does not set out specific rules to determine what is “trading” versus what is an “investment”. As normally

<sup>9</sup> Australian Taxation Office, “Tax Treatment of Cryptocurrencies in Australia – Specifically Bitcoin”, <https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-bitcoin/>.

<sup>10</sup> Canada Revenue Agency, “What You Should Know About Digital Currency”, <https://www.canada.ca/en/revenue-agency/news/newsroom/fact-sheets/fact-sheets-2015/what-you-should-know-about-digital-currency.html>.

<sup>11</sup> Section 21 of the Taxes Consolidation Act 1997 (“TCA 1997”).

understood, “trading” means the carrying on of business or the engaging in activities on a regular and habitual basis normally with a view to realising a profit. The UK “badges of trade”<sup>12</sup> – being (i) subject matter realised; (ii) length of ownership; (iii) frequency of transactions; (iv) supplementary work; (v) circumstances for realisation; and (vi) motive – are of persuasive authority in Ireland in determining whether a “trade” exists.

Ultimately, the question of whether a company is trading is a mixed question of fact and law; it is a matter of law what “trade” means, but the answer in any particular case will depend on the facts of the case.

To the extent that a company is not engaged in a trade of cryptocurrency trading, it is likely that the buying and selling of cryptocurrencies will be liable to corporation tax on chargeable gains at an effective rate of 33% on the realisation of any gains on the sale of cryptocurrencies.

If traders accept cryptocurrencies as part of their business, then the profits and losses will flow through to their profit and loss account in the same manner as accepting payment in any foreign currency. As cryptocurrencies are not a functional currency as defined,<sup>13</sup> a company’s accounts cannot be prepared in cryptocurrencies for tax purposes.

## VAT

VAT (as it applies in Ireland) is, to date, the only tax that has received any judicial consideration in its application to transactions involving the use of virtual currencies.

*In Skatteverket v Hedqvist* C-264/14 the Court of Justice of the European Union (CJEU) ruled that transactions that consist of the exchange of traditional currency for Bitcoin (and vice versa) constitute supplies of services for consideration for VAT purposes, including

where the taxable person derives its profit from the spread. The CJEU also ruled that the supplies fall to be regarded as exempt under Article 135(1)(e) of the VAT Directive (2006/112/EC) as:

*“transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors’ items, that is to say, gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest”.*

The CJEU judgment is based on the premise that although a cryptocurrency is not legal tender in any country, it has been accepted by the parties to the transaction as an alternative to legal tender and has no purpose other than as a means of payment.

Although Revenue has adopted a different basis on which cryptocurrencies are VAT exempt, it has ultimately come to the same result as the decision of the CJEU in Hedqvist. It is Revenue’s view that Bitcoin and similar cryptocurrencies are regarded for VAT purposes as “negotiable instruments” and exempt from VAT in accordance with para. 6(1)(c) of the Value-Added Tax Consolidation Act 2010.

On the basis that the buying and selling of cryptocurrencies constitutes a VAT-exempt activity, where a company supplies cryptocurrencies to customers within the EU, it should have no obligation to account for VAT on its turnover but, correspondingly, will have no entitlement to reclaim VAT on costs and expenses incurred in connection with those supplies. If a company were to supply cryptocurrencies to customers outside the EU, even though it would have no obligation to account for VAT on its turnover, it would have an entitlement to reclaim VAT on costs and expenses incurred in connection with those

<sup>12</sup> Derived from the UK Royal Commission on the Taxation of Profits and Income (June 1955).

<sup>13</sup> Section 402(1) of TCA 1997.

supplies where they are regarded as “qualifying activities”.<sup>14</sup> If a company is supplying both EU and non-EU customers, it may be necessary to calculate a VAT recovery rate.

If traders accept cryptocurrencies as part of their business, they will have to reflect this in their accounts and have to charge and account for VAT by reference to the consideration received, translated at the appropriate exchange rate at the time of supply.

Income from cryptocurrency mining activities will generally be outside the scope of VAT on the basis that the activity does not constitute an economic activity for VAT purposes.

### Stamp duty

Stamp duty is a tax on documents. With some limited exceptions, there must be a written document in existence before a charge to stamp duty can arise. The main situation where stamp duty arises despite no physical document being in existence is where shares are transferred via the CREST system. In such a case, the operator instruction is deemed to be an instrument of transfer of the relevant shares. The legislation operates by artificially deeming an instrument to exist and imposes an obligation on the brokers using the system to collect and pay over the relevant amount of stamp duty.<sup>15</sup>

There is no stamp duty on the transfer of currency provided that no physical document is brought into being. As cryptocurrencies do not physically exist, they cannot pass by delivery. As of yet, no specific legislation has been introduced to bring cryptocurrency transactions within the stamp duty net and at the present time no legislation is expected. However, when drafting any document for the acquisition or disposal of cryptocurrency, careful consideration should be given to

ensuring that one does not inadvertently trigger an Irish stamp duty charge.

### Other Considerations

As noted above, the use of cryptocurrencies poses a challenge for tax authorities around the world and should their use become more prevalent, Revenue may be minded to introduce measures to counter potential tax avoidance through the use of cryptocurrencies. Dealing with cryptocurrencies may also give rise to particular issues where Revenue wants to audit a company's tax returns. Where there is an underlying tax event involving the use of a cryptocurrency, there is a requirement in the tax code for a record to be kept of that transaction, which will include any record in relation to the cryptocurrency.

The buying and selling of cryptocurrencies by Irish-resident individuals may also give rise to potential issues surrounding the transfer of assets abroad<sup>16</sup> where cryptocurrencies are held abroad (e.g. through Coinbase). Further discussion on this is beyond the scope of this article.

### Conclusion

Tax authorities in many other jurisdictions have issued guidance on the tax treatment of cryptocurrencies to provide some level of certainty to taxpayers. Revenue has now followed suit, with the recent publication of the eBrief on the matter. The eBrief (although not binding on Revenue) confirms that the general tax rules will apply to the taxation of cryptocurrencies. Given the rollercoaster ride that cryptocurrencies have been on over the past 12 months or so and the ability of traders to make spectacular gains and losses, the publication of the eBrief in relation to the tax treatment of cryptocurrencies is a welcome development.

<sup>14</sup> Section 402(1) of TCA 1997.

<sup>15</sup> Section 69 of the Stamp Duties Consolidation Act 1999.

<sup>16</sup> Sections 579 and 579A TCA 1997.