

VAT Issues – Crypto Currencies and Mining

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Bitcoin, tokens, ICO, blockchain, mining — Terms related to crypto currencies are on everyone's lips. However, there are many open questions and uncertainties, especially regarding the VAT treatment of individual transactions with digital currencies. The fact that the Swiss Federal Tax Administration (SFTA) has not yet made an official statement on the subject does not make things any easier.

The services provided by taxable persons in return for payment (deliveries or services) are subject to VAT, unless they are exempt from tax (Art. 18 para. 1 VAT law). A typical VAT-liable service involves the sale of goods in Switzerland. If, on the other hand, funds are paid without counter-performance of a service, there is no performance relationship in the sense of value-added tax. These types of funds flows do not qualify as consideration and are therefore not subject to VAT.

A service is deemed as the granting of a usable economic asset to a third party in expectation of payment (Art. 3 lit. c VAT law). The term “usable economic asset” is to be understood as anything that serves to satisfy needs or demands in any form. Usable economic assets are goods and services. Land and capital (money), for example, are not usable within the framework of value-added tax law.

Currently there are about 200 crypto currencies on the market; the best known of these is Bitcoin. A crypto currency is created within the framework of so-called Initial Coin Offerings (ICO) or Token Generating Events (TGE), at which, in some cases, funds worth over CHF 100 million are generated. The question whether VAT is to be charged on this amount because the transaction is equivalent to the sale of goods, or, whether the funds may flow without a VAT surcharge since crypto currencies qualify as money, is therefore of crucial importance.

1. Does a crypto currency qualify as money or goods?

1.1. General information

Crypto currencies are digital information units or tokens which can be used to purchase credit which enables the possibility of making payments in electronic form. Crypto currencies enable payment transactions without the need for central instances such as banks using cryptographically secured protocols and decentralised data storage. Ownership of the crypto currency is represented by the possession of a cryptological key consisting of credit that has also been cryptologically signed in a collective block chain. Crypto currencies have no inherent or intrinsic value. This value only arises from the acceptance and trust between the trade partners (payers and recipients), which in turn results from the possibilities of use and the resulting advantages.

A crypto currency is offered for sale to investors or the public within the framework of an ICO. The functionality of the issued crypto currency or token varies greatly from case to case. The implementation of the planned project takes place only after the funds or the token has been issued. By issuing the tokens in return for money, the issuer has essentially fulfilled all their obligations towards the buyer. As a rule, the purchaser has no claim to the development, structure or realisation of the planned project. In most cases, therefore, a token does not represent a claim for the delivery of a product or the provision of a service. For this reason, the token qualifies as financial means used for the same purpose as legal tender.

1.2. VAT assessment

When investing in tokens a usable economic value is not guaranteed. No benefit is provided within the meaning of the Value Added Tax law, but rather, a form of capital contribution to a company. In this case, the funds received in the issue of tokens are not to be qualified as consideration, i.e. the cash flows are not subject to VAT (Art. 18 para. 2 VAT law).

If, as an exception, a specific and precisely defined claim for the delivery of a product or service is granted at the time of the ICO, in such a specific case the issue of the tokens could lead to a corresponding VAT charge, depending on the composition of the overall service. Due to the varying VAT treatment depending on the structure, each ICO must be assessed individually and in detail based on the functional usage granted according to the general VAT audit procedure: What is the structure of the overall performance? Are supplies or services involved? Where is the place of performance? Are the individual services taxable or exempt from tax? Are they treated independently or are they categorised as a combined, overall or main and ancillary service? Subjectively, is the seller/issuer even liable for the tax?

2. Payment with crypto currencies

2.1. General information

Following the ICO, a software solution is developed or programmed in the form of a platform on which the issued tokens can be used. If you own a token, you may purchase specific products or services. Since 2016, for example, it has been possible to use Bitcoins for tickets at certain SBB ticket machines or to pay the fee for a residence certificate at the residents' registration office in Zug.

Anyone that sells products or services is generally subject to tax. The remuneration is defined as an asset, that the beneficiary spends for the receipt of a supply (Art. 3 lit. f VAT law). In barter transactions in which a service is fully repaid via provision of a counter-performance, the market value of each service is regarded as the remuneration amount for the other service (Art. 24 para. 3 VAT law). In barter transactions, both parties must declare the full value of their own services as turnover and value-added tax as well as taking VAT into account. An exchange transaction should only exist in exceptional cases when paying with a crypto currency, since tokens, in most cases, already qualify as a means of payment (and should therefore not be considered as a counter-performed service in an barter transaction).

2.2. VAT implications

The value added tax, or the calculation of the tax must be carried out in the national currency (CHF). For charges in foreign currency, the Value Added Tax Ordinance provides that the taxable person can choose between the monthly average rate published by the SFTA or the daily exchange rate (sale) (Art. 45 para. 3 VAT law). Affiliated companies may also choose the affiliated companies exchange rate (Art. 45 para. 4 VAT law). How should the crypto currency be converted into CHF? To calculate the VAT owed, fees in foreign currency



are to be converted into CHF at the time the tax claim arises (Art. 45 para. 1 VAT law). The tax claim generally arises (i.e. when invoicing according to agreed consideration method) at the time the invoice is issued or the (purchase/service) contract is concluded (Art. 40 para. 1 VAT law). In accordance with these provisions, sales in crypto currency would have to be converted using the virtual currency's exchange rate at the indicated time.

3. Trading with crypto currency

3.1. General information

Investors with a speculative background are counting on the end product to be very successful and for demand for the tokens to rise substantially. They are not using the crypto currency to purchase products or services, but rather, to buy and sell the tokens.

3.2. VAT implications

If the crypto currency qualifies as a means of payment the sale of tokens is to be exempt from tax as it is deemed to be turnover in the area of money and capital transactions in accordance with Art. 21 para. 2 item 19 VAT law. The exchange of one (virtual) means of payment to another (legal) means of payment is not subject to VAT.

4. Mining - Renting computing capacity

4.1. General information

Crypto currencies are not only interesting for investors and speculators. For many entrepreneurs it is profitable to create crypto currencies themselves via so-called mining. Crypto currencies are based on a decentralised peer-to-peer system or on the creation of value units in a self-contained network of users. This means that all transactions taking place over the internet are linked together in a decentralized database - the so-called blockchain — with the help of numerous computers. The data is cryptographically encrypted directly in the blockchain to protect it and ensure that no token is issued more than once. With each transaction the computational effort becomes ever greater. This is where the so-called miners come into play — they make their computing power available for the transaction processing. This so-called mining is rewarded with newly generated tokens. With Bitcoins, mining now mostly takes place via so-called pools, in which numerous users come together and the acquired tokens are shared. In addition to pool mining, solo mining is another alternative where users install a client program to connect to the currency network.

4.2. VAT assessment

There is a great deal of legal uncertainty regarding mining's VAT status. The Swiss Federal Tax Administration has not yet adopted a stance on this matter. Moreover, there are currently few clear opinions available in literature and jurisprudence. A point of reference may at least be found in nearby countries — the Federal Ministry of Finance in Austria determined in July 2017, based on the ECJ ruling regarding Bitcoin (see ECJ ruling of 22/10/2015, C-264/14 — Hedqvist) that mining "is not subject to VAT due to the lack of an identifiable service recipient".

From a Swiss VAT point of view, anyone operating a company is generally subject to tax (Art. 10 para. 1 VAT law). A person operating a company is deemed to be anyone that independently carries out a professional or commercial activity aimed at the sustainable generation of income from services and presents themselves to the outside world under their own name. In the case of an external appearance under one's own name, it is a requirement that contractual obligations towards service recipients are entered independently by the service provider. Is a miner operating a business? In line with the Austrian approach, the problem that the service recipient cannot be identified, and



contractual obligations cannot be proven also exists in Switzerland. Therefore, in such cases an external appearance under one's own name is also not applicable. In addition, entrepreneurial activity requires a service which — as described above — is defined as the granting of a consumable economic value to a third party in expectation of payment. Here too, the third party or the service recipient cannot be identified. Therefore, from a VAT point of view, entrepreneurial activity cannot be asserted during mining, meaning that the conditions of subjective tax liability have not been met.

5. SFTA – Quo vadis?

Many VAT questions related to crypto currency are still unanswered. However, it is slowly becoming apparent in which direction things will go. An imminent regulation would be beneficial to obtain legal certainty. The SFTA currently has many written submissions on this subject and the types of transactions described. These will necessitate numerous internal administrative clarifications and decisions. A written statement has already been drafted by the SFTA, however it is not yet ripe for judgement. We hope that the SFTA will publish guidelines regarding the VAT treatment of the varied transactions arising from crypto currencies as well as their necessary requirements by mid-year at the latest.



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