AUSTRIAN GUIDANCE ON TAXATION OF BITCOIN AND OTHER CRYPTOCURRENCIES

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Recently, the Ministry of Finance published guidance on the Austrian income and value added tax aspects of investing in the crypto space.

Given the recent roller-coaster rise and fall of the value of Bitcoins and other cryptocurrencies (such as Ethereum, Ripple, and Litecoin), and given the resulting interest of the mainstream media and the public at large, it is in principle good that the Ministry of Finance has summarized (and partly reiterated) its views on the tax consequences of investing in this new asset class.

Pursuant to the guidance, the following applies regarding income tax:

- For individuals holding cryptocurrencies as non-business assets, any gains (*e.g.*, upon the conversion of Bitcoin into euros) are tax-free if realized upon expiry of the one-year "speculation period" but are taxable if realized before that point in time (with a tax-exempt amount of €440 per annum applying).
- These rules also apply to the conversion of one cryptocurrency into another cryptocurrency (*e.g.*, conversion of Bitcoin into Litecoin). This is inconsistent, since it has long been held that the conversion of one foreign currency into another foreign currency (*e.g.*, conversion of U.S. dollars into pounds sterling) normally does not lead to a taxable event; only if the conversion gain is permanently secured (*e.g.*, by converting into euros or into a foreign currency that is tied to the euro) are gains realized for tax purposes and thus taxable. In the authors' view, the same should apply to conversions between cryptocurrencies. Apart from this legal argument, there is also a practical aspect to be considered: As every trader in cryptocurrencies knows, exchange rates on the various cryptocurrency exchanges are highly disparate (even more than normal forex rates) and it remains totally unclear which exchange rate is to be used for calculating the taxable gain.
- Where an investor purchases a specific cryptocurrency at different times and then sells a portion of his or her holdings from one wallet, the investor can freely determine which portion was sold, provided that he or she can fully document the acquisition dates and the acquisition costs of the individual purchases; otherwise, the F.I.F.O. (first in, first out) method is to apply when calculating the taxable income.
- The rules mentioned above (taxable within one year, tax-free after one year) shall not apply if cryptocurrencies are "rented out," with "interest" being earned *pro rata* temporis. In such a case, a later sale would lead to capital gains that qualify as investment income, which is taxable at a flat income tax rate of 27.5% (irrespective of the holding period). Yet again, this seems inconsistent: Interest is income from capital claims. Thus, only if one qualifies cryptocurrencies as capital claims (such as loans, bank deposits, and bonds) could

a gain from the sale of cryptocurrencies lead to investment income. Further, even if cryptocurrencies were to be qualified as capital claims, should such gains not be taxable at the flat income tax rate of 27.5% (but rather at the progressive income tax rate)?

- Further, the guidance states that income from the operation of cryptocurrency exchanges, from the operation of Bitcoin A.T.M.'s, and from the mining of cryptocurrencies will normally be considered as income from an active trade or business, which is taxable at the progressive income tax rate. While the authors would concur with the first two cases, a more nuanced conclusion is warranted in case of cryptocurrency "mining" (a term that unluckily evokes an association with large-scale heavy industrial operations, which probably led to this classification).
- What is missing in the guidance is an explanation of under which circumstances the trading of cryptocurrencies is to be considered as an active trade or business.
- What is also striking is that the Ministry of Finance does not deal with cryptoassets (such as Augur or Monaco). This seems to be an oversight, and we believe there should be no difference whether an investor sells Bitcoins or, for example, crypto-graphic tokens acquired in an initial coin offering ("I.C.O.").

Pursuant to the guidance, the following applies regarding value added tax:

- Following the E.C.J.'s case law,[1] the exchange of fiat currency into Bitcoins and vice versa is exempt from value added tax.
- Similarly, the mining of cryptocurrencies is not to be seen as a taxable service for lack of an identifiable recipient of the service.
- On the other hand, the supply of goods and services with Bitcoins used as consideration is to be treated in the same way as supplies of goods and services that are sold against fiat currency.

In summary, the guidance issued shows that trading with virtual assets can have real life tax consequences.

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[1] *Cf.* E.C.J. October 22, 2015, C-264/14 – *Hedqvist*.