

## Cryptoassets and their treatment for tax purposes

### Autumn Statement 2023 Representation by the Chartered Institute of Taxation

#### 1 Executive Summary

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 The CIOT (via the joint working group with the Association of Taxation Technicians) submitted responses to the Decentralised Finance (DeFi) consultations of 2022 and 2023, as well as that concerning the reform of the regulation framework within the Financial Services and Market Act 2000, released earlier this year<sup>1</sup>. In each of these submissions we called for the introduction of tailored legislation, within the existing tax code, which specifically addresses the tax treatment of cryptoassets.
- 1.3 This purpose of this representation is simply to re-iterate this call and take this opportunity to urge HM Treasury to address this as a matter of some urgency. The world of cryptoassets is developing at a rapid rate; unless there is a clear, uniform set of legislation across the taxes, the UK will lose out to other countries whose legal systems<sup>2</sup> recognise cryptoassets for the unique assets they are, providing certainty and a more attractive place to do business for investors.

#### 2 About us

- 2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

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<sup>1</sup> 'Future financial services regulatory regime for cryptoassets: consultation and call for evidence' – February 2023, see our responses to this consultation [here](#); click [here](#) for our submission to the 2022 DeFi consultation, and [here](#) for that in 2023

<sup>2</sup> See greater detail about this from our 2022 DeFi submission

- 2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA' and 'CTA (Fellow)', to represent the leading tax qualification.
- 2.5 Our stated objectives for the tax system include:
  - A legislative process that translates policy intentions into statute accurately and effectively, without unintended consequences.
  - Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
  - Greater certainty, so businesses and individuals can plan ahead with confidence.
  - A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
  - Responsive and competent tax administration, with a minimum of bureaucracy.

### 3 The current position

- 3.1 Cryptoassets are not like any tangible investment, they are generally much more volatile, less regulated but also very versatile - they can be invested, staked and loaned within DeFi, or be used as money's-worth consideration. Transactions can be processed automatically under smart contracts and such trades may run into the thousands each day for an individual trader. Despite this, for tax purposes, they are subject to the same laws as tangible assets like company shares; for example, HMRC treat them akin to shares within the capital tax gains (CGT) legislation (Taxation of Chargeable Gains Act 1992 – TCGA) and the cost pool rules. HMRC define cryptoassets as: "*cryptographically secured digital representations of value or contractual rights that can be transferred, stored and traded electronically*<sup>3</sup>". This is virtually identical to that proposed in the consultation concerning financial regulation (see footnote 1), but there is currently no uniform statutory definition for tax purposes.
- 3.2 With respect to the lex-situs of cryptoassets, there is no statute nor any judicial precedent to help investors and their advisers (or HMRC) ascertain whether income and gains are even subject to UK tax. According to HMRC, it is dependent upon the residence of the beneficial owner, though s.275A TCGA (concerning intangible or incorporeal property) is adopted with respect to those assets mined, forged or created within the UK. HMRC have ruled out using points of control or location of private key holder to determine lex-situs, but will instead take this single factor view of the residence of the owner.
- 3.3 Cryptoassets received in consideration for services provided will be subject to income tax (and potentially national insurance contributions for readily-convertible assets), in the same way as earnings from

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<sup>3</sup> HMRC manual CRYPTO10100

employment/self-employment. However, where this is not the case, HMRC's income tax treatment revolves around the long-standing 'badges of trade' tests to determine whether or not there is a trading activity. Where there is no trading activity, it needs to be considered based on the characteristics of the activity, whether the receipts of cryptoassets are revenue or capital in nature. These tests are based upon judicial cases dating back a hundred years in some instances and have only ever been considered in light of conventional, tangible assets. An amendment to the legislation, setting out whether a trade is taking place or not, is needed to give the certainty needed to investors.

- 3.4 As far as inheritance tax (IHT) is concerned, should the value of cryptoassets fall post-mortem (and these falls could be severe especially over even a short period of time), there is no relief for the death estate. Currently, only listed shares (included within the definition of 'qualifying investments' in s.178 Inheritance Tax Act 1984 - IHTA) sold at a loss within a year of death can qualify for relief. As well as a fall in value of these assets, executors and beneficiaries may not have access to a deceased's crypto wallet if the key is irretrievably lost. Without this key, the asset is effectively worthless, yet there is no relief for the IHT paid on the full value of the asset upon death.
- 3.5 The application of VAT to cryptoassets is not covered in any legislation either. HMRC's guidance states<sup>4</sup>: "*VAT is due in the normal way on any goods or services sold in exchange for cryptoasset exchange tokens*"...."*exchange tokens received by miners for their exchange token mining activities will generally be outside the scope of VAT*", and "*when exchange tokens are exchanged for goods and services, no VAT will be due on the supply of the token itself*". Given the wide range of application of cryptoassets, HMRC's guidance is wholly inadequate, and as well as changes to that guidance, amendments need to be made to the VAT Act 1994 to give clarity as to the VAT treatment of the various kinds of cryptoassets and their uses.

## 4 Our recommendations

- 4.1 Existing legislation needs to be amended to specifically address the tax treatment of cryptoassets across: income tax, CGT, IHT and VAT (but also ensuring corporation tax, stamp duty and stamp duty reserve tax legislation is addressed accordingly to provide the same degree of clarification). This follows recommendations made earlier this year by the Law Commission<sup>5</sup> that cryptoassets be recognised in law as a 'third form' of property (separate from 'things in possession' and 'things in action' which currently constitute personal property). If they should be recognised in law as a separate category of property, then the tax legislation should follow that sentiment.
- 4.2 The proposed definition of cryptoassets used for financial regulation purposes should apply equally to the taxes and be enshrined within the tax legislation; this would ensure certainty and a uniform treatment of the assets in the eyes of UK law generally.
- 4.3 The basis for determining the lex-situs of cryptoassets, for all tax purposes, should also be enshrined within legislation. Whilst the CIOT has expressed some concern over the current interpretation given by HMRC, whatever territorial test is adopted, it needs to be made consistently clear within legislation.
- 4.4 For CGT, whilst moves have been made to codify the tax treatment of those cryptoassets staked and lent as part of DeFi transactions, TCGA as a whole needs to be amended to recognise the unique definition of cryptoassets. Rather than HMRC's simply treating them akin to company shares, they need to be recognised

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<sup>4</sup> CRYPTO45000

<sup>5</sup> 'Digital Assets – Final Report'. Law Com No 412, June 2023 [Digital assets - Law Commission](#)

and addressed in their own right; for example, the cost pool rules, designed for conventional shares, simply cannot cope with the level of transactions involved with cryptoassets. In particular, unrepresented taxpayers are likely to fall into non-compliance as regards their cryptoasset transactions, either through lack of awareness or difficulties in accurately computing and reporting their liabilities. The current record-keeping burdens on such taxpayers are also unrealistic. Treating each wallet separately might be one such way to address this issue of recording share costs and reporting disposals<sup>6</sup>.

- 4.5 For income tax, instead of relying on the out-dated 'badges of trade' tests, predicated on tangible assets and their handling, clear legislation needs to be put into place about how an investor can determine whether their assets are to be taxed as trading income or miscellaneous revenue/receipts.
- 4.6 For IHT, we would recommend that cryptoassets be recognised within the definition of 'qualifying investments' in IHTA, alongside listed shares, to allow a deceased's estate to benefit from relief when their cryptoassets are sold at a loss post-death or the key is lost. The losses incurred with cryptoassets can be particularly drastic over a very short period of time, so to exclude the possibility of an executor's making a claim, which could be very costly.
- 4.7 The VAT Act needs to updating to identify, not only the situs of cryptoassets, but also their uses and how they will be treated. Currently there is nothing in the legislation as to how they will be treated or defined.

## 5 Acknowledgement of submission

- 5.1 We would be grateful if you could acknowledge safe receipt of this representation. We would welcome the opportunity to discuss these issues and the legislative proposals we have made with HMT and HMRC in more detail.

The Chartered Institute of Taxation

12 October 2023

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<sup>6</sup> This is similar to a recommendation made by the Office of Tax Simplification in May 2021, in which the same shares/units held in more than one portfolio should be held in separate pools (recommendation 4 within '*Capital Gains Tax – second report: Simplifying practical, technical and administrative issues*')