

## TAXATION OF CRYPTO ASSETS IN PORTUGAL

ANDRÉ DIAS • JOÃO COMENDA

With the development of the digital economy, new economic and financial assets, like tokens and cryptocurrencies, were created. Because of their high (potential) returns, they have become a refuge for investors, leading more and more people to invest in them.

This type of asset is not subject to the limits of monetary and exchange rate policies defined and controlled by central banks, and this lack of regulatory control encourages volatility and speculation. The innovation of these instruments involves significant legislative challenges, particularly regarding their legal nature, the regulation of the respective market and the taxation of their holders' profits.

Concerns such as money laundering and terrorist financing led to the publication of the report "Taxing Virtual Currencies", by OECD, in October 2020, which addresses the existing legislative gaps for the main types of taxes and gives countries that want to strengthen their tax policy in this area some recommendations. Among OECD's recommendations there was the need to provide guides on tax treatment of virtual currencies that are clear, regularly updated, and consistent with the treatment of other assets. In Portugal, unlike many other European countries, such regulation was not yet implemented.

### BUT IS THERE A TAX REGIME IN PORTUGAL?

In Portugal, the law is silent as to how this type of asset is taxed.

Between March and May 2020, the purchase and sale of cryptocurrencies in Portugal increased by 60% compared to the same period in the previous year. However, against what would be expected, neither the Government nor the Parliament have been following this growth through a clear and adequate legislative framework.

More recently and following the announcement that the Bank of Portugal has taken over the supervision of entities managing cryptocurrencies and the approval of anti-money laundering rules specifically addressed to transactions on these assets, there have been rumors of a change in the position of the Portuguese Tax Authorities to consider that this income should be taxed as capital income (at a rate of 28% or 35% if from a "tax haven"). But no amendments have been approved (yet).

### ... SO HOW ARE THEY TAXED CURRENTLY?

In the absence of an express taxation, and after being questioned by several taxpayers, Tax Authorities took the only position that would be acceptable under the law.

In what concerns Personal Income Tax ("PIT"), the Tax Authorities confirmed that the income from this type of assets is presumably not taxable, unless the income arises from the performance of constant, regular professional activity. However, it has not been clarified when there is a regular performance of a professional activity for this purpose, which creates uncertainty.

Tax Authorities have not yet disclosed any kind of understanding regarding Corporate Income Tax (“CIT”). But, as the taxable profit of legal persons is based on the net profit recorded in the company’s financial statements for the period and any income earned by a company must be registered in its accounts, the income arising from transactions on bitcoins should be subject to CIT.

Regarding VAT treatment of the transactions on bitcoins, Tax Authorities considered, following the understanding of CJEU in the *Hedqvist* case (C-264/14), that bitcoins are comparable to fiduciary currency and their exchange for fiduciary currency, or vice versa, carried out for consideration, although characterized as a supply of services for VAT purposes, will be exempt from Portuguese VAT.

### WHAT'S NEXT?

At the income tax level, very few countries have considered cryptocurrencies as fiduciary currency because they have limited acceptance, lack intrinsic value (they are not linked to the value of any commodity or foreign currency), are volatile, are not issued by a public authority and are not regulated.

The current tax framework for cryptocurrencies leaves Portugal on the (increasingly short) list of countries that still do not tax income from this type of asset, which makes Portugal an attractive destination for investors of this kind.

But it is difficult to imagine that these gains will escape the tax net in the future. The 2022 State Budget to be presented in the next two months could be a turning point and new tax rules could be approved starting January 1, 2022.