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# NEWSLETTER

INITIAL COIN OFFERINGS,  
CRYPTOCURRENCY AND VAT

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## SUMMARY

Different issues regarding the taxation applicable to the transactions involving virtual products and, particularly, cryptocurrencies, have, recently, been raised before the Portuguese Tax Authority, which has now issued, a new binding ruling addressing VAT issues in the context of cryptocurrencies and tokens.



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## BACKGROUND

Different issues regarding the taxation applicable to the transactions involving virtual products, namely cryptocurrencies and blockchain, have, recently, been raised before the Portuguese Tax Authority, through binding tax ruling requests.

Following the questions raised regarding the liability to income tax of income derived from the sale of *bitcoins* that were clarified on the binding ruling published on December, 27, 2017, the Portuguese Tax Authority now issued a binding ruling addressing the liability to VAT of transactions of goods, commercialized, through the internet without any physical identity, namely in the context of cryptocurrencies and an Initial Coin Offering (ICO).

## INITIAL COIN OFFERINGS (ICO)

The binding tax ruling request arose in the context of an Initial Coin Offering, i.e. the issuance of cryptocurrency, on the one

hand, for the purpose of financing a company and enterprise, and on the other hand, in exchange for a Token that can take on a number of characteristics and, in particular in the blockchain Ethereum, allow the construction and execution of smart contracts with self-enforceability characteristics.

The multiple ICOs carried out around the world in the recent past demonstrate that they can take on multiple forms and, in particular, the tokens issued may have substantially different characteristics. Without prejudice to the relevant regulatory issues that are commonly raised, as the European Securities and Markets Authority points out, the Tokens may be categorized in a variety of ways (although a categorization does not necessarily exclude another categorization).

In particular, the following should be emphasized:

- i. *Currency or Value Tokens*, when they function similarly to a fiduciary

## Initial Coin Offerings, Cryptocurrency and VAT

currency, namely, when they intend, more strictly, to represent the value of that currency and serve as an potential medium of exchange (e.g. Bitcoin);

ii. *Securities Tokens and Equity Tokens*, when the smart contract deals with financial instruments and securities, including stock, loans, and derivatives, and have often served as a “vehicle” to mimic an Initial Public Offering (Initial Public Offer) on blockchain platforms;

iii. *Utility Tokens*, when its issuance does not imply the granting of rights beyond the ownership of the Token itself, and may, on the one hand, admit access to a product or service of the company (e.g. a *Usage Token*) or the permission to contribute and participate in a certain work (e.g. Work Token, normally associated with decentralized applications and services) but also, on the other hand, admit their sale in the market (often

also use issued in the context of an ICO; and

iv. *Asset Tokens*, when it corresponds to an underlying physical asset (e.g. gold or real estate).

## THE TAX RULING REQUEST

In this context, with respect to the Binding Information Request formulated, the virtual product in question (a Token), was described as being similar to Bitcoins, with the particularity of being built on top of the existing blockchain Ethereum. Although the details about the Token are scarce, the Token under consideration seems to resemble a *Utility / Usage* Token.

## THE VAT ISSUES RAISED

Considering the intrinsic features of the product under analysis and the platform of its commercialization, questions were raised to whether or not this transaction would be liable to VAT, particularly:

i. the possibility to apply the VAT exemption foreseen for transactions

concerning currency, bank notes and coins used as legal tender.

- ii. the concept and consequences, for VAT purposes, of the rendering of services through an electronic platform; and
- iii. if it is mandatory the register on MOSS, for an entity that supplies this type of services.

## THE TAX AUTHORITY'S VIEW

### I. THE VAT EXEMPTION

Taking into consideration the factual description provided to the Portuguese Tax Authority, they concluded that the transactions concerning the Token may be considered as an onerous transfer of goods. In this sense, such transactions ought to be subject to the general rule stated in the Portuguese VAT Code according to which all transfers of goods and rendering of services are liable to VAT.

Notwithstanding that conclusion, the Portuguese Tax Authority, following the European Court of Justice decision on the

*Hedqvist* case (C-264/14) concerning the transfer of Bitcoin, and based on the similarities (from the Tax Authority's perspective) between the two virtual products in questions, decided that the transfer of Token may be VAT exempted under the exemption foreseen for transactions concerning currency, bank notes and coins used as legal tender.

However, according to the Portuguese Tax Authority for that exemption to apply the transfer of Token must consist, only, in an alternative form of payment. In our understanding, the Token characterization would normally require a case-by-case analysis in order to ascertain its inner workings and purpose. As the European Court of Justice mentioned in the *Hedqvist* case, that ruling was issued under the assumption that the cryptocurrency in question "*ha[d] no purpose other than to be a means of payment*".

On this subject, the Portuguese Tax Authority also considered that this

exemption may apply in other Member States since VAT is a harmonized system.

## II. THE PLACE OF PROVISION OF AN ELECTRONIC SERVICE

Addressing the other questions, the Portuguese Tax Authority described and explained the rules foreseen to establish the place where the electronic rendering of services is taxable.

According to the Portuguese VAT Code and the tax ruling, the electronic rendering of services is liable to taxation on the state of the acquirer, whether the latter is a final consumer domiciled in the EU (a non-taxable person) (B2C) or a taxable entity also domiciled in the EU (B2B), and regardless the state of the supplier.

In such a case, the supplier has the obligation to assess the VAT, even if the acquirer is resident of another state.

Should such services be provided to non-taxable persons established outside the EU, the corresponding services shall not be deemed to be located in the EU

territory. However, some electronic services supplied to purchasers established outside the EU are taxed on national territory when they are actually used therein and the provider is established therein.

## III. THE MINI ONE STOP SHOP (MOSS)

In this last scenario, the supplier has the option to register in each state where it renders electronic services or to register at MOSS, which allows him to comply with all the different VAT obligations in one Member State.

## FINAL COMMENTS

This new binding ruling sheds some light on the position of the Portuguese Tax Authority regarding the liability to taxation of virtual products and cryptocurrencies.

Up until now, the Portuguese position seems to lead to an interpretation that allows the exemption of the income derived from the sale of cryptocurrency, under certain circumstances, but now,



also, in the field of taxes on consumption  
(VAT).

Lisbon, May 11<sup>th</sup>, 2018

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