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Portuguese Tax Authority Issues Ruling on ICO and VAT: Expert Take

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Transactions involving cryptocurrencies are raising interesting questions and concerns in the field of taxation. The supply of electronic goods and services has implications in the field of consumption taxation, which has been harmonized in the European Union through the implementation of the value added taxation (VAT) system. Following a recent tax ruling issued by the Portuguese Tax Authority (PTA), this article discusses VAT-related implications of cryptocurrencies, tokens, and initial coin offerings (ICO).

On the nature of tokens and VAT system

Tokens have an essential role in initial coin offerings, where tokens may be used as a medium of exchange with a function similar to a fiduciary currency, e.g. Bitcoin (currency or value tokens). However, tokens can also be used in several other contexts and leverage functionalities enabled by smart contracts. Thus, they may embody various functions and characteristics depending on the specific circumstances in question. For instance, tokens can be used as smart contracts related to financial instruments and securities, including stock, loans, and derivatives (securities and equity tokens), they can provide access to a product or a service, or permit the contribution and participation in a certain job (usage or work tokens; utility tokens), and may correspond to an underlying physical asset such as gold or real estate (asset tokens).

According to VAT regulations, VAT applicability, liability, and exemption from VAT all depend on the nature of the goods or the services subject to supply as well as certain other circumstances, e.g. the parties of the transaction. As tokens can be used for several purposes, VAT implications of a single token may vary based on its characteristics, functionalities, and final use. Furthermore, VAT implications of virtual products as electronic goods and services are still somewhat unestablished, leaving room for interpretation. Following this legal uncertainty, the PTA recently issued a **binding tax ruling** (only in Portuguese) addressing the VAT liability of a token in the context of an initial coin offering.

Tax ruling by the Portuguese Tax Authority

The tax ruling request arose from an ICO and the token in question, which had been built on top of Ethereum, was described to be similar to Bitcoin. However, the scarce information provided indicates that it actually seemed to resemble a utility/usage token. The essential question brought up in the request was whether VAT exemption could be granted to the token by applying the exemption foreseen for transactions concerning currency, banknotes, and coins used as legal tender. Other matters to be discussed concerned the rendering of services through an electronic platform in the light of VAT purposes as well as the registration on the Mini One Stop Shop ("MOSS").

The PTA concluded that, in principle, transactions containing a token may be considered an onerous transfer of goods and, thus, *prima facie* liable to VAT. Notwithstanding, the Tax Authority confirmed that the transfer of tokens may be exempt from VAT under the exemption foreseen for transactions concerning currency, banknotes, and coins used as legal tender. Furthermore, it was established that the VAT exemption only applies if the transfer of tokens consists merely in an alternative form of payment. In other words, attention needs to be paid to the characteristics and functions of the token in question, which typically requires a case-by-case analysis. Lastly, the PTA considered that the VAT exemption may also apply in other EU Member States since VAT is a harmonized system.

The view adopted by the PTA is in line with the previous decision issued by the European Court of Justice (ECJ) on the [Hedqvist case \(C-264/14\)](#), where the ECJ established that the exchange of traditional currency for Bitcoins and vice versa constituted the supply of services under the VAT directive. However, the supply of services in question was regarded as exempt from VAT under the exemption concerning legal tender. It is to be noted that the ECJ also founded its conclusion on the common factual ground (in the specific circumstances of that case) according to which "the 'bitcoin' virtual currency has no other purpose than to be a means of payment," which is also indicative of a need for a case-by-case analysis, namely with close attention to each token's functions and characteristics.

With regard to the supply of electronic services, the PTA stated that, pursuant to the Portuguese VAT Code, the electronic rendering of services is taxable in the state of the acquirer, whether the latter is a consumer (B2C) or a company (B2B), and regardless of the state of the supplier. Consequently, the supplier must assess the VAT even if the acquirer is a resident in another state. Apart from the possibility to register in each state where the supplier renders electronic services, the supplier may also register at MOSS, which enables all VAT obligations to be complied with in one EU Member State.

Other tax aspects: Income tax exemption on the sale of cryptocurrencies

In addition to the VAT-related implications discussed above, cryptocurrencies have raised other tax-related questions in Portugal. The PTA has already deliberated on income taxation of the sale and purchase of cryptocurrencies in a previous **tax ruling** (only in Portuguese). **According to this ruling, also touched upon at Cointelegraph**, the Portuguese personal income taxation regime did not apply to the income derived from the sale of cryptocurrency, as no income category covers cryptocurrency gains, provided that the sale is not performed in the context of a business activity. Thus, there was no legal basis in Portugal for income taxation of cryptocurrency gains in those circumstances. However, as opposed to consumption taxation, income taxation is not harmonized at the European Union level. Consequently, the views adopted by the PTA regarding income taxation and cryptocurrencies have primarily only a domestic impact.

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