DOI: 10.37372/mrttvpt.2020.1.6

Halász, Zsolt*: Legal challenges related to virtual currencies especially in the field of taxation

Abstract
The appearance of the virtual currencies opens up several questions in the field of taxation of different transactions, gains, incomes with virtual currency involvement. Along with the significant economic (primarily monetary) impacts, there is a long list of legal issues related to the virtual currencies to be answered. Within the territory of these legal issues, this paper focuses mainly on the taxation of incomes, transactions, etc., received in or implemented by virtual currencies. The author gives a brief background of relevant regulatory issues and attempts of individual countries. The paper considers taxation issues that virtual currencies raise concerning the taxation of incomes and also to the sale of goods and services against the virtual currency. As a conclusion, the author emphasises the need for regulatory answers and univocal definition of tax obligations related to virtual currencies.

Keywords: virtual currencies, taxation, income tax

Absztrakt
A virtuális valuták megjelenése számos kérdést vet fel a különféle tranzakciók, nyereségek, jövedelmek adóztatása terén. A jelentős gazdasági (különösen a monetáris) hatások mellett, számos tisztázandó jogi kérdés maradt a virtuális valutákkal kapcsolatban. E jogi kérdések területén, a tanulmány elsősorban a jövedelmek, tranzakciók stb. adóztatására összpontosít, amelyeket virtuális valutákban kapnak vagy fizetnek ki. A szerző röviden ismerteti egyes országoknak az említett kérdések területén tett szabályozási kísérleteit, illetve próbálkozásait. A tanulmány figyelembe vesz olyan adózási kérdéseket, mint a virtuális valutában felvett jövedelem adóztatása, valamint az áruk és szolgáltatások virtuális valuta ellenében történő értékesítése. Következtetésként a szerző hangsúlyozza a jogi szabályozási válaszok szükségességét és a virtuális valutákhoz kapcsolódó adókötelezettségek egyértelmű meghatározását.

Kulcsszavak: virtuális valuta, adózás, jövedelemadó

***

1. Introduction

The emergence of virtual currencies or virtual assets raises several legal and regulatory issues. How can they be classified? Are they to be regarded as money, or value, or data, or asset, or property? What are the consequences off the different approaches of classification?

In the field of the regulation, a very generic question pops also up frequently, namely whether the virtual currencies need to be regulated at all? If yes, what and how to regulate? If one approaches this topic through the specific territory of taxation, it is easy to understand, that a certain level of regulation: clear definitions, clearly defined obligations, clear categories are essential.

The virtual currencies have very different implications on the different fields of finances (e.g. on lending and other financial services, taxation, law enforcement, etc.)

* HALÁSZ Zsolt, dr., PhD., tanszékvezető egyetemi docens, Pázmány Péter Katolikus Egyetem, Jog és Államtudományi Kar, Pénzügyi Jogi Tanszék, Budapest
Zsolt HALÁSZ, associate professor, Head of Financial Law Department, Péter Pázmány Catholic University, Faculty of Law, Budapest, Hungary
ORCID: 0000-0002-7463-8619, halasz.zsolt@jak.ppke.hu
The author does not do any businesses related to virtual assets.

It is debatable whether virtual devices should be considered money. There are various approaches (by central bankers, lawyers, tax authorities and advisers), which all put controversial, but valid arguments on the table. For mere the purpose of taxation, the most simple way would be to recognise the virtual assets as money.
One should note, that there are some further relevant questions: virtual currencies and financial/monetary sovereignty; impacts on monetary policy issues, origins of virtual currencies; payment; lending and borrowing transactions; investment issues. This paper focuses however only on the issues related to taxation.

2. The virtual currencies, their markets and areas of use

The first virtual currency has been created in 2009. Since then, the number of these assets has grown rapidly: in January 2018 one could count 1500, in June 2019 there were more than 2200, a bit more than one year later 3000. In 2019 the number of virtual currencies has begun to grow exponentially, by the end of the year it exceeded 5000. In April 2020 the counter stands at 5300.
The market capitalisation varying between USD 200 and 250 bn (comparable with Hungary's GDP around USD 130 bn). The most dominant virtual currencies are the Bitcoin (around 65%of the market capitalisation) and the Ethereum (between 8-9%)[269].
Virtual currencies are not specific assets used only somewhere in a galaxy far, far away. They are already in everyday use in noticeable volume for example in financial services (loans intermediated by P2P platforms or used for coverage), in payment services for money transfers and also for settlement the countervalue of products and services. They can appear as revenue of companies and private individual (gain of mining or salaries paid in virtual currencies), but also as a specific form of capital/equity for companies. They can be targets of investments similar to the traditional financial instruments.
There are several legal issues related to the emergence and usage of virtual currencies:
- the new legal challenges related to the P2P loans in the light of the regulation applicable to traditional financial services;
- the regulation of risk management of loans disbursed in virtual currency – how to tackle the similar type of risks as the risks of FX loans;
- the specific issues related to the virtual assets used as loan coverage;
- customer and investor protection, and the lack of them;
- the regulation method of exchange services (between fiat and virtual currencies);
- the payments implemented in virtual currencies especially in case of specific payments like salaries, taxes, etc.;
- anti-money laundering and counter-terrorist financing;
- the specific issues of the company law (equity in virtual currency, bankruptcy);
- finally the issues of taxation: what types of gains are to be taxed and by what method; or how can the transactions be settled by virtual currencies be taxed under the current VAT regime?

3. Main characteristics of the virtual currencies

One of the main differences between fiat and virtual currencies is the non-regulated nature of the latter ones. Non-regulated is the issuance, the creation of them, and in may terms

[269] Source of data: www.coinmarketcap.com

the usage either, however, more and more jurisdictions started applying less o more detailed rules on certain aspects. Any developer group can create its own new virtual. The issuers/creators are usually not known, users trust in the system itself.
Since the virtual currencies are not issued by any state or central bank, there is no legal background/guarantee behind them. Central banks don't recognise them as currencies, they refer them as virtual assets.
The non-regulated usage means, that – where they are not prohibited – anyone can use and accept them, but only at own risk. Exchange services between virtual currencies and between fiat and virtual currencies are not regulated either and unlike the exchange services between fiat currencies, this type of services is not bound to supervisory authorisation in most countries.
Due to their non-regulated nature, no formal process exists for their termination or cessation. Any virtual currency can disappear at any time without a formal process, any guarantee and compensation from the creators/issuers.
Despite the generally unregulated nature, one should note, that the blockchain and distributed ledger technology is not used only for the operation of virtual currencies. In Switzerland, the Federal Government has already tabled the bill on the Federal Law on Adaptation of federal law to developments in the technology of distributed electronic registers (DLT-Law bill)[270]. The consultation on the proposal started in March 2019, but the bill has not been endorsed yet. This proposal contains several amendments on the relevant laws where the distributed ledger technology could be used beyond the virtual currencies. The most important novelties would affect the securities law (DLT rights as "new forms of securities"), but several amendments are proposed also in the field of bankruptcy law, private international law, financial services law and the supervision of it concerning crypto assets, the law on the trading of blockchain-based securities. Beyond these territories, there are obviously several more parts of the legal system, which requires adaptation e.g. specific fields of administration, administrative procedure, taxation, property law, the law of obligations, law on the procedure of executions.
The most comprehensive regulatory response in the last years has been set up in Malta. The Maltese Parliament has adopted three laws establishing the legal basis of DLT based businesses and setting up the relevant safeguards: the Virtual Financial Assets Act (VFA Act), the Innovative Technology Arrangements and Services Act (ITAS Act), and the Malta Digital Innovation Authority Act (MDIA Act).
Beside the unregulated nature of the virtual currencies, there is a second, similarly important characteristic of them: the global usage. Virtual currencies can be used for payments, transferred stored anywhere around the world. Even if some countries are trying to ban or limit the use of virtual currencies, these endeavours cannot exterminate the usage of the virtual currencies. On the other hand, in most countries, virtual currencies can be freely used. The possibility of global usage can be regarded as an advantage and as a disadvantage either. The general consequence is, however, that isolated particular regulations are useless, the issue of virtual currencies would require global regulatory answers.

[270] Bundesgesetz Entwurf zur Anpassung des Bundesrechts an Entwicklungender Technik verteilter elektronischer Register, https://www.admin.ch/opc/de/federal-gazette/2020/329.pdf (Letöltés: 2020. 04. 13.)

Concerning the technology, the decentralized nature of the virtual currencies has to be emphasized. It means, there is no central service provider exists, the operation of the whole system is based on the internet, the blockchain and distributed ledger technology. There is no central authority (like a central bank in case of fiat currencies), who creates and issues the virtual currencies. They are created by private developers, who are independent of state authorities. Since state authorities don't participate in the creation and the operation of virtual currencies, states cannot defend users against any malfunction. However, as more than 5000 examples show, virtual currencies can exist without the state. The question is, whether states can exist, survive and be successful without own currency, especially in case if virtual currencies gain more importance.
Finally, virtual currencies seem to provide anonymity for its user. Many users believe it is just the same as the anonymity provided by cash. In fact, users are known, however not by their natural ID-data. Users are known by their public keys/addresses. In practice, the real identity of the users can be traced back in case of most virtual currencies (e.g. Bitcoin or Ethereum, etc.), but in case of some others (e.g. Monero, Zcash) it is not possible. Since in the case of most virtual currencies the real identity can be tracked back, this situation is called pseudo-anonymity or pseudonymity. Both situation – real and pseudo-anonymity – raises relevant legal issues. The real anonymity together with the possibility of global usage opens a wide door for illicit activities as money laundering, terrorist financing, etc., while the pseudo-anonymity raises data protection issues (e.g. wallets used for keeping the coins become transparent).

4. Can virtual currencies be recognised as money?

After having a look at the statements of different authorities one can observe the lack of consensus on the legal characterisation of virtual currencies.
The European Banking Authority defines virtual currencies as "a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment, and can be transferred, stored or traded electronically. The main actors are users, exchanges, trade platforms, inventors, and e-wallet providers"[271].
European Central Bank's report on virtual currencies uses a very similar conceptual description. ECB points out that key actors of the virtual currencies are neither regulated nor supervised and users do not benefit from legal protection such as redeemability or a deposit guaranty scheme and are more exposed to the various risks that regulation usually mitigates.[272]
In the United States, at the federal level, the IRS (the federal tax authority) has issued a notice[273] on the income tax treatment of virtual currencies. The IRS treats virtual currencies as property, however, the tax authority's notice leaves several questions unanswered. The Canada Revenue Agency (CRA) regards virtual currencies as commodity[274].
In the field of VAT taxation, the European Court of Justice also had to analyse the nature and operation of the virtual currencies. The question the Court had to answer was: whether

[271] EBA Opinion on 'virtual currencies'EBA/Op/2014/08 4 July 2014
[272] European Central Bank: Virtual Currency Schemes – further analysis, Eurepean Central Bank, February 2015
[273] IRS Notice 2014-21, 2014-16 I.R.B. 938
[274] Canada Revenue Agency Document No. 2013-051470117 of 23 December 2013

the exchange transactions of fiat currency for units of the Bitcoin and vice versa, in return for the payment of a sum equal to the difference between, on the one hand, the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his clients, constitutes the supply of services for consideration within the meaning of the relevant article of the VAT Directive? In its ruling, the Court declared „bitcoin virtual currency, being a contractual means of payment, cannot be regarded as a current account or a deposit account, a payment or a transfer. Moreover, (…) the 'bitcoin' virtual currency is a direct means of payment between the operators that accept it. Transactions involving non-traditional currencies, that is to say, currencies other than those that are legal tender in one or more countries, in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions. It is common ground that the 'bitcoin' virtual currency is neither a security conferring a property right nor a security of a comparable nature.[275] The Court ruled that exchange services between fiat and virtual currencies constitute supply of services within the meaning of the applicable rules of the VAT Directive. The Court also ruled that these transactions are exempt from VAT.

Even if many stakeholders celebrated this ruling as a general recognition of Bitcoin as money, there are a number of limitations, which has to be observed. Firstly, the Court ruling is not generally applicable for each virtual currency, it is only about exchange transactions between fiat currencies and Bitcoin (only). Secondly, the ruling doesn't reflect on other VAT issues than exchange services. It doesn't give any guidance for example on the calculation on the tax base in case of sale of goods or services.

The EU Member States generally follow the requirements of ECJ's Hedquist ruling (C-264/14) and exchange transactions between fiat and virtual currencies are deemed to be exempt from VAT.

The Portuguese VAT code, strictly from a tax perspective treats virtual currencies as means of payment similar traditional currencies[276].

A special detailed VAT regulation is applicable in Switzerland where the VAT law makes difference between the sale of payment tokens, asset tokens and utility tokens. Only the latter one is taxable by VAT and only in case of Swiss resident investors.

Despite the Hedquist ruling of the ECJ, it should be noted that the European Central Bank represents an opposite view on virtual currencies. According to the ECB VCs are not used widely to exchange value, they are not legally money, and – in the absence of minted versions – they are not currency either, and no virtual currency is a currency. However, it does not exclude to use virtual currencies as contractual money between private parties.[277]

Unfortunately, in Hungary, there is no specific legislation is applicable for any kinds of virtual currency transaction. Hungarian laws (including tax laws) don't refer at all to virtual currencies, and there is no official guidance by government or tax authority on virtual currencies and their taxation.

5. Virtual currencies and taxation

[275] C-264/14. Skatteverket v David Hedqvist ECLI:EU:C:2015:718 [22], [42], [49], [55]

[276] Portuguese Tax Authority Ruling No 12904 of 15 February 2018

[277] European Central Bank: *Virtual Currency Schemes – further analysis*, European Central Bank, February 2015, 24.

The very first question in the field of taxation is whether taxes can be paid in virtual currencies. Most states or maybe each of them collect taxes in their own fiat currency. Tax collection in own currency is a question of sovereignty. If tax payments in virtual currencies would be allowed, it may mean the rejection of the own currency with all of its consequences. On the other hand, if it is not allowed, it would mean a serious barrier for virtual currency usage due to the exchange risks.

In case of businesses based on and/or implemented in virtual currencies, it may be reasonable to make the tax payments possible in virtual currencies. In Canton Zug of Switzerland, a smart solution has been found for this issue, where certain tax (Commerce registry duties) payments in virtual currencies are have made possible since 2017. For eliminating the risks on the state's side, the virtual currency "payments" are implemented through a selected intermediary company. The tax amount to be paid is defined in CHF and the intermediary applies always the actual exchange rate. The amounts payable are sent in Bitcoin or Ethereum, received in CHF by the authority.

In the field of revenue taxation, the taxation of mining activities, salaries, exchanges gains are to be addressed.

For taxation of mining activities of private individuals, the question is how to define the revenue type, which revenue category of the personal income tax[278] is to be applied. Since this activity doesn't fit in any of the separately taxable incomes, it is most likely taxable as an independent activity. In the case of company tax, revenues arising from mining activities may be regarded as financial revenues if the virtual currency mined is recognised as money. (If not recognised, it can be part of the general business revenues). Within the framework of the Hungarian accounting rules, it is still an open question how to calculate provisions related to substantial exchange rate changes? The most important challenge is the lack of the precisely defined applicable exchange rate. Neither a globally uniform exchange rate for cryptocurrencies exist, nor the Hungarian tax/accounting laws define it. Cryptocurrencies are traded on various electronic marketplaces/platforms where different quotations are to be found. In case of salaries or other remuneration earned and received in a virtual currency the same question crops up. In this case, the lack of definition results in further uncertainties in timing: what exchange rate is to be applied? The date of transaction or year-end or an average of a certain period of time?

A specific field of taxable incomes is the gains from exchange activities. According to the provisions of the Hungarian Act on personal income tax[279] the non-commercial gains arising from fiat currency exchange activities are exempt from income taxation in Hungary. However, the referred provisions are applicable for gains from exchange transactions between fiat currency, since the Hungarian regulations (both tax and other) don't recognise virtual currencies as currency. Consequently, any gains arising from exchange activities to, from and between virtual currencies are taxable in each case.

Besides the income taxation, the taxation of commercial activities (VAT) raises important questions, since the countervalue for supply goods or services can be settled more and more often by virtual currencies. The question is in these cases, how to define such transactions in the VAT system? Can virtual currency transfer be regarded as payment? In its well known and above referred Hedquist ruling the European Court of Justice has already declared that exchange services between Bitcoin and fiat currencies are to be

[278] Act CXVIII of 1995 on the personal income tax
[279] Annex 1. Para 7.1

regarded as financial services and they are exempt from VAT (based on Art 135 para (1) e) of Directive 2006/112/EC). This ruling gives guidance for special cases only.
Payments in virtual currencies for goods and services raise consequently specific issues in case if virtual currencies are not recognised as money. In this case, the transactions involving the exchange of any virtual currency for goods and services is treated as barter transaction: a combination of supply of goods or services on the one hand and the supply of virtual currency on the other. This situation leads to a disadvantageous outcome, however in certain countries (e.g. in New Zealand) these transactions are still subject of GST (Goods and Services Tax – a similar tax to EU VAT)[280].
Within the EU the same issue arises. Purchases settled by any kind of virtual currencies raising different question especially related to the determination of tax base. Art. 230 of the VAT Directive requires to express the amounts appearing on the invoice in any currency, and the amount of VAT payable is to be expressed in the national currency of the respective Member State. The tax base is referred as taxable amount in the Directive, that includes everything which constitutes consideration. Consequently means the tax base also has to be expressed in any currency. The Directive (adopted in 2006) doesn't refer to virtual currencies. Applying the methods of historical interpretation the concept of currency may mean fiat currency only.
Within the framework of VAT, the use of virtual currencies as a means of payments may also require documenting exchange rates.
According to the Hungarian Act on the Value Added Tax[281] in case of purchases of goods and services, the tax base is to be determined as countervalue expressed in money. If the countervalue is not expressed in money the amount of the tax base has to be calculated on the basis of open market value. The most crucial issue is, however, how to define the open market value? Art. 80. of the Act on VAT describes what exchange rates can be applied. These are however only rates for conversion fiat currencies. Neither the central bank nor the commercial banks publish official rates for conversion of virtual currencies. Under these circumstances, there is substantial uncertainty on the exchange rate to be applied. Exchange rates published by different platforms[282] could be applied, but there is no official calculation mechanism defined and to be applied. In case of a purchase, the transaction would be deemed as an exchange of goods (the goods to be sold on one hand and the virtual currency on the other), the VAT rules would require the determination of the open market price of both calculation of the tax base. At this point, one has to face the same, above described issue of the missing official exchange rate determination method. As a solution, there are two possible ways. Either virtual currencies would be declared as money (currency) in general or at least for taxation purposes and in these cases, banks could start publishing conversion rates. The current, unregulated situation results in legal uncertainty and consequently impedes the freedom of enterprise and contract.
In certain countries such (e.g. in Norway) virtual currencies are considered as assets being subject of the wealth tax. Taxable is the capital gain, (while losses are deductible from tax base), and the net wealth of the individual taxpayers[283].

[280] Deemple BUDHIA, Tom HUNT: New Zealand, In: Michael S SACKHEIM, Nathan A HOWELL (eds.): The Virtual Currency Regulation Review, The Law Business Research Ltd., London, 2019
[281] Act CXXVII. of 2007 Art. 65-66.
[282] E.g. Coinmarketcap, Bloomberg, Coinbase
[283] Cf. Art. 5-1 (2) and 6-2 (1) of Norwegian Tax Act No. 14. of 26 March 1999

6. Virtual currencies and law enforcement

The substantial question is, whether the concept and technical characteristics of the virtual currencies – the blockchain and distributed ledger technology – allow any law enforcement measures implemented by the state authorities against the virtual currency owners/users?

Access to the owned virtual currencies happens through wallets, which can be web-based, software on computers or mobile devices, hardware or even paper wallets. These wallets are not similar to a bank account, where the bank can be obliged to implement law enforcement measures. Access to the stored data is possible only by using the valid private key. The private key is generated by the owner and the virtual currency coins are inaccessible without the private key.

There are some prerequisites of any kind of seizure of virtual currency coins. Firstly, the tracking and identification of the owner would be needed. Most of the virtual currencies (e.g. Bitcoin) can be tracked back, while Monero and some others not.

Even if the owner is identified, access to the private key is essential either. Voluntary handing over the private keys can be questionable. Additionally, private keys can be duplicated and stored in different places. Consequently, for successful law enforcement measures, authorities have to transfer the virtual currency coins to be seized to their official wallet as soon as possible after receiving the private key. Obviously, the prerequisite of this activity the creation of official wallets. Unfortunately, the relevant Hungarian laws in force don't contain any specific rules on the creation and management of official virtual currency wallets.

Since efficient law enforcement is the basis of the legal system, the mentioned issues of the can be regarded as the most serious risk the legal system as a whole has to face.

7. Conclusion

As a conclusion, we can clearly see, that the basic question is not whether regulation is needed! The real questions are how to define, and classify virtual currencies and what details are to be regulated to maintain a functional financial and legal system?

Obviously, society and law – including taxation – have to adapt themselves to the new technology and technology-based finances. The first possible regulatory steps are:

1) Virtual currencies commonly used as means of exchange should be at least for taxation purposes recognised as money. Especially, but not exclusively this recognition would be essential in case of the applicable rules on the calculation method of VAT basis, the fiat/virtual currency exchange services, the loans disbursed in virtual currency, etc.

2) Regulatory steps should not focus on virtual currencies or virtual assets only. The blockchain and the distributed ledger technology (DLT) can be used fruitfully in several other territories of law (e.g. securities), as the Swiss legislation shows.

3) Regulation and monitoring of the fiat/virtual currency exchange/intermediary activities (not solely AML) would be essential.

4) For the case of taxation: clear regulatory guidelines would be essential. For the requirement of legal certainty, the consistency of law – especially in the field of taxation – and a clear regulatory framework has to be ensured.

Consequently, one can discover several reasons for justification of legal regulation. Head in the sand is not an option.

References:

[1] www.coinmarketcap.com
[2] Act CXVIII of 1995 on the personal income tax
[3] Act CXXVII. of 2007 on the value-added tax
[4] Deemple BUDHIA, Tom HUNT: New Zealand, In: Michael S SACKHEIM, Nathan A. HOWELL (eds.): The Virtual Currency Regulation Review, The Law Business Research Ltd., London, 2019
[5] Bundesgesetz Entwurf zur Anpassung des Bundesrechts an Entwicklungender Technik verteilter elektronischer Register, https://www.admin.ch/opc/de/federal-gazette/2020/329.pdf (Letöltés: 2020. 04. 13.)
[6] Canada Revenue Agency Document No. 2013-051470117 of 23 December 2013
[7] C-264/14. Skatteverket kontra David Hedqvist ECLI:EU:C:2015:718 [22], [42], [49], [55]
[8] EBA Opinion on 'virtual currencies'EBA/Op/2014/08 4 July 2014
[9] European Central Bank: Virtual Currency Schemes – further analysis, European Central Bank, February 2015
[10] IRS Notice 2014-21, 2014-16 I.R.B. 938
[11] Norwegian Tax Act No. 14. of 26 March 1999 Art. 5-1 (2) and 6-2 (1)
[12] Portuguese Tax Authority Ruling No 12904 of 15 February 2018

Lektor:
Varga Erzsébet Dr., PhD. tanársegéd
Nemzeti Közszolgálati Egyetem Államtudományi és Nemzetközi Tanulmányok Kar,
Közpénzügyi Tanszék
Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar,
Pénzügyi Jogi Tanszék, megbízott oktató
varga.erzsebet@uni-nke.hu