Sigma TC's News

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Questionable tax treatment of cryptocurrency trading

The end of February is the deadline for reporting realized capital gains on disposal of financial assets (for the previous year) subject to personal income tax, so the question of the tax treatment of cryptocurrency trading has again been taken up in this context.

In 2018, the Tax Authorities recognized that this area was inadequately regulated in tax law, so the Tax Authorities published detailed guidance on the tax treatment of cryptocurrencies for personal income tax purposes. The Guidance dated 19 March 2018, Class: 410-01/17-08/29, Ref. number: 513-07-21-01/18-4 (hereinafter: "the Respective Guidance") was issued in 2018, but unfortunately after the deadline for reporting realized capital gains for the previous year had already been expired. Therefore, the Respective Guidance could be interesting for some taxpayers only this year, in the context of reporting realized capital gains for 2018 for which the deadline expires on 28 February 2019.

Since it was obvious that the tax treatment of cryptocurrencies has not adequately been regulated by the Croatian Personal Income Tax Act (hereinafter: "the PIT Act") and since the provisions of the PIT Act were changed after the issuance of the Respective Guidance, it is actually a pity that clarification of this problem stopped with the issuance of the Respective Guidance instead of adequately regulating this subject under the PIT Act.

At its very beginning, the Respective Guidance made reference to the judgment of the European Court of Justice (hereinafter: "ECJ") delivered in the case C-264/14 in the context of VAT taxation, and in which the ECJ ruled that bitcoin trading is considered *a financial transaction* for VAT purposes. Furthermore, the introductory part of the Respective Guidance also states **that income realized from the cryptocurrency trading is subject to personal income tax from capital gains on disposal of financial assets and that cryptocurrency is equivalent to money-market instruments. However, we are of the view that these statements from the Respective Guidance should be considered critically because it is questionable to what degree some parts of the Respective Guidance are based on the law.**

22. veljače 2019.

Upitan porezni tretman trgovanja kriptovalutama

Kraj veljače je rok za prijavu kapitalnih dobitaka od financijske imovine oporezivih porezom na dohodak, pa je u tom kontekstu ponovno aktualno pitanje poreznog tretmana trgovanja kriptovalutama.

U 2018. godini je Porezna uprava prepoznala da je ovo područje neadekvatno regulirano te je objavila dosta detaljnu uputu vezanu za tretman kriptovaluta u kontekstu poreza na dohodak. U pitanju je uputa od 19.03.2018., klasa: 410-01/17-08/29, ur.broj: 513-07-21-01/18-04 (dalje: Predmetna uputa) koja je u 2018. godini nažalost donesena tek nakon isteka roka za prijavljivanje godišnjih kapitalnih dobitaka, pa će stoga Predmetna uputa nekim poreznim obveznicima biti interesantna tek ove godine u kontekstu prijavljivanja kapitalnih dobitaka za 2018. godinu za što rok ističe 28.2.2019.

Kako je očito da porezni tretman kriptovaluta nije adekvatno reguliran Zakonom o porezu na dohodak, i s obzirom da su se nakon donošenja Predmetne upute mijenjale odredbe Zakona o porezu na dohodak, šteta je što se razjašnjenje ove problematike zaustavilo na izdavanju Predmetne upute umjesto da se ta problematika adekvatno uredila kroz izmjene Zakona.

Na samom početku Predmetne upute spominje se presuda Europskog suda, koja je donesena u predmetu C-264/14 u kontekstu oporezivanja PDV-om, i u kojoj presudi je Europski sud zaključio da se trgovanje bitcoinima smatra *financijskom transakcijom* u kontekstu oporezivanja PDV-om. Osim toga, uvodni dio Predmetne upute navodi i **da se na dohodak ostvaren po osnovi trgovanja kriptovalutama plaća porez na dohodak po osnovi kapitalnih dobitaka od financijske imovine te da je kriptovaluta ekvivalent instrumentima tržišta novca. Međutim, smatramo da bi navedeno u Predmetnoj uputi trebalo kritički razmotriti jer je upitno u kojoj mjeri su neki dijelovi iz navedene Predmetne upute utemeljeni na zakonu.**

Below is the brief overview of some of the questionable parts:

Are cryptocurrencies financial assets within the context of specific definition contained in the PIT Act?

The Article 67 paragraph 2 of the PIT Act contains the definition of financial assets on the basis of which taxable capital gains are determined. However, the Respective Guidance does not mention this definition at all, but it refers to the judgement of the ECJ in the case C-264/14 which considers the VAT aspects of cryptocurrency trading. This is the part of the Respective Guidance which, in our view, is questionable due to the following consideration: if trading of an asset is considered a financial transaction exempt from VAT, **this does not automatically mean that such asset is included in the definition of financial assets in the PIT Act.**

According to the Article 67 paragraph 2 of the PIT Act, financial assets in this context include:

1. transferrable securities and structured products, including the shares in capital of companies and other types of associations whose mode of disposal of shares is comparable with such companies,
2. money-market instruments,
3. units in collective investment undertakings,
4. derivatives and/or
5. proportional share in the liquidation mass in case of liquidation of an investment fund and other receipts realized from equity in case of liquidation, cessation or withdrawal.

The Respective Guidance, among other things, states that cryptocurrencies are "**equivalent to money-market instruments**".

It could be obvious that, by this formulation in the Respective Guidance, the intention was to bring cryptocurrencies within the definition of financial assets as defined in the Article 67 of the PIT Act. However, the PIT Act does not define what is considered to be "money-market instruments" while the Article 3 of the Capital Market Act provides the following definition: "'money-market instruments' means those classes of instruments which **are normally dealt in on the money market**, such as treasury bills, cash bills and commercial bills and certificates of deposit, **but excluding instruments of payment**. It is interesting to note in this context that the Respective Guidance points out that in the judgement of the ECJ (C-264/14) it is stated that cryptocurrency trading is considered a financial transaction (although this is not decisive for the conclusion on whether cryptocurrencies are consider financial assets within the context of the Article 67 paragraph 2 of the PIT Act), but the Respective Guidance fails to mention that, in the same judgement, the ECJ also stated: "*...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*

U nastavku dajemo kratki osvrt na neke od takvih upitnih dijelova:

Jesu li kriptovalute financijska imovina u kontekstu posebne definicije sadržane u Zakonu o porezu na dohodak?

Zakon o porezu na dohodak u čl. 67. st. 2. sadrži definiciju financijske imovine po osnovi koje se utvrđuju oporezivi kapitalni dobici. No, Predmetna uputa ovu definiciju uopće ne spominje, već se poziva na presudu Europskog suda u predmetu C-264/14 koji razmatra trgovanje kriptovalutama s aspekta PDV propisa. Ovaj dio upute smatramo spornim jer, ako se trgovanje nekom imovinom smatra financijskom transakcijom koja je oslobođena PDV-a, **to automatski ne znači da je ta imovina sadržana u definiciji financijske imovine iz Zakona o porezu na dohodak.**

Prema navedenom u čl. 67. st. 2. Zakona, financijska imovina u tom kontekstu uključuje sljedeće:

1. prenosive vrijednosne papire i strukturirane proizvode, uključivo i udjele u kapitalu trgovačkih društava i drugih vrsta udruživanja čiji je način raspolaganja udjelima usporediv s takvim društvima,
2. instrumente tržišta novca,
3. jedinice u subjektima za zajednička ulaganja
4. izvedenice i/ili
5. razmjerni dio likvidacijske mase u slučaju likvidacije investicijskog fonda te ostale primitke ostvarene od vlasničkih udjela u slučaju likvidacije, prestanka ili istupa.

Predmetna uputa između ostalog navodi da su kriptovalute „**ekvivalent instrumentima tržišta novca**".

Očito se takvom formulacijom u okviru Predmetne upute nastojalo kriptovalute podvesti pod definiciju financijske imovine iz čl. 67. Zakona o porezu na dohodak. No, Zakon o porezu na dohodak ne definira što se smatra „instrumentima tržišta novca", dok je u članku 3. Zakona o tržištu kapitala navedena sljedeća definicija „instrumenti tržišta novca su one vrste instrumenata kojima se **uobičajeno trguje na tržištu novca**, kao što su trezorski, blagajnički i komercijalni zapisi i certifikati o depozitu, **osim instrumenata plaćanja**". U tom kontekstu je interesantno uočiti da Predmetna uputa ističe kako je u presudi Europskog suda (C-264/14) navedeno da se trgovanje kriptovalutama smatra financijskom transakcijom (iako to nije odlučujuće za zaključak smatraju li se kriptovalute financijskom imovinom u kontekstu definicije iz čl. 67.st. 2. Zakona o porezu na dohodak), ali Predmetna uputa ne navodi da je u istoj presudi Europski sud naveo: *„...valute koje nisu tradicionalne, odnosno koje nisu novac koji se koristi kao zakonsko sredstvo plaćanja u jednoj ili više zemalja, pod uvjetom da učesnici u transakciji prihvaćaju tu valutu kao* ***alternativno sredstvo plaćanja*** *u odnosu na zakonska*

purpose other than to be a means of payment, are financial transactions." and "*...it is common ground that the 'bitcoin' virtual currency has no other purpose than to be a* ***means of payment*** *and that it is accepted for that purpose by certain operators.*". It means that the ECJ has ruled in its judgement that cryptocurrency is not legal tender or traditional currency, but it is a virtual currency that serves as an **alternative and contractual instrument of payment**.

Starting from the facts that cryptocurrencies are instruments of payment (although alternative and contractual) and that instruments of payment are excluded from the definition of money-market instruments (as defined in Capital Market Act) and that there is no special tax definition of instruments of payment, it is questionable what is the basis for the conclusion from the Respective Guidance that cryptocurrencies are equivalent of money-market instruments, from which it is further concluded that cryptocurrencies are financial assets within the scope of the Article 67 paragraph 2 of the PIT Act and trading of which is taxable.

Assuming that cryptocurrencies are financial assets within the context of the PIT Act (which is questionable), a further question could arise: under which conditions exchange of one financial asset with another financial asset would not be subject to taxation?

In the part related to exchange of bitcoins with another cryptocurrency, the Respective Guidance states the following conclusion: exchange of one cryptocurrency with another cryptocurrency is not subject to capital gains taxation, referring to the provision of the Article 67 paragraph 4 point 2 of the PIT Act, which specifies conditions under which exchange is not considered to be disposal of financial assets. However, if starting from the point that cryptocurrencies are financial assets in the context of the Article 67 paragraph 2 of the PIT Act (which is questionable), then the conclusion that each exchange of cryptocurrency with another cryptocurrency is not taxable – does not have the basis in the Article 67 paragraph 4 point 2 of the PIT Act, because the Article 67 paragraph 4 point 2 of the PIT Act excludes from taxation only two limited cases of exchange of financial assets: (i) "exchange of **securities** with **equivalent securities** issued by the **same issuer**, whereby **relations among the members and the capital of the issuer do not change**" and (ii) "exchange of securities or shares in the capital of companies, i.e. financial instruments, with another or other securities, i.e. with financial instruments, and acquisition of securities, i.e. financial instruments *in case of status changes*" whereby in both cases under (i) and (ii) it is important that there is no cash flow and that the sequence of the acquisition of financial assets has been ensured. Although it could be assumed that the intention of such interpretation was to "overbridge" the problem of evaluation and monitoring of such transactions, we also wanted to point out this part of the Respective Guidance as being questionable due to the fact that it lacks the basis in regulation to which it refers to.

sredstva plaćanja, predstavljaju financijske transakcije." te : „*...nesporno je da je jedina svrha virtualne valute ‚bitcoin' da služi kao* ***sredstvo plaćanja*** *te da je u tu svrhu prihvaćena od strane određenih operatora.*" Znači, Europski sud je u toj presudi zaključio kako nije riječ o zakonskom niti tradicionalnom sredstvu plaćanja, ali da je u pitanju virtualna valuta koja služi kao **alternativno i ugovorno sredstvo plaćanja**.

Polazeći od toga da su kriptovalute sredstvo plaćanja (iako alternativno i ugovorno), da su iz definicije instrumenata tržišta novca (iz Zakona o tržištu kapitala) isključena sredstva plaćanja te da ne postoji posebna porezna definicija instrumenata plaćanja, upitno je na čemu se temelji zaključak iz Predmetne upute da su kriptovalute ekvivalent instrumentima tržišta novca iz čega je dalje izvučen zaključak da se radi o takvoj financijskoj imovini koja je navedena u članku 67. st. 2. Zakona o porezu na dohodak i čija trgovina je oporeziva.

Ako se pođe od toga da su kriptovalute financijska imovina u kontekstu propisa o porezu na dohodak (što je upitno), nadalje se postavlja pitanje pod kojim uvjetima zamjena jedne financijske imovine za drugu financijsku imovinu ne podliježe plaćanju poreza na dohodak?

Uputa Porezne uprave u dijelu koji se odnosi na pretvaranje bitcoina u drugu kriptovalutu navodi sljedeći zaključak: kod zamjene jedne kriptovalute za drugu ne utvrđuje se dohodak od kapitala, pri čemu Predmetna uputa upućuje na odredbu čl. 67. st. 4. t. 2. Zakona o porezu na dohodak kojom je propisano u kojim slučajevima se zamjena ne smatra otuđenjem financijske imovine. No, ako se pođe od toga da su kriptovalute financijska imovina u kontekstu čl. 67. st. 2. Zakona o porezu na dohodak (što je upitno), onda zaključak o tome da svaka zamjena kriptovalute za drugu kriptovalutu nije oporeziva ne proizlazi iz čl. 67. st. 4. t. 2. Zakona o porezu na dohodak jer čl. 67. st. 4. t. 2. Zakona od oporezivanja isključuje samo dva ograničena slučaja zamjene financijske imovine i to se odnosi samo i isključivo na sljedeće slučajeve: (i): „zamjena **vrijednosnih papira** s **istovrsnim** papirima **istog izdavatelja** pri čemu se **ne mijenjaju odnosi među članovima i kapital izdavatelja**" kao i (ii) „zamjena vrijednosnih papira ili udjela u kapitalu trgovačkih društava, odnosno financijskih instrumenata drugim ili drugima vrijednosnim papirima, odnosno financijskim instrumentima te stjecanja vrijednosnih papira, odnosno financijskih instrumenata *u slučajevima statusnih promjena*" - pri čemu je u oba navedena slučaja pod (i) i (ii) bitno i to da nema novčanog tijeka i da je osiguran slijed stjecanja financijske imovine. Iako se može pretpostaviti da je namjera takvog tumačenja bila „premostiti" problem vrednovanja i praćenja takvih transakcija, ističemo i ovaj dio Predmetne upute kao sporan jer nije utemeljen na odredbama propisa na koje se poziva.

The purpose of these comments is not to analyze in detail all the parts of the Respective Guidance issued by the Tax Authorities, but only to draw the attention to the fact that existing interpretations are not entirely based on existing regulations, and therefore it is advisable to take this into account in case of referring to such interpretations or acting in accordance with them. Also, the content of these comments should not be understood as a standpoint concerning justification of taxation or non-taxation of cryptocurrency trading, but if taxation was an intention of the legislation, this should have been clearly covered by relevant regulations, which was not the case.

Svrha ovih komentara nije bila detaljno analizirati sve dijelove ove Predmetne upute Porezne uprave, već skrenuti pažnju na to da postojeća tumačenja nisu u cijelosti utemeljena na postojećim propisima, pa da je to uputno uzeti u obzir u slučaju pozivanja na njih ili postupanja u skladu s njima. Također, u ovim komentarima ne izražavamo stav vezano za opravdanost oporezivanja ili neoporezivanje trgovanja kriptovalutama, ali ako je oporezivanje bila namjera zakonodavca, to je trebalo biti jasno propisano relevantnim propisima, a što nije slučaj.

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