



Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Submission: Digital Currency

1.1 Taxpayers Australia Limited welcomes the opportunity to provide a submission in respect of the design of appropriate tax laws to effectively regulate digital currencies. We also hope the previous submissions we have included will provide some background in relation to how the current tax laws operate in respect of this new development.

1.2 The tax regime for digital currencies suggested by the Tax Office will:

- Negatively discriminate against businesses currently accepting Bitcoin as part of their purchasing and sales capability
- Inhibit the take-up of digital currencies across Australia, particularly amongst small businesses
- Inhibit innovation in the future development of digital currencies and associated payment systems within Australia
- Potentially lead to revenue loss through unreported or incorrectly reported transactions
- Increase compliance costs for taxpayers
- Increase administration costs within the Tax Office
- Inevitably need to be revised as current or future digital currencies become embedded into everyday payment systems

2. Background to submission

2.1 Taxpayers Australia Limited is a not for profit independent educational and advocacy group charged with being a voice for all Australian taxpayers. Our submission is somewhat restricted to ascertaining the most appropriate definition of digital currency under Australian tax laws. The digital



currency referenced most commonly throughout the submission will be Bitcoin as it is at present the most widely adopted.

2.2 We have, in partnership with a number of other associations, provided a preliminary view to the Australian Taxation Office in respect of how the tax laws of Australia at present deal with Bitcoin and other crypto-currencies. These submissions have informed the view we put forward in this submission to the Senate Standing Committee on Economics looking at digital currency. For ease of reference both the draft Rulings that are the subject of our previous submission to the Tax Office and the previous submissions are included within this submission.

3. Terms of Reference

3.1 Digital currency, with particular reference to:

- a. how to develop an effective regulatory system for digital currency that:
 - i. ascertains the most appropriate definition of digital currencies under Australian tax law,
 - ii. promotes competition and growth of the digital currency industry,
 - iii. ensures ongoing stability in the financial services industry,
 - iv. secures protection of consumers and businesses against illegal activity,
 - v. incorporates digital currencies into Australia's national security framework, and
 - vi. ensures the financial stability of the industry;
- b. the potential impact of digital currency technology on the Australian economy, including the:
 - i. payments sector,
 - ii. retail sector, and
 - iii. banking sector;
- c. how Australia can take advantage of digital currency technology to establish itself as market leader in this field; and
- d. any other related matters.

4. Objectives of submission

4.1 In the context of the above stated terms of reference, this submission aims to clearly identify problems that may arise currently under some key Australian tax laws in respect of the interpretation of key definitions contained within these laws by the Australian Tax Office.

4.2 Secondly, the submission provides an alternative legal interpretation in respect of these key definitions to that of the Australian Tax Office. The differences between the Tax Office draft view and our interpretation is explored within our previous submissions that are included with this submission.

4.3 Finally, in respect of key taxes we propose the most appropriate policy regarding the definitions that should be used with the aim of developing the most effective regulatory system for digital currency.



5. Income Tax definitions

5.1 The critical definitions that need to be considered for income tax purposes are as follows:

- Foreign currency,
- Trading stock, and
- Capital Gains Tax asset

5.2 The Tax Office has provided an interpretation of when a Bitcoin may or may not meet these definitions in TD 2014/D11 (Foreign currency), TD 2014/D13 (Trading stock) and TD 2014/D12 (Capital Gains Tax asset). This submission will only explore the 'foreign currency' definition in detail as we form the view that currently digital currencies would satisfy this definition.

5.3 Division 775 of the *Income Tax Assessment Act 1997* (ITAA97) contains the rules that include foreign currency gains in the assessable income of a taxpayer. This gain is only included in assessable income under Division 775 under these circumstances.

5.4 The Tax Office view is that Bitcoin does not satisfy the definition of foreign currency under Division 775 ITAA97. This argument is broadly based on the implicit statutory meaning of this term used in the *Currency Act 1965* (Currency Act) and the Tax Office's interpretation of the ordinary meaning of this term.

5.5 Our submission is contrary to the Tax Office draft position in that Bitcoin, as well as other digital currencies, would satisfy the definition of 'foreign currency' as used in Division 775 ITAA97. This argument is broadly based upon the definition of this term contained in s995-1 ITAA97 and the increasing adoption of this medium of exchange within the community.

5.6 The Tax Office interpretation naturally leads to consideration of whether digital currencies, because they do not fall into this regime, could potentially form part of the trading stock of a business or Capital Gains Tax asset. We argue that this is a suboptimal policy position when viewed in the context of the current terms of reference.

5.7 The obvious disadvantage of the current Tax Office treatment is the need for a taxpayer to determine whether the digital currency is being held on a capital or revenue account. Further to this, where the digital currency is a capital gains tax asset the small business concessions, general capital gains tax 50% discount and a number of other measures may apply to any applicable gains. These measures represent in our view an inappropriate leakage of tax revenue that would otherwise be collected under Division 775 ITAA97.

5.8 The record keeping requirements under both the trading stock regime and the capital gains tax regime are also more difficult to apply to a digital currency as they have been specifically designed to deal with different types of assets. The nature of digital currency with reference to the volume of transactions and the ability to split digital currency into very small fractions makes this another reason these regimes are suboptimal in terms of being effective regulatory tax regimes.

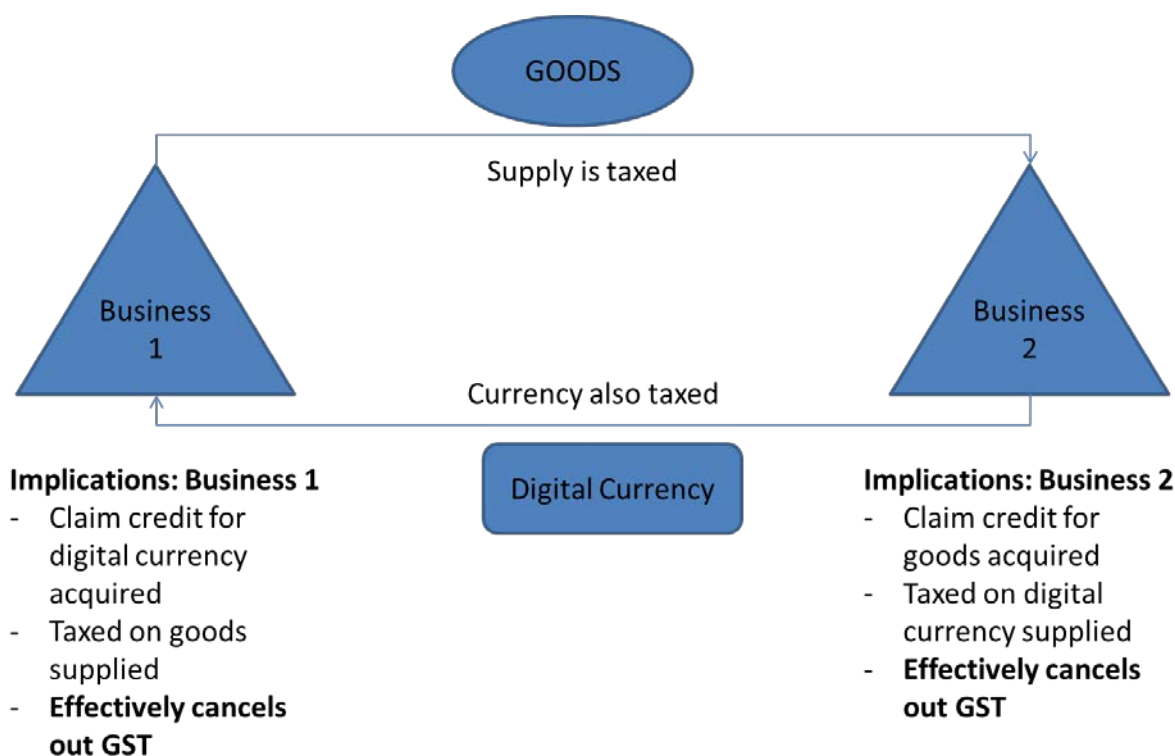


5.9 The policy priorities in relation to the future design of income tax legislation should be to revisit Division 775 to ensure that digital currencies fall within this regime and also clarifying and simplifying the operation of this division in general. Taxpayers Australia would also like to direct some consideration to the degree of integration between the taxing regime of digital currencies and traditional foreign currencies.

6. Goods and Services Tax definitions

6.1 The primary definition that impacts upon digital currency in the Goods and Services Tax (GST) law is the definition of ‘money’ contained in s195-1 *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

6.2 The Tax Office has provided an interpretation of when a Bitcoin may or may not meet this definition in GSTR 2014/D3. The Tax Office takes the view in this draft Ruling that Bitcoin does not satisfy this definition. A transaction based upon this view between two businesses registered for GST is provided below:



6.3 The practical implications of this interpretation when viewed in the context of how digital currencies are used will mean that GST on both sides of a transaction may effectively be cancelled out. This clearly is not an effective policy position.



6.4 There is a difference between how we interpret the GST laws in this area that is covered more extensively in our detailed previous submission. This submission broadly outlines a difference in the application of various legal rules as well as how changes of technology are dealt with under the tax and general law.

6.5 Taxpayers Australia advocates for some consideration to be given to clarifying this key definition to include digital currencies within it. Some consideration should also be given to the degree of integration that digital currency should have with reference to both traditional foreign currency but also the income tax laws.

7. Fringe Benefits Tax definitions

7.1 The primary definition that impacts upon digital currency in the Fringe Benefits Tax (FBT) law is the definition of 'salary and wages' contained in s136 *Fringe Benefits Tax Assessment Act 1986* (FBT Act).

7.2 Broadly speaking the Tax Office views Bitcoin and presumably similar digital currencies as not falling within this definition and therefore constituting a property fringe benefit. There are a number of practical difficulties with this classification. These are addressed at length in our previous submissions but broadly speaking they are:

- Determining the taxable value of the property fringe benefit,
- Dealing with digital currencies provided as part of a remuneration package, and
- Administrative requirements

7.3 How Bitcoin is classified for income tax purposes automatically determines whether it will be captured by the FBT regime. Where Bitcoin is considered to be a form of currency, then PAYG withholding will apply and the FBT regime would not apply.

7.4 This set of circumstances is preferable as it facilitates transactions between employers and employees. The withholding tax system would reflect a more accurate value of the total remuneration package to any given employee.

7.5 From a tax collection perspective, greater tax revenues will be collected as tax will be levied at the current value of the digital currency (as opposed to a historic rate that would apply under the FBT regime) as well as potentially triggering further employment tax obligations such as Superannuation Guarantee.

7.6 Clearly further consideration of the degree of integration into the PAYG withholding system, the superannuation and other employment tax obligation regimes will need to be made in respect of digital currencies.



8. All taxes

8.1 The designation of digital currencies under all Australian tax laws should be as similar as possible. This consistency in respect of the definition of digital currency will simplify a taxpayer's compliance with Australian tax laws as well streamlining the administration of the tax system in this area.

8.2 The other key issue to consider in the design of measures to address how digital currencies should be regulated within the tax system is the degree of integration that these new measures will have with measures that apply to traditional non-digital currency. As highlighted above, integration may actually be more effective in promoting compliance with tax laws and leveraging checks and balances that are already built into the system.

8.3 Taxpayers Australia is concerned primarily with the integrity of the tax systems and how robustly they can effectively regulate digital currencies. The risk of revenue loss and the imposition of inappropriate compliance costs on the taxpaying community have led to this submission being drafted.

8.4 We welcome further comment and engagement and will follow the development of this issue as it progresses and would welcome the opportunity to discuss a future system of appropriate taxation regulation around digital currencies with the committee when they hold hearings.

Regards,

Vasilios Mavropoulos CA
Tax Specialist



Date: 22 September 2014

Author: Letty Tsoi

Draft Taxation Determination TD 2014/D11: Income tax: is Bitcoin a 'foreign currency' for the purposes of Division 775 of the *Income Tax Assessment Act 1997* (ITAA 1997)?

We, Taxpayers Australia Ltd, welcome the opportunity to comment on Draft Taxation Determination TD 2014/D11 (the draft TD).

The draft TD expresses the Commissioner's preliminary view that Bitcoin is not a 'foreign currency' for the purposes of Division 775 of the ITAA 1997 (Division 775).

In our submission below, we put forward our preferred alternative view, namely that Bitcoin is a 'foreign currency' for the purposes of Division 775. Our key contentions are as follows:

- The provisions and application of the *Currency Act 1965* (the Currency Act) do not preclude Bitcoin from being 'currency' or 'foreign currency' for income tax law purposes; and
- Bitcoin is a 'currency' under the ordinary meaning of the term.

Paragraph numbers refer to the draft TD unless otherwise stated.

SUBMISSION

Ruling

We submit that the Ruling section of the draft TD (paragraph 1) should state that Bitcoin is a 'foreign currency' for the purposes of Division 775 of the ITAA 1997.

Our view is explained below.

Explanation

Is Bitcoin 'currency' taking into account the legislative context and purpose?

For the purposes of Division 775, 'foreign currency' means 'a currency other than Australian currency' (s995-1 of the ITAA 1997). The question is whether Bitcoin is 'currency' for the purposes of s995-1.

We consider that Bitcoin is 'currency' taking into account the ordinary meaning, legislative context and legislative purpose.

The Currency Act

We concur that the Commissioner must take the statutory interpretation approach espoused in paragraph 28 – ie. that the legislature intends for words in a statute to be interpreted by reference to a legal meaning if available, unless a contrary intention is clear. Accordingly, we agree with the



view that 'currency' should have the meaning imparted by the Currency Act, if there is a relevant meaning.

'Currency' is not defined in the Currency Act – so there is no explicit 'legal meaning' which can be adopted for tax law purposes. We then searched the provisions of that Act for an implicit meaning.

We accept that sections 9 and 11 of the Currency Act require transactions and payments, respectively, to be done or made in either 'the currency of Australia' or 'the currency of some country other than Australia'. For a relevant financial transaction or payment to be legally effective, there is no third permissible option. We also accept that 'the currency of some country other than Australia' necessarily requires recognition by a sovereign State other than Australia. It is an uncontroversial position that Bitcoin does not have State recognition. Accordingly, Bitcoin cannot be 'currency of Australia' or 'currency of some country other than Australia'.

The draft TD (paragraphs 30-31) indicates that the Commissioner has taken the view that the fact that the Currency Act only permits the use of two specific types of currency leads to a conclusion that the definition of 'currency' only comprises those two elements.

Our view differs from the Commissioner's in this regard. Sections 9 and 11 of the Currency Act only permits – and only identifies – those two types of currency. But the wording of those provisions does not provide that the definition of 'currency' only comprises those two identified elements.

In paragraph 31, the Commissioner contends that 'the critical character of the Currency Act's concept of 'currency' is State recognition and adoption of a monetary unit under law'. The provisions of the Currency Act indicate that these elements are critical to a currency being deemed to be an acceptable currency for transactions and payments covered by the Currency Act; those same provisions do not force a conclusion that those elements are critical and necessary in a definition of the term 'currency'.

The Commissioner's statutory duty

In the exercise of his statutory duty to administer the taxation statutes, the Commissioner should not rely on an argument that Bitcoin is not an accepted currency for the purposes of the Currency Act.

The purposes of the Currency Act do not include ensuring that taxpayers are taxed correctly on their transactions or enabling taxpayers to correctly calculate their tax liabilities.

Refer to Appendix 1 for a discussion of the relevance of the Commissioner's statutory duty to this submission.



Ordinary meaning

Relevance of the ordinary meaning

We disagree with the view expressed in paragraph 25 that it is not critical to conclude on whether Bitcoin is 'currency' and 'money' under the ordinary meanings of those terms. The term 'currency', as it is used in the s995-1 definition of 'foreign currency', is not itself statutorily defined by either the taxation statutes or, as explained above, by the Currency Act.

Accordingly, the ordinary meaning of the term is relevant, taking into account the legislative context and purpose. This is not inconsistent with the statute providing 'its own particular conception of currency' (paragraph 25).

The EM does not indicate any legislative purpose or context in respect of which it would be reasonable to conclude that a determination as to whether Bitcoin is currency under the ordinary meaning of the term is *not* critical.

Why Bitcoin is 'currency' under its ordinary meaning

The Commissioner's key arguments for the position that Bitcoin does not satisfy the ordinary meaning of 'money' (and, by extension, 'currency') are the following (paragraph 24):

- that the current use and acceptance of Bitcoin in the community is not sufficiently widespread such that it satisfies the test in *Moss v Hancock*¹ (*Moss*); and
- that Bitcoin is not a generally accepted medium of exchange as per *Travellex Limited v Commissioner of Taxation*.²

CoinJar, an Australian Bitcoin startup, estimates that Bitcoin is currently being used by 500,000 Australians. Coinjar claims that over the 12 months leading up to September 2014, it has processed more than \$50 million worth of bitcoin transactions for more than 30,000 customers. The business has recently commenced trialling a bitcoin EFTPOS card, which can be topped up with Australian dollars and enables users to use their Coinjar bitcoin wallet funds in any store than accepts EFTPOS.³

Earlier this year, ABA Technologies installed Australia's first Automatic Teller Machine (ATM) in a Westfield shopping centre in central Sydney and plans to roll out 100 more bitcoin ATMs in Australia by the end of 2016.⁴

¹ [1899] 2 QB 111.

² (Corrigendum dated 4 February 2009) [2008] FCA 1961.

³ 'CoinJar pioneers Australia's first bitcoin EFTPOS card', Kye White, 18 September 2014, www.startupsmart.com.au.

⁴ 'Will Australia's first bitcoin ATM get more retailers signing up?', Sylvia Varnham O'Regan, 23 April 2014, www.sbs.com.au.



Such anecdotes indicate that Australian businesses predict that the use of Bitcoin will grow in the next few years – and that the predicted growth will be sufficient to justify investing capital in products and services to facilitate the use of Bitcoin.

Further, it is indisputable that the examples discussed, EFTPOS cards and ATMs, both facilitate and are symbols of the ‘widespread use’ of any State-recognised currency which the Australian Taxation Office would accept to be ‘money’. Applying such technologies, which are common and pedestrian in relation to transactions involving accepted forms of ‘money’, to Bitcoin will result in perception and acceptance that Bitcoin is as valid a medium of exchange as other forms of ‘money’.

We agree with the Commissioner that the question of the levels of use and/or acceptance is ‘very much a question of fact and degree’ (paragraph 24). This necessitates due consideration of all relevant factors – not only Bitcoin usage at a static, current point in time. While it is impossible to predict the level of use or of acceptance in the future, the recent experiences and investments of Bitcoin enterprises certainly suggest that the sector anticipates use to become more widespread and accepted. The fact that ABA Technologies intends to roll out their 100 bitcoin ATMs by the end of 2016 indicates that the ascension in the use and acceptance is expected to be rapid. The thresholds of use and/or acceptance that may qualify as ‘currency’ are arbitrary measures; trends and qualitative factors should be taken into account.

Late in 2013, the United States (US) District Court in *Securities and Exchange Commission v. Trendon T. Shavers and Bitcoin Savings and Trust*⁵ found that “bitcoin is a currency or form of money, and investors wishing to invest in [the accused’s entity] provided an investment of money.”

The court’s decision adds to a growing body of policy in the US markets and references in US law that assume bitcoin to be a currency. For example, the US Treasury Department’s director of the Financial Crimes Enforcement Network, Jennifer Calvery, called companies that deal in bitcoin “financial institutions” that had “the same obligations as any money services business”. And a California court attempted to shut down the US Bitcoin Foundation on the grounds that it was operating an unlicensed “money transmission” business.

We acknowledge that the ATO’s US counterpart, the Internal Revenue Service, earlier this year published its view that virtual currency is to be treated as property for US tax purposes. However, this view is based on US taxation law. The trend in the US to increasingly recognise Bitcoin as currency or money for commercial and economic purposes clearly shows that it would be proper to characterise Bitcoin as ‘currency’ under the ordinary meaning of the term.

We note that the ordinary meaning references cited by the Commissioner do not conclusively require State recognition as a crucial element of a ‘currency’ or of ‘money’. We do acknowledge that State recognition is an important consideration. However, it does not appear that the presence or absence of recognition by a specific State is the defining element under any of the sources cited. Further, as discussed below, in the legislative context, the absence of State recognition should not

⁵ CASE NO. 4:13-CV-416



impeded Bitcoin from properly being characterised as a 'currency' for the purposes of s995-1 and Division 775.

Section 995-1 and Division 775

For the purposes of Division 775, and as defined in s995-1, 'foreign currency' must be a 'currency' but not 'Australian currency'. There is no explicit or implicit requirement that 'foreign currency' must be a currency of 'a country other than Australia' or otherwise have the recognition of a particular State.

We accept the Commissioner's interpretation of 'Australian currency' but in the context of the definition of 'foreign currency' in s995-1, 'Australian currency', however defined, is only a subset of 'currencies'.

The provisions of Division 775, in relation to which the s995-1 definition of 'foreign currency' is critical, do not implicitly or explicitly require that the 'foreign currency' in question be recognised by a State in order for the provisions to be operative. In fact, there is no mention of 'foreign country', 'country other than Australia', 'another country' or similar within the Division.

Pursuant to Division 775, an assessable forex realisation gain or a deductible forex realisation loss may be calculated by reference to a 'currency exchange rate effect' or by reference to the 'forex cost base' of a right to receive or the 'forex entitlement base' of a right to pay foreign currency, depending on the applicable forex realisation event.

Section 775-105 defines a 'currency exchange rate effect'. Broadly, this is either a fluctuation in currency exchange rates or the difference between a currency exchange rate at different points in time.

A 'forex cost base' and a 'forex entitlement base' are defined in sections 775-85 and 776-90 respectively. Broadly, these amounts are calculated by reference to the amounts of 'money' paid or payable and the 'market value' of any non-cash benefit to be provided.

The construction of Division 775 does not set any legislative or operational impediment for Bitcoin to be treated as foreign currency. It is possible to compare the Australian dollar value of Bitcoin at specific points in time to calculate any 'currency exchange rate effect'. It is also possible to measure Bitcoin by reference to the money (whether in Australian dollars or in the monetary unit of another sovereign State) exchanged for it or by the market value of the goods or services exchanged for it. While there will certainly be administrative challenges in ensuring compliance, these challenges will exist regardless of which regime Bitcoin is taxed under.

Division 775 was introduced into the ITAA 1997 by the *New Business Tax System (Taxation of Financial Arrangements) Act (No. 1) 2003*. The explanatory memorandum (EM) to this Act indicates that the legislative context behind the introduction of Division 775 is to provide a statutory framework under which a gain or loss that occurs as a result of currency exchange rate movements or fluctuations is brought to account at an appropriate time for tax purposes.



Significantly, the s995-1 definition of ‘foreign currency’ was introduced as part of the Division 775 reform. Bitcoin as foreign currency does not contravene the legislative purpose and context of the s995-1 definition. It would enable fluctuations and changes in the value of Bitcoin to be treated at an appropriate taxing point, on revenue account. Notably, this is the case even if the ‘monetary elements of the transaction’ are not converted into Australian dollars.

Other

How is ‘foreign currency’ relevant for tax purposes? (paragraphs 4-6)

Paragraph 4 discusses the anti-overlap rule in subs775-15(4) ITAA 1997 in relation to foreign currency gains. We suggest that there be an equivalent comment in relation to subs775-30(4) which provides that there is no double deduction for a foreign exchange loss.

The suggested inclusion will make the commentary complete. The value of Bitcoin fluctuates greatly and losses may arise as well as gains.

Concluding remarks

The taxation statutes do not currently adequately provide for the taxation of Bitcoin and other similar technological advances with sufficiency clarity. However, this is the legislative framework under which the Commissioner is compelled to carry out his statutory duties, in the absence of legislative change. Treating Bitcoin as foreign currency will:

- comply with current law, as explained above
- provide a robust framework which will insulate against what is likely to be sudden and large changes. For example, once the use of Bitcoin increases to an arbitrary level that the Commissioner may consider to be sufficiently ‘widespread’, the taxation treatment does not require change
- maximise the efficient use of resources, as the Commissioner would not be required to reconsider the treatment of Bitcoin under the same law at future, arbitrary points in time; and
- provide fairness and certainty to taxpayers. A taxpayer, or different taxpayers, undertaking the same transaction in the same circumstances at different points in time will not be taxed differently simply because some changes (eg. in the level of use, or if it receives recognition by sovereign states) means that it starts being ‘foreign currency’ according to the interpretation expressed in the draft TD.

We also request that the Commissioner, in consultations with government, lobbies for legislative change to provide greater certainty for taxpayers who will increasingly use Bitcoin, other virtual currencies and other electronic or digital media of exchange which may be developed in the foreseeable future.



Appendix 1

The Commissioner's statutory duty

Section 8 of the ITAA36 provides that the Commissioner shall have the general administration of the Taxation Acts. In carrying out this duty, the Commissioner issued Taxation Ruling TR 93/25. This ruling expresses the view that the proceeds of certain illegal activities will be treated as assessable income.

In issuing this ruling, the Commissioner exercised his power to administer the relevant taxation statute. This power does not oblige nor permit the Commissioner to administer other laws over which he has no administrative jurisdiction. The Commissioner correctly took the approach of determining whether the amounts in question were income by reference to, and only by reference to, the governing rules for taxation purposes. The fact that those amounts arose from circumstances that contravened statutes that are not covered by the Commissioner's administrative powers were of no consequence for taxation law purposes.

The Full Court in *Commissioner of Taxation v La Rosa*⁶ allowed a deduction for stolen monies even though the funds were obtained illegally. Hely J acknowledged the public policy conflict inherent in allowing tax relief in relation to an illegal activity. However, in his reasons, his Honour held that 'the purpose of the ITAA is to tax taxable income, not to punish wrongdoing' and that the illegality of such activities are dealt with by the criminal law, and not by income tax laws.

Prior to *La Rosa*, the courts had already established that the Commissioner's duty is to collect the correct amount of tax, no more, no less (*Lighthouse Philatelics Pty Ltd v FCT*⁷ and *Brown v FCT*⁸).

The extent to which non-taxation statutes do or do not adequately deal with the rising emergence of Bitcoin and similar digital currencies does not govern the manner in which the Commissioner administers the taxation laws to ensure that a taxpayer pays the correct amount of tax.

⁶ [2003] FCAFC 125.

⁷ (1991) 32 FCR 148.

⁸ (1999) 42 ATR 118.



Date: 22 September 2014

Author: Letty Tsoi

Draft Taxation Determination TD 2014/D12: Income tax: is Bitcoin a CGT asset for the purposes of subsection 108-5(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)?

We, Taxpayers Australia Ltd, welcome the opportunity to comment on Draft Taxation Determination TD 2014/D12 (the draft TD).

The draft TD expresses the Commissioner's preliminary view that Bitcoin is a 'CGT asset' for the purposes of subs108-5(1) of the ITAA 1997.

We agree with this view.

Paragraph numbers refer to the draft TD unless otherwise stated.

Legislative references are to the ITAA 1997 unless otherwise stated.

SUBMISSION

Ruling

We agree with the view expressed in the Ruling section of the draft TD (paragraph 1) that Bitcoin is a 'CGT asset' for the purposes of subs108-5(1).

Our view is explained below.

Explanation

In our submission on TD 2014/D11, we disagree with the Commissioner's preliminary view that Bitcoin is not 'foreign currency' for the purposes of Division 775 and not 'foreign currency' as defined in s995-1.

In that submission, we put forward our preferred alternative view that Bitcoin is 'foreign currency'.

If Bitcoin is 'foreign currency'

Should the final version of TD 2014/D11 express the view that Bitcoin is 'foreign currency', the view expressed in this draft TD that Bitcoin is a 'CGT asset' remains valid for the reasons provided in the draft TD. In addition, Note 1 to s108-5 specifically states that 'foreign currency' is an example of a CGT asset.



In the event that the Commissioner determines that Bitcoin is 'foreign currency', we request that paragraph 16 is amended. Paragraph 16 discusses the anti-overlap rule in s118-20. We request that it should include a specific reference to s118-20 where part or all of the capital gain is assessable as a foreign currency gain pursuant to Division 775. We also request that an appropriate example be included in the final TD.

If Bitcoin is not 'foreign currency'

Should the final version of TD 2014/D11 express the Commissioner's current view that Bitcoin is not 'foreign currency', we agree with the view expressed in this draft TD that Bitcoin is a 'CGT asset'.

In this event, we request that an appropriate example of the application of s118-20 (discussed in paragraph 16) where part or all of the capital gain or loss is assessable or deductible on revenue account be included in the final TD.



Date: 22 September 2014

Author: Letty Tsoi

Draft Taxation Determination TD 2014/D13: Income tax: is Bitcoin trading stock for the purposes of subsection 70-10(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)?

We, Taxpayers Australia Ltd, welcome the opportunity to comment on Draft Taxation Determination TD 2014/D13 (the draft TD).

The draft TD expresses the Commissioner's preliminary view that Bitcoin is 'trading stock' for the purposes of subs70-10(1) of the ITAA 1997 when it is held for the purpose of sale or exchange in the ordinary course of business.

We comment on this view below.

Paragraph numbers refer to the draft TD unless otherwise stated.

Legislative references are to the ITAA 1997 unless otherwise stated.

SUBMISSION

Ruling

We agree with the view expressed in the Ruling section of the draft TD (paragraph 1) that Bitcoin, when held for the purpose of sale or exchange in the ordinary course of a business, is trading stock for the purposes of subs70-10(1) – with possible qualifications.

In our submission on TD 2014/D11, we disagree with the Commissioner's preliminary view that Bitcoin is not 'foreign currency' for the purposes of Division 775 and not 'foreign currency' as defined in s995-1.

In that submission, we put forward our preferred alternative view that Bitcoin is 'foreign currency'.

Should the Commissioner agree with our position and amend TD 2014/D11 to express a view that Bitcoin is 'foreign currency', the Ruling section of the draft TD should include a comment to the effect that to the extent that an amount that is assessable or deductible under Division 70 is also assessable or deductible under Division 775, then Division 775 has primacy.

Explanation

If Bitcoin is 'foreign currency'

Should the final version of TD 2014/D11 express the view that Bitcoin is 'foreign currency', the view expressed in this draft TD that Bitcoin can be 'trading stock' remains valid for the reasons provided in the draft TD. Section 70-10 does not exclude foreign currency from the definition of trading stock.



In the event that the Commissioner determines that Bitcoin is 'foreign currency', we request that the Ruling and Explanation sections of the draft TD be amended.

We request that the TD should discuss subs775-15(4), which provides an anti-overlap rule to the extent that if a gain is both assessable as a forex realisation gain and assessable under another provision (including a Division 70), Division 775 takes priority (and the gain would not be assessable under the trading stock rules).

Similarly, we request that the TD should discuss subs775-30(4), which provides an anti-overlap rule to the extent that if a loss is both deductible as a forex realisation loss and deductible under another provision (including a Division 70), Division 775 takes priority (and the loss would not be deductible under the trading stock rules).

We also request that appropriate examples be included in the final TD.

If Bitcoin is not 'foreign currency'

Should the final version of TD 2014/D11 express the Commissioner's current view that Bitcoin is not 'foreign currency', we agree with the views expressed in this draft TD.



Dated: 25 September 2014

Author: Angela Lehmann

Draft Taxation Determination TD 2014/D14: Fringe benefits tax: is the provision of Bitcoin by an employer to an employee in respect of their employment a property fringe benefit for the purposes of subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*?

We, Taxpayers Australia Ltd, welcome the opportunity to comment in respect of Draft Taxation Determination TD 2014/D14 and the Commissioner's view on the treatment of Bitcoin for Fringe Benefits Tax (FBT) purposes.

Commissioner's position

TD 2014/D14 outlines the Commissioner's preliminary view on the appropriate taxation treatment of Bitcoin under the Fringe Benefits Tax Assessment Act 1986 (FBTAA).

The Commissioner's view is that where Bitcoin is provided by an employer or an associate of the employer to an employee, it would be treated as a property fringe benefit.

The support for this stance is s136(1) of the FBTAA, which defines a property fringe benefit as consisting of both 'intangible property' and 'tangible property.' With intangible property further defined as:

- real property
- a chose in action; and
- any other kind of property other than tangible property, but does not include:
 - a right arising under a contract of insurance, or
 - a lease or licence in respect of real property or tangible property.

All legislative references are to the FBTAA, unless otherwise stipulated.

Valuation of property fringe benefits

Assuming that an employer is not in the 'business' of trading Bitcoin, the provision of Bitcoin to an employee would be classified as an external property fringe benefit. Determining the taxable value of external property fringe benefits is stated at section 43 and is summarised below:

- a) Where the employer or associate of the employer acquires the Bitcoin under an arm's length transaction, and the property is then provided to the employee, the taxable value is the cost of the property to the employer (or associate) less any amount contributed by the employee.
- b) Where the benefit is provided by a third party and is paid for by the employer or associate, the taxable value is the amount the employer (or associate) paid to the third party at "arm's length".



- c) In any other situation, the taxable value is the amount the recipient would have been required to pay to the provider for the benefit under an arm's length transaction at the time the benefit was provided as per the guidance in TD 93/231.

Issues to be addressed

There are some practical issues with the proposed classification in TD 2014/D14, which are discussed below:

1. Determining taxable value of the property fringe benefit

As discussed above, the value of the Bitcoin property fringe benefit would generally be the purchase price that the employer or associate has paid for the Bitcoin and is a significant issue.

It would require that the employer has maintained the relevant records to establish the date of purchase of that specific Bitcoin and the price paid. Where an employer has a number of Bitcoin in an 'ewallet' purchased at different times at different prices, records will need to be kept referencing the Bitcoin identifier to enable the employer to use the correct purchase price when calculating the FBT.

Also, by using the historic price, it means that the value used for FBT purposes is likely to be significantly less than the value at the time they are provided to the employee, given the trending of Bitcoin significantly increasing. Therefore, where it may have cost an employer \$200 to buy a Bitcoin, by the time he provides it to his employee it may be valued at \$2,000 and the tax will be levied on the significantly lower valuation of the benefit.

In addition, there would be no recourse under the Act to somehow tax the residual between the two values (namely the purchase price and market value at the time the Bitcoin is received by the employee).

Alternatively, where a valuation is required under scenario c) above, a market value of the Bitcoin has to be established to determine the taxable value of the property fringe benefit provided.

Given that the Commissioner does not view Bitcoin as a form of currency, on what basis would a market value be determined? There are theoretical Bitcoin exchanges with market prices, but these exchanges use comparative analysis with cash and cash equivalents to determine value.

If the theory is that as an asset and effectively an item of 'barter', then logically it means that the market value can only be established once the employee has used the Bitcoin to purchase something of value, thus determining the Bitcoin's "worth."



2. Bitcoin provided as remuneration package

Where an employer allows for the provision of Bitcoin under an employment agreement or contract as part of a total remuneration package, then Bitcoin would be considered salary and wages and PAYG withholding tax would apply.

For example, if a salary was quoted as \$100,000pa gross, plus two Bitcoins plus super, the Bitcoins in this scenario take on the characteristics of salary and wages and not a property fringe benefit.

In addition, where Bitcoin forms part of an employee's remuneration, it can potentially be considered Ordinary Times Earnings for Superannuation Guarantee purposes also.

3. Administrative requirements

Treating Bitcoin as a fringe benefit will be cumbersome on employers to keep the records necessary to determine the purchase price of each Bitcoin and hence the value, of the property fringe benefit.

Or where a market valuation for the Bitcoin is required, the employer would likely require some sort of valuation or calculation to be performed by a third party.

Where the Bitcoin is treated as currency and taxed under the PAYG Withholding regime, employers could levy tax as part of the payroll process and include the amount in existing reporting forms such as PAYG Payment Summaries.

Conclusion and recommendation

How Bitcoin is classified for income tax purposes automatically determines whether it will be captured by the FBT regime. Where Bitcoin is considered to be a form of currency, then PAYG withholding will apply and no FBT will apply.

Our contention is that were Bitcoin classified as and taxed as a form of currency, employers can easily transact with employees using Bitcoin under the withholding tax system and reflect a more accurate value of the total remuneration package to the employee including Bitcoin.

From a tax collection perspective, greater tax revenues will be collected as tax will be levied at the current value of the Bitcoin (as opposed to historic rate) as well as potentially triggering further employment tax obligations such as Superannuation Guarantee.

Logically, treating Bitcoin as currency and taxing it under the PAYG regime instead of the FBT regime when provided to employees simplifies the treatment for all parties involved and is more tax effective.



Date: 22 September 2014

Author: Vasilios (Bill) Mavropoulos

Draft Goods and Services Tax Ruling GSTR 2014/D3: Goods and Services Tax: the GST implications of using Bitcoin

We, Taxpayers Australia Ltd, welcome the opportunity to comment on Draft Goods and Tax Ruling GSTR 2014/D3 in relation to the GST treatment of 'Bitcoin' transactions.

The Tax Office should be commended for moving quickly to provide guidance to the community regarding this emerging technology. The following submission examines some issues of construction and interpretation in relation to GST concepts that impact the way 'Bitcoin' transactions are dealt with under the GST.

Commissioner's position

GSTR 2014/D3 makes it clear that the Tax Office does not view 'Bitcoin' as 'money' as that word is defined in s195-1 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("GST Act"). The Tax Office provides an explanation of why they do not view 'Bitcoin' as satisfying this definition in Appendix 1 of your draft Ruling. This appendix refers to paragraph 26-28 of *Travellex Ltd v Federal Commission of Taxation* [2008] FCA 1961 ("*Travellex case*") to support the view made in paragraph 73 of the draft Ruling as follows:

Consistent with statutory context, policy and the wider legislative framework governing Australian currency established by the Currency Act, this is the sense in which the word 'money' is used in the section 195-1 definition.

We note that the Full Federal court decision in the *Travellex case* was subsequently reversed by the High Court in *Travellex Ltd v Commissioner of Taxation* (2010) 241 CLR 510. It is clear from the High court decision in that case at paragraph (34) that:

"a sale of foreign currency is a supply in relation to the rights that attend upon ownership of that currency."

The High court decision also brings into question a number of the findings of the Full Federal court. In light of this, we request that the Tax Office make some reference to the High court decision and explain why the concepts they have drawn from the Full Federal court decision are still to be relied upon.

We suggest that the Tax Office review their position that the legal definition of the word "currency" in the *Currency Act 1965* (Cth) ("Currency Act") is the sense in which the word "money" is used in s195-1 GST Act. The rest of our submission provides reasons as to why we feel this reconsideration is necessary.



Case Law rule

The conclusion the Tax Office has reached examines the domestic law of Australia in relation to what constitutes 'currency' to provide appropriate context in relation to the interpretation of the word money. We request that the Tax Office's reasoning should also include a more rigorous focus on determining the context in which the word 'money' is used as it sits in s195-1 of the GST Act as a whole.

In order place the word 'money' used in the GST Act within the purview of the word "currency" as used in the *Currency Act* the Commissioner has referred to a rule of statutory interpretation described in *Y.Z. Finance Company Pty. Limited v Cummings* (1964) 109 CLR 395 ("*Y.Z. Finance case*"). This case offers an alternative construction to words that are preceded by the word 'includes' (as is the case for the word 'money' in the GST Act). In the *Y.Z. Finance case* the construction of the word 'includes' was interpreted as "mean and include".

In other words, a word may have an ordinary meaning, and legislation can expand upon the ordinary meaning of a term by using the word 'includes'. On the other hand, the word may instead take on a different meaning entirely, solely with reference to that which it 'includes'.

However, as with all rules of statutory interpretation the rule in the *Y.Z. Finance case* has a caveat. This construction can only arise where the context of **the Act** sufficiently shows that this construction is preferred.

Commissioner's interpretation

The Commissioner refers to s9-85 GST Act in paragraph 18 of the Ruling where the term 'currency' is used to support characterising the word 'money' as 'currency' stating:

"the value of that taxable supply must be expressed in Australian currency or translated into Australian currency if the consideration is expressed in a foreign currency."

The Commissioner expresses how the rule in *Y.Z. Finance case* operates in paragraph 31 as follows:

"Determining whether a broader meaning is intended and the content of that meaning is informed by the statutory context in which the term 'money' appears."

The Commissioner then goes on to determine whether 'Bitcoin' falls within the definition of currency used in the *Currency Act*.

Summary of our contentions

The rule in the *Y.Z. Finance case* makes it clear that where the terms that follow the word 'include' in the statutory definition of the word 'money' **falls strictly** within the meaning of the ordinary word 'money' this would have the effect of the GST Act confining the meaning of that word. This consideration is performed in our appendix to this submission. This consideration does not seem to be dealt with in great detail within the draft Ruling.



The other issue that has not been addressed by the Tax Office in relying upon this authority is that the *Y.Z. Finance case* deals with a definition that applies to only one section of the relevant Act. The definition of the word ‘money’ applies to the whole of the GST Act. Therefore this case could be distinguishable on this basis.

The word “includes” used in the statutory definition, in our view, makes it clear that the ordinary meaning of the word “money” is either being expanded or clarified by the statutory provision rather than restricted when viewing the definition in the context of the other definitions made under s195-1 GST Act and when comparing the wording of the statutory definition with the ordinary meaning of the word ‘money’ as required under the rule espoused by *Y.Z. Finance case*. This method of interpretation is, in our view, preferred in determining the purpose of the provision because it does not rely upon definitions made in other Acts.

Finally, we refer to a recent Federal Circuit Court case in the US that expresses the view that a ‘Bitcoin’ falls within the ordinary meaning of the word “money” albeit in a different statutory context. This view as well as the ordinary meaning of the word “money” in our view necessitates further consideration of this draft Ruling by the Tax Office.



Appendix

Issue to be addressed

The word 'money' is a defined term under the GST Act. The proper construction of the word 'money' needs to be determined within the context in which it appears in the GST Act. The issue is how this word should be construed given this context.

Once the context of this word has been determined and the proper construction reached a further issue arises. The issue is whether a 'Bitcoin' falls within the definition of the word 'money' as it has been construed.

Relevant Law

The definition of 'money' was originally introduced by *A New Tax System (Goods and Services Tax) Bill 1998* as part of the introduction of the GST regime itself. The definition has not changed and no meaningful guidance in relation to this definition is given by the explanatory memorandum. The literal meaning of these words in isolation would encapsulate a very wide variety of things and arguably result in considerable ambiguity. The wording of the provision is as follows:

"money" includes:

- (a) currency (whether of Australia or of any other country); and*
- (b) promissory notes and bills of exchange; and*
- (c) any negotiable instrument used or circulated, or intended for use or circulation, as currency (whether of Australia or of any other country); and*
- (d) postal notes and money orders; and*
- (e) whatever is supplied as payment by way of:*
 - (i) credit card or debit card; or*
 - (ii) crediting or debiting an account; or*
 - (iii) creation or transfer of a debt.*

However, it does not include:

- (f) a collector's piece; or*
- (g) an investment article; or*
- (h) an item of numismatic interest; or*
- (i) currency the market value of which exceeds its stated value as legal tender in the country of issue.*

Analysis of legal rules – Determine context & construction

The correct approach to interpreting the construction of this provision in our view is a purposive approach in the context of the provision and GST Act as a whole. In arriving at a definition of the word 'money' and how it should be read in the context of s195-1 of the GST Act, the interpretation of the word 'currency' used in other Acts, while being relevant, should not displace this interpretation in the context of the GST Act, see *R v Scott* (1990) 20 NSWLR 72.



A purposive approach is supported in common law (see Dawson J in *Mills v Meeking* (1990) 169 CLR 214, 234-5) as well as by Commonwealth Statute by virtue of section 15AA of the *Acts Interpretation Act 1901 (Cth)* which reads:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

The explanatory memorandum to *A New Tax System (Goods and Services Tax) Bill 1998* gives some insight into the purpose of Parliament in introducing the GST Act as follows:

The GST is a broad based indirect tax introduced by the Government to replace the wholesales sales tax and a number of State indirect taxes. Broadly speaking, the GST is a tax on private consumption in Australia. The GST taxes the consumption of most goods, services and anything else in Australia, including things that are imported. Generally the GST will not apply to consumption outside Australia, which is why the GST does not apply to exports.

The other general common law rules of statutory interpretation that may apply includes that of *ejusdem generis* that may limit the general words of a definition by those used in the other part of the definition. The application of this rule in this case however is limited by the observation of Spigelman CJ in *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 ("*Clark case*") at 143 and in our view interpretation of the word 'money' should more correctly consider the overall context of the GST Act itself.

Examination of text of the provision

On close examination of the text of *Y.Z. Finance case* referred to by the Tax Office we are of the view that the word that requires interpretation in order to apply a different construction to the word 'money' is not the word 'money' but the word 'includes'. McTiernan J cited with approval the rule expressed by Lord Watson in *Dilworth v. Commissioner of Stamps* [1899] A. C. 99 as follows:

"The word , 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions"

The task of statutory construction is clarified further by McTiernan J in *Y.Z. Finance case* when he goes on to quote Sugarman J in *Batchelor & Co. Pty. Ltd. v. Websdale* [1963] S.R. (N.S.W.) 46:



*"The enumeration in sub-so (2) adds nothing to the natural import of the word, security'. Indeed **all the matters enumerated are within the strictest meaning of that term and, within that meaning, the second limb of the definition is of the widest import. All the matters enumerated share the common characteristic that they relate to securities by which rights in relation to specific property of the debtor are conferred.** These considerations lead to the conclusion that 'include' in sub-so (2) is equivalent to 'mean and include' and that the definition therein given is intended to be exhaustive, or at least that the securities intended to be embraced all share the common characteristic of conferring rights against specific property"*

To correctly apply this rule therefore, one must examine each paragraph used in the statute that is said to be included in the statutory definition of the word 'money' and determine whether or not that paragraph would fall within the ordinary meaning of the word 'money'.

The Tax Office in contrast examines each paragraph of the statutory definition of the word 'money' with reference to whether a 'Bitcoin' would be included within that specific statutory paragraph or not. This analysis while it is critical in our view may be premature. We feel that before embarking upon this exercise, further consideration and thought should be directed to the statutory construction of the word 'money' itself.

We note that there would be some doubt as to whether paragraph (d) and (e) of the statutory definition could rightly form part of the ordinary meaning of the word money, even in its widest sense. The term money is described in the *Encyclopaedic Australian Legal Dictionary* as:

Any generally accepted medium of exchange for goods, services, and the payment of debts. Examples are coin, banknotes, bills of exchange, promissory notes and claims on bank deposits.

Applying the rule in *Y.Z. Finance case* the term 'money order' as appears in subparagraph (d) of the definition of the word 'money' in the GST Act is defined in that dictionary as follows:

An instrument used to remit money to the named payee, often used by persons who do not have a cheque account relationship with a financial institution, to pay bills or to transfer money to another person or to a company.

This suggests that perhaps the context in which the word 'money' is used in the GST Act is the ordinary meaning of the word rather than the more limited statutory definition. The context may also be ascertained by reference to the wider section in which the definition is placed.

Section 195-1 GST Act – use of 'includes' and 'meaning'

Turning to section 195-1 GST Act it should be noted that the word 'includes' is used in various other definitions, it should also be noted that the use of this word can be contrasted with the use of the word 'means' also used in the provision. On the whole the word 'means' is used to restrict or explain what the meaning of a word is within the GST Act and the word 'includes' is used to either expand or clarify the meaning of a word where it may be ambiguous. The *Y.Z. Finance case* makes it clear how the section uses the word 'includes' is the clearest indication of the words construction.



The following are examples from the GST Act that demonstrate the application of this interpretation:

"amount" includes a nil amount.

"business" includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee.

"carrying on" an *enterprise includes doing anything in the course of the commencement or termination of the enterprise.

"person" includes a *company.

"ship" means any vessel used in navigation, other than air navigation.

"adjustment" means an *increasing adjustment or a *decreasing adjustment.

"Commissioner" means the Commissioner of Taxation.

Due to the nature of the ordinary meaning of the word 'money' it may be difficult to define. This may be an explanation as to why most (but not all) of the parts of the statutory definition seem to fall within the ordinary meaning of the word. To take this as meaning the context is restricted by the definition of the word 'currency' in our view is perhaps premature.

A fuller examination of the context of the GST Act and the relevant provision seem to support a wider definition for this term. This brings us to the change in the meaning of words used in statutes when technology changes.

How 'money' in the GST Act could be interpreted over time

The other relevant point to make here is the way in which the meaning of words changes over time. It is relevant to note that at the time the definition of the word 'money' was enacted in the GST Act 'bitcoins' did not exist and would not have been specifically contemplated by Parliament.

Lake Macquarie Shire Council v Aberdare County Council (1970) 123 CLR 327 ("*Lake Macquarie case*") at 331 is authority for the proposition that while the connotation of a word will remain fixed its denotation will change with changing technologies. In the *Lake Macquarie case* Barwick CJ states at 331:

"I can see no reason why, whilst the connotation of the word "gas" will be fixed, its denotation cannot change with changing technologies."

This analogy is undoubtedly useful in interpreting whether a 'Bitcoin' can be described as within the ordinary meaning of the word 'money' as it is used in s195-1 GST Act. It is also, in our view, a good reference to assist in determining whether the generality of the ordinary meaning of the word 'money' is a preferable construction for the purposes of the GST Act.



The ordinary meaning of the word ‘money’ seems to have been extended by the GST Act, this along with how the words ‘include’ and ‘mean’ are used in that Act support the use of the ordinary meaning of this word as this interpretation furthers the intended purpose of the Act. Furthermore, the inherent flexibility of the word over time is supported not only by the *Lake Macquarie case* but also by the inclusion of paragraph (e) within the statutory definition itself.

How to treat ‘Bitcoin’ in light of a wider definition

The definition of ‘Bitcoin’ as money is supported by [Securities and Exchange Commission v. Trendon T. Shavers and Bitcoin Savings and Trust](#)¹ in the United States District Court.

We note the purpose of introducing the GST Act was to tax personal consumption of goods and services. The use of ‘Bitcoin’ seems to more readily be described as a general medium of exchange. Taxpayers Australia would like to see further consideration from the Tax Office regarding whether ‘Bitcoin’ would constitute ‘money’ for GST purposes in light of the points raised within this submission and associated appendix.

¹ CASE NO. 4:13-CV-416

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You can access a [guidance paper](#) that has been issued with this draft Determination. The guidance paper provides an overview of the tax treatment for transactions associated with crypto-currencies, specifically Bitcoin. Where other crypto-currencies have the same characteristics as Bitcoin, the information in the guidance paper applies equally to the taxation treatment for other crypto-currencies.



Draft Taxation Determination

Income tax: is Bitcoin a ‘foreign currency’ for the purposes of Division 775 of the *Income Tax Assessment Act 1997* (ITAA 1997)?

❶ This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner’s preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don’t have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

Ruling

1. No. Bitcoin is not a ‘foreign currency’ for the purposes of Division 775 of the ITAA 1997.

Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

3. While the ATO view will have application for periods prior to its publication, the ATO will not generally apply compliance resources to past year cases in relation to taxpayers who have behaved in a bona fide manner and made a genuine attempt to understand and satisfy their obligations.

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Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.*

Explanation

How is ‘foreign currency’ relevant for tax purposes?

4. Division 775 of the ITAA 1997 provides rules for recognising foreign currency gains and losses for income tax purposes. Under subsection 775-15(4) of the ITAA 1997 to the extent that a foreign currency gain would be included in a taxpayer’s assessable income under Division 775 and another provision of the Assessment Acts, the gain is only included in the taxpayer’s assessable income under Division 775.

5. Section 995-1 of the ITAA 1997 provides that ‘foreign currency means a currency other than Australian currency’. The terms ‘currency’ and ‘Australian currency’ are not defined in the Assessment Acts and therefore take their ordinary meaning having regard to their context and the legislative purpose.

6. Determining whether a bitcoin is ‘foreign currency’ or ‘currency’ as those terms are used in the income tax law requires consideration of the characteristics of Bitcoin.

What is Bitcoin?

7. The *Oxford Dictionary of English* (3rd Ed) defines Bitcoin as:

a type of digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank: *bitcoin has become a hot commodity among speculators | If you want to buy something using bitcoin you need to make sure the seller accepts the cryptocurrency.*

8. It is described by commentators as ‘a virtual currency that essentially operates as online cash’¹ and as a ‘crypto-currency, designed to reinvent the way that money works’.² Bitcoin operates as a decentralized peer-to-peer payments network whose implementation relies on the use of public-key cryptography to validate transactions involving existing bitcoins and in doing so generates new bitcoin.³ The Bitcoin system is decentralized in that it is not under the control of a central authority.⁴ Transactions on the Bitcoin network are denominated in bitcoin. The value of Bitcoin is ‘not derived from gold or government fiat, but from the value that people assign it’.⁵

¹ Brito, J and Castillo, A ‘Bitcoin: A Primer for Policymakers’, *Policy*, Summer 2013-2014, vol. 29, no. 4, pp 3-12.

² Bradbury, D ‘The problem with Bitcoin’, *Computer Fraud & Security* November 2013, issue 11, pp 5-8.

³ Refer note 1 above at p 4.

⁴ See also Guthrie, N ‘The End of Cash? Bitcoin, the Regulators and the Courts’ *Banking & Finance Law Review* Apr 2014, vol 29, no. 2, pp 355-367; Moore, T ‘The promise and perils of digital currencies’ *International Journal of Critical Infrastructure Protection*, 2013, pp 147-149.

⁵ Refer note 1 above at p 4 and see also note 4 above: Guthrie, N at 357 and Moore, T at p 147.

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9. The process through which bitcoins are created and enter into circulation is called Bitcoin 'mining'. Mining involves a 'miner' using freely downloadable Bitcoin software to solve complex cryptographic equations that essentially verify and validate transactions involving the transfer of existing bitcoins between other parties, for example, to ensure an existing bitcoin cannot be transferred more than once by the one person. The first 'miner' to successfully solve an equation receives as a reward a specified number of newly created Bitcoins to their Bitcoin address. The process of 'mining' has been explained as follows:⁶

The actual mining of bitcoins is by a purely mathematical process. A useful analogy is with the search for prime numbers: it used to be fairly easy to find the small ones (Eratosthenes in Ancient Greece produced the first algorithm for finding them). But as they were found it got harder to find the larger ones.

...

For bitcoins the search is not actually for prime numbers but to find a sequence of data (called a 'block') that produces a particular pattern when the Bitcoin 'hash' algorithm is applied to the data. When a match occurs the miner obtains a bounty of bitcoins (and also a fee if that block was used to certify a transaction). The size of the bounty reduces as bitcoins around the world are mined.

The difficulty of the search is also increased so that it becomes computationally more difficult to find a match. These two effects combine to reduce over time the rate at which bitcoins are produced and mimic the production rate of a commodity like gold. At some point new bitcoins will not be produced and the only incentive for miners will be transaction fees.

10. Bitcoins that are already in circulation can be acquired either by exchanging 'national' or 'fiat' currencies⁷ for them through an online exchange (or through a Bitcoin ATM), or by accepting them as a gift or in exchange for goods and services.

11. Bitcoins are sent and received via Bitcoin addresses. A Bitcoin address is a long alphanumeric string used by the network as an identifier. A Bitcoin address can be generated at no cost by any user of Bitcoin and a person can have any number of Bitcoin addresses.⁸

12. Bitcoin uses public key cryptography to make and verify digital signatures used in Bitcoin transactions.⁹ Each user is assigned a 'public/private' keypair which is saved in that person's Bitcoin wallet. A Bitcoin wallet has been described as something 'that stores the digital credentials for [a person's] bitcoin holdings'.¹⁰

⁶ Tindell, K 'Geeks Love the Bitcoin Phenomenon Like They Loved the Internet in 1995' *Business Insider* 5 April 2013. See also note 2 above at pp 5-6.

⁷ For example, Australian dollars, US dollars etcetera. 'Fiat money' is defined as 'Money that a government has declared to be legal tender, although it has no intrinsic value and is not backed by reserves. Most of the world's paper money is now fiat money.': *A Dictionary of Finance and Banking* (Oxford) 4th revised ed.

⁸ See note 2 above at p 5.

⁹ See note 1 above at p 4.

¹⁰ Villasenor, J 'Secure Bitcoin Storage: A Q&A With Three Bitcoin Company CEOs' *Forbes* 26 April 2014.

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13. The public key is an alphanumeric number that mathematically corresponds to the Bitcoin address which is publically known. The private key is also an alphanumeric number, however, it is kept secret as it is what allows the bitcoins to be transferred between Bitcoin addresses.¹¹ The private key is also mathematically related to the Bitcoin address. It is designed so that the Bitcoin address can be calculated from that private key, but importantly, the same cannot be done in reverse.¹²

14. To transfer bitcoins, a person creates a transaction message with the number of bitcoins to be transferred and signs the transaction with their private key.¹³ Those bitcoins are associated with the person's public key. The transaction is then broadcast to the Bitcoin network for validation through the Bitcoin mining process.¹⁴

15. A bitcoin is only accessible by the person in possession of the private key that relates to the Bitcoin address associated with that person's bitcoin holdings. Accordingly, a bitcoin consists not just of the numerical amount (or balance) of bitcoins and the Bitcoin address to which they are associated, but also the related private key that allows the holder to do anything with those bitcoin.

Is Bitcoin 'currency' under the ordinary meaning of the term?

16. The *Macquarie Dictionary* relevantly defines 'currency' as:

1. that which is current as a medium of exchange; the money in actual use.
- ...
5. circulation, as of coin.

17. This definition suggests one of the core features of currency is that it is ultimately related to, and might be viewed as a species of the broader category of, 'money'. The term 'money' is defined in the *Macquarie Dictionary* as:

1. gold, silver, or other precious metal pieces of convenient form stamped by public authority and issued as a medium of exchange and measure of value.
2. current coin.
3. coin or certificate (as banknotes, etc.) generally accepted in payment of debts and current transactions.
4. any article or substance similarly used.
5. a particular form or denomination of currency.
6. a money of account.
7. property considered with reference to its pecuniary value.
8. an amount or sum of money.
9. wealth reckoned in terms of money.
10. (plural) Law pecuniary sums.
11. pecuniary profit.

¹¹ See note 1 above at p 4.

¹² Wiener, H, Zelnik, J, Tarshish, I, & Rodgers, M 'Chomping at the Bit: U.S. Federal Income Taxation of Bitcoin Transactions' *Journal Of Taxation Of Financial Products* (2013) vol. 11, no. 3, pp. 35-47 at 35.

¹³ Kondor D, Posfai M, Csabai I, Vattay G 'Do the Rich Get Richer? An Empirical Analysis of the Bitcoin Transaction Network' (2014) *PLoS ONE* vol. 9, issue 2 pp 1-10 at p 1.

¹⁴ See note 1 above at p 4.

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18. In *Leask v. Commonwealth*¹⁵ (*Leask*), in finding that subsection 31(1) of the *Financial Transaction Report Act 1988* was a law with respect to 'currency' within the meaning of paragraph 51(xii) of the Constitution, Brennan CJ stated at 5077:

Currency consists of notes or coins of denominations expressed as units of account of a country and is issued under the laws of that country for use as a medium of exchange of wealth.

19. Justice Gummow further explained at 5089-5092:

Section 8(1) of the *Currency Act 1965* (Cth) (the *Currency Act*) states that the monetary unit, or unit of currency, of Australia is the dollar; s 9(1), so far as is material, requires every transaction, dealing, matter or thing relating to money or involving the payment of, or a liability to pay, money to be made, executed, entered into or done according to the currency of Australia, unless the currency of some other country is used; and s 11(1) requires that every payment, unless made according to the currency of some other country, be made according to the currency of Australia.

...

In *Watson v Lee* (147), Mason J, with whom Gibbs J agreed, held that s 51(xii) gave the Parliament power 'to control and regulate the receipt and use' in Australia of foreign currency. Barwick CJ and Stephen J (with whom Gibbs J also agreed) spoke to the same effect (168). By parity of reasoning, the power also supports laws to control and regulate the receipt and use of coin and paper money in Australia, being the medium of exchange in Australia.

Stephen J and Mason J also emphasised that, while 'coinage' and 'legal tender' involved quite specific and narrow concepts, the former being concerned with coins as money and the latter with the prescription of that which at any particular time may be a lawful mode of payment, 'currency' was a broader expression. This is exemplified by the provisions of the *Currency Act* to which I have referred earlier in these reasons. They illustrate the proposition that currency is a universal means of exchange, designated by a particular unit of account (169). (footnotes omitted)

20. The meaning of 'money' was considered in *Travellex Limited v. Commissioner of Taxation*¹⁶ (*Travellex*) in the context of the *A New Tax System (Goods and Services Tax) Act 1999*. The issue in question was whether the taxpayer was entitled to a declaration that a foreign currency exchange transaction was a supply made in relation to rights and, if so, whether the rights were for use outside Australia, such that it was a GST-free supply. In considering when money may be considered to be 'goods' Emmett J stated:

Money is any generally accepted medium of exchange for goods and services and for the payment of debts (see *Butterworth's Australian Legal Dictionary* at 759). Currency and legal tender are examples of money. However, a thing can be money and can operate as a generally accepted medium and means of exchange, without being legal tender. Therefore, bank notes have historically been treated as money, notwithstanding that they were not legal tender. It is common consent and conduct that gives a thing the character of money (see *Miller v. Race* (1758) 1 Burrow 452 at 457). Money is that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities (see *Moss v. Hancock* [1899] 2 QB 111 at 116).

¹⁵ [1996] HCA 29; (1996) 187 CLR 579; (1996) 140 ALR 1; (1996) 70 ALJR 995; 96 ATC 5071; (1996) 35 ATR 91.

¹⁶ (Corrigendum dated 4 February 2009) [2008] FCA 1961; 2008 ATC 20-087; (2008) 71 ATR 216.

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21. In *Messenger Press Proprietary Ltd v. FC of T*¹⁷, Perram J referred to the test in *Moss v. Hancock*¹⁸ (*Moss*) as adopted by Emmett J in *Travelex* and applied it to promissory notes denominated in a foreign currency paid in exchange for release of a book debt denominated in Australian currency. In concluding that the promissory notes were not ‘money’ per the *Moss* formulation, Perram J noted that:¹⁹

There was no evidence that the promissory notes had taken on the quality of being able to be used throughout the community for the discharge of debts and, if they did have that quality, any reasonable person would certainly make inquiries as to the ‘character or credit’ of the issuer before accepting such a note.

22. It is also noted that in respect of the formulation of the test in *Moss*, Perram J noted that ‘no doubt this definition has its limitations’²⁰ referring to the fact that the *Moss* formulation did not include the exchange settlement funds held by banks with a central bank as such funds are not available to the community at all, passing only between banks despite the fact that they constitute the monetary base of the payments system. Noting some other deficiencies in the definition, Perram J referred to *Mann on the Legal Aspects of Money*.²¹

23. In that text, Proctor suggests that the formulation in *Moss* had tended to adopt a purely functional approach to the definition of money.²² It is further suggested that although a legal definition of money should reflect at least some of these functional attributes, it must also include an element which recognises the international law requirement that money ‘must exist within some form of legal framework, because it reflects an exercise of sovereignty by the State in question’.²³ Proctor then goes on to state:

For anything which is treated as ‘money’ purely in consequence of local custom or the consent of the parties does not represent or reflect an exercise of monetary sovereignty by the State concerned, and thus cannot be considered as ‘money’ in a legal sense.²⁴

24. It has been argued that Bitcoin satisfies the ordinary meaning of money because on a functional approach it satisfies three essential elements for money because it serves as (1) a medium of exchange, (2) a unit of account, and (3) a store of value. In addition, it is argued that there is widespread usage and acceptance of Bitcoin in the community as a means of discharging debts and making other payments, and accordingly Bitcoin’s increasing acceptance has now reached the point that it qualifies as ‘money’. This later point is very much a question of fact and degree. The Commissioner’s view is that the current use and acceptance of Bitcoin in the community is not sufficiently widespread such that it satisfies the test in *Moss*, nor is it a generally accepted medium of exchange as per *Travelex*.²⁵ Accordingly, Bitcoin does not satisfy the ordinary meaning of money.

¹⁷ [2012] FCA 756.

¹⁸ [1899] 2 QB 111.

¹⁹ At 196.

²⁰ *Ibid.*

²¹ *Ibid.*

²² C. Proctor, *Mann on the Legal Aspects of Money* (Oxford University Press, 6th Ed, 2005) at [1.11].

²³ *Ibid.*, at [1.12].

²⁴ *Ibid.*, at [1.13].

²⁵ Given the anonymous nature of bitcoin and the fact that a Bitcoin user can have, and usually will have, many Bitcoin addresses, it is difficult to determine precisely the current number of Bitcoin users. Recent estimates are that there are approximately 500,000 Bitcoin users worldwide, and that it is likely that fewer than one in ten businesses would currently accept payment in bitcoins even in the United States, where Bitcoin is most widely used. These rough figures suggest that Bitcoin use at present is far from universal and is rather uncommon.

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25. Ultimately, it is not critical to come to a conclusion on whether Bitcoin is covered by the ordinary meanings of currency and money because within the context of section 995-1 of the ITAA 1997, the statute is considered to have provided its own particular conception of currency.

Is Bitcoin ‘currency’ taking into account the legislative context and purpose?

26. The Commissioner considers that Bitcoin does not constitute ‘currency’ nor ‘foreign currency’ in the context in which those terms operate for the purposes of Australian tax law.

27. The legislative context in which the term ‘currency’ is used is to define ‘foreign currency’ as something ‘other than Australian currency’. Accordingly, Parliament chose to define ‘foreign currency’ as the antithesis of ‘Australian currency’. Therefore it is necessary to consider what the ITAA 1997 means by ‘Australian currency’ in order to determine in what sense the term ‘currency’ is being used within the definition of foreign currency.

28. Although the term ‘Australian currency’ is undefined in the Assessment Acts, it has a legal meaning under Australian law by virtue of the Currency Act as explained above in *Leask*. It is a general principle of statutory interpretation that, where a statute uses words that have acquired a legal meaning, ‘it will be taken, prima facie, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context’.²⁶

29. In *Gamer’s Motors Centre (Newcastle) Pty Ltd v Natwest Wholesaler Pty Ltd*²⁷ Priestley JA further elaborated:²⁸

The object of the approach is not to find the legal as opposed to the ‘ordinary’ meaning, but to find from the range of legal and ordinary meanings, which in any event will seldom be in watertight compartments, the meanings best suited to the statutory document as a whole.

30. Subsection 8(1) of the Currency Act provides that the unit of currency of Australia is the dollar. The Australian Dollar is the only legally recognised form of payment in Australia (apart from the currency of some other country) under sections 9 and 11 of the Currency Act (see paragraph 19 above for the relevant aspects of sections 9 and 11).

²⁶ *Attorney-General (NSW) v. Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 531. See also the other authorities discussed in Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) at 128 [4.13].

²⁷ (1985) 3 NSWLR 475.

²⁸ (1985) 3 NSWLR 475 at 484. For an example of the application of this principle, see *Johnson v. Native Title Registrar* [2014] FCA 142 at [29]-[30].

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31. Accordingly, the meaning of ‘the currency of Australia’ (or ‘Australian currency’) under the Currency Act is the monetary unit established by that Act as the requisite unit of account, and means of discharging monetary obligations, for all transactions and payments that are not made according to the currency of another country. Conversely, ‘the currency of some country other than Australia’ – the only other species of ‘currency’ according to which transactions and payments can proceed under the Currency Act – must be any monetary unit recognised by another country’s laws for the same purposes. Therefore, the critical character of the Currency Act’s concept of ‘currency’ is State recognition and adoption of a monetary unit under law. This approach under the Currency Act reflects the position taken in *Mann on the Legal Aspects of Money*, namely that money ‘must exist within some form of legal framework, because it reflects an exercise of sovereignty by the State in question’.²⁹

32. The Commissioner considers that when defining ‘foreign currency’ as ‘a currency other than Australian currency’ in section 995-1 of the ITAA 1997, Parliament intended to use the term ‘currency’ in the same sense that ‘currency’ is used in the Currency Act – namely, a currency legally recognised as a unit of account and form of payment by the laws of some country. Consistent with the Currency Act, this concept of currency is in turn divided into two types for the purposes of the ITAA 1997: Australian currency on the one hand, and every currency that is legally recognised as a unit of account and form of payment by the laws of any other sovereign state on the other hand (that is, foreign currency).

33. As Bitcoin is not legally recognised as a unit of account and form of payment by the laws of any other sovereign country it is not ‘foreign currency’ for the purposes of Division 775 of the ITAA 1997.

²⁹ Proctor, *Mann on the Legal Aspects of Money*, (6th ed, 2005) at 14 [1.12].

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Appendix 2 – Your comments

34. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

35. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

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References

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2009) [2008] FCA 1961; 2008 ATC 20-087; (2008) 71 ATR 216

*Related Rulings/Determinations:*TD 2014/D12; TD 2014/D13; TD 2014/D14;
GSTR 2014/D3; TR 2006/10*Other references:*

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Subject references:

- foreign currency

Legislative references:

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- ITAA 1997 995-1
- Currency Act 1965 (Cth) 8(1)
- Currency Act 1965 (Cth) 9(1)
- Currency Act 1965 (Cth) 11(1)
- Financial Transaction Reports Act 1988 31(1)
- Constitution (Cth) 51(xii)

Case references:

- Attorney-General (NSW) v. Brewery Employees Union of New South Wales (1908) 6 CLR 469
- Gamer's Motors Centre (Newcastle) Pty Ltd v Natwest Wholesaler Pty Ltd (1985) 3 NSWLR 475
- Johnson v. Native Title Registrar [2014] FCA 142
- Leask v. Commonwealth [1996] HCA 29; (1996) 187 CLR 579; (1996) 140 ALR 1; (1996) 70 ALJR 995; 96 ATC 5071; (1996) 35 ATR 91
- Messenger Press Proprietary Ltd v. FC of T [2012] FCA 756
- Miller v. Race (1758) 1 Burrow 452 at 457
- Moss v. Hancock [1899] 2 QB 111
- Traveler Limited v. Commissioner of Taxation (Corrigendum dated 4 February

ATO references

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Draft Taxation Determination

Income tax: is Bitcoin a CGT asset for the purposes of subsection 108-5(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)?

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Ruling

1. Yes. Bitcoin is a 'CGT asset' for the purposes of subsection 108-5(1) of the ITAA 1997.

Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

3. While the ATO view will have application for periods prior to its publication, the ATO will not generally apply compliance resources to past year cases in relation to taxpayers who have behaved in a bona fide manner and made a genuine attempt to understand and satisfy their obligations.

Commissioner of Taxation
20 August 2014

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Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.***

Explanation

What is Bitcoin?

4. This Draft Taxation Determination is part of a suite of determinations issued by the Commissioner on Bitcoin. Accordingly, a detailed description of Bitcoin is contained in Draft Taxation Determination TD 2014/D11 *Income tax: is Bitcoin a ‘foreign currency’ for the purposes of Division 775 of the Income Tax Assessment Act 1997 (ITAA 1997)?*

Is Bitcoin a ‘CGT asset’?

5. The term ‘CGT asset’ is defined in subsection 108-5(1) of the ITAA 1997 as:

- (a) any kind of property; or
- (b) a legal or equitable right that is not property.

Is Bitcoin ‘any kind of property’?

6. In *Yanner v. Eaton*¹ (*Yanner*) the High Court accepted that property refers not to a thing but to a description of a legal relationship with a thing; and, more specifically, to the degree of power that is recognised in law as permissibly exercised over the thing. Noting the difficulties in determining what is meant by ‘property’ in a thing, their honours quoted Professor Gray who stated ‘[a]n extensive frame of reference is created by the notion that ‘property’ consists primarily in control over access’.²

¹ (1999) 201 CLR 351 at 365-7 [17]-[19].

² *Ibid* at 366 [18].

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7. There is no single test nor a single determinative factor for identifying a proprietary right.³ Courts have emphasised different characteristics in different circumstances.⁴ One formulation that has been applied in Australia is the ‘Ainsworth test’ – which asks whether a right is definable, identifiable and capable of assumption by third parties, and permanent or stable to some degree.⁵ However, courts have also focused on factors such as excludability (whether it is possible to exclude others from the right in question),⁶ commercial value (whether something is treated in commerce as a valuable proprietary right),⁷ and enforceability of the right against third parties generally.⁸ Accordingly, in determining whether something amounts to property it is necessary to weigh up a range of factors, and to treat none as definitive.

8. In the case of Bitcoin, the relevant relationship in the nature of property that must be considered is the relationship between:

- (a) the object or thing, bitcoin, being the digital representation of value constituted by three interconnected pieces of information (a Bitcoin address; the Bitcoin holding or balance in that address; and the public and private keypair associated with that address),⁹ and
- (b) the bundle of rights (hereafter referred to as ‘Bitcoin holding rights’) ascribed to a person with access to the bitcoin under the Bitcoin software and by the community of Bitcoin users.

9. The most important of these Bitcoin holding rights are the rights of control over one or more bitcoins in the holder’s Bitcoin wallet, for example, the capacity to trade a bitcoin for other value or use it for payment. These rights, however, do not amount to a chose in action as a Bitcoin holding does not give rise to a legal action or claim against anyone.

³ See, for example, Meagher, Heydon and Leeming, *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* (4th ed, 2002) at [4-015] (identifying various characteristics of proprietary rights, but remarking that it is “incorrect to assume that unless all these characteristics are present there cannot be ‘property’”).

⁴ For one commentator’s summary of some of the main approaches, see Moses, “The Applicability of Property Law in New Contexts: From Cells to Cyberspace” (2008) 30 *Sydney Law Review* 639 at 647-652.

⁵ *National Provincial Bank Ltd v. Ainsworth* [1965] AC 1175 at 1247-8, approved in, for example, *R v. Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342.

⁶ See, for example, *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 at 272; *Potter v. Commissioners of Inland Revenue* (1854) 156 ER 392 at 396.

⁷ See, for example, *Halwood Corporation Ltd v. Chief Commissioner of Stamp Duties* (1992) 33 NSWLR 395 at 403.

⁸ See, for example, *Wily v. St George Partnership Banking Ltd* (1999) 84 FCR 423 at 426.

⁹ See Taxation Determination TD 2014/D11 for further explanation of these Bitcoin concepts.

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10. However, there are other factors that support the conclusion that Bitcoin holding rights are proprietary in nature. The most compelling is that bitcoins are treated as valuable, transferable items of property by a community of Bitcoin users and merchants. There is an active market for trade in bitcoins and substantial amounts of money can change hands between transferors and transferees of bitcoins.¹⁰ *Armstrong DLW GmbH v. Winnington Networks Ltd*¹¹ and other English and Australian cases¹² evidence a judicial willingness to regard property that is valuable in commerce as property for the purposes of law.

11. Bitcoin holding rights involve an inherent excludability because the Bitcoin software restricts control of a bitcoin holding to the person in possession of the relevant private key. As the Bitcoin software prescribes how the transfer and trade of bitcoins can occur and transactions are verified through the Bitcoin mining process, Bitcoin holding rights are definable, identifiable by third parties, capable of assumption by third parties, and sufficiently stable as per the Ainsworth test.

12. In weighing all these factors it is considered that Bitcoin holding rights amount to property within the meaning of paragraph 108-5(1)(a) of the ITAA 1997. As such, a person holding a bitcoin is considered to hold a 'CGT asset' for the purposes of that provision.

13. Apart from a dealing in individual bitcoins it is possible for there to be a dealing relating to the Bitcoin wallet (which would necessarily be a dealing in each and every bitcoin in the wallet and the private key), or just in the private key. Rights may exist in relation to either. Bitcoin wallet rights are essentially the same as the Bitcoin holding rights but represent a more extensive interest, the whole (the wallet) including the lesser (individual bitcoins). Rights in the private key would fall short of 'property' for the purposes of paragraph 108-5(1)(a) of the ITAA 1997. However, the law of confidential information would point to the existence of an equitable right in relation to the private key, enforceable by a court, which would then give rise to a CGT asset for the purposes of paragraph 108-5(1)(b) of the ITAA 1997. Dealings in relation to either the wallet or the private key are therefore capable of amounting to CGT events that happen to CGT assets.

14. While it is not necessary for the purposes of this tax determination to decide whether the wallet is an item of property distinct from the individual bitcoins or merely their aggregation, more probably it is the latter. A disposition of the wallet would be considered, in normal circumstances, to be identical with a disposition of the bitcoins in it. On the other hand, confidential information in relation to the private key is probably an item distinct from the bitcoins. The distinction is thought to be unlikely to have practical significance in normal circumstances.

¹⁰ These factors were influential in the English case of *Armstrong DLW GmbH v. Winnington Networks Ltd* [2012] 3 WLR 835 at 848 [49] which held that European Union Allowances (EUAs) constitute intangible property. EUAs possess similar characteristics to Bitcoin in that they are entirely electronic, tradeable and can involve substantial amounts of money being exchanged. However, EUAs are a creature of statute and this fact was a significant factor in the reasoning of the court, whereas Bitcoin is created by software.

¹¹ *Ibid* at 852 [58].

¹² See, for example, *Halwood* (1992) 33 NSWLR 395 (dealing with transferrable floor space) and the cases listed in Moses, "The Applicability of Property Law in New Contexts: From Cells to Cyberspace" (2008) 30 *Sydney Law Review* 639 at 650 n 75 (dealing with export quotas, licences and similar interests).

CGT consequences of disposing of Bitcoin

15. The disposal of Bitcoin to a third party gives rise to CGT event A1 under subsection 104-10(1) of the ITAA 1997. A taxpayer will make a capital gain from CGT event A1 if the capital proceeds from the disposal of the bitcoin are more than the bitcoin's cost base. The capital proceeds from the disposal of the bitcoin are, in accordance with subsection 116-20(1) of the ITAA 1997, the money or the market value of any other property received (or entitled to be received) by the taxpayer in respect of the disposal. The money paid or the market value of any other property the taxpayer gave in respect of acquiring the bitcoin will be included in the cost base of the bitcoin in accordance with subsection 110-25(2) of the ITAA 1997.

16. However, section 118-20 of the ITAA 1997 reduces any capital gain made by a taxpayer by an amount that is included in the taxpayer's assessable income under another provision of the tax law, for example, ordinary income under section 6-5 of the ITAA 1997.

17. Under subsection 118-10(3) of the ITAA 1997, a capital gain made from a personal use asset (a CGT asset used or kept mainly for personal use or enjoyment)¹³ is disregarded if the first element of the cost base is \$10,000 or less.¹⁴ In addition, any capital loss made from a personal use asset is disregarded under subsection 108-20(1) of the ITAA 1997.

18. This Draft Tax Determination is not intended to define the circumstances in which Bitcoin would be a personal use asset. Bitcoin is not kept or used for personal enjoyment. Bitcoin that is kept or used mainly for the purpose of profit-making or investment, or to facilitate purchases or sales in the course of carrying on business is not used or kept mainly for personal use. Bitcoin that is kept or used mainly to make purchases of items for personal use or consumption ordinarily will be kept or used mainly for personal use. Other categories of use conceivably could exist; taxpayers in these cases should seek private rulings.

¹³ As per paragraph 108-20(2)(a) of the ITAA 1997.

¹⁴ Section 108-25 of the ITAA 1997 may apply where a taxpayer disposes of number of bitcoins separately for the purposes of trying to obtain the personal use asset exemption in section 118-10 of the ITAA 1997.

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Subject references:

- Bitcoin
- Digital currency
- Property
- Intangible property
- CGT asset

Legislative references:

- ITAA 1997 6-5
- ITAA 1997 104-10(1)
- ITAA 1997 108-5(1)
- ITAA 1997 108-5(1)(a)
- ITAA 1997 108-5(1)(b)
- ITAA 1997 108-20(1)
- ITAA 1997 108-20(2)(a)
- ITAA 1997 108-25
- ITAA 1997 110-25(2)
- ITAA 1997 116-20(1)
- ITAA 1997 118-10
- ITAA 1997 118-10(3)
- ITAA 1997 118-20

Case references:

- Yanner v. Eaton (1999) 201 CLR 351
- National Provincial Bank Ltd v. Ainsworth [1965] AC 1175
- R v. Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327
- Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141
- Potter v. Commissioners of Inland Revenue (1854) 156 ER 392
- Halwood Corporation Ltd v. Chief Commissioner of Stamp Duties (1992) 33 NSWLR 395
- Wily v. St George Partnership Banking Ltd (1999) 84 FCR 423
- Armstrong DLW GmbH v. Winnington Networks Ltd [2012] 3 WLR 835

Other references:

- *Meagher, Heydon and Leeming, Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (4th ed, 2002)*
- *Moses, 'The Applicability of Property Law in New Contexts: From Cells to Cyberspace' (2008) 30 Sydney Law Review 639 at 647-652*

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Draft Taxation Determination

Income tax: is Bitcoin trading stock for the purposes of subsection 70-10(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)?

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Ruling

1. Yes. Bitcoin, when held for the purpose of sale or exchange in the ordinary course of a business, is trading stock for the purposes of subsection 70-10(1) of the ITAA 1997.

Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

3. While the ATO view will have application for periods prior to its publication, the ATO will not generally apply compliance resources to past year cases in relation to taxpayers who have behaved in a bona fide manner and made a genuine attempt to understand and satisfy their obligations.

Commissioner of Taxation

20 August 2014

TD 2014/D13

Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.***

Explanation

What is Bitcoin?

4. This Draft Taxation Determination is part of a suite of determinations issued by the Commissioner on Bitcoin. Accordingly, a detailed description of Bitcoin is contained in Draft Taxation Determination TD 2014/D11 *Income tax: is Bitcoin a ‘foreign currency’ for the purposes of Division 775 of the Income Tax Assessment Act 1997 (ITAA 1997)?*

5. In accordance with Draft Taxation Determination TD 2014/D12 *Income tax: is Bitcoin a CGT asset for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997 (ITAA 1997)*, Bitcoin is considered property for tax purposes.

Is Bitcoin ‘trading stock’ for the purposes of subsection 70-10(1) of the ITAA 1997?

6. The term ‘trading stock’ is defined in subsection 70-10(1) of the ITAA 1997 as:

- (a) anything produced, manufactured or acquired that is held for the purposes of manufacture, sale or exchange in the ordinary course of a *business; and
- (b) *livestock.

7. The term ‘anything’ is not defined in the ITAA 1997 and therefore takes its ordinary meaning taking into account the legislative context in which the term is used. According to the *Macquarie Dictionary*, the term ‘anything’ means ‘any thing whatever; something, no matter what; a thing of any kind’.

8. The Commissioner considers the ordinary meaning of the term ‘anything’ when considered in its legislative context, however, has a narrower meaning than the dictionary definition of the term.

9. Throughout Division 70, ‘trading stock’ is referred to as something that a taxpayer ‘holds’ or has ‘on hand’. It is clear that the legislative context is one which is referring to a thing that is capable of ownership, that is, some form of property. This construction is also supported by the relevant case law.

10. In *Federal Commissioner of Taxation v. Suttons Motors (Chullora) Wholesale Pty Ltd*¹ (*Sutton Motors*), the majority of the High Court noted that shares and land had both been held to be capable of being trading stock and the term’s central denotation was ‘...of goods held by a trader in such goods for sale or exchange in the ordinary course of his trade.’

11. The High Court in *John v. Federal Commissioner of Taxation*² (*John*) stated that the definition of trading stock ‘presupposes that the person by whom [goods] are produced, manufactured, acquired or purchased is or will be engaged in trade in those goods.’

¹ (1985) 157 CLR 277; 85 ATC 4398; (1985) 16 ATR 567.

² (1989) 166 CLR 417; 89 ATC 4101; (1989) 20 ATR 1.

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Status: **draft only – for comment**

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12. It is evident from the context in *John* in which the definition of trading stock was being considered that the trading activity to which the definition applies involves the passing of a proprietary interest in the things traded. It is also clear from *Sutton Motors* that intangible property such as shares are capable of being trading stock.

13. Accordingly, as Bitcoin is property for tax purposes, Bitcoin is 'trading stock' for the purposes of subsection 70-10(1) of the ITAA 1997 where it is held for the purpose of sale or exchange in the ordinary course of a business.

Draft Taxation Determination

TD 2014/D13

Page 4 of 5

Status: **draft only – for comment**

Appendix 2 – Your comments

14. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

15. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

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CIVIC SQUARE ACT 2608

TD 2014/D13

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Page 5 of 5

References

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TD 2014/D11; TD 2014/D12; TD 2014/D14;
GSTR 2014/D3; TR 2006/10

Subject references:

- foreign currency
- trading stock

Legislative references:

- ITAA 1997 70-10(1)

Case references:

- Federal Commissioner of Taxation v. Suttons Motors (Chullora) Wholesale Pty Ltd (1985) 157 CLR 277; 85 ATC 4398; (1985) 16 ATR 567
- John v. Federal Commissioner of Taxation (1989) 166 CLR 417; 89 ATC 4101; (1989) 20 ATR 1

Other references:

- *The Macquarie Dictionary*, [Online], viewed 13 August 2014, www.macquariedictionary.com.au

ATO references


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ATOlaw topic:	Income tax ~~ Assessable income ~~ Other types of income ~~ Foreign currency


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 You can access a [guidance paper](#) that has been issued with this draft Determination. The guidance paper provides an overview of the tax treatment for transactions associated with crypto-currencies, specifically Bitcoin. Where other crypto-currencies have the same characteristics as Bitcoin, the information in the guidance paper applies equally to the taxation treatment for other crypto-currencies.



Australian Government
Australian Taxation Office

Draft Taxation Determination

TD 2014/D14

Status: **draft only – for comment**

Page 1 of 6

Draft Taxation Determination

Fringe benefits tax: is the provision of Bitcoin by an employer to an employee in respect of their employment a property fringe benefit for the purposes of subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*?

① This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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Ruling

1. Yes. The provision of Bitcoin by an employer to an employee in respect of their employment is a property fringe benefit for the purposes of subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA).¹

Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

¹ All legislative references in this Draft Determination are to the FBTAA unless otherwise indicated.

Taxation Determination

TD 2014/D14

Page 2 of 6

Status: **draft only – for comment**

3. While the ATO view will have application for periods prior to its publication, the ATO will not generally apply compliance resources to past year cases in relation to taxpayers who have behaved in a bona fide manner and made a genuine attempt to understand and satisfy their obligations.

Commissioner of Taxation

20 August 2014

TD 2014/D14

Status: **draft only – for comment**

Page 3 of 6

Appendix 1 – Explanation

❶ ***This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.***

Explanation

What is Bitcoin?

4. This Draft Taxation Determination is part of a suite of draft determinations issued by the Commissioner on Bitcoin. A detailed description of Bitcoin is contained in Draft Taxation Determination TD 2014/D11 *Income tax: is Bitcoin a ‘foreign currency’ for the purposes of Division 775 of the Income Tax Assessment Act 1997 (ITAA 1997)?* (TD 2014/D11).

5. In accordance with Draft Taxation Determinations TD 2014/D11 and TD 2014/D12 *Income tax: is Bitcoin a CGT asset for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997 (ITAA 1997)?* Bitcoin is not money² but is considered property for tax purposes. Bitcoin is also not a chose in action (TD 2014/D12).³

Is the provision of Bitcoin a property benefit?

6. ‘Property benefit’, as defined in subsection 136(1) of the FBTAA, ‘means a benefit referred to in section 40, but does not include a benefit that is a benefit by virtue of a provision of Subdivision A of Divisions 2 to 10 (inclusive of Part III)’. Bitcoin is not a benefit described in Divisions 2 to 10 of the FBTAA.

7. Section 40 of the FBTAA provides that where a person (the ‘provider’) provides⁴ property to another person (the ‘recipient’), the provision of the property ‘shall be taken to constitute a benefit provided by the provider to the recipient’.

8. Property as defined in subsection 136(1) of the FBTAA means ‘intangible property’ and ‘tangible property’. ‘Tangible property’ is, in turn, defined as ‘goods and includes animals, including fish; and gas and electricity’. ‘Intangible property’ is defined as:

- (a) real property;
- (b) a chose in action; and
- (c) any other kind of property other than tangible property,

but does not include:

- (d) a right arising under a contract of insurance; or
- (e) a lease or licence in respect of real property or tangible property.

² See paragraph 24 of TD 2014/D11.

³ Although a dealing in just the private key would constitute an equitable interest: paragraph 14 of TD 2014/D12.

⁴ ‘Provide’ is defined in subsection 136(1) of the FBTAA to mean, as relevant, in relation to property, to dispose of the beneficial or legal ownership of the property.

TD 2014/D14

9. Bitcoin is not tangible property for the purposes of the FBTAA. Nor is Bitcoin real property and Bitcoin holding rights are not a chose in action. However as the definition of intangible property also includes ‘any other kind of property other than tangible property’, Bitcoin will fall within this definition. The provision of bitcoin by an employer to an employee is therefore a property benefit.

Is Bitcoin a property fringe benefit?

10. ‘Property fringe benefit’ is defined in subsection 136(1) of the FBTAA and means ‘a fringe benefit that is a property benefit’.

11. The term ‘fringe benefit’ is relevantly defined in subsection 136(1) of the FBTAA to mean:

...a benefit provided to the employee ... by the employer ... in respect of the employment of the employee, but does not include a payment of salary or wages ...

12. Accordingly, a benefit will not be a fringe benefit if it is ‘salary or wages’. ‘Salary or wages’ is relevantly defined in subsection 136(1) of the FBTAA to mean:

(a) a payment from which an amount must be withheld (even if the amount is not withheld) under a provision in Schedule 1 to the *Tax Administration Act 1953* listed in the table, to the extent that the payment is assessable income;...

13. Item 1 of the table to this definition lists section 12-35 of Schedule 1 to the *Tax Administration Act 1953* (TAA) as the relevant provision in relation to a payment to an employee.

14. Section 12-35 of Schedule 1 to the TAA, however, will not apply to require withholding on ‘a payment in so far as it consists of providing a non-cash benefit’ in accordance with section 12-10 of Schedule 1 to the TAA.

15. Section 995-1 of the ITAA 1997 defines the term ‘non-cash benefit’ as ‘property or services in any form except money’.

16. As Bitcoin is not money but is considered to be property for tax purposes, Bitcoin satisfies the definition of a ‘non-cash benefit’ and it is excluded from Pay As You Go (PAYG) withholding. This exclusion from PAYG withholding means that Bitcoin is not ‘salary or wages’ within the definition of that term in subsection 136(1) of the FBTAA and accordingly is not ‘salary or wages’ for the purposes of the exclusion in the definition of ‘fringe benefit’ in the same subsection.

17. Accordingly, the provision of bitcoin by an employer to an employee in respect of the employee’s employment will be a property fringe benefit for the purposes of subsection 136(1) of the FBTAA.

TD 2014/D14

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Page 5 of 6

Appendix 2 – Your comments

18. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

19. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

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References

Previous draft:

Not previously issued as a draft

- FBT intangible property
- FBT tangible property
- FBT property fringe benefit
- fringe benefits tax

Related Rulings/Determinations:

TD 2014/D11; TD 2014/D12; TD 2014/D13;
GSTR 2014/D3; TR 2006/10

Legislative references:

Subject references:

- benefit
- FBT
- FBT salary or wages

- ITAA 1997 995-1
- FBTA 1986 40
- FBTA 1986 136(1)
- TAA 1953 Sch 1 12-10
- TAA 1953 Sch 1 12-35

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You can access a [guidance paper](#) that has been issued with this draft Ruling. The guidance paper provides an overview of the tax treatment for transactions associated with crypto-currencies, specifically Bitcoin. Where other crypto-currencies have the same characteristics as Bitcoin, the information in the guidance paper applies equally to the taxation treatment for other crypto-currencies.



Draft Goods and Services Tax Ruling

Goods and services tax: the GST implications of transactions involving bitcoin

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What this Ruling is about

1. This draft Ruling explains the Commissioner's view on the goods and services tax (GST) consequences of transactions involving the use of Bitcoin.
2. In particular, this draft Ruling considers whether bitcoin is 'money' as defined in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and whether it is a 'financial supply' under subsection 40-5(1) of the GST Act.
3. In considering the GST consequences, the draft Ruling focuses on the requirement that there must be a 'supply for consideration' for there to be a taxable supply. For the purposes of this draft Ruling, it is assumed that the other requirements in section 9-5 (taxable supplies) and section 11-5 (creditable acquisitions) of the GST Act are satisfied.
4. All references in this draft Ruling are to the GST Act unless otherwise specified.

GSTR 2014/D3

Ruling

5. A transfer of bitcoin is a 'supply' for GST purposes.¹ The exclusion from the definition of supply for supplies of money² does not apply to bitcoin because bitcoin is not 'money' for the purposes of the GST Act.³

6. The supply of bitcoin is not a 'financial supply' under section 40-5. Further, it is not an input taxed supply under paragraph 9-30(2)(b).

7. A supply of bitcoin is a taxable supply under section 9-5 if the other requirements in section 9-5 are met and the supply of bitcoin is not GST-free under Division 38 (for example, as a supply to a non-resident for use outside of Australia).⁴ A supply of bitcoin in exchange for goods or services will be treated as a barter transaction.

Example 1: bitcoin exchange transactions

8. *Liam carries on a business buying and selling bitcoin (BTC) as an exchange service online in Australia charging a 1% commission on the published exchange rate. Liam is registered for GST.*

9. *David, who is not registered for GST, uses Liam's online service to exchange 10 BTC to Australian dollars. The exchange rate at the time of the transaction is 1BTC = AUD662. The commission is \$66.20. David receives AUD\$6,553.80 for his 10 BTC.*

10. *The following day Karin, who is registered for GST, wishes to purchase 10 BTC from Liam's online service for use in acquiring an asset for her business. The exchange rate is 1BTC = AUD662. Karin acquires the 10 BTC for AUD\$6,686.20 plus GST. The GST inclusive amount of AUD\$7,354.40 is calculated as follows: 10 BTC x AUD\$662, plus AUD\$66.20 commission, plus AUD\$668.62 GST.*

11. *Liam records this exchange transaction with Karin and includes the amount in his business activity statement. If Karin's acquisition is wholly for a creditable purpose, Karin may claim input tax credits for the GST she paid on the acquisition of the bitcoin. When Karin later acquires an asset in exchange for bitcoin, she will record the supply of bitcoin as a taxable supply and an equivalent credit may be claimed in respect of her asset acquisition.*

Example 2: bitcoin provided in exchange for goods or services

12. *Paul owns a computer shop and is registered for GST. He sells a server for a GST-inclusive price of \$7,700 to Ross Co, a building company that is registered for GST. Paul agrees to accept bitcoin from Ross Co in exchange for the server.*

¹ Subsection 9-10(1).

² Subsection 9-10(4) excludes a supply of money from the definition of supply except where money is provided as consideration for the supply of money.

³ 'Money' is defined in section 195-1.

⁴ See section 38-190.

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Status: **draft only – for comment**

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13. When Paul lodges his business activity statement, he includes \$7,700 for the taxable supply of the server to Ross Co and claims credits of \$700 for the acquisition of the bitcoin. When Ross Co lodges its business activity statement, it includes \$7,700 for the GST inclusive market value of the bitcoin, and claims credits of \$700 for the acquisition of the server.

Example 3: merchant using an intermediary to accept bitcoin in exchange for goods or services

14. Following on from Example 2 above, Paul has an agreement with an intermediary acting as his agent to accept bitcoin in exchange for goods and services. When customers provide bitcoin to the intermediary in exchange for goods and services, Paul pays commission to the intermediary equal to 1% of the price. The intermediary agrees to deposit Australian currency (immediately or within one day) into Paul's nominated bank account. There is no agreement between the customer and the intermediary.

15. Two transactions occur here. First, the customer supplies bitcoin in exchange for the supply of goods and services from Paul as a barter transaction. The GST consequences of this are explained in Example 2. Second, Paul supplies bitcoin to the intermediary (through the transfer of bitcoin from the customer) for Australian currency which is treated as a taxable supply by Paul on which GST is payable. The intermediary provides Paul with taxable services for which the commission is consideration and the intermediary may claim credits for the acquisition of the bitcoin.

Date of effect

16. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

17. While the ATO view will have application for periods prior to its publication, the ATO will not generally apply compliance resources to past year cases in relation to taxpayers who have behaved in a bona fide manner and made a genuine attempt to understand and satisfy their obligations.

Commissioner of Taxation

20 August 2014

GSTR 2014/D3

Appendix 1 – Explanation

ⓘ *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.*

Relevance of the concepts of ‘money’ and ‘currency’ in the GST Act

18. Whether bitcoin is ‘money’ is relevant for determining whether the transfer of bitcoin is a ‘supply’ for GST purposes. A supply ‘...does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money’.⁵ The value of a taxable supply is calculated by reference to the price which is made up of consideration which is expressed as an amount of money and the GST inclusive value of non-monetary consideration.⁶ Further, the value of that taxable supply must be expressed in Australian currency or translated into Australian currency if the consideration is expressed in a foreign currency.⁷ Having regard to these provisions, ‘money’ is a central concept in determining whether there is a ‘supply’ for GST purposes, and the calculation of the GST payable on a taxable supply.

19. ‘Money’ is defined to specifically include, amongst other things, ‘currency (whether of Australia or of any other country)’.⁸ The term ‘currency’ is not defined. The meaning of each of these terms in the context of the GST Act is discussed in detail in the explanation below.

20. Determining whether bitcoin is ‘money’ or ‘currency’ for the purposes of the GST Act requires consideration of the characteristics of Bitcoin.

What is Bitcoin?

21. The *Oxford Dictionary of English*⁹ defines Bitcoin as:

a type of digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank: *bitcoin has become a hot commodity among speculators | If you want to buy something using bitcoin you need to make sure the seller accepts the cryptocurrency.*

⁵ Subsection 9-10(4).

⁶ Subsection 9-75(1).

⁷ Section 9-85.

⁸ Definition of ‘money’ in section 195-1.

⁹ *Oxford Dictionary of English* [online] 3rd ed. viewed 7 August 2014
www.oxfordreference.com.

22. It is described by commentators as ‘a virtual currency that essentially operates as online cash’¹⁰ and as a ‘crypto-currency, designed to reinvent the way that money works’.¹¹ Bitcoin operates as a decentralized peer-to-peer payment network whose implementation relies on the use of public-key cryptography to validate transactions involving existing bitcoin and in doing so generates new bitcoin.¹² The Bitcoin system is decentralized in that it is not under the control of a central authority.¹³ Transactions on the Bitcoin network are denominated in bitcoin. The value of bitcoin is ‘not derived from gold or government fiat, but from the value that people assign it’.¹⁴

23. The process through which bitcoins are created and enter into circulation is called bitcoin ‘mining’. Mining involves a ‘miner’ using freely downloadable Bitcoin software to solve complex cryptographic equations that essentially verify and validate transactions involving the transfer of existing bitcoins between other parties, for example to ensure an existing bitcoin cannot be transferred more than once by the one person. The first ‘miner’ to successfully solve an equation receives as a reward a specified number of newly created Bitcoins to their Bitcoin address. The process of ‘mining’ has been explained as follows:¹⁵

The actual mining of Bitcoins is by a purely mathematical process. A useful analogy is with the search for prime numbers: it used to be fairly easy to find the small ones (Eratosthenes in Ancient Greece produced the first algorithm for finding them). But as they were found it got harder to find the larger ones.

...

For Bitcoins the search is not actually for prime numbers but to find a sequence of data (called a ‘block’) that produces a particular pattern when the Bitcoin ‘hash’ algorithm is applied to the data. When a match occurs the miner obtains a bounty of Bitcoins (and also a fee if that block was used to certify a transaction). The size of the bounty reduces as Bitcoins around the world are mined.

The difficulty of the search is also increased so that it becomes computationally more difficult to find a match. These two effects combine to reduce over time the rate at which Bitcoins are produced and mimic the production rate of a commodity like gold. At some point new Bitcoins will not be produced and the only incentive for miners will be transaction fees.

¹⁰ Brito, J and Castillo, A ‘Bitcoin: A Primer for Policymakers’, *Policy*, Summer 2013-2014, vol. 29, no. 4, pp 3-12.

¹¹ Bradbury, D ‘The problem with Bitcoin’, *Computer Fraud & Security* November 2013, issue 11, pp 5-8.

¹² Refer note 10 above at p 4.

¹³ See also Guthrie, N ‘The End of Cash? Bitcoin, the Regulators and the Courts’ *Banking & Finance Law Review* Apr 2014, vol 29, no. 2, pp 355-367; Moore, T ‘The promise and perils of digital currencies’ *International Journal of Critical Infrastructure Protection*, 2013, pp 147-149.

¹⁴ Refer note 10 above at p 4 and see also note 13 above: Guthrie, N at 357 and Moore, T at p 147.

¹⁵ Tindell, K ‘Geeks Love the Bitcoin Phenomenon Like They Loved the Internet in 1995’ *Business Insider* 5 April 2013. See also note 11 above at pp 5-6.

GSTR 2014/D3

24. Bitcoins that are already in circulation can be acquired either by exchanging 'national' or 'fiat' currencies¹⁶ for them through an online exchange (or through a Bitcoin ATM), or by accepting them as a gift or in exchange for goods and services.

25. Bitcoins are sent and received via Bitcoin addresses. A Bitcoin address is a long alphanumeric string used by the network as an identifier. A Bitcoin address can be generated at no cost by any user of Bitcoin and a person can have any number of Bitcoin addresses.¹⁷

26. Bitcoin uses public key cryptography to make and verify digital signatures used in Bitcoin transactions.¹⁸ Each user is assigned a 'public/private' keypair which is saved to that person's Bitcoin wallet. A Bitcoin wallet has been described as something 'that stores the digital credentials for [a person's] bitcoin holdings'.¹⁹

27. The public key is an alphanumeric number that mathematically corresponds to the Bitcoin address which is publically known. The private key is also an alphanumeric number, however, it is kept secret as it is what allows the bitcoins to be transferred between Bitcoin addresses.²⁰ The private key is also mathematically related to the Bitcoin address. It is designed so that the Bitcoin address can be calculated from that private key, but importantly, the same cannot be done in reverse.²¹

28. To transfer bitcoins, a person creates a transaction message with the number of bitcoins to be transferred and signs the transaction with their private key.²² Those bitcoins are associated with the person's public key. The transaction is then broadcast to the Bitcoin network for validation through the Bitcoin mining process.²³

29. A bitcoin is only accessible by the person in possession of the private key that relates to the Bitcoin address associated with that person's bitcoin holdings. Accordingly, a bitcoin consists not just of the numerical amount (or balance) of bitcoins and the Bitcoin address to which they are associated, but also the related private key that allows the holder to do anything with those bitcoin.

¹⁶ For example, Australian dollars, US dollars etcetera. 'Fiat money' is defined as 'Money that a government has declared to be legal tender, although it has no intrinsic value and is not backed by reserves. Most of the world's paper money is now fiat money.': *A Dictionary of Finance and Banking* (Oxford) 4th revised ed.

¹⁷ See note 11 above at p 5.

¹⁸ See note 10 above at p 4.

¹⁹ Villasenor, J 'Secure Bitcoin Storage: A Q&A With Three Bitcoin Company CEOs' *Forbes* 26 April 2014.

²⁰ See note 10 above at p 4.

²¹ Wiener, H, Zelnik, J, Tarshish, I, & Rodgers, M 'Chomping at the Bit: U.S. Federal Income Taxation of Bitcoin Transactions' *Journal Of Taxation Of Financial Products* (2013) vol. 11, no. 3, pp. 35-47 at 35.

²² Kondor D, Posfai M, Csabai I, Vattay G 'Do the Rich Get Richer? An Empirical Analysis of the Bitcoin Transaction Network' (2014) *PLoS ONE* vol. 9, issue 2 pp 1-10 at p 1.

²³ See note 10 above at p 4.

Is Bitcoin ‘money’ for GST purposes?

30. For the purposes of the GST Act, the term ‘money’ is defined in section 195-1 as:

Money includes:

- (a) currency (whether of Australia or any other country); and
- (b) promissory notes and bills of exchange; and
- (c) any negotiable instrument used or circulated, or intended for use or circulation, as currency (whether of Australia or of any other country); and
- (d) postal notes and money orders; and
- (e) whatever is supplied as payment by way of:
 - (i) credit card or debit card; or
 - (ii) crediting or debiting an account; or
 - (iii) creation or transfer of a debt.

However, it does not include:

- (f) a collector’s piece; or
- (g) an investment article; or
- (h) an item of numismatic interest; or
- (i) currency the market value of which exceeds its stated value as legal tender in the country of issue.

31. Generally the use of the term ‘includes’ indicates something broader than what follows in a statutory definition. Determining whether a broader meaning is intended and the content of that meaning is informed by the statutory context in which the term ‘money’ appears.²⁴ In determining whether bitcoin is ‘money’ for the purposes of the GST Act, it is essential to consider each of the specified items in the definition in section 195-1. Should bitcoin be ‘money’ then further consideration of the meaning of ‘money’ is not required.

Is Bitcoin ‘money’ under any item listed in the section 195-1 definition?

Paragraph (a): ‘currency (whether of Australia or of any other country)’

32. Paragraph (a) of the definition operates to include:
‘currency (whether of Australia or of any other country)’.

33. The term ‘currency’ in paragraph (a) of the definition of ‘money’ is qualified by ‘of Australia’ and ‘of any other country’. The term ‘Australian currency’ is interchangeable with the term ‘currency of Australia’, which is prescribed a meaning under Australian law by virtue of the *Currency Act 1965* (Cth) (Currency Act).

²⁴ *ZY Finance Co Pty Ltd v. Cummings* (1964) 109 CLR 395 at 398-399 and *Blacktown Workers’ Club Ltd v. O’Shannessy* (2011) 183 LGERA 184 at 190-191.

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34. In *Leask v Commonwealth*²⁵ (*Leask*), in finding that subsection 31(1) of the *Financial Transaction Reports Act 1988* (Cth) was a law with respect to 'currency' within the meaning of paragraph 51(xii) of the Constitution, Brennan CJ stated:²⁶

Currency consists of notes or coins of denominations expressed as units of account of a country and is issued under the laws of that country for use as a medium of exchange of wealth.

35. Gummow J further explained:²⁷

Section 8(1) of the *Currency Act 1965* (Cth) ('the Currency Act') states that the monetary unit, or unit of currency, of Australia is the dollar; s 9(1), so far as is material, requires every transaction, dealing, matter or thing relating to money or involving the payment of, or a liability to pay, money to be made, executed, entered into or done according to the currency of Australia, unless the currency of some other country is used; and s 11(1) requires that every payment, unless made according to the currency of some other country, be made according to the currency of Australia.

...

In *Watson v Lee* (167), Mason J, with whom Gibbs J agreed, held that s 51(xii) gave the Parliament power 'to control and regulate the receipt and use' in Australia of foreign currency. Barwick CJ and Stephen J (with whom Gibbs J also agreed) spoke to the same effect (168). By parity of reasoning, the power also supports laws to control and regulate the receipt and use of coin and paper money in Australia, being the medium of exchange in Australia.

Stephen J and Mason J also emphasised that, while 'coinage' and 'legal tender' involved quite specific and narrow concepts, the former being concerned with coins as money and the latter with the prescription of that which at any particular time may be a lawful mode of payment, 'currency' was a broader expression. This is exemplified by the provisions of the *Currency Act* to which I have referred earlier in these reasons. They illustrate the proposition that currency is a universal means of exchange, designated by a particular unit of account (169). (footnotes omitted)

²⁵ [1996] HCA 29; (1996) 187 CLR 579.

²⁶ *Leask* (1996) 187 CLR 579 at 595.

²⁷ *Ibid* at 617-618 and 622.

36. Accordingly, the meaning of the ‘currency of Australia’ under the Currency Act is the requisite monetary unit of exchange established by that Act as a means of discharging monetary obligations for all transactions and payments in Australia. Conversely, ‘the currency of some country other than Australia’ – the only other species of ‘currency’ according to which transactions and payment obligations can be discharged consistent with the Currency Act – must be any monetary unit recognised by another country’s laws for the same purposes. It is the legislative recognition of something as a monetary unit of exchange which makes that thing ‘currency’. That ‘currency’ can only exist within a legal framework and as an exercise of sovereignty is an aspect of the State theory of money²⁸ insofar as it is only by ‘fiat’ of the State that legitimacy is conferred.

37. It is a general principle of statutory interpretation that, where a statute uses words that have acquired a legal meaning, ‘it will be taken, prima facie, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context’.²⁹

38. In *Gamer’s Motors Centre (Newcastle) Pty Ltd v Natwest Wholesaler Pty Ltd*³⁰ (*Gamer’s*) Priestley JA further elaborated:³¹

The object of the approach is not to find the legal as opposed to the ‘ordinary’ meaning, but to find from the range of legal and ordinary meanings, which in any event will seldom be in watertight compartments, the meanings best suited to the statutory document as a whole.

39. As noted above, the term ‘currency’ is not defined in the GST Act. It has both an ordinary meaning and a legal meaning. The *Macquarie Dictionary*³² relevantly defines ‘currency’ as:

1 that which is current as a medium of exchange; the money in actual use;

.....

5 circulation, as of coin.

²⁸ C. Proctor, *Mann on the Legal Aspects of Money* (Oxford University Press, 6th ed. 2005) at [1.12] – [1.15].

²⁹ *Attorney-General (NSW) v. Brewery Employees Union of New South Wales* (1908) 6 CLR 469 at 531. See also the discussion in Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed. 2011) at 128 [4.13] which considers case authority which has both applied the rule and distinguished it based on the context of the particular case.

³⁰ (1985) 3 NSWLR 475. For an application of this principle see *Johnson v Native Title Registrar* [2014] FCA 142 at ([29]-[30]).

³¹ (1985) 3 NSWLR 475 at 484. See also McHugh JA in *Gamer’s* (1985) 3 NSWLR 475 at 494.

³² *The Macquarie Dictionary*, [Online], viewed 23 June 2014, www.macquariedictionary.com.au.

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40. The dictionary definition focuses on the function of currency as a medium of exchange. The legal meaning is that taken from the Currency Act. The Currency Act forms part of the broader statutory context in which the GST Act is to be construed. The use of the qualifiers 'of Australia' and 'of any other country' in paragraph (a) of the definition of 'money' are consistent with the concept of 'currency' in the Currency Act. Taking into account that context, the Commissioner is of the view that the concept of 'currency' in the GST Act does not extend to any broader concept of money that is current as a medium of exchange in the community.

41. Rather, in using the term 'currency', Parliament intended that the term take its legal meaning under the Currency Act – namely, a currency recognised as a universal means of exchange, designated by a particular unit of account and form of payment by the law in Australia or in some other country. The qualifiers 'of Australia' and 'of any other country' divide currency into two types: Australian currency and currency that is recognised as a universal means of exchange, designated by a particular unit of account and form of payment by the laws of another sovereign State (that is, foreign currency).

42. There is nothing in the GST Act which indicates an intention to depart from this established legal meaning of 'Australian currency' or the associated concept of 'foreign currency'.

43. Bitcoin is not a legally recognised universal means of exchange and form of payment by the laws of Australia or the laws of any other country. Therefore, it is not 'currency (whether of Australia or of any other country)' under paragraph (a) of the definition of 'money'.

Paragraph (b): promissory notes and bills of exchange

44. In Australia, the *Bills of Exchange Act 1909* (Cth) (the BOE Act) establishes a framework within which the use of specified financial instruments is comprehensively governed. The BOE Act defines the terms 'bills of exchange' and 'promissory note' in sections 8 and 89 respectively. A 'bill of exchange' is defined as:

8(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

8(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

45. A 'promissory note' is defined as:

89(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer.

46. It is specifically stated in the BOE Act that common law rules shall continue to apply to bills of exchange and promissory notes unless inconsistent with that statute.³³ Therefore, the legal meaning of these terms is also informed by relevant case law.

47. Each of the definitions quoted above evidence the character of bills of exchange and promissory notes as documentary intangibles in that the rights are transferrable by the document itself. The holder of the document, by reason of that holding alone, is able to enforce those rights against others. The same is not true for a bitcoin holding.

48. Further, the reference to ‘a sum certain in money’ in the definitions of a bill of exchange and promissory note requires payment in either Australian currency or foreign currency. That is, the sum must be denominated in and the rights enforceable by reference to ‘fiat’ currency. This interpretation is consistent with case law which, for example, has concluded that an instrument which provided for payment in gold dust was not a promissory note.³⁴

49. It follows that a bill of exchange or promissory note which purportedly granted a right denominated in bitcoin does not meet paragraph (b) of the definition of ‘money’ in the GST Act.

Paragraph (c): negotiable instruments used or circulated as currency

50. Paragraph (c) of the definition of ‘money’ includes:

any negotiable instrument used or circulated, or intended for use or circulation, as currency (whether of Australia or of any other country).

There are two elements to this paragraph – first, whether Bitcoin is a negotiable instrument, and second, whether its use or circulation is as currency of Australia or any other country.

51. The term ‘negotiable instrument’ is not defined. As noted in paragraphs 37 and 38 above, where words have a range of meanings, the construction of those words must take into account both the legal and ordinary uses to which they have been put. The meaning best suited to those words is determined by reference to the statutory context as a whole.

³³ Subsection 5(2) of the BOE Act.

³⁴ *McDonald v. Belcher* [1904] AC 429 at 435. See also Guest, AG 2009 *Chalmers and Guest on Bills of exchange, cheques and promissory notes*, 17th ed. Sweet & Maxwell, London, pp. 29-30.

52. An examination of the context in which the phrase ‘negotiable instrument’ appears indicates that it is intended to take on a technical or legal meaning. The *Encyclopaedic Australian Legal Dictionary*³⁵ defines a ‘negotiable instrument’ as:

A document recording a chose in action (such as a promise to pay money by one person to another, or a direction by one person to another to pay money to a third person), with the following characteristics: the ability to transfer the property rights recorded on the document by delivery, or by signature (indorsement) and delivery, of the document itself (unless the document, being a bill, is marked non-transferable) and without immediate notice of the transfer to the person against whom the rights are to be enforced — an instrument so transferred is said to be ‘negotiated’; the ability to sue on the property rights recorded in the document in the name of the person who currently owns the rights (being the holder of the document); and the transfer not being ‘subject to equities’, so that a transferee in good faith, for value, prior to the maturity date of the instrument and without notice of prior defects in title (such as fraud or theft) can acquire a better title than previous holders, free of defects in title and personal equities between remote prior parties. *Miller v. Race* (1758) 1 Burr 452 ; 97 ER 398 per Lord Mansfield LCJ; *Crouch v. Credit Foncier of England Ltd* (1873) LR 8 QB 374 at 381–2 per Blackburn J; *Goodwin v Robarts* (1875) LR 10 Ex 337 at 346–54 per Lord Cockburn LCJ (affirmed (1876) 1 App Cas 476) ; *Ilich v. R* (1987) 162 CLR 110 ; 69 ALR 231 ; 61 ALJR 128 ; [1987] HCA 1.

53. Bitcoin neither is nor involves a negotiable instrument at least because there is no instrument recording any chose in action against anyone relating to the payment of currency, nor any use or circulation actual or intended as ‘currency’. It follows that bitcoin is not money under paragraph (c) of the definition.

Paragraph (d): postal notes and money orders

54. Neither the term ‘postal note’ nor ‘money order’ are defined for the purposes of the GST Act. Those terms take their ordinary meaning subject to context and applicable rules of interpretation.

55. The *Macquarie Dictionary*³⁶ defines each of these terms as follows:

- ‘postal note’ (or ‘postal order’) is ‘an order for the payment of ... money, bought from and generally cashed at a post office’; and
- ‘money order’ is ‘an order for the payment of money, as one issued by one post office and payable at another’.

³⁵ *Encyclopaedic Australian Legal Dictionary* [online] Lexis Nexis, 2011 viewed 23 June 2014 www.lexisnexis.com.

³⁶ *The Macquarie Dictionary*, [Online], viewed 23 June 2014, www.macquariedictionary.com.au.

56. Bitcoin is neither a 'postal note' nor a 'money order' at least because no post office is involved and no money, in the sense of fiat currency, is involved. Therefore, Bitcoin does not meet paragraph (d) of the definition of 'money' in the GST Act.

Paragraph (e): payment supplied by specified means

57. Paragraph (e) of the definition of 'money' states:

whatever is supplied as payment by way of:

- (i) credit card or debit card; or
- (ii) crediting or debiting an account;
- (iii) creation or transfer of a debt.

58. The term 'payment' is not defined and therefore takes its ordinary meaning subject to context and applicable rules of interpretation.³⁷ That context may limit a word which would otherwise have a wide connotation.³⁸

59. The *Macquarie Dictionary*³⁹ defines 'payment' as '2. That which is paid; compensation; recompense' or '3. requital'. These definitions are of a wide connotation. The question is whether, in the context in which the word 'payment' appears in the definition of 'money', it is intended that a narrower definition be applied.

60. The Commissioner's view is that for the purposes of paragraph (e), there will be 'payment' by way of one of the payment mechanisms listed in paragraph (e) if whatever is supplied is denominated in (or sounds in), and the performance or enforcement of the relevant payment is in (or sounds in), fiat currency.⁴⁰ There is a distinction in the GST Act between consideration which finds expression as an amount of money and that which does not. The latter is sometimes called non-monetary consideration or 'in kind' consideration.⁴¹ Bitcoin is not denominated in an amount of fiat currency nor is consideration provided as an amount of bitcoin something which finds expression in money.

³⁷ *Avondale Motors (Parts) Pty Ltd v. FCT* [1971] HCA 17 at [13] referring to the maxim *noscitur a sociis*.

³⁸ See further in Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed. 2011) at [4.23] for circumstances in which the maxim *noscitur a sociis* has been applied to limit a word of wide possible connotation.

³⁹ *The Macquarie Dictionary*, [Online], viewed 23 June 2014, www.macquariedictionary.com.au

⁴⁰ The concept of 'payment' may encompass an amount accounted for in notional units that are directly translatable as of right to a particular amount of fiat currency (see GSTR 2003/14 *Goods and services tax: the GST implications of transactions between members of a barter scheme conducted by a trade exchange*).

⁴¹ Section 9-75 and GSTR 2001/6 *Goods and services tax: non-monetary consideration* at [32]. See also *Burrill v Commissioner of Taxation* (1996) 67 FCR 519 at 525 where the Court stated that a promise to pay money was 'not consideration in kind, and although it is not actually money, it sounds in money'.

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61. Even if ‘payment’ takes a broader meaning, bitcoin would not fall within any of the payment mechanisms listed in paragraph (e) of the definition of ‘money’ in the GST Act. The reasons for this conclusion are as follows.

‘Whatever is supplied as payment by way of credit card or debit card’

62. In a credit card or debit card situation, a customer is able to effect payment for goods or services through a series of pre-existing contracts between the customer and the credit or debit card provider and the credit or debit card provider and the merchant.⁴² Bitcoin holdings and transactions do not replicate the contractual relationships between the parties to a credit or debit card transaction, and so do not fall within the scope of subparagraph (e)(i) of the definition of ‘money’ in the GST Act.

‘Whatever is supplied as payment by way of crediting or debiting an account’

63. The term ‘account’ is not defined and therefore takes its ordinary meaning subject to context and applicable rules of interpretation.⁴³

64. The Commissioner considers that, having regard to the context in which the phrase ‘crediting or debiting an account’ appears, the word ‘account’ is intended to be used in its legal sense. That is, the account must consist of a chose in action which the account holder can enforce against the account provider. As was discussed above, a holding of bitcoin creates no right of action against anyone. Where there is a transfer of bitcoin, the person receiving it has not ability, by virtue of that holding to compel anyone to do anything. Hence, bitcoin does not satisfy paragraph (e)(ii) in the definition of ‘money’ in the GST Act.

‘Whatever is supplied as payment by way of creation or transfer of a debt’

65. The term ‘debt’ is not defined and therefore takes its ordinary meaning subject to context and applicable rules of interpretation.⁴⁴

⁴² See *Re Charge Card Services* [1989] 1 Ch 497 for a detailed discussion of the credit card system and *Commissioner of Taxation v. American Express Wholesale Currency Services Pty Ltd* (2010) 187 FCR 398 at 421-2. See also GSTR 2014/D2 *Goods and services tax: treatment of ATM service fees, credit card surcharges, and debit card surcharges.*

⁴³ *Avondale Motors (Parts) Pty Ltd v. FCT* [1971] HCA 17 at [13] referring to the maxim *noscitur a sociis*.

⁴⁴ *Ibid.*

66. The Commissioner considers that, having regard to that statutory context ‘debt’ should be given its legal meaning of ‘an obligation to pay a sum of *money* owed’.⁴⁵ The transfer of bitcoin does not constitute the creation or transfer of a debt in the sense that there is an obligation to pay money. Hence, Bitcoin does not satisfy the terms of paragraph (e)(iii) of the definition of ‘money’ in the GST Act.

What is the intended scope of the term ‘money’

67. As was noted at paragraph 31, the definition of ‘money’ in the GST Act is an inclusive definition which generally indicates something broader than what follows in a statutory definition. Determining whether a broader meaning is intended and the content of that meaning is informed by the statutory context in which the term ‘money’ appears.⁴⁶

68. In the Commissioner’s view, the use of the term ‘money’ is intended to prescribe fiat currency and those financial instruments and payment mechanisms which are denominated in, or relate directly to, fiat currency.⁴⁷

69. The meaning of ‘money’ in the context of the GST Act was considered in *Travelex Limited v. Commissioner of Taxation*⁴⁸ (*Travelex*). There Emmett J observed:⁴⁹

Money is any generally accepted medium of exchange for goods and services and for the payment of debts (see *Butterworth’s Australian Legal Dictionary* at 759). Currency and legal tender are examples of money. However, a thing can be money and can operate as a generally accepted medium and means of exchange, without being legal tender. Therefore, bank notes have historically been treated as money, notwithstanding that they were not legal tender. It is common consent and conduct that gives a thing the character of money (see *Miller v. Race* (1758) 1 Burrow 452 at 457). Money is that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities (see *Moss v. Hancock* [1899] 2 QB 111 at 116).

⁴⁵ *A Dictionary of Law* (7th ed.) [online], definitions 1 and 2 of ‘debt’, viewed 23 July 2014 www.oxfordreference.com.

⁴⁶ *ZY Finance Co Pty Ltd v. Cummings* (1964) 109 CLR 395 at 398-399 and *Blacktown Workers’ Club Ltd v. O’Shannessy* (2011) 183 LGERA 184 at 190-191.

⁴⁷ Such as, for example, a promise to pay money under a bond which ‘sounds in’ money: *Burrill v. Commissioner of Taxation* (1996) 67 FCR 519 at 525.

⁴⁸ [2008] FCA 1961; 2008 ATC 20-087.

⁴⁹ [2008] FCA 1961 at [25].

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70. In *Mann on the Legal Aspects of Money*,⁵⁰ Proctor says that the formulation in *Moss*, as referred to by Emmett J in *Travellex*, applied the functional theory to the definition of money. The functional theory of ‘money’ focused on that which was a generally accepted medium of exchange for goods and services and the payment of debts.⁵¹

71. In the modern era, however, the State theory of ‘money’⁵² requires that, in addition to the functional characteristics described, money ‘must exist within some form of legal framework, because it reflects an exercise of sovereignty by the State in question’.⁵³

72. It has been argued that bitcoin satisfies the functional theory of money because it serves as a medium of exchange, a unit of account and a store of value. In addition it is argued that bitcoin’s increasing acceptance in the community as a means of discharging debts and a means of exchange for acquiring goods and services has now reached the point that it qualifies as money. In determining whether bitcoin is money for GST purposes, however, it is not necessary to come to a conclusion whether bitcoin satisfies the functional requirements referred to in *Moss*.

73. Custom alone, whether it be local or international, cannot make something ‘money’ in the absence of an ‘exercise of monetary sovereignty by the State concerned’. Consistent with statutory context,⁵⁴ policy and the wider legislative framework governing Australian currency established by the Currency Act, this is the sense in which the word ‘money’ is used in the section 195-1 definition.⁵⁵ Bitcoin, therefore, is not ‘money’ for GST purposes.

Is a supply of Bitcoin input taxed?

Financial supplies

74. A financial supply is input taxed under section 40-5.⁵⁶ An entity may make financial supplies in the course of carrying on an enterprise if the entity provides, acquires or disposes of an interest listed in the GST Regulations and certain other requirements for a ‘financial supply’ are satisfied. No GST is payable on input taxed supplies.

⁵⁰ Proctor C, *Mann on the Legal Aspects of Money* (Oxford University Press, 6th ed. 2005) at [1.11].

⁵¹ *Moss v Hancock* [1899] 2 QB 111 (at 116), *Ilich v. R* (1987) 162 CLR 110 (at 118), *Travellex Ltd v. Commissioner of Taxation* [2008] FCA 1961 (at [25]), *Messenger Press Pty Ltd v. Commissioner of Taxation* [2012] FCA 756 (at [195-196]).

⁵² See paragraph 36 above.

⁵³ Proctor, note 50 above at [1.12].

⁵⁴ Discussed at paragraph 18 above.

⁵⁵ cf *Travellex Ltd v. Commissioner of Taxation* [2008] FCA 1961 (at [26-28]).

⁵⁶ See GSTR 2002/2 *Goods and services tax: GST treatment of financial supplies and related supplies and acquisitions* for detailed discussion of the operation of the financial supplies provisions.

75. A supply is a financial supply only if it is mentioned as a financial supply in regulation 40-5.09 or is an incidental financial supply under regulation 40-5.10.⁵⁷ Regulation 40-5.12 exclude things that otherwise would be a financial supply other than things that are an incidental financial supply.⁵⁸

Item 9: Australian currency or currency of a foreign country

76. The provision, acquisition or disposal of an interest in Australian currency, the currency of a foreign country, or an agreement to buy or sell currency of either kind is a financial supply.⁵⁹ The term 'currency' for the purposes of item 9 has the same meaning as in paragraph (a) of the definition of 'money' in section 195-1 for GST purposes.⁶⁰ As bitcoin is not 'currency' of Australia or any other country for GST purposes, it is not a financial supply.

Item 11: A derivative

77. The term 'derivative' is defined in the GST Regulations as:

An agreement or instrument the value of which depends on, or is derived from, the value of assets or liabilities, an index or rate.

78. Although an entity may enter into an agreement which uses the exchange rate of a bitcoin as a measure of value, this definition does not apply to bitcoins themselves. Bitcoin is not itself an agreement or instrument nor is it evidenced or created through an agreement or instrument. Whilst the value of a bitcoin may fluctuate over time, the bitcoin itself does not derive its value from any asset or liability, or the movements in an index or rate. Bitcoin is not a derivative as defined in the GST Regulations.

Subregulation 40-5.09(4A): ATM services

79. Certain automatic teller machine (ATM) services are input taxed as financial supplies where they involve specified accounts. The term '**account**' is defined in the dictionary to the GST Regulations:

account:

- (a) means an account mentioned in item 1 in the table in regulation 40-5.09; and
- (b) includes an account in relation to which the account holder (the customer) has the right:
 - (i) to have the account maintained by the account provider (the provider); and
 - (ii) to repayment of the amount credited to the account by the provider; and

⁵⁷ Paragraph 40-5.08(1)(b) of the GST Regulations.

⁵⁸ Regulation 40-5.10 of the GST Regulations.

⁵⁹ Item 9 of the table in subregulation 40 5.09(3) of the GST Regulations.

⁶⁰ Refer to paragraphs 32-43 above.

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- (iii) to require the provider to act on directions by the customer that are in accordance with the arrangements, or any agreement, between the provider and the customer in relation to operation of the account.

80. Use of Bitcoin ATMs do not involve transactions from, into or of an 'account' as defined.⁶¹ Further, Bitcoin ATMs are not part of the ATM payment system.⁶² Services provided through a Bitcoin ATM are not financial supplies.

GST-free supplies⁶³

81. The supply of bitcoin from an entity in Australia to a non-resident, including a bitcoin exchange that is outside Australia, may be a GST-free supply under item 2 in the table in subsection 38-190(1).

82. Item 2 refers to supplies made to a non-resident who is not in Australia when the thing supplied is done⁶⁴ and:

- the supply is neither a supply of work physically performed on goods situated in Australia when the work is done nor a supply directly connected with real property situated in Australia or
- the non-resident acquires the thing in carrying on the non-resident's enterprise, but is not registered or required to be registered.

83. Item 3 in the table in subsection 38-190(1), also may apply to the transfer of bitcoins by a supplier located in Australia to a recipient outside Australia at the time of the supply and where the effective use or enjoyment takes place outside Australia.⁶⁵ Item 3 does not apply to work physically performed on goods situated in Australia at the time of the supply nor to a supply directly connected with real property situated in Australia.

⁶¹ See also discussion at paragraph 64 above.

⁶² See paragraph 5 of GSTR 2014/D2: 'The term "ATM" is an automatic teller machine that is used in the payment system designated by the Reserve Bank of Australia (RBA) as the ATM system.'

⁶³ See more generally GSTR 2000/31 *Goods and services tax: supplies connected with Australia*.

⁶⁴ See GSTR 2004/7 *Goods and services tax: in the application of items 2 and 3 and paragraph (b) of item 4 in the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999*.

• when is a 'non-resident' or other 'recipient' of a supply 'not in Australia when the thing supplied is done'?

• when is 'an entity that is not an Australian resident' 'outside Australia when the thing supplied is done'?

⁶⁵ See GSTR 2007/2 *Goods and services tax: in the application of paragraph (b) of item 3 in the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999 to a supply, when does 'effective use or enjoyment' of the supply 'take place outside Australia'?*

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84. Subsection 38-190(2) provides that a supply covered by any of items 1 to 5 in the table in subsection 38-190(1) is not GST-free if it is the supply of a right or option to acquire something the supply of which would be connected with Australia and would not be GST-free.⁶⁶

85. Subsection 38-190(2A) provides that a supply covered by any of items 2 to 4 in the table in subsection 38-190(1) is not GST-free if the acquisition of the supply relates (whether directly or indirectly, or wholly or partly) to the making of a supply of real property situated in Australia that would be input taxed under Subdivisions 40-B or 40-C.

86. Under subsection 38-190(3), a supply covered by item 2 in subsection 38-190(1) is not GST-free if:

- (a) it is a supply under an agreement entered into, whether directly or indirectly, with a **non-resident**; and
- (b) the supply is provided, or the agreement requires it to be provided, to another entity in Australia.⁶⁷

⁶⁶ See paragraphs 143-150 of GSTR 2003/8 *Goods and services tax: supply of rights for use outside Australia*.

⁶⁷ See GSTR 2005/6 *Goods and services tax: the scope of subsection 38-190(3) and its application to supplies of things (other than goods or real property) made to non-residents that are GST-free under item 2 in the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999*.

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Appendix 2 – Your comments

87. You are invited to comment on this draft Ruling including the proposed date of effect. Please forward your comments to the contact officer by the due date.

88. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 3 October 2014
Contact officer: Hoa Do
Email address: hoa.do@ato.gov.au
Telephone: (08) 9268 5171
Facsimile: (08) 9268 8371
Address: Australian Taxation Office
GPO Box 9977
Perth WA 6848

Appendix 3 – Detailed contents list

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