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Taxation of cryptocurrency's trade – directions and tax policy decisions[1]

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Taxation of trading in cryptocurrencies raised many doubts by the end of 2018, in particular in light of the lack of special rules in relation to income taxes and tax on civil law transactions. Since 1 January 2019, the Polish legislator has decided to introduce into the Polish tax system a new and comprehensive regime sanctioning tax effects related to the virtual currency business in relation to both income taxes, while in mid-2018 a decision was taken to abandon for one year the collection of tax on civil law transactions. Trading in virtual currencies also produces certain effects in relation to the value added tax (tax on goods and services), in relation to which the leading role should be attributed to the 2015 judgment of the Court of Justice of the European Union. The intention of this article is to present an analysis of the rules related to the taxation of cryptocurrencies deepened by an indication of practical problems in their application and tax policy decisions, which in their assumption, were aimed to resolve these problems. Where appropriate, the author will also refer to tax situation before the changes were introduced.

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1. Introduction

The 2019 year marked the eleventh anniversary of the invention of bitcoin cryptocurrency as the first decentralized virtual currency using blockchain technology. In 2008, hardly anyone could predict that what was considered to be an electronic payment system based on cryptographic evidence would become one of the 21st century's major innovations with a deep influence that goes far beyond the payment sector (Bal, 2018, p. 54). In recent years, dynamic development of the virtual currencies market can be observed. The number of both users and merchants who want to accept it as a valid form of payment is growing rapidly. In addition, the popularity of the issue of a new cryptocurrency (Initial Coin Offering – ICO) modelled after the first public offering/crowdfunding shows that the virtual currency is no longer limited to acting as a payment alternative to classic *fiat* currencies (e.g. PLN, EUR, USD) but is increasingly perceived as a promising instrument for raising funds. Bitcoin paved the way

[1] The author is a; views expressed in the article do not necessarily reflect the position of the institution whose author is an employee

for the development of over 1,600 other virtual currency systems (altcoins – alternative cryptocurrency), which are currently in use and which led to the creation of the whole industry of virtual currency based companies, aimed at facilitating transactions between users of the virtual currency. The increasing use of virtual currency and blockchain technologies is well illustrated by the numbers regarding bitcoin as the largest type of cryptocurrency. In December 2017, bitcoin market capitalization amounted to over USD 299 billion, and the currency price exceeded USD 17,000 (Coin Market Cap, 2017). The growing interest in cryptocurrencies is also confirmed by the review of the library of the American Congress, which in 2014, in its scope included an analysis of the legal situation related to the trading of virtual currencies in about 40 countries around the world, while the version of this review of 2018 already includes more than 130 countries (The Law Library of Congress, 2018, p. 1).

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Like any innovation, the virtual currency raises the question of whether tax systems of particular countries are prepared for it. Although the virtual currency exhibits similarities both to traditional cash (*fiat* currencies) and commodities, it has some unique features and a different risk profile, which the previous regulations may not have taken into account. This is due to the fact that virtual currency trading operates to a large extent in most countries without any special regulations or legal supervision[2]. As an example of the complexity of tax implications related to virtual currencies, let us be reminded of the fact that in the Polish tax rulings database (https://sip.mf.gov.pl/), as many as 250 tax interpretations appear under the search word "cryptocurrency".

Already in 2013, the Organization for Economic Cooperation and Development (OECD) started analyzing tax challenges related to the digitizing economy as part of its Base Erosion and Profit Shifting (BEPS) project. In the OECD report from March 2018 discussing tax challenges resulting from digitization, virtual currencies were mentioned among issues requiring a more detailed and in-depth study (OECD/G20, 2018, p. 208). The OECD suggested an analysis of the risks associated with tax evasion as a result of the use of cryptocurrencies and possible solutions to this problem, such as legislative measures that oblige platforms that trade cryptocurrencies or other third parties to conduct adequate reporting, which would enable the tax authorities to obtain information on subject of such operations[3].

In the OECD report from March 2018 discussing tax challenges resulting from digitization, virtual currencies were mentioned among issues requiring a more detailed and in-depth study.

Due to the growing popularity, some countries have taken steps to define the tax consequences arising from the trading of virtual currencies. Other countries remained silent, leaving taxation of the virtual currencies in the realm of existing general tax rules. The Polish Minister of Finance already in 2013 stated that the functioning and trading of virtual currencies on the territory of Poland does not violate Polish law, nor EU law *per se* (Minister of Finance,

[2] Regarding Polish conditions, it must be emphasized that we are awaiting the Report of the Working Group for blockchain and cryptocurrencies, which was set up by the Polish Financial Supervision Authority (Bitcoin-online.pl, 2018)

[3] The author had the privilage to participate as a Polish delegate in the development of this report.

2013, p. 1). Given the growing use of the virtual currency, it is important to understand the nature of trading in virtual currency and technology behind it, so that one can determine whether the trade in virtual currency requires additional regulation and whether the applicable law is adequate to stand up to the challenges associated with such trade. The national legislator decided to intervene by introducing for the first time from 1 January 2019 in relation to both income taxes a new regime dedicated to the trade of cryptocurrencies. The issue of formulating the proper tax policy related to the trade of cryptocurrencies is hindered by its structural features, in particular (1) anonymity which is complicating possible tax audits and verification of the correctness of tax settlements, (2) often cross-border character of operations, and (3) high volatility of exchange rate and multiplicity of sources of these exchange rates (cryptocurrency exchanges and exchange offices) making it difficult to determine the actual value of cryptocurrencies, which in turn may lead to undervaluation or overestimation of taxable value for tax purposes (Girasa, 2018, p. 169).

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The emergence of virtual currencies results in the need to ask at least a few fundamental questions from the sphere of the tax policy. What is the status of a virtual currency for tax purposes? Is it classified as movable property, money or something else? Is it possible to treat all types of virtual currencies in a universal way? Does the sale of a virtual currency create income or capital gain? Is the mere possession of a virtual currency subject to income tax? Does the extraction of the currency cause taxable income? When a person who extracts or sells a virtual currency can be considered an entrepreneur for tax purposes? Which transactions in virtual currency can benefit from VAT exemption? (He et al., 2016, pp. 30–31)

2. Definition of virtual currency

Determining tax consequences associated with the trade of cryptocurrencies depends on defining what virtual currencies are, which is not a simple task. On the technical side, cryptocurrencies refer to a wide range of technological solutions that use a technique known as cryptography. To put it simply, cryptography is a technique to protect information by encrypting it into an unreadable format that can be decrypted by someone who has a secret key. Cryptocurrencies are protected by a technique that uses a system of public and private digital keys.

In broadly understood legal circumstances, there are at least a few commonly accepted definitions developed by various institutions at the international and national level (Houben, Snyers, 2018, pp. 20–23). And so, the European Central Bank classified "a virtual currency" as „a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community" (European Central Bank, 2012, p. 13). According to the communication of the National Bank of Poland and the Polish Financial Supervision Authority of 7 July 2017 on virtual currencies, these currencies are not issued or guaranteed by the central bank of the state, they are not money, i.e. they are not legal tender, nor currency, they cannot be used to repay tax liabilities and they do not meet the criterion of universal acceptability in commercial and service outlets (National Bank of Poland, Polish Financial Supervision Authority, 2017, p. 1). Virtual currencies are not electronic money, they do not fall within the scope of the Act of 19 August 2011 on payment services and the Act of July 29, 2005 on Trading in Financial Instruments.

In April 2018, a newly adopted law on counteracting money laundering and financing of terrorism introduced for the first time into the system of Polish legislation a normative definition of virtual currency and the obligation of cryptocurrency exchange to assess the risk of money laundering by market operators (Journal of Laws

2018, item. 723). According to this law, the term virtual currency should be understood as a *digital representation of values, which at the same time is not:*

- *legal tender issued by the NBP, foreign central banks or other public administration bodies,*
- *an international settlement unit established by an international organization and accepted by individual countries belonging to or cooperating with that organization,*
- *electronic money within the meaning of the Act of 19 August 2011 on Payment Services,*
- *a financial instrument within the meaning of the Act of July 29, 2005 on Trading in Financial Instruments, e) a bill of exchange or a cheque*

– and is exchangeable in the course of trade with legal means of payment and accepted as a medium of exchange, and may also be stored electronically or transferred or may be subject to electronic commerce.

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The concept used is a literal translation of the term "virtual currencies" as used by the Financial Action Task Force to identify currencies that are not legal tender and includes both cryptocurrencies (such as Bitcoin, Monero, Litecoin, etc.), as well as centralized virtual currencies (such as e.g. WebMoney or PerfectMoney). A centralized virtual currency has one central administrator that manages their issuance and distribution, and also maintains a central payment register and has the right to buy units of a given virtual currency (Justification, Print No. 2233, p. 12).

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This new definition of virtual currency was subsequently used in tax law (Journal of Laws of 2018, item 2193). A regime introduced to income taxes, dedicated to the taxation of cryptocurrencies based on art. 5a point 33a of the PIT Act (Journal of Laws of 1991 No. 80 item 350, as amended) and art. 4a point 22 of the CIT Act (Journal of Laws of 1992 No. 21 item 86, as amended) refers directly and without any changes to the above definition from the Act on Counteracting Money Laundering and Terrorism Financing (Justification, Print no. 2860, p. 10). If, therefore, the definition in this last act changes, then it will automatically trigger the relevant tax consequences. Importantly, the adopted legislative technique causes virtual currencies in the system of the Act on Counteracting Money Laundering and Terrorist Financing to be classified as one of the types of property values which, in the light of art. 2 para. 2 point 27 of this Act include property rights or other movable or immovable property, means of payment, financial instruments, other securities, foreign exchange values and virtual currencies. Although cryptocurrencies are a subcategory of virtual currencies, the author uses these terms interchangeably for the purposes of this article.

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3. Income taxes

Until the end of last year, the Polish laws of both income taxes did not provide for specific regulations regarding the taxation of trading in cryptocurrencies, which led to various interpretations and finally disputes before administrative courts. Taxpayers had to make tax settlements resulting from trading in cryptocurrencies on the basis of general principles expressed in the Income Taxes Acts, and in the unclear areas, taking into account positions expressed in the explanations of the Ministry of Finance, individual tax rulings

and verdicts of the administrative courts. However, the jurisprudence has often presented contradictory positions, e.g. with respect to taxation of cryptocurrency exchange transactions.

Designing a new tax regime for cryptocurrencies was accompanied by the overriding premise that the tax system should be characterized by simplicity, due to the large number of natural persons (ordinary citizens) dealing in cryptocurrencies in a way which does not amount to trading activity.

In 2018, the legislator decided to intervene to give the same rules, clear and simple for all taxpayers, with a special thought for a large number of taxpayers making unprofessional trading in cryptocurrencies. When designing a completely new regime, the legislator had to take a few basic policy decisions in the field of tax policy, where the most important ones include determining the appropriate source of revenues for revenues stemming from cryptocurrency trade, which in the next step allowed to decide whether the loss from virtual currencies trading could be compensated by other income of a taxpayer (for example by income from operating activities), determination of tax consequences of using cryptocurrencies to pay for goods or services, as well as cryptocurrencies exchange operations for other cryptocurrencies. Designing a new tax regime for cryptocurrencies was accompanied by the overriding premise that the tax system should be characterized by simplicity, due to the large number of natural persons (ordinary citizens) dealing in cryptocurrencies in a way which does not amount to trading activity.

3.1. Taxable revenues

3.1.1. Transactions resulting in taxable revenues

According to art. 17 sec. 1 point 11 of the Law on PIT, income from the sale of a virtual currency for payment is subject to taxation, whereas such a sale on the basis of Art. 17 sec. 1f of the PIT Act should be understood as the exchange of a virtual currency into a legal tender, commodity, service or property right other than the virtual currency or the settlement of other liabilities with the virtual currency. Mirroring guidelines can be found in art. 7b para. 1 point 6 letter f of the CIT Act.

In other words, transactions resulting in the creation of tax revenues are (1) exchange of a virtual currency into a legal tender (*fiat* currency – e.g. PLN, EUR, USD), that is, their sale in exchange office, on a cryptocurrency exchange or on a free market, (2) payment of virtual currency for a good, service or property law, or the settlement of a liability, where this property right or liability *per se* does not have the form of a virtual currency[4]. In the case of payment for goods and services, the newly introduced provisions actually sanction the current legal outcome, where also until the end of 2018 the value of such revenue was determined in the amount of the purchased goods or services (Justification, Print No. 2860, p. 11). Accepting payment for a good or service in the form of a virtual currency is treated for tax purposes as two contracts (barter). Each of the parties to the contract will be both the seller and the buyer. In this case, the tax revenue arises both on the side of the buyer who pays the purchase price in the form of cryptocurrency, and seller of goods or services that accepts payment in this form. The entrepreneur's revenue from the sale of, for example, the commodity, will be the price (value) of the commodity. Hence, when the trader sells the currencies so obtained

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[4] Exchange of a virtual currency into another virtual currency, irrespective of whether it is performed on the cryptocurrency exchange or individually, is neutral in income taxes, as discussed in more detail in Section 3.4 of this article.

(uses them to pay), the resulting income will be attributed to the source of revenues from capital or capital gains.

The above definition of tax revenues from virtual currencies also implies that they will not include the revenues of entities conducting business activity consisting in the supply of services, inter alia, in the field of virtual currency exchange for legal tender or exchange of virtual currencies into other virtual currencies. This means that the taxation of business activities carried out, for example, by exchanges or exchange offices of virtual currencies will proceed according to general principles, appropriate to other entities conducting general business activity.

As a consequence of the adoption of the above principles from 1 January 2019, the loss incurred from the virtual currencies trade will not be eligible to reduce other income of the taxpayer, for example from the sale of shares or from business activity. This is to prevent the manipulation of cryptocurrency costs for purposes of lowering the income tax base in general. In other words, such a solution leads to creation of a separate sub-basket within the already separated and existing "basket" for capital/capital gains, so as to isolate the tax result on virtual currency trading and to prevent offsetting it with other incomes.

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3.1.2. Classification to the appropriate revenue source

The classification of revenues from virtual currencies to the proper source is similar in the case of the PIT Act and the CIT Act. And so, on the basis of the PIT Act, these will be revenues from capital (Article 17 of the PIT Act). Meanwhile, for the purposes of the CIT Act, revenues from virtual currencies will be included in the source of capital gains (Article 7b of the CIT Act). Revenues from trading in virtual currencies will be classified into revenues from capital or capital gains, even when trading in them will take place as part of business activity (excluding those entrepreneurs running exchanges of cryptocurrencies and other intermediaries). Until the end of 2018, revenues from exchange of cryptocurrencies into *fiat* currency (domestic or foreign), except for business operations, were in light of the uniform position of administrative courts included in the source of income, which are property rights referred to in art. 18 of the PIT Act (see reference number III SA/Wa 3374/14, reference number I SA/Gd 1551/15, reference number II FSK 488/16, reference number I SA/Ol 202/18). The latter classification meant that the taxation of income from the sale of cryptocurrencies followed the progressive tax scale[5].

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3.2. Tax deductible costs

3.2.1. Categories of tax deductible costs

In the light of art. 22 par. 14 of the PIT Act and art. 15 para. 11 of the CIT Act, the costs from trading in cryptocurrencies should be understood as documented expenses directly incurred for the purchase or sale of a virtual currency, including documented expenses incurred to the benefit of entities referred to in art. 2 para. 1 point 12 of the Act on Counteracting Money Laundering and Terrorism Financing (commission charged by intermediaries in exchange). Thus, the formulated

[5] In this context, the change was also brought about by the opinion of the Central Statistical Office, which on 12 December 2016 decided that trading in cryptocurrencies cannot take the advantage of lump sum taxation – 3% sales revenue taxation (GUS, 2016).

definition of tax costs as direct expenditures excludes from their scope costs other than directly related (so-called indirect costs). This applies, for example, to the costs of financing the purchase of virtual currencies, i.e. the costs of loans/credits.

The nature of directness and connection with the acquisition in the aforementioned definition, however, turns out to be problematic in the case of activities other than strictly relating to trade of virtual currencies. This is about the so-called miners who incur expenses not so much to acquire cryptocurrencies but to "produce" them, which based on the literal interpretation of art. 22 par. 14 of the PIT Act and art. 15 para. 11 of the CIT Act may lead us to the conclusion that they are not entitled to recognize as tax deductible costs the expenses for the purchase of computers, computing servers/"cryptocurrencies excavators" and electricity costs related to the use of these appliances/servers (reference number 0113-KDIPT3). 4011.599.2018.1.SK)[6].

Important feature of the definition of tax deductible costs applicable to virtual currency is absence of linkage requirements between the expenses and the specific revenue streams. All costs that a taxpayer incurs in a given tax year will be qualifiable to be presented in the annual tax return, regardless of whether in a given year, he earns income or not.

3.2.2. Tax deductibility of costs over time

Another important feature of the definition of tax deductible costs applicable to virtual currency is absence of linkage requirements between the expenses and the specific revenue streams. All costs that a taxpayer incurs in a given tax year will be qualifiable to be presented in the annual tax return, regardless of whether in a given year, he earns income or not. The amount of revenue that a taxpayer will recognize in respect of trading in cryptocurrencies will be irrelevant in a given tax year. In practice, therefore, a situation may arise in which the taxpayer will be obliged to recognize the costs of obtaining revenues even in a situation in which he did not recognize any income from trading in cryptocurrencies. The rule of recognizing costs "on a regular basis" is decisive. At the same time, the new regime envisages that the possible surplus of tax deductible costs over revenues earned in the tax year increases the tax deductible costs incurred in the next tax year (the principle of carrying tax costs forward).

Importantly, the newly introduced provisions also apply to income from virtual currencies purchased before January 1, 2019. There is no transitional provision excluding the application of the new regulations to such revenues, while there is a provision indicating how to account for expenses incurred on purchase of virtual currency and not utilized until the end of 2018. Such expenses should be shown in the tax return for the first tax year starting after 31 December 2018 (Journal of Laws of 2018, item 2193, Article 23).

3.2.3. Evidencing tax deductible costs

An area that led to considerable controversy was the issue of how to document expenses related to the trading of cryptocurrencies in the case of natural persons conducting business activity and accounting in a simplified manner on the basis of 'tax revenues and expenses ledger (book)'. It is necessary to mention the established interpretative line of the tax authorities referring in this respect to the regulation of the Minister of Finance of 26 August 2003 on the conduct of the tax revenues and expenses ledger (OJ 2003 No. 152 item 1475), which was to be justified in the assertion that trading in virtual currencies has the feature of trade in trading goods (commodities). This in turn led to the recognition that the

[6] Unlike the previous legal status (reference number 0112-KDIL3-1.4011.350.2018.1.AN; reference number 0113-KDIPT2-3.4011.526.2018.ID)

expenditure in question should be documented on the basis of a closed catalog of accounting documents that are the basis for making entries in the ledger in accordance with § 12 para. 3 of this regulation. This resulted in the tax authorities' acknowledgment (see reference number 0115-KDIT3.4011.400.2018.2.DP) that these are not sufficient documents to evidence the tax costs as not meeting the definition of an accounting document:

- printout of the confirmation of the transfer from the taxpayer's account to the cryptocurrency exchange account,
- screenshot confirming the purchase of cryptocurrencies,
- an electronic statement from the cryptocurrency exchange containing records of transactions made,
- email confirmation of the transaction,
- confirmation of receipt of the transfer.

The administrative courts did not agree with such restrictive interpretation (see reference number I SA/Ol 201/18, reference number I SA/Bk 225/18, reference number I SA/Gl 464/18, reference number I SA/Kr 740/18, reference number I SA/Po 802/18). They claimed that the assumption that tax deductible costs can only be demonstrated by means of evidence set out in the said Regulation would, in fact, create a non-statutory condition, without representation in Income Tax Acts and the Tax Ordinance Act, for qualifying expenditure as tax deductible cost. This would lead to a situation in which the cost incurred in order to achieve revenues or maintain or secure a source of revenue undocumented in the manner provided for by an implementing act (regulation) could not lead to a reduction of the tax base contrary to statutory regulation, which would in turn lead to a violation of the hierarchy of sources of law expressed in the Constitution [Article 87 (1)]. If, therefore, the specificity of transactions made through the cryptocurrency exchange makes it impossible to obtain documents specified in the provisions of the Regulation, and other documents will explicitly confirm the purchase of cryptocurrencies (quantity, price, etc.), then these documents may constitute the basis for including expenditure in tax deductible costs.

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From the beginning of 2019, tax regulations use a general indication of the obligation to document expenses without specifying the methods of demonstrating the actual expenditure incurred, which means that the above considerations remain valid even on the grounds of the newly introduced regime. The Ministry of Finance's communication from April 2018 stipulates that the taxpayer is entitled to recognize the tax deductible costs for cryptocurrencies if it reliably documents the expenses incurred (Ministerstwo Finansów, 2018, p. 2).

As a side remark, it should be added that in the case of taxpayers who run a business with full accounting and people who deal in cryptocurrencies outside of business, a different standard of expenditure documentation is used, where a broader arsenal of evidence is acceptable. With regard to persons who do not run a business, an electronic statement from the cryptocurrency exchange confirming when and at what price the cryptocurrency was purchased or sold should be sufficient.

3.3. Tax neutrality of cryptocurrencies exchange

The newly introduced tax regime for trading in virtual currencies sanctions *expressis verbis*, albeit in a negative way, that transactions consisting in the exchange of a virtual currency into another virtual currency do not create taxable revenues. A consequential effect on the revenue side

is a mirror absence of right to recognize expenses related to such exchange as tax deductible costs pursuant to art. 23 par. 1 point 38d of the PIT Act and art. 16 sec. 1 point 75 of the CIT Act.

Tax neutrality of cryptocurrencies exchange operations with other cryptocurrencies is consistent with some of the administrative court decisions made on the basis of legal grounds until the end of 2018, where the judges shared the taxpayers' view of the technical impossibility to calculate the real tax base for this type of operation, both under the PIT Act and the CIT Act (see reference number I SA/Kr 740/18, reference number I SA/Ol 201/18, reference number I SA/Po 802/18; reference number I SA/Kr 740/18, reference number I SA/Po 802/18). The decisive factor in this dimension was the argument that it is possible to determine only the approximate, but not the actual value of cryptocurrency at the time of conversion, and its value can be ascertained only at the time of sale in exchange for traditional currency or payment for a good or service. It was also claimed that in the case of exchanging one cryptocurrency into another cryptocurrency, such exchange can not be equated with the case of currency conversion of the traditional currency, since a more appropriate analogy would be to compare it to exchange of any other property rights (e.g. receivables). Another argument against taxing the exchange of cryptocurrencies into other cryptocurrencies was to emphasize the lack of intrinsic asset value of the virtual currencies. The cryptocurrency has a function of other than traditional money equivalent of 'virtual value' traded electronically. An entity that exchanges cryptocurrences only exchanges the form of holding of such virtual value. According to this position, the purchaser of cryptocurrency does not obtain any material right or expectancy of specific law. He is also not entitled to a claim against any person, as he can not seek the exchange of cryptocurrencies for money, goods or services from third parties.

It is difficult to agree with the view that it is impossible in every case to determine the tax base in the event of virtual currencies being exchanged for other such currencies (similar to 0112-KDIL3-1.4011.351.2018.1.AN; reference number 0113-KDIPT2-1.4011.527.2017.1.KO; reference number 0113-KDIPT2-3.4011.450.2017.1.AC, reference number I SA/Gl 248/18). According to the author, the view presented in one of the judgments of the Provincional Administrative Court is convincing, where the court considered that the technical obstacle is in fact a taxpayer's own fault, who voluntarily chose this form of trading in intangible property rights in the form of cryptocurrencies, which makes it impossible – due to the lack from cryptocurrency exchanges detailed information on the value of rights for a specific moment [for a given second] – to precisely determine the tax base (reference number I SA/Bk 226/18). In such a case, the court recommends using the data provided by the cryptocurrency exchange to estimate the value of the cryptocurrency subject to conversion according to the exchange rate for a given minute (and not according to the exchange rate for a given second).

Considering technical difficulties related to the nature of cryptocurrency trading the legislator finally decided to recognize the exchange of cryptocurrencies as tax-neutral, making a decision in the field of tax policy that tax consequences should reveal themselves only as soon as the "exit" of the investment from the virtual currency occurs, i.e. "exit" to the fiat currency or purchased product or service.

Considering technical difficulties related to the nature of cryptocurrency trading – often the absence of available transaction price – the legislator finally decided to recognize the exchange of cryptocurrencies as tax-neutral, making a decision in the field of tax policy that tax consequences should reveal themselves only as soon as the "exit" of the investment from the virtual currency occurs, i.e. "exit" to the *fiat* currency or purchased product or service. At the

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same time, the author is able to imagine that in the future such legal status may change under the condition that trading of virtual currencies is regulated, for example by introducing centralized official rates of individual cryptocurrencies.

3.4. Income, tax rate and tax collection

Income from sale of virtual currencies to be achieved in the fiscal year is the difference between the sum of revenues obtained from the disposal of cryptocurrencies and the costs of obtaining such revenues. The tax rate is 19% for both persons conducting and not conducting business activity in the field of cryptocurrencies trade. After the end of the tax year, taxpayers are obliged to show their income and the calculated tax in the annual tax return.

Importantly, pursuant to art. 30b par. 5d of the PIT Act and art. 22d ust. 4 of the CIT Act, revenues from disposal of virtual currencies are not to be combined with other income, even when taxpayer generates revenues from trading in virtual currencies as part of his business. As a result, tax deductible costs resulting from trading in virtual currencies will be able to reduce only the income earned as part of transactions involving cryptocurrencies.

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During the year, taxpayers will not be required to pay tax advances, relying on the annual settlement period, by analogy to the rules governing the taxation of other income from capital.

The Income Tax Acts assume the tax calculation without the intermediation of the withholding agent, whom theoretically could be exchanges or exchange offices of virtual currencies. A decision was also made that the latter entities should not be burdened with automatic reporting obligations with respect to identification of taxpayers and transactions of the latter made through them. Taxpayers can, however, download transaction history from such exchanges. During the year, taxpayers will not be required to pay tax advances, relying on the annual settlement period, by analogy to the rules governing the taxation of other income from capital.

3.5. Tax classification of cryptocurrency „miner"

The new regulations differentiate the status of taxpayers who acquire cryptocurrencies on their own behalf and those who "mine" on behalf of a third party. If the miner acquires virtual currency on his own account in the original way, i.e. through "extraction" using the computing power, then the tax revenue resulting from the sale of cryptocurrency or its conversion into a good or service will be qualified as revenue from capital or capital gains, respectively. Until disposal of the so-acquired virtual currency, the "miner" will not need to recognize any tax consequences. If, on the other hand, "digging" is carried out at the request of a third party, for example based on a service or employment contract, then the value of the acquired currencies will be taxed as service or employment remuneration. From a system perspective, the above solution will not lead to double taxation of the "miner". Intuitively, one could put forward an argument about such a double taxation, i.e. once at

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the moment of receiving remuneration, and the second time at the moment of disposal of such acquired virtual currency, for example when the "miner" pays such currency for goods or services. Nevertheless, the "miner" who will sell virtual currencies received as part of remuneration will be entitled to include as tax deductible costs the equivalent value of the currency that was accepted for taxation as remuneration.

4. Value added tax

The consequences of dealing in virtual currencies in terms of value added tax has stabilized long before income taxes, although here the Court of Justice of the European Union turned out to be the deciding factor. Originally, the Polish tax authorities took the view that the sale of cryptocurrencies by the taxpayer constitutes a supply of services and as such is subject to taxation at the basic (23%) VAT rate. These authorities considered that the virtual currency could not be considered as legal tender, which resulted in a conclusion that the taxpayers who were trading it could not benefit from the tax exemption (see reference number IBPP2/443-258/13/ICz; IPTPP2/443-52/14-6/IR).

Court concluded that for the purposes of the VAT directive, the concept of "currency" should be widely interpreted. The result of this interpretative maneuver is that VAT exemption for currency transactions should apply to both traditional and "non-traditional" currencies, whose only purpose is the function of legal tender.

The change in the above line of reasoning took place with the verdict of CJEU on 22 October 2015 in *the Skatteverket case against David Hedqvist* (reference number C-264/14). First of all, the Court found that virtual currency is not a "tangible property" in the meaning of the VAT directive, as a result of which transactions involving the exchange of *fiat* currency (e.g. PLN, EUR, USD) into virtual currency units and *vice versa*, performed in return for payment of a sum equal to the difference between, on the one hand, the price paid by the trader to purchase the currency and, on the other hand, the price at which he sells that currency to his clients, should be classified as a taxable supply of service for the purposes of this directive. Secondly, the Court concluded that the provision of this type of service is exempt from taxation by virtue of the special exemption for currency transactions, where, due to the differences between the different language versions of the Directive and the resulting insufficient effect of the literal interpretation, it acknowledged that for the purposes of the VAT directive, the concept of "currency" should be widely interpreted. The result of this interpretative maneuver is that VAT exemption for currency transactions should apply to both traditional and "non-traditional" currencies, whose only purpose is the function of legal tender. This conclusion should be extended also to the case of purchase of goods and services with the use of virtual currency, where cryptocurrencies as a form of means of payment do not amount to consumption but are used to measure it.

The aforementioned ruling of the CJEU had then a positive impact on taxpayers as regards interpretation by the Polish tax authorities of VAT taxation of trading in cryptocurrencies. From that moment, tax authorities in response to requests for individual tax rulings started to confirm that the sale by taxpayers of virtual currencies acquired in the original way, i.e. in the way of "extraction" using computing power, as well as in a derivative manner, i.e. purchased existing cryptocurrency from third parties (virtual stock exchanges, individual holders), should be considered as a service exempt from VAT pursuant to

art. 43 par. 1 point 7 of the VAT Act (see reference number ILPP5/4512-1-5/16-4/IP, reference number 0111-KDIB3-3.4012.152.2017.3.MS; reference number 0111-KDIB3-1.4012.816.2017.3).ICz, reference number 0114-KDIP4.4012.640.2018.3.EK). The condition for such a classification would be that the place of supply of these activities, and at the same time their place of taxation, was on the territory of Poland[7]. Ministry of Finance in the announcement of April 2018 classifies virtual currencies directly as legal tender for VAT purposes (Ministry of Finance, 2018, p. 3). Trading in cryptocurrencies, such as sale or exchange, if subject to VAT, benefits from the VAT exemption (reference number I SA/Łd 54/16, reference number III SA/Wa 2882/15). The key condition for validity of the above reasoning is the condition that the person selling cryptocurrencies be a VAT taxpayer, which has direct grounds in the judgment of the CJEU (reference number III SA/Wa 180/17). On the other hand, it should not be forgotten that as a rule, the taxpayer has no right to deduct VAT on purchased goods and services related to the mining activities and related to the purchase or sale of cryptocurrencies.

PCC tax was a significant cost in the case of trading in cryptocurrencies, when such trade assumed multiple purchases of cryptocurrencies throughout the day and their resale at a more favorable rate. In some cases, the expenditure on PCC could even exceed the profit from trading on a given day.

5. Civil law transaction tax

The year 2018 also brought changes to the taxation of trade in cryptocurrencies in the area of tax on civil law transactions (*podatek od czynności cywilnoprawnych* – PCC). Until then, in line with general principles, the contract of sale and exchange of cryptocurrencies, which is a property right, was subject to PCC taxation pursuant to art. 1 point 1 point 1 of this Act on PCC (Journal of Laws of 2000 No. 86 item 959, as amended). Such interpretation assumes that for the purpose of PCC the virtual currency is classified as "property law". Thus, in the case of a sales contract, the obligation to pay tax in the amount of 1% of the market value of the cryptocurrency sold is binding on the buyer. As regards the exchange agreement, the obligation to pay tax, also in the amount of 1% of the market value of the property right, is shared jointly and severally by both sides of the transaction. Such legal status led to situation where PCC tax was a significant cost in the case of trading in cryptocurrencies, when such trade assumed multiple purchases of cryptocurrencies throughout the day and their resale at a more favorable rate. In some cases, the expenditure on PCC could even exceed the profit from trading on a given day. In addition, it involved a cumbersome obligation to prepare the P-CC3 declaration separately from every virtual currency trading transaction, which resulted in the obligation to submit also numerous tax declarations (reference IPPB2/436-304/14-2/AF).

The PCC Act provides for an exemption from PCC tax on the basis of art. 2 para. 4 in case of a sale or exchange agreement of cryptocurrencies subject to VAT to the extent that the transaction is subject to VAT, or if at least one of the parties to the transaction is exempt from VAT for its performance. However, to rely on this exclusion information about the other party to the transaction is needed, which in turn allows to determine the proper VAT effects (reference number 0111-KDIB4.4014.226.2018.4.PM). In practice, in case of trading on the cryptocurrency market, it is not possible to identify whether the purchase was made from a natural person or an enterprise, or whether the other party traded as business, as counterparties are usually anonymous to each

[7] On the subject of differentiation of consequences in VAT, depending on the place of providing services, i.e. in Poland, in another Member State or in a third country – see ref. 0115-KDIT1-1.4012.450.2018.2.MN

other. Cryptocurrency users of such exchanges may not have such knowledge unless the other side of the transaction reveals itself.

Other interpretive challenges could also have been raised by art. 1 point 4 point of the PCC Act, which subjects the tax obligation in PCC to whether property right is exercised on the territory of Poland or if it is exercised outside of Poland, whether the buyer is domiciled or resident in the territory of Poland and the sale or exchange agreement has been made on the territory of Poland. In the course of trading in cryptocurrencies, if the property right is acquired via the cryptocurrency exchange, the Civil Code (Article 70 § 2) should be relied on to establish the place of performance, according to which if the offer is submitted electronically, then the contract is deemed to be concluded at the place of residence or at the seat of the offeror at the time of signing the contract (reference number 0111-KDIB2-2.4014.85.2018.1.SK; reference number 0111-KDIB4.4014.266.2018.2.BD). The decisive criterion for the place of concluding the contract of sale in electronic form is, therefore, the place of residence or seat of the person making the offer of purchase. In fact, while performing currency trading on international stock exchanges, it can be difficult to determine what the actual offices of the parties to the contract are and where, in fact, such an agreement has been concluded.

In order to meet the evident mismatch between the PCC Act and the market practice of cryptocurrencies trade the Minister of Finance issued on 12 July 2018 regulation on abandoning the collection of tax on civil law transactions against a sale or conversion of a virtual currency, which was published and took effect from the next day (Journal of Laws of 2018, item 1346). Such abstention from tax collection applies to taxpayers purchasing by way of a contract of sale or conversion of the virtual currency in meaninng of art 2 para. 2 point 26 of the Act of March 1, 2018 on counteracting money laundering and financing of terrorism. In the justification for the draft regulation, the Minister of Finance recognized the above problems by stating explicitly (...) *the application of strict interpretation of the Act on tax on civil law transactions may result in imposition of an unenforceable obligations on taxpayers that in many cases lead to confiscation of property and thus a constitutional violation of the principle regarding the right to protection of property* (Justification, Journal of Laws of 2018, item 1346, p. 2). Moreover, such abandonment of collection ensures system coherence on the basis of the PCC Act regarding taxation of business operations involving property rights of a similar nature, i.e. financial instruments and foreign currencies that benefit from tax exemption.

In order to meet the evident mismatch between the PCC Act and the market practice of cryptocurrencies trade the Minister of Finance issued on 12 July 2018 regulation on abandoning the collection of tax on civil law transactions against a sale or conversion of a virtual currency, which was published and took effect from the next day.

The abandonment of tax collection applies to the contract of sale or conversion of virtual currency made from the date of entry into force of the Regulation until 30 June 2019 and applies to all taxpayers dealing in virtual currencies on the stock exchange, irrespective of the number of transactions carried out and their respective value.

6. Summary

The tax consequences of trading in cryptocurrencies have not been harmonized in the European Union, where in the area of direct taxation (PIT and CIT), the binding rules in individual Member States remain decisive, whereas in the area of indirect taxation (VAT), there is harmonization through the "back door", i.e. through the settlement of the EU Court. In Polish scenery, the

Idée fixe of the tax regime regulating income taxation of cryptocurrencies' trade introduced from the beginning of 2019 was to ensure the simplicity of this regime.

most severe – but no longer applicable – results of the lack of specific tax regulations aimed at virtual currency trading were the burden on individuals' income tax calculated according to a progressive rate of 32% PIT and the burden on each transaction of cryptocurrency of 1% PCC.

Idée fixe of the tax regime regulating income taxation of cryptocurrencies' trade introduced from the beginning of 2019 was to ensure the simplicity of this regime. This avoids accusations of the once-case-law formulation that *the specificity of trading in cryptocurrencies cannot be reconciled with the applicable tax law, which does not follow the emerging and still new forms of doing business by taxpayers* (reference number I SA/Po 802/18).

The newly introduced tax regime for dealing in virtual currencies addresses the key interpretative doubts that taxpayers had to face before that date. In particular, current regulations directly answer questions about the attribution of revenue from trading in cryptocurrencies to the appropriate source of revenue, the method of accounting for tax deductible costs or defining the tax consequences of exchanging cryptocurrencies or paying for goods or services. The solutions in relation to both income tax laws are analogous as regards the principles of determining revenues, costs and income (losses).

The new regulations undoubtedly introduce order to the tax issues of trading in virtual currencies, trying to reach a compromise between the certainty and preference of new guidelines (manifested, among others, in applying at the moment of exit from cryptocurrency investment, a 19% flat rate for all taxpayers – not only those who run a business and no advance payments during the tax year) and protection of the State Treasury's interest (assuming that the tax result from trading in cryptocurrencies is not to be blended with other income of the taxpayer).

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