Tax on cryptocurrency transactions: SARS should come to the aid of taxpayers

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Tax Newsletter

The South African Revenue Service (SARS) recently released a media statement indicating that "normal income tax rules" apply to cryptocurrency transactions. Cryptocurrencies like Bitcoin and Ethereum, though relatively new to the South African marketplace, started gaining popularity as early as 2016 and have until recently operated with little to no official guidance or regulation from the South African government.

Though SARS' announcement on the tax status of cryptocurrencies has been anticipated, at this late stage it may come as a shock to many to learn that, not only will their cryptocurrency transactions be taxable going forward, but that tax legislation has applied all along.

SARS' statement has now made it clear that cryptocurrency is not regarded as "currency" for tax purposes, but rather as an intangible asset and that the onus rests on taxpayers to "declare all cryptocurrency-related taxable income in the tax year in which it is received or accrued" as part and parcel of their gross income for purposes of their normal income tax returns or alternatively, as a capital gain.

As early as 1926, the court in the case of *Lategan v CIR* interpreted the word "amount" in the definition of "gross income" as not being limited to receipts of money, but also to include all other forms of property. Provided an "amount" has a money value that can objectively be determined, it can form part of a taxpayer's "gross income".

The Income Tax Act 58 of 1962 specifically defines "gross income" as being the total *amount*, in cash *or otherwise*, received by or accrued to or in favour of a South African tax resident, excluding receipts or accruals of a capital nature (our emphasis). For capital gains tax purposes, the word "amount" is interpreted as having the same meaning as discussed above. It follows that gains made from cryptocurrency transactions can be subjected to tax in a taxpayer's hands, even if payment was received in the form of another cryptocurrency.

The relative accessibility of cryptocurrency has had the effect that, on average, investors are younger, and while they are more tech-savvy than what would have in the past constituted the average in investors, they are generally far less informed regarding the tax and regulatory

implications of their dealings. Although ignorance of the law is certainly no excuse, the question must be asked whether SARS will come to the assistance of those who may now face criminal charges, interest and penalties in respect of tax defaults on their cryptocurrency dealings.

To date, SARS has on several occasions demonstrated its willingness to adopt special disclosure measures and offer special treatment to defaulting taxpayers. In such instances SARS has made use of either an amnesty programme or a Special Voluntary Disclosure Programme (SVDP) as a mechanism for those who have fallen foul of tax legislation to approach SARS to regularise their affairs on far more favourable terms than they would have received had they been pursued by SARS.

In 2003/4, SARS rolled out an amnesty programme with one of its main aims being to encourage both the repatriation and taxation of unreported foreign assets. In terms of the amnesty programme, those who qualified for tax relief on previously undisclosed foreign income were absolved from having to pay interest and income tax and/or capital gains tax that arose prior to the 2003 tax year, as well as civil and criminal liability.

In 2016, National Treasury announced an SVDP specifically for taxpayers who wished to disclose their offshore assets and income and regularise their tax affairs prior to SARS becoming aware of their foreign dealings under the Organisation for Economic Cooperation and Development Common Reporting Standard (CRS). The SVDP ran parallel to the existing statutory Voluntary Disclosure Programme (discussed in more detail below) for the period between 1 October 2016 and 31 August 2017.

Under the SVDP, successful applicants were entitled to full relief from criminal prosecution, administrative and understatement penalties, and tax on investment earnings and other "taxable events" arising prior to the 2015 tax year as well as interest on tax debts arising prior to the 2015 tax year. Additionally, in basic terms, only the highest aggregate value of the offshore assets in the five-year period from 2011 to 2015 was subject to tax at an effective rate of 16%.

Since no such amnesty or SVDP programme is currently on the table, the only option available to those wishing to regularise their tax affairs is the statutory Voluntary Disclosure Programme (VDP). National Treasury implemented the VDP in 2010 following the success of the 2003/4 amnesty programme and it was initially put in place for the period from November 2010 to October 2011.

The VDP has since been legislated as part of the Tax Administration Act 28 of 2011 and has formed a permanent feature of the South African tax landscape since 1 October 2012. In terms of this programme, non-compliant taxpayers may voluntarily approach SARS in an effort to regularise their tax affairs. A successful VDP application will allow a taxpayer to enjoy relief from criminal prosecution, as well as understatement and administrative non-compliance penalties.

Unlike the 2003/4 amnesty programme or the SVDP, the statutory VDP does not offer any relief

from payment of interest on unpaid taxes, or from the actual underlying tax obligations. Although this programme is available to those who have thus far failed to declare their cryptocurrency transactions, the statutory VDP is far less favourable (and therefore attractive) than the 2003/4 amnesty programme and the subsequent 2016 SVDP.

The lack of guidance from both SARS and the South African government prior to the recent media statement regarding cryptocurrency transactions is at least partly to blame for the precarious tax position in which many South Africans now find themselves. SARS should therefore give serious consideration to the creation of a further amnesty or SVDP, specifically aimed at non-compliance arising from cryptocurrency transactions.

With new cryptocurrencies and trading platforms being developed daily, the ever-increasing accessibility and relative anonymity that defines cryptocurrency transactions means that, for SARS to effectively investigate all cryptocurrency transactions being entered into by taxpayers, it will require extensive monetary, technological and other resources, to which it arguably does not presently have access.

With this in mind, SARS will be remiss not to consider implementing an amnesty or SVDP to make it more attractive for cryptocurrency traders and investors to come forward, for its own benefit as well as that of taxpayers and the fiscus. Not only will such an amnesty or SVDP assist SARS in collecting potentially large sums of previously undisclosed tax money without the need for expensive and resource-intensive investigation processes, it will better prepare SARS for investigating cryptocurrency transactions going forward, as well as provide young cryptocurrency traders and investors with a clean slate, thus promoting and facilitating their long-term tax compliance.

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