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Berlin Bitcoin Ruling Spurs Industry to Seek Tax Clarity

By Jabeen Bhatti Nov 7, 2018

- Ruling means cryptocurrencies can't be considered financial instrument or currency
- Decision opens the door for new crypto-ventures like ATMs and currency exchanges

Tax advisers are telling their clients to begin new cryptocurrency ventures like ATMs and currency exchanges—previously impossible—in a bid to force lawmakers to reconcile different income and value-added tax treatments.

The move to exert pressure on legislators comes amid a Berlin court ruling stripping Bitcoin of its status as a type of currency, underscoring contradictions in regulating and taxing digital currencies in Germany.

Attorneys told Bloomberg Tax they are already advising clients energized by the ruling to pursue ventures that Germany's Federal Financial Supervisory Authority (BaFin) would have previously banned.

"Now I'd advise clients when they start on an exchange basis on the internet, or want to start a Bitcoin ATM, to take this decision and bring it to BaFin," said Istvan Cocron, a partner with CLLB law firm in Berlin. "We're sure that it's not a criminal act."

The ruling means that for regulatory purposes, cryptocurrencies can't be considered a financial instrument or a form of currency but what needs to follow is a change in the tax code to reflect this, to give legal security to burgeoning businesses in the sector.

"If you say that cryptocurrencies are in fact not currencies at all, then there has to be a different point of view from the tax side," Cocron told Bloomberg Tax Oct. 30.

"You always have to pay taxes if you're trading with something—even with virtual items," he added.

'Milestone' Case

Berlin's Court of Appeals dismissed Sept. 25 an appeal from the state prosecutor's office (161 Ss 28/18) to fine a young Bitcoin entrepreneur who didn't license his burgeoning online cryptocurrency exchange with BaFin.

The Court of Appeals upheld a lower court's decision to waive any and all fines against the entrepreneur for not licensing the operation. It also stripped Bitcoin of its status as a unit of account that represents the real-world value of a good or service that would make it subject to financial oversight, according to court documents.

Such a move serves as a "milestone" for the taxation and regulation of cryptocurrencies in Germany, Cocron said. The legally-binding decision opens the door for new crypto-ventures like ATMs and currency exchanges to take flight. It's a move attorneys hope will force new legislation to remedy contradictory tax treatments on Bitcoin and other virtual currencies in Germany.

"There's a need for legal certainty," said Cocron. "From a tax perspective, BaFin and the tax authorities have to think again how they treat cryptocurrencies if they're not equal to actual currencies."

Confusing Status

Cryptocurrency practitioners and tax attorneys have long complained about the confusing taxation of virtual currencies in Germany and beyond.

For income tax purposes, Bitcoin and other cryptocurrencies are treated the same as assets, meaning that any income derived from buying and selling cryptocurrencies is subject to income tax in the same way as buying and selling goods and services.

Attorneys told Bloomberg Tax that most would prefer cryptocurrencies to be handled as such while the technology develops so as to avoid crippling regulations.

But earlier this year, the German Parliament and the Federal Ministry of Finance elevated cryptocurrencies to the status of fiat money when used as a means of payment, or when exchanged or sold, making such transactions exempt from Germany's 19-percent value-added tax. That dovetails with BaFin's consideration of cryptocurrencies a unit of account.

That confusing dichotomy has only been exacerbated by the Berlin Court of Appeals' ruling that Bitcoin is not a classical currency and therefore not subject to the same rules as fiat money, Matthias Luther, an attorney specializing in VAT and cryptocurrencies with KMLZ law firm in Dusseldorf, told Bloomberg Tax.

"The treatment of Bitcoins is contradictory in Germany," he said. "For VAT purposes, taxpayers must treat bitcoins as currency. For regulatory purposes, they are not a financial instrument."

Changes Coming

More broadly, the ruling is a "good indicator that things are evolving" in ways that could clear up the legal and tax treatment of cryptocurrencies in Germany, David Hötzel, a senior associate with P+P law firm in Berlin, who specializes in the taxation of virtual currencies, told Bloomberg Tax Oct. 30.

Such a development is badly needed, considering confusion between the income taxation of private and commercial crypto-traders, and the VAT levied on different types of crypto-tokens that hitherto haven't been discussed by the government.

"It's a good sign," he added. "Lobby groups will use this to go to the Parliament and give input to the federal government to do something legislatively."

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