MinterEllison.

30 September 2022

The Board of Taxation

BY EMAIL

Dear Sir/Madam

Review of the tax treatment of digital assets and transactions

1. Introduction

1.1 We are writing in response to The Board of Taxation's (**Board**) published Consultation Guide – *Review of the tax treatment of digital assets and transactions* (August 2022) (**Consultation Guide**).

1.2 As noted in the Consultation Guide, the Board has invited comments on the consultation questions set out in the Consultation Guide in relation to its review of the tax treatment of certain digital assets and transactions. Specifically, we are writing in response to question 1:

> *Is the current tax treatment of crypto assets clear and understood under the Australian tax law? If not, what are the areas of uncertainty that may require clarification?*

1.3 We have set out a summary of our view on this question below in section 2 and our more detailed comments in section 3.

1.4 Legislative references throughout this letter are references to the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**) or the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**), as applicable, unless otherwise indicated.

2. Summary

2.1 Where a taxpayer is in the business of actively trading in cryptocurrencies, the taxpayer will clearly hold that cryptocurrency on revenue account. However, the position is less straightforward where a taxpayer acquires cryptocurrency outside of their ordinary course of business and as a result of an isolated transaction.

2.2 The Australian Taxation Office (**ATO**) has expressed its view in various publications that where a taxpayer holds cryptocurrency as an *'investment'* (which, the ATO states, is where an investor acquires and holds crypto assets to make a *financial profit* from *holding or disposing* of them), it holds that cryptocurrency on capital account. However, it is not clear to us, based on the particular features of cryptocurrency and the application of ordinary principles and Australian case law, how the ATO can form this view.

2.3 We consider that various comments made by the ATO in its published material are irreconcilable with the view that cryptocurrencies are held on capital account.

2.4 Our submission considers the tax consequences of a taxpayer, who is not in the business of trading in cryptocurrencies, acquiring and disposing of cryptocurrencies. In summary, our view is

that if a taxpayer acquires and holds cryptocurrency as a means of storing value or for use as a payment mechanism to facilitate trade, the cryptocurrency should be treated as being acquired for a profit-making purpose and held on revenue account. This means that any gains or losses incurred by a taxpayer on disposal of cryptocurrency may be assessable / deductible.

3. Detailed analysis

ATO view on the taxation of acquiring, holding and disposing of cryptocurrencies

3.1 The ATO has set out its view in TD 2014/26 – *Income tax: is bitcoin a 'CGT asset' for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997?* (**TD 2014/26**) that Bitcoin is a CGT asset for tax purposes. The same analysis could be made with respect to many different types of crypto assets generally, including Ether, such that they should be properly characterised as CGT assets for tax purposes.

3.2 The ATO has issued various publications, including a (non-binding) guide on the tax treatment of cryptocurrencies in Australia (focussing on Bitcoin) (**Guide**).[1] The ATO notes that the most common use of crypto assets is as an *'investment'*.[2]

3.3 For instance, the ATO's cryptocurrency site suggests that aside from holding cryptocurrencies as personal use assets, the alternatives for holding or keeping the cryptocurrencies are:

- as an **investment**;
- as part of a profit-making scheme; and
- in the course of carrying on a business.[3]

3.4 The ATO has indicated that the meaning of the term *investment* is where an investor acquires and holds crypto assets to make a *financial profit* from *holding or disposing* of them.[4]

3.5 The ATO also confirms in the Guide that an isolated transaction could give rise to ordinary income if the taxpayer entered into the transaction with a purpose or intention of making a profit and the transaction is part of a business operation or is commercial in character.

3.6 The ATO gives no guidance on when the transaction would be considered to be part of a business operation or commercial in character. This would suggest to most readers that the gain or loss will be treated on capital account unless the taxpayer carries on a business of trading in cryptocurrency.

3.7 The ATO view is reflected in the example (Example 2) given in the Guide, which states:

> *Terry has been a long-term investor in shares and has a range of holdings in various public companies in a balanced portfolio of high and low risk investments. Some of his holdings are income producing and some are not. He adjusts his portfolio frequently at the advice of his adviser. Recently, Terry's adviser told him that he should invest in cryptocurrency. On that advice, Terry purchased a number of different cryptocurrencies which he has added to his portfolio. Terry doesn't know much about cryptocurrency but, as with all of his investments, he adjusts his portfolio from time to time in accordance with appropriate investment weightings. If Terry sells some of his cryptocurrency, the proceeds would be subject to CGT because he has acquired and held his cryptocurrency as* ***an investment*** *(our emphasis).*

3.8 There is no guidance on why gains on this *'investment'* are not assessable.

3.9 It is also difficult to reconcile the comments made by the Commissioner in the Guide with statements made in TD 2014/26 where the Commissioner states at paragraphs 24 and 25:

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[1] *Tax treatment of crypto-currencies in Australia – specifically bitcoin* (QC 42159), last modified: 30 March 2020, accessed at https://www.ato.gov.au/misc/downloads/pdf/qc42159.pdf on 24 August 2022.
[2] Refer to *How to work out and report CGT on crypto* (QC 69952), last modified 19 August 2022, accessed at https://www.ato.gov.au/Individuals/Investments-and-assets/Crypto-asset-investments/How-to-work-out-and-report-CGT-on-crypto/ on 24 August 2022.
[3] Ibid at [1].
[4] *What are crypto assets?* (QC 69946), last modified 19 August 2022, accessed at https://www.ato.gov.au/Individuals/Investments-and-assets/Crypto-asset-investments/What-are-crypto-assets-/ on 24 August 2022.

'24. Accordingly, for example, where a taxpayer mines a small amount of bitcoin as a hobby and after two years decides to sell the bitcoin for a small profit in order to purchase a more stable investment item, the gain will be assessed under the CGT provisions, not as ordinary income. Further, as the bitcoin were used to purchase an investment, the capital gain will not be disregarded under subsection 118-10(3) because the bitcoin will not be personal use assets.

25. If, on the other hand, a taxpayer acquires bitcoin with the purpose of profiting from it upon a commercial transfer, a gain made on its disposal will be assessable under section 6-5 and any capital gain arising under CGT event A1 will be correspondingly reduced under section 118-20.'

3.10 Further, in the footnote to paragraph 23 of TD 2014/26 seems irreconcilable with the statements in the Guide.

'Paragraph 49 of TR 92/3 explains that the nature of the property acquired and disposed of is a relevant factor. For example if the property has no other use other than as the subject of trade, a conclusion that the property was acquired for the purpose of trade and, therefore, the transaction was commercial in nature, would be readily drawn.
See Edwards (Inspector of Taxes) v. Bairstow and Anor [1956] A.C. 14; Hobart Bridge Co. Ltd. v. Federal Commissioner of Taxation 82 CLR 372. The former case involved the issue of whether the acquisition and disposal of a spinning plant amounted to an adventure in the nature of trade. Viscount Simonds found ' that the nature of the asset lent itself to commercial transactions. And by that I mean, what I think Rowlatt J. meant in Leeming v. Jones [1930] 1 KB 279 that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.'

3.11 It is difficult to understand how the ATO can form the view that where a taxpayer acquires cryptocurrency as an *investment*, meaning where an investor acquires and holds crypto assets to make a *financial profit* from *holding or disposing* of them, the taxpayer may make a capital gain or loss on disposal. On the basis of the features of current cryptocurrencies, which do not provide any return other than by way of disposal, it is difficult to comprehend a situation in light of these comments by the Commissioner of Taxation that a taxpayer would not acquire cryptocurrency to make a profit on realisation (i.e. taxpayers do not generally make returns from holding crypto assets). We have considered these particular features below in paragraph 3.38. On this basis, based on ordinary principles and Australian case law, a taxpayer should hold cryptocurrency on revenue account. We have discussed this in detail below.

Application of ordinary principles and Australian case law

3.12 Generally, CGT assets held on capital account are those that are acquired for the purpose of deriving income as a result of holding the asset (rather than deriving gains from the disposal of the asset) whereas, if the holder acquires the asset for the purposes of resale or disposal, they are generally treated as holding the asset on revenue account.

3.13 Where a taxpayer is in the business of trading in cryptocurrencies, the taxpayer will clearly hold those cryptocurrencies on revenue account. However, the position is not as straightforward where a taxpayer acquires cryptocurrency outside of their ordinary course of business as a result of an isolated business transaction.

3.14 Specifically, in order to determine if cryptocurrency acquired by a taxpayer outside of their ordinary course of business is held on revenue or capital account, it is necessary to consider the following:

(a) do the taxpayer's activities result from an isolated business transaction entered into by a non-business taxpayer, or outside the ordinary course of business of the taxpayer carrying on a business, which is a profit-making undertaking or plan?; or

(b) have the taxpayer's activities become a separate business operation or commercial transaction?

3.15 This test was considered in an Australian Board of Review decision – *Case P27 (Ref. no. 106/1981)* (***Case P27***), regarding a taxpayer who invested his money in gold and silver bullion as he wanted to preserve its purchasing power, claiming the reason for acquiring the bullion was to

hold it as a hedge against inflation. On selling the bullion, the taxpayer realised a profit. In this decision, the Board distinguished between the taxpayer's *motive* for acquiring the bullion (being to hedge against inflation) and *purpose* of making the acquisition. Citing Gibbs J in *XCO Pty Ltd v F.C. of T.* 71 ATC 4152 at p 4156 and in *Loxton v F.C. of T.* 73 ATC 4001 at p 4006 where he said:

> *'...but under the first limb [of section 26(a)] also if the acquisition was actuated by the dominant purpose of profit-making by sale it is immaterial what motive the taxpayer had to seek to make the profit.'*

3.16 The purpose of the taxpayer is the dominant purpose which he or she held at the time of acquiring the property.[5] In *Case P27*, the Board found that when a person acquires property (whether real or personal) as an investment, they seek to derive some *benefit from holding* that property. The benefit can either be qualitative or quantitative, and if the latter, it can be measured by the profit to be gained (e.g. rent, interest, dividends or an increase in the price of the property itself). In the case of gold and silver bullion, the Board found that the very nature of the property acquired excluded any other form of return other than a profit gained by the increase in their price and the taxpayer can only have acquired the bullion for its price appreciation potential.[6] It is on this basis that the Board found the taxpayer's dominant purpose in acquiring the bullion was for the purpose of profit-making. B. R. Pape also noted that the taxpayer's contention that he acquired the bullion in order to hedge against inflation only went to his *motive*, rather than *purpose*, for acquiring the bullion.

3.17 We consider that generally the purpose for the acquisition of cryptocurrency is not different to the acquisition of gold bullion. Cryptocurrencies do not provide a return other than by way of sale.

3.18 Another relevant factor in *Case P27* for finding that the taxpayer had a profit-making purpose when acquiring the bullion was that he intended at the time of acquisition to resell it at some time in the future to realise a profit. That is, bullion was considered to be a fairly readily realisable asset, but could not itself be used to pay for purchases the taxpayer intended to make, but rather had to be sold eventually.[7]

3.19 In relation to isolated transactions, the leading authority on this is the *Myer Emporium* decision,[8] which established that the profit arising from an isolated business or commercial transaction will be ordinary income if the taxpayer's purpose or intention in entering into the transaction was to make a profit, notwithstanding that the transaction was not part of the taxpayer's daily business activities (***Myer* principle**).

3.20 Taxation Ruling TR 92/3 – *Income tax: whether profits on isolated transactions are income* (**TR 92/3**) discusses the application of the *Myer* principle and provides guidance from the ATO to determine whether profits from isolated transactions are ordinary income and therefore assessable under section 6-5. According to paragraph 1 of TR 92/3, the term 'isolated transactions' refers to:

(a) those transactions outside the ordinary course of business of a taxpayer carrying on a business, and

(b) those transactions entered into by non-business taxpayers.

3.21 Paragraph 8 of TR 92/3 explains that it is not necessary that the intention or purpose of profit-making be the sole or dominant intention or purpose for entering into the transaction. Rather, it is sufficient if profit-making is a *significant purpose*.

3.22 Paragraph 16 of TR 92/3 provides that if a taxpayer makes a profit from a transaction or operation, that profit is income if the transaction or operation is not in the course of the taxpayer's business but:

(a) the intention or purpose of the taxpayer in entering into the profit-making transaction or operation was to make a profit or gain, and

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[5] See *Pascoe v F.C. of T.* (1956) 30 A.L.J.R. 402
[6] See paragraph 21 of the decision of B.R. Pape in Case P27.
[7] See paragraph 26 of the decision of B.R. Pape in Case P27
[8] *Federal Commissioner of Taxation v The Myer Emporium Ltd.* 87 ATC 4363, [1987] HCA 18.

(b) the transaction or operation was entered into, and the profit was made, in carrying out a business operation or commercial transaction.

3.23 The example (Example 4 in TR 92/3) is relevant to the current discussion in finding that the profit arising on this "investment" was assessable:

> *'78. Mr Goldfinger purchased a number of gold bars for $100,000 and, following a sharp rise in the price of gold, sold the gold bars one week later for $110,000. Goldfinger did not carry on a business and had no previous dealings in gold.*
>
> *79. The profit of $10,000 is income and assessable under subsection 25(1). It can be inferred from the objective circumstances (especially the quick sale following a rise in price and the fact that the asset had no immediate use other than as an object of trade) that profit-making was a significant purpose of Goldfinger in acquiring the gold bars. Furthermore, the substantial amounts of money involved and the nature of the asset traded lead to the conclusion that the transaction was commercial in nature.'*

Deductibility of losses

3.24 Where a taxpayer holds cryptocurrency on revenue account (and the trading stock provisions do not apply), it will be assessable on any gains made on disposal as ordinary income (under section 6-5), or alternatively, as profit arising from carrying on a profit-making undertaking or plan (under section 15-15).

3.25 Conversely, any loss or outgoing relating to the cryptocurrency would be deductible under section 8-1 to the extent that:

(a) it is incurred in gaining or producing the taxpayer's assessable income; or

(b) it is necessarily incurred in carrying on a business for the purpose of gaining or producing the taxpayer's assessable income,

provided that the loss or outgoing is not private or domestic in nature, is not of capital or of a capital nature and does not relate to the earning of exempt income or non-assessable, non-exempt income.

3.26 The indicia for determining whether the loss on the sale of an asset is deductible should be the same as determining whether a profit on the sale of an asset would be assessable.[9] Accordingly, if the taxpayer makes a loss on disposal of the cryptocurrency, where the trading stock provisions do not apply, the loss should be deductible if the taxpayer, at the time of acquisition, acquired the cryptocurrency as a business operation or commercial transaction. It is not necessary that the taxpayer carried on a business of investing at the time of acquisition.

3.27 The ATO has set out its view on when a loss from an isolated transaction will generally be deductible in Taxation Ruling TR 92/4 – *Whether losses on isolated transactions are deductible* (**TR 92/4**). The ATO is of the view that a loss made from an isolated transaction is generally deductible under section 8-1 if the taxpayer expected the transaction to produce a profit which would have been income assessable under section 6-5.[10] In this regard, the ATO also considers the same elements that apply to determine whether a profit from an isolated transaction is income are relevant to determining whether a loss on an isolated transaction is deductible (set out above in paragraph 3.22).

3.28 The Full Federal Court decision of *Greig v Commissioner of Taxation* [2020] FCAFC 25 (***Greig's* case**) considered the deductibility of a loss made by a taxpayer on cancellation of shares. Specifically, *Greig's* case concerned a taxpayer who regularly invested in listed shares, based on advice from financial advisors and stockbrokers. Between March 2012 and May 2014, the taxpayer invested nearly A$12m, over 64 trades, in Nexus Energy Limited (**Nexus**) shares. Subsequently, the Nexus shares were compulsorily transferred and cancelled by Nexus administrators, resulting in an approximately A$12.3m loss to the taxpayer (attributable to the share loss and legal fees).

3.29 The taxpayer sought a private ruling from the ATO that the loss made was on revenue account on the basis that the taxpayer had acquired the Nexus shares in accordance with a 'profit target

[9] Paragraph 4 of TR 92/4.
[10] Paragraph 13 of TR 92/4.

strategy' he had formed prior to acquiring the shares. The Commissioner ruled that the taxpayer held the shares on capital account and the loss was not deductible and issued a notice of assessment to the taxpayer in accordance with his ruling. The taxpayer objected to the notice, but his objection was disallowed and he appealed to the Federal Court. At first instance, the primary judge held that the loss was not deductible and dismissed the appeal. The taxpayer subsequently appealed to the Full Federal Court who ultimately found (by majority) that the disposal of shares by the taxpayer was on revenue account and the loss made on particular shares was deductible under section 8-1.

3.30 In coming to that conclusion, the Court considered the *Myer* principle – that to be on revenue account, the gain or loss must arise from a transaction that constituted a *'business operation or commercial transaction'* entered into with a purpose of deriving a profit or gain. In considering the character of the share acquisitions (and if they constituted a business operation or commercial transaction or dealing), the Court looked to the nature of the taxpayer's activities in acquiring the shares and if they were the kinds of things a business person or person in trade would do in seeking to make a profit. In this regard, the Court considered the following activities relevant:

(a) a profit-making intention or purpose existed on acquisition of the shares;

(b) the realisation of profit formed part of the taxpayer's larger profit target strategy;

(c) each share *'bundle'* was acquired in a *'systematic fashion'*;

(d) the taxpayer actively participated in a plan to *'crystalise indirectly what the taxpayer perceived was the true value of the ...asset'*;

(e) the taxpayer used his personal experience and knowledge of the industry in determining whether to buy and sell shares; and

(f) the taxpayer acted as a 'business person' would, including by engaging professional help, monitoring analysts' reports, making strategic acquisitions to increase his influence on a potential sale, directly fielding offers from third parties and defending the value of his investment.[11]

3.31 Considering these factors, the Court found that the taxpayer's share trading was not a 'hobby' and *'was more than a "mere" realisation of an asset'*.[12] Justice Steward (who was a majority decision maker) found that if shares are acquired by a taxpayer as a long term investment and to receive dividends over time, they are likely to be held on capital account (although the mere waiting for a gain would not alter the character of a transaction that is otherwise on revenue account).[13] Similarly, Justice Kenny (who was the other majority decision maker) noted that:

> *'...the evidence established that Mr Greig did not have an intention or a purpose of holding his ...shares over the long-term as an investment on the basis that he would receive dividends in the meantime. Rather, Mr Greig set out to sell his shares at a profit quickly or at least before he retired.*
>
> *Plainly enough, any profit on the sale of the ...shares would have been the fulfilment of Mr Greig's intention or purpose at the time he acquired the shares to make a profit on their sale. '*[14]

3.32 The majority concluded that the taxpayer must act as a 'business person'. However, in reviewing this requirement they made reference to Professor Parsons' *Income Tax In Australia* and suggested that this caveat is necessary in order that gains from all profit making undertakings are not assessable. In particular, the Privy Council in *McClelland v Federal Commissioner of Taxation* (1970) 120 CLR487 indicated that gains from wagering and lotteries are not assessable. While excluding such gains from assessable income, Justice Steward suggested that the requirement to be a 'business deal' or a 'commercial transaction' *'would likely be a low threshold'*.[15] This differed from the view of Justice Thawley at first instance who considered that the transactions were not entered into as a business operation or commercial transaction.

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[11] *Greig's* case at [245] per Steward J.
[12] *Greig's* case at [248] per Steward J.
[13] *Greig's* case at [246] per Steward J.
[14] *Greig's* case at [29] per Kenny J.
[15] *Greig's* case at [235] per Steward J.

3.33 Justice Steward also found that any notion as to whether a particular transaction was of a 'private' nature was not useful to determining its business-like or commercial character.

3.34 Justice Derrington dissented on the decision in *Greig's* case and noted that the element of a commercial transaction or business operation must coexist at the same time as the relevant profit-making intention. In this regard, Justice Derrington found that the taxpayer's post-acquisition conduct that was intended to maintain or improve the share value was not sufficient to give the acquisition the necessary commercial character in order for the loss to be deductible.

3.35 *Greig's* case confirms that even if a taxpayer acquires an income producing asset for the purpose of obtaining a profit or gain on their subsequent sale, the acquisition must be made in a *'business operation or commercial transaction'* or *'commercial dealing'* (and that business or commercial character must exist at the time of acquisition) so as to bring it within the *Myer* principle, such that a loss on subsequent sale will be treated as being on revenue account. In this regard, the Court found that if the taxpayer's activities in acquiring the intended profit-making property are the kind of things that a *business person* would do in seeking to make an intended profit, then the property would generally be acquired in a *'business operation or commercial transaction'*.[16]

3.36 Greig's case also confirms that shares acquired by individuals or private investors are not automatically held on capital account, but rather, the proper characterisation must be determined on a case by case basis and the *Myer* principle can apply even where the taxpayer is not otherwise engaged in business. That is, even though a private investor may not have the same knowledge and experience as the taxpayer in *Greig's* case (who held various senior executive roles), less sophisticated taxpayers who acquire investments in a systematic and business-like manner may have gains from the investments taxed on revenue account.

3.37 *Greig's* case was subsequently cited in an Administrative Appeals Tribunal decision, *McCarthy v Commissioner of Taxation* [2021] AATA 1511, in which the Tribunal considered if the subdivision of a block of land and sale of the resulting lots amounted to carrying out a business operation or commercial transaction, such that the profits from sale were assessable as ordinary income. The Tribunal in its decision confirmed that the relevant test *'...is not whether the transaction was carried out in an efficient or business-like manner, the test is whether the transaction is of the sort that a person in business would undertake...'*.[17] Although this decision concerned the assessability of income (and not the deductibility of a loss), the same test should apply to determine if the relevant transaction was carried out in a business operation or commercial dealing.

Application to the acquisition, holding and disposal of cryptocurrency

3.38 Cryptocurrencies, such as Bitcoin and Ether, can be used either to store value or as a payment mechanism. Accordingly, a holder would generally have the purpose of acquiring the relevant cryptocurrency as a means of storing value or alternatively, to be used as a mechanism of trade.

Bitcoin acquired as a means of storing value

(a) Where the taxpayer can only realise a gain on the particular cryptocurrency by selling it (for example, where a taxpayer acquires Bitcoin and can only realise its gains by disposing of it when it is trading at a higher price), this would suggest that the taxpayer has clearly acquired the cryptocurrency for a profit-making purpose. Unlike some other assets that generate periodic returns – such as shares generating dividends, property generating rent, debt generating interest – Bitcoin does not generate a similar regular return to the investor. Although it is possible in some cases that the holder of Bitcoin might receive a new crypto asset by way of a chain split/fork in the blockchain (e.g. Bitcoin Cash or Bitcoin Gold), this is an unpredictable event and a holder of Bitcoin could not be said to have a reasonable expectation on acquisition (i.e. more than merely a theoretical possibility) of generating a return from the Bitcoin by way of a chain split (as could be the case for shares that generate dividends[18]).

(b) The acquisition of Bitcoin is analogous to the acquisition of gold and silver bullion, considered in the *Case P27* (discussed above in paragraphs 3.15 to 3.17). As the Board determined in respect of bullion in that case, the very nature of Bitcoin excludes any other

[16] *Greig's* case at [31] per Kenny J.
[17] *McCarthy v Commissioner of Taxation* [2021] AATA 1511 at [48] per Boyle Deputy President.
[18] Taxation Ruling IT 2606: *Income tax: deduction for interest on borrowings to fund share acquisitions*, at paragraph 9.

form of return other than profit generated by the increase in its price and accordingly, unless the holder uses Bitcoin as a payment mechanism, the holder can only have acquired Bitcoin for its price appreciation potential. On this basis, the very nature of the asset means that it would be difficult to argue that where a holder acquires Bitcoin as a means to store value (and not, for example, to use as a payment mechanism), they do not have a profit-making purpose when acquiring and holding the asset.

(c) Under the *Myer* principle, it becomes a question of whether the acquisition of cryptocurrencies has the necessary business or commercial character.

(d) Furthermore, cryptocurrencies can typically only be acquired online via a public market /exchange and most commonly involve transactions between anonymised parties (i.e. where the identity of the seller and buyer are not known to each other) or alternatively, can be acquired through a mining process. In either case, there is sophistication in the acquiring and selling of Bitcoin, which would reflect a commercial and business transaction. In TR 92/3, the ATO considers that a relevant factor to determine whether an isolated transaction amounts to a business operation or commercial transaction is whether the transaction takes place in a public market and the acquirer has no connection to the seller of the asset (and the transaction does not involve a family dealing). This is generally the case with the acquisition and sale of cryptocurrencies and, based on TR 92/3, is indicative that these transactions are commercial in nature.

(e) The ATO also considers that the amount of money involved in the transaction and the magnitude of the profit sought or obtained is relevant to determining whether a particular transaction is business like or commercial in nature (paragraph 13(c) of TR 92/3). However, as indicated by other commentators, this is contrary to Gibbs J's comments made in *Whitfords Beach* that *'the mere magnitude of the realisation does not convert it into a business'* transaction.[19] On this basis, the value of the cryptocurrency acquired by the taxpayer should not be determinative in concluding whether that transaction is business like or commercial in nature.

(f) Accordingly, where a taxpayer acquires Bitcoin for the purposes of storing value, it is not clear to us why the ATO takes the view that generally Bitcoin should be treated as being held by the taxpayer on capital account as, for the reasons set out above, the taxpayer should have a profit-making purpose for entering into the transaction and the transaction should be treated as being commercial in nature.

(g) We do not see any relevant distinction between a taxpayer holding a non-income producing asset as a short term, as opposed to a long term, investment. The length of time would seem to be irrelevant if the asset is acquired for sale. We also do not consider that non-income producing cryptocurrency, which are held for a long term as a store in value or with an expectation of capital appreciation, are held on capital account (refer Stewart J's comments in *Greig's* case – see paragraph 3.31).

Bitcoin used as a mechanism of trade

(h) If the holder acquires cryptocurrency to be used as a payment mechanism to facilitate trade, then consistent with the ATO's reasoning in TR 92/3, this would indicate that the cryptocurrency was acquired for the purposes of trade and therefore the transaction should be treated as commercial in nature. In these circumstances, if the holder intends to use the cryptocurrency as part of a profit-making scheme or in the course of carrying on a business, it would be treated as being a revenue asset (and possibly subject to the trading stock provisions).

(i) In this regard, as set out above, where a taxpayer carries on a business of mining and selling Bitcoin, or is carrying on a Bitcoin exchange business, the Bitcoin held by the taxpayer will be treated as trading stock and subject to the trading stock provisions.[20] In addition, the ATO also considers that Bitcoin received as a method of payment by any

[19] Cassidy, Dr Julie, *The taxation of isolated sales under section 25(1) ITAA: TR 92/3 v Joint Submission* p 19 and *Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at [4038].
[20] Paragraph 14 of Taxation Determination TD 2014/27 Income tax: is bitcoin trading stock for the purposes of subsection 70-10(1) of the Income Tax Assessment Act 1997?.

business selling goods is also trading stock of that business, where the Bitcoin is held for the purposes of sale or exchange in the ordinary course of that business.[21]

3.39 On this basis, if a taxpayer acquires and holds cryptocurrency as either a means of storing value or to use as a payment mechanism to facilitate trade, the cryptocurrency should be treated as being acquired for a profit-making purpose and held on revenue account (and subject to the trading stock provisions if it uses that cryptocurrency in the course of carrying on its business or for some other profit-making purpose).

Thank you for your consideration of our submission.

Yours faithfully
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[21] Ibid at [20].