Taxation of Crypto Assets, Germany,Germany

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1. COUNTRY GUIDE

1.1 Germany

1.1.1 *Applicable Tax Law, Guidance, and Case Law*

(a) *Which laws, regulations, and other administrative guidance exist dealing with crypto assets?*

There are no tax laws which specifically deal with crypto assets in Germany. Rather, the general rules apply, in particular those of the German Income Tax Act (GITA),[1] the German Corporate Income Tax Act (GCITA),[2] the German Trade Tax Act (GTTA),[3] the German Value Added Tax Act (GVATA),[4] and the German General Fiscal Code (GGFC).[5] Accounting standards are derived from the German Commercial Code,[6] which are to a great extent authoritative for tax accounting.[7] Some specific rules pertaining to crypto assets exist in legislation regarding financial market supervision – namely, the German Banking Act[8] includes crypto assets as financial instruments.[9] However, this has no direct consequence for tax purposes.

There are some administrative guidelines and statements regarding the tax treatment of crypto assets, which have been issued by different authorities. They concern the taxability of private crypto sales,[10] the use of crypto assets as a means of payment,[11] the taxability of profits from mining,[12] the valuation of crypto assets,[13] and certain questions of value added tax treatment.[14]

The German Federal Ministry of Finance is currently working on an administrative guideline which shall deal with questions for private crypto sales. Yet, it is not to be expected that the administrative guideline will deviate strongly from the current prevailing views in literature as laid out in this chapter.

(b) *Which court cases exist dealing with crypto assets?*

So far, there are only few preliminary[15] court rulings concerning the income tax implications of crypto assets, which have not yielded comprehensive insights.[16] For value added tax purposes, the *Hedqvist* decision of the European Court of Justice (ECJ) should be noted, *see infra* 1.1.3(a).

1.1.2 *Income and Capital Gains Taxes*

(a) *How are crypto assets classified for income and capital gains tax purposes?*

The classification of crypto assets depends on their specific characteristics. There is no uniform standard. Nonetheless, some guidance can be drawn from the German Federal Financial Supervisory Authority, which differentiates between three kinds of (archetypal) crypto assets.[17] Based on its work, crypto assets can be classified using the following categories:

— Currency[18] tokens serve as a means of payment (without being a legal tender) and do not have an intrinsic value.

- Security[19] tokens provide their holders with a specific claim or right against the issuer. They can be subdivided into equity, debt, or asset-backed tokens providing the owner of the token with rights comparable to a shareholder, lender, or owner of an asset.
- Utility tokens can be used for acquiring or receiving goods or services.

This general classification would help to apply tax rules.

Another important preliminary question concerning the classification of crypto assets is whether they constitute an asset in the sense of German income tax law. An asset in that sense is an object, right, concrete perspective, or effective condition which is expected to be useful for several years, is transferable, and has an objective value for an external merchant.[20] It is widely acknowledged that this is at least the case for prominent crypto assets which are traded regularly on crypto exchanges.[21] However, for low-profile crypto assets which are not traded, a careful case-by-case assessment is needed.[22]

Furthermore, for German income tax purposes, one needs to distinguish between income from a business (*Gewerbebetrieb*)[23] and such derived from other sources[24] (*see* for this distinction *infra* (d)). This means that a crypto asset can be held by an individual as a private or as a business asset. It can also be held by a partnership, which is taxed transparently for income tax purposes.[25] A partnership is not necessarily qualified as a business but can also merely be engaged in private asset management. Corporations, on the other hand, are taxed opaquely and only have business assets.

(i) Private

For private individuals, crypto assets qualify as 'other assets',[26] which can lead to the taxation of private sales (*see infra* (b)).

(ii) Business

Businesses have to classify crypto assets for the purpose of accounting. The classification depends on the characteristics and can only be determined through a case-by-case analysis. However, the following general guidelines will apply:

- Crypto assets, especially currency tokens, are usually intangible assets.
- The classification as fixed assets (*Anlagevermögen*) or as current assets (*Umlaufvermögen*) depends on whether the assets are intended to serve the business permanently. Currency tokens will often qualify as current assets.[27] Self-created intangible assets must not be capitalized for tax purposes (*see infra* (k)).
- In most cases, crypto assets are not subject to wear and tear (*nicht abnutzbar*) (i.e., there is no depreciation over time for the purpose of accounting). However, this might be different for tokens held as fixed assets which grant a right of use over a limited time.[28]

(b) *What are the income/capital gains tax consequences of selling crypto assets against fiat currency?*

(i) Private

Profits (and losses) from the sale of crypto assets which are held as private assets are taxable if the period between acquisition and sale has been one year or less; if the holding period has been more than one year profits and losses are not taxable.[29] The profit is calculated by subtracting the acquisition costs and other incidental costs, such as fees from trading platforms or transaction fees, from the selling price.[30] If the profits derived from the sale of crypto assets and other private sales (*private Veräußerungsgeschäfte*[31]) cumulate to

less than EUR 600 for a year, the profits are not taxable.[32] If the profits cumulate to EUR 600 or more, the full amount is taxable.

There is a debate on whether lending or staking crypto assets trigger a regulation which would extend the holding period of one to ten years.[33] This regulation applies if the taxpayer has used the asset in question as a source of income and has actually obtained income from it in at least one calendar year. Lending and staking crypto assets are therefore covered by the wording of the regulation. However, most authors nonetheless reject its application to lending and staking for teleological reasons: The regulation has a very broad wording but was only introduced to fight certain tax savings schemes. It should therefore be interpreted restrictively. Some authors want to apply the regulation only for improper tax saving schemes, i.e., not for regular lending and staking.[34] Others want to apply the regulation only if the assets were acquired with the specific intention to use them to generate income.[35] Additionally, it can be argued that income from lending and staking is comparable to interest derived from the holding of foreign currency. For such income, some authorities have specifically stated that the respective regulation does not apply.[36] It is expected that the above-mentioned guideline of the German Federal Ministry of Finance will clarify question.

For the purpose of determining the acquisition costs and adherence to the holding period for privately held crypto assets, the prevailing view in the literature is to apply the 'first in, first out' method, at least as a default.[37] This view is shared by the tax authorities.[38] Nonetheless, a taxpayer should be allowed to use an average cost approach or even an asset-by-asset approach if he can prove the acquisition costs for every specific asset sold individually.[39] In any case, if different wallets are used the respective token transactions should be treated separately.

(ii) Business

Crypto assets held as business assets are generally capitalized with their acquisition costs. This includes incidental costs.[40] Hence, the purchase of a crypto asset will be profit neutral for a taxpayer applying accrual-based accounting. Selling these assets will in turn realize respective profits or losses.

For business assets, neither the 'first in, first out' method may be used, nor the 'last in, first out' method.[41] Rather, the attribution of acquisition costs to specific assets has to be based on an asset-by-asset approach, which should normally be technologically feasible considering the nature of the distributed ledger technology. If determining the specific acquisition costs for an asset is not possible, which might be the case for assets held on an exchange, it has to be based on the average acquisition costs of all respective assets.

The situation differs for taxpayers using cash-based accounting (*Einnahmen-Überschuss-Rechner*[42]). In this case, the purchase costs for crypto assets qualifying for current assets generally are fully tax-deductible at the time of the purchase, whereas the selling price is fully taxable at the time of sale.

This full tax deductibility of purchase costs of current assets has been used in the past for tax structuring (so-called 'Goldfinger' model): Taxpayers would acquire large amounts of assets (typically gold or securities) to offset high income in one year and sell the assets in a year with low or negative income. This would flatten the tax burden and would have advantageous effects for the progressive income tax rate. Germany has introduced certain safeguards to prevent this procedure.[43] Whether these rules apply for crypto assets is questionable.[44] It therefore seems at least possible that the 'Goldfinger' model can be used in crypto trading under certain conditions. Yet, it would involve a higher risk than trading in gold or securities due to value fluctuations.

(c) *What are the income/capital gains tax consequences of exchanging crypto assets against other crypto assets?*

(i) Private

An exchange of crypto assets for other crypto assets is treated as a sale of the transferred assets for the fair market value of the assets received expressed in EUR.[45]

(ii) Business

Trading crypto assets for other crypto assets is an exchange (*Tausch*[46]) for the purpose of German tax accounting law, having the following consequences.

A taxpayer using accrual-based accounting has to capitalize the received assets with the fair market value of the transferred assets. This means that the taxpayer will uncover any hidden reserves[47] of the assets given away or realize losses in value.

For taxpayers using cash-based accounting, the effects are similar: The exchange is treated as a sale of the transferred assets at their fair market value and a purchase of the assets received at the same price.[48]

(d) *If a distinction is made between business assets and non-business assets, when does trading in crypto assets lead to a trade or business?*

A business is an independent and sustained operation, which is conducted with the intention to realize profits and which participates in the general economic market.[49] These prerequisites might be met by trading in crypto assets. However, it is established under jurisprudence that an activity is only deemed a business if it is not to be classified as mere private asset management (*private Vermögensverwaltung*).[50]

The distinction between private asset management and a business is whether the prevailing view in the relevant market would consider the activity to be a business (*Verkehrsanschauung*). Such assessment can only be made on a case-by-case basis. Since generally accepted specific criteria for trading in crypto assets are yet to be established, guidance can be drawn from the jurisprudence governing securities trading.[51] Hence, the assessment should be based on the following circumstances, which respectively indicate a business rather than private asset management:[52]

- trading for third-party account;
- using debt capital;
- offering transactions to a broad public;
- exploiting market opportunities by using relevant occupational experience;
- exercising the activity full time by utilizing special software (‘day-trading’); and/or
- maintaining an office and/or organization.

Within this assessment, it should be noted that the threshold for considering an activity to be a business will be comparatively high. Investing a substantial amount of capital or recomposing one’s portfolio regularly is generally not sufficient to establish a business.

(e) *What are the income/capital gains tax consequences for an employee receiving wages or salaries in crypto assets?*

Wages or salaries paid in crypto assets are payments in kind. An employee realizes taxable income when he receives the assets.[53] The taxation is based on the value of the assets at the time of payment, being the moment at which the employee acquires the economic ownership (i.e. the economic power of disposal).

If an employee is granted options for tokens as a remuneration, taxable income should only be realized when the options are exercised and the employee has received the underlying assets.[54] In this case as well, taxation is based on the value of the assets at the moment of transfer, not on the value at the moment the options were

granted.[55] If the employee sells his assets at a later point in time, the value of the assets at the time he received them constitutes his acquisition costs for the purpose of possible further taxation of private sales.[56]

Wages paid in crypto assets constitute tax-deductible costs of employment for the employer.

(f) *What are the income/capital gains tax consequences for a merchant receiving payment in crypto assets?*

If a merchant using accrual-based accounting receives a payment in crypto assets for selling goods (assets) or to balance receivables, the received crypto assets are booked with the fair market value of the asset sold.[57] This means that the profit impact when selling assets can differ from a sale against fiat currency: If the taxpayer sells assets for fiat currency at prices above fair market value, the difference between carrying value and price constitutes an immediate taxable profit. If the payment is made in cryptocurrency, only the difference between carrying value and fair market value is realized. Any additional payments are not taxed before the received crypto assets are sold again.

For merchants using cash-based accounting,[58] the consequences are principally the same.

(g) *What are the income/capital gains tax consequences of a loss of crypto assets?*

(i) Private

If a taxpayer loses a crypto asset completely (i.e., loses the private key associated to a crypto asset), no income tax consequences follow. For lack of a sale, the loss of a crypto asset is not tax-deductible, regardless of whether the speculation period is over.

(ii) Business

For taxpayers using accrual-based accounting, losing the private key for a crypto asset leads to a loss. For taxpayers using cash-based accounting, this has no effect.

(h) *What are the income/capital gains tax consequences of a loss in value of crypto assets?*

(i) Private

A loss in value has no direct impact for taxpayers holding crypto assets as private assets. If the assets are sold within the speculation period of one year (ten years), realized losses are deductible from profits derived from other private sales. However, such losses cannot be offset with income from other sources (e.g. income from employment).[59]

(ii) Business

A taxpayer using accrual-based accounting has to revalue current assets according to market values at year end leading to a loss if there was a decrease in value. Any increases in value in excess of the acquisition costs are not capitalized. Fixed assets may only be subject to a write-off if there was a presumably permanent reduction of their fair market value.[60] For losses of value due to value fluctuations, there are no established criteria yet. However, it seems reasonable to apply the jurisprudence covering securities trading,[61] which allows for write-offs if the value of the security has fallen by more than 5% from the time of purchase. It should be noted that a

taxpayer who has exercised this option will have to raise the value of the asset on his balance sheet again if the market value rises, resulting in taxable income.[62]

For taxpayers who determine their income by cash-based accounting, the loss in value has no direct effect on their taxable income before the asset is sold.

(i) *What are the income/capital gains tax consequences of forks of crypto assets?*

(i) Private

For taxpayers holding crypto assets as private assets, the hard fork itself should have no consequences for income tax purposes.[63] However, if the taxpayer sells assets received from a fork, the impact thereof is not clear. The question is whether an act of acquisition (*Anschaffungsvorgang*) can be attributed to the assets, which is a prerequisite for taxation as a private sale. Some authors take the view that assets derived from a fork lack an act of acquisition, since they appear automatically and without assistance from the taxpayer in his wallet.[64] The opposing view would attribute the new assets received from the fork to the acquisition of the old assets.[65] This would lead to the taxation of profits from the sale of assets received through a fork if the speculation period of one year since the acquisition of the original assets has not elapsed.[66]

(ii) Business

For taxpayers who hold crypto assets as business assets, the consequences of a hard fork are uncertain as well. However, if a hard fork is to be understood as the split-up of the original crypto asset into two, the original acquisition costs should be divided among the new assets for accounting purposes as well.[67] This would mean that the hard fork itself would not lead to taxable income until the sale of the assets at a later point in time.

(j) *What are the income/capital gains tax consequences of airdrops of crypto assets and are the tax consequences different if the airdropped tokens are unwanted?*

(i) Private

For crypto assets received from an airdrop outside of a business, the airdrop itself should not lead to taxable income.[68] If the taxpayer sells these assets, the profits should not be taxable as well due to a lack of an act of acquisition.[69] Even though the acquisition of the distributor might be attributed to the taxpayer because the transaction was unpaid,[70] the distributor usually has not acquired the assets in the sense of German income tax law either, since he is the original creator.[71]

(ii) Business

If a taxpayer receives crypto assets from an airdrop in the course of his business, the tax accounting consequences have not been comprehensively discussed yet. However, the guidelines of the German Federal Ministry of Finance for the free distribution of bonus shares[72] could apply analogously.[73] This would mean that crypto assets received in airdrops would lead to taxable income in the amount of their fair market value. If a market value cannot be established, which would be presumed for international matters, the value would be set to EUR 0. Selling the assets received from the airdrop would then lead to taxable income.

The tax consequences should not differ if receiving the crypto assets by an airdrop is not wanted.

(k) *What are the income/capital gains tax consequences of (solo, pool, and cloud) mining?*

The income tax consequences of mining depend on whether the mining operation constitutes a business or is to be qualified as a private activity.[74] Because of the intense usage of resources required for successful mining (e.g. computing hardware, power supply, etc.), a mining operation should usually constitute a business.[75] However, the German Federal Ministry of Finance has stated that 'occasional' mining can qualify as a non-business (i.e., private) activity.[76] Mining may however even be considered an entirely non-taxable hobby activity (*Liebhaberei*) if conducted in an objectively non-profitable manner. In this case, losses derived from the mining operation are not tax-deductible.

(i) Private

If the taxpayer is mining crypto assets outside of a business (but not as a hobby activity), profits derived from the sale of the mined assets are not taxable as private sales. This is because mining involves no act of acquisition from the perspective of German income tax law.[77] However, according to the German Federal Ministry of Finance,[78] profits derived from private mining can be taxed as income from other services.[79] In this case, the profits are fully taxed if they cumulate to EUR 256 or more per year.[80] If this threshold is not met, they are not taxed.

(ii) Business

For taxpayers who use cash-based accounting, mining will lead to taxable income only when the received (current) crypto assets are sold, while the costs of the operation are deductible at the time they occur. Taxpayers applying accrual-based accounting must capitalize mined assets with their development costs, which means that the difference between development costs and selling price is taxable income at the time of sale. An exception should apply for mined assets held as fixed assets since they should qualify as self-manufactured intangible assets: In this case, capitalization is prohibited for the purpose of tax accounting,[81] leading to tax consequences similar to the situation in cash-based accounting. The latter would not apply to the extent the mining operation is rewarded by transaction fees paid with already existing crypto assets.

(l) *What are the income/capital gains tax consequences of staking crypto assets?*

Contrary to mining crypto assets, staking does not require substantial resources other than the asset itself (e.g., no specific computing hardware, power supply, etc.). This means that staking is considerably less likely to constitute a business than mining.[82]

Based upon the determination of whether the staking operation constitutes a business or not, the income tax consequences are the same as for mining crypto assets.

(m) *What are the income/capital gains tax consequences of an indirect investment in crypto assets?*

The tax consequences of an indirect investment in crypto assets strongly depend on the intermediary mechanism used and the exact nature of the crypto assets. There are various options for an indirect investment. The following constellations are possible examples:[83]

- An investor might invest in a partnership which in turn invests in crypto assets. Since the partnership is taxed transparently for income tax purposes and the income of the partnership is attributed to the

partners, the income tax effects are similar to a direct investment. The consequences will therefore mainly depend on whether the activity of the partnership constitutes a business or not.

- An investor might acquire call options or other derivatives on the purchase of crypto assets. If the call options were held as business assets, they would be capitalized with their acquisition costs in accrual-based accounting. Exercising an option, the acquisition costs for the option and the exercise price will determine the acquisition costs of the crypto asset.[84] Therefore, exercising the option itself is profit neutral. For privately held assets, profits from options and other derivatives will normally be taxed as capital gains.[85] For options granted as wages or salaries, *see supra* (e).
- An investor might grant a profit participating loan to a company owning crypto assets, which entitles him to a share of the company's revenues or profits (*partiarisches Darlehen*). If the investor does so in the course of a business, the income is taxed at his normal income tax rate. If it is a private investment, it is subject to the preferential flat tax rate on capital income. If the investor is a corporation, the income is taxed as part of the profits. It should be noted that participation rights under further circumstances might qualify for a taxation as a trading partnership.
- Indirect investments might also be conducted by investment in a crypto fund which trades in or holds crypto assets. The taxation of the fund depends on its structure and classification. For a closed-end alternative investment fund which is structured as a partnership, the fund itself is typically not subject to income taxation. Rather, any profits achieved are directly attributed to the investors and taxed on their level, regardless of whether profits are retained or not. If the activity of the fund amounts to a business (as opposed to mere asset management), the fund may be subject to trade tax. An open alternative investment fund structured as a corporation is only subject to corporate income taxation if its activity amounts to a business.[86] Private investors in such fund pay capital gains tax on retained profits,[87] income from distributions[88] or the sale of fund shares.[89] Investors who hold their fund shares as business assets are taxed with their normal (corporate) income tax rate.[90]

(n) *How is income from crypto assets to be treated under double tax treaty law?*

The double tax treaties of Germany are based on the OECD Model Convention on Income and on Capital (OECD-MC), which means that income has to be qualified under the Convention. There is no guidance of the tax authorities specifying the application to crypto assets. Due to a lack of specific rules within the tax treaties the application should be based according to Art. 3(2) OECD-MC upon the German tax law as outlined before; taxation rights are allocated as follows:

- Income from a business is normally allocated to the state the business is located. It is however allocated to the other state if the business has a permanent establishment in this state. The location of hardware (e.g., for mining) in a specific jurisdiction may constitute a permanent establishment.
- Dividend or interest income derived from indirect investments into crypto assets is allocated to the state of the creditor.[91] Yet, the state in which the dividends or interests are paid is allowed to tax the income up to a certain extent.[92]
- Private sales of crypto assets are allocated to the state the seller is resident.[93]

(o) *What are the income/capital gains tax consequences of selling crypto assets in an ICO/STO/IEO?*

(i) Generating and selling crypto assets in an ICO/STO/IEO

Taxpayers who generate and sell tokens will usually do so within the framework of a business, which means that the effects of an ICO have to be classified for accounting purposes. The exact classification varies.

If the generated tokens are held as current assets, which will normally be the case, they are to be capitalized with their development costs.[94] If they are classified as fixed assets, capitalization is not permitted for tax purposes.[95]

From selling the tokens, the taxpayer will generate revenue, which involves the risk of high taxable profits if a corresponding expense, equity, or liability cannot be accounted for.[96] This depends on the kind of tokens generated:

- If the generated tokens are mere currency tokens, meaning that no obligations or use cases apart from the use as a currency are attached to them, no expense, equity, or liability can be accounted for. The issuer will realize a taxable profit from the collected funds (fiat or other crypto assets).
- For security tokens, the situation depends on whether the issued and/or sold tokens are equity, debt, or asset-backed tokens. If they are equity tokens and grant participation rights which are strong enough to qualify as equity in the sense of German tax law, the collected capital will be profit neutral. This is because it would be treated as a contribution and be accounted for as equity. If the security tokens qualify as debt tokens and grant a claim against the issuer, the income from the token sale will be neutralized by a corresponding liability. However, a liability may not be booked if the claim derived from the security token is conditional on future revenue or profits.[97] If the token were asset-backed this might lead to a realization as if the underlying assets were sold by the issuer of the tokens.
- In the case of utility tokens, the situation depends on whether the tokens grant an enforceable claim against the issuer. If this is the case, an accrual for future liabilities could be booked, (partly) balancing the received funds until the point in time when the tokens are actually used.[98] If no such claim exists, the collected funds lead to taxable income.[99]

(ii) Acquiring crypto assets in an ICO (STO/IEO)

If an ICO includes the distribution of tokens to an employee, the assets are qualified as income in kind and are taxable for the employee.[100] The taxation will depend on the fair market value of the crypto assets when received by the employee. For crypto assets which already have a significant market value, granting token options might be preferable in certain cases to avoid immediate dry income taxation and give the employee control over the timing of the tax burden.[101] Alternatively, the tokens can be transferred early by letting the employee purchase them financed by an employer loan, which is offset by a bonus payment after a vesting period. Hereby, only the bonus payment would be subject to income taxation, unaffected by changes in value of the tokens.

For other taxpayers, the acquisition of tokens through an ICO has no different effects than other trade in crypto assets.

1.1.3 *Other Taxes*

(a) *What are the value added tax/sales tax consequences of selling crypto assets?*

Pursuant to the determinations made by the European Court of Justice in *Hedqvist* decision,[102] the German Federal Ministry of Finance has released an administrative guideline to implement the decision for the German tax administration.[103] The guideline specifies that selling cryptocurrencies for fiat currency and vice versa constitutes a taxable service under section 1(1) no. 1 GVATA, but is tax-exempt under section 4 no. 8 lit. b GVATA when interpreted in conformity with the Value Added Tax Directive (VATD)[104]. Yet, this only applies for currency tokens which are accepted by the parties to a transaction as an alternative means of payment and which do not serve another purpose than the use as such.[105]

The German Federal Ministry of Finance also outlines its view on related issues:

- It considers the acquisition of tokens from mining (irrespective whether from a block-reward or from a transaction fee) not to be a taxable service under the GVATA.
- An entrepreneur who is providing wallets against payment carries out a taxable service under the GVATA. No tax-exemption applies.

The treatment of other tokens (i.e., utility and security tokens) is not discussed by the administrative guideline.

Nevertheless, utility tokens which grant the right to receive goods or services can be qualified as vouchers in the sense of the VATD.[106] Article 30a VATD differentiates between single-purpose and multi-purpose vouchers. A single-purpose voucher is a voucher 'where the place of supply of the goods or services to which the voucher relates, and the VAT due on those goods or services, are known at the time of issue of the voucher'.[107] If a utility token qualifies as a single-purpose voucher, the transfer of the token is regarded as the supply of the good or service and is therefore taxable. The actual handover of the good or the actual provision of the service will in this case not be considered as an independent transaction (i.e., it will not be taxable). However, utility tokens might not meet the criteria and will therefore qualify as multi-purpose vouchers. In this case, not the transfer of the token, but the actual handover of the good or actual provision of the service is taxable.[108]

The VAT treatment of security tokens depends on whether they are to be qualified as equity, debt, or asset-backed tokens.[109] Pursuant to the *KapHag* decision of the ECJ,[110] in which the court stated that the inclusion of a shareholder against cash distributions is no taxable service, the acquisition of equity tokens should not be taxable either.[111] The acquisition of debt tokens equates to granting a loan, which is not entrepreneurial in nature, but merely private asset management for VAT purposes. Therefore, it is normally not a taxable activity under the VATD. The acquisition may be taxable however if it is the necessary extension of a market activity. In this case, it should be tax-exempt under section 4 no. 8 lit. a GVATA.[112] For asset-backed tokens the common VAT rules for selling (tangible) assets could become applicable.

(b) *Are payments in crypto assets subject to withholding taxes?*

There are no specific withholding taxes tailored to payments in crypto assets. Whether withholding taxes apply will depend on the nature and context of the payment. Notable withholding taxes in Germany are the payroll tax (*supra* (c)) as well as the withholding tax on income from capital such as dividends and interest (*Kapitalertragsteuer*[113]). These are not autonomous taxes, but a method to collect the income tax. In all cases, the debtor is liable for the amounts to be withheld. This can become problematic for payments which are made completely in crypto assets, because the tax must be paid in fiat currency. It may force the debtor to sell a portion of the crypto assets to be able to discharge the tax debt.

(c) *Does payment of compensation in crypto assets give rise to payroll tax consequences?*

The income tax on income from employment is levied by a payroll tax (*Lohnsteuer*) which is withheld by the employer.[114] The amount of payroll tax to be withheld is calculated on the basis of the salary of the employee, including the fair market value of any remuneration in kind, which includes crypto assets.[115] The value is determined by the fair market value of the crypto assets at the moment the employee receives them.[116]

The payroll tax must be paid in fiat currency and cannot be discharged with crypto assets. If the wage of the employee does not include a sufficient amount of fiat currency to be withheld, the employee will have to pay for the missing amount.[117] The employer can be secondarily liable for any outstanding amount which cannot be collected from the employee.[118]

(d) *Do transactions with crypto assets trigger any transfer taxes?*

Germany has not introduced a financial transfer tax yet, even though the introduction of such tax has been on the political agenda for a long time. The current proposal of the German Federal Ministry of Finance[119] only includes taxation of the purchase of shares of certain companies (i.e., no taxation of crypto transactions).

The only transfer tax that could potentially apply to crypto transactions is the German real estate transfer tax. This is because the tax is not only triggered by the actual transfer of legal ownership of real estate (which is not possible by the transfer of crypto assets for lack of a notarial certification); it is also due on the transfer of at least 95% of the membership interest or shares in a company which owns real estate.[120] The transfer of equity tokens which represent membership interest or shares in such company can therefore be a taxable transaction.

(e) *Are firms operating in the crypto space subject to digital service taxes?*

To date, Germany has not introduced a digital service tax.

(f) *Are crypto assets subject to gift, inheritance, estate, or wealth taxes?*

Gift and inheritance taxes apply to transactions with crypto assets under the standard rules of the German Inheritance and Gift Tax Act (*Erbschaftsteuer- und Schenkungsteuergesetz*). The tax is normally based on the fair market value of the transferred assets at the moment they are received by the donee or successor.[121] However, complex provisions and tax exemptions apply if the subject of donation or inheritance is a business. The tax rate ranges between 7% and 50%, depending on the relationship of the donee/successor to the donor/testator,[122] which also determines tax-exempt amounts.[123]

Since the tax-exempt amount per donee is at least EUR 20,000 for ten years, airdrops will not trigger gift taxes in most cases.

Formally, Germany has a wealth tax with the relevant act still being in force.[124] However, due to a decision of the German Federal Constitutional Court in 1995,[125] the legislature would have needed to reform the tax to be able to further levy it. Instead, it was decided to cease its collection, which means that effectively, there is no wealth tax in Germany.

Germany also does not have an estate tax. However, family estates are subject to inheritance tax every thirty years.[126]

(g) *Are crypto assets subject to exit tax?*

Germany has exit taxation rules.[127] These apply to individuals who have been subject to unlimited income taxation[128] for the last ten years and relocate outside of Germany. However, it only relates to hidden reserves of corporate shares when certain thresholds are met. This means that crypto assets held by an individual as private assets are not subject to exit taxation if not qualifying as equity tokens.

If a corporation relocates[129] or transfers a business or assets to a permanent establishment outside of Germany,[130] hidden reserves are generally taxed. There exist no specific provisions concerning crypto assets.

Individuals who relocate outside of Germany who have been subject to unlimited income taxation for five years within the last ten years can also be subject to so-called extended limited income taxation.[131] This is the case if they have substantial economic interests inside of Germany and relocate to a low-tax territory. In this case, they are treated as if they are still subject to unlimited income taxation, except for foreign income in the sense of section 34d GITA.

(h) *Can mining trigger gambling tax?*

Germany has a gambling tax on race bets and lotteries (*Rennwett- und Lotteriesteuer*[132]). The person liable to pay the gambling tax is the organizer of the lottery.[133] There is however no reason to consider mining to be a lottery or the miner to be the organizer of such lottery. For this reason, the application of the lottery tax to mining is not being discussed. Germany also has a casino tax (*Spielbankabgabe*) for public casinos, which is clearly not applicable to mining crypto assets.

1.1.4 *Compliance and Documentation Obligations*

(a) *What documentation requirements exist for taxpayers regarding crypto assets and are there best practices in recordkeeping to support representations made in tax returns?*

No specific documentation obligations exist for crypto assets, but only the general requirements. This means that businesses must comply with specific accounting obligations,[134] while private individuals are subject to an obligation to cooperate with the tax authorities in determining the facts of the case.[135] To comply with this obligation, taxpayers should keep records of their trade in and other activities with crypto assets. Noncompliance can lead to determinations of the tax base by estimate,[136] which is typically detrimental to the taxpayer. A taxpayer who does not include profits from crypto assets in his tax returns can incur an administrative fine for reckless understatement of taxes of up to EUR 50,000[137] or be criminally liable for tax evasion.[138]

If a taxpayer wants to prevent the application of the 'first in, first out' method for private trades in crypto assets, it is advisable to separate the assets into different wallets which serve different purposes, e.g., one wallet for long-term investments and one wallet for day-trading.[139] Even though the tax authorities may not accept such separation in every case, separate wallets will make it more likely.

(b) *What is the evidentiary burden of supporting tax positions when a digital wallet address is lost or shared with other persons?*

German tax authorities must investigate and clarify the facts relevant for taxation ex officio,[140] which means that in principle there is no burden of proof for the taxpayer to fulfil. However, within their duty of cooperation, taxpayers must support the authorities by naming relevant facts and evidence. Hence, a taxpayer who has lost or shared a digital wallet address will have to lay out to the authorities the specificities of his situation to be able to convince them that his statement is truthful.

(c) *Are crypto asset exchanges and wallet providers subject to reporting obligations?*

Crypto asset exchanges and wallet providers are subject to the general reporting requirements under German tax law (e.g., the obligation to file tax returns). There are however no specific obligations tailored to crypto activities. As any other person, they can be compelled by the authorities to provide relevant information for the taxation of third parties, *see infra* 1.1.5(a).

The question of specific tax reporting requirements for exchanges and wallet providers is mainly theoretical because the main impediment for such enterprises are the regulatory requirements in the field of financial market supervision, requiring them to file for a banking licence.

(d) *Are taxpayers holding crypto assets subject to reporting obligations apart from the filing of income tax/capital gains tax returns?*

There are no crypto-specific additional reporting obligations.

(e) *Are crypto asset exchanges and wallet providers subject to CRS/FATCA reporting?*

Germany has ratified and transformed into domestic law both its Intergovernmental Agreement (IGA) with the US concerning the FATCA requirements[141] and the Multilateral Competent Authority Agreement of 29 October 2014.[142]

There exists however no guidance from the German tax authorities on whether they consider crypto asset exchanges or wallet providers to be subject to these regimes. It could be argued that crypto exchanges and wallet providers are no financial institutions under the provisions of the relevant German law,[143] because crypto assets are not financial assets in a traditional sense.[144] That would mean that they would not be subject to CRS/FATCA and other exchange of information requirements.

1.1.5 *Civil and Criminal Tax Enforcement*

(a) *What power do the tax authorities have to compel the disclosure of information by third parties, such as exchanges or wallet providers, and have these tools been used in the past?*

Tax authorities may request information from third parties if clarification of the matter by the taxpayer does not or is not likely to produce any results.[145] They may also issue group information requests to third parties regarding facts concerning yet to be identified taxpayers.[146] This power could be used to compel information from exchanges or wallet providers.

Information requests from tax authorities must be complied with. In case of non-compliance, the authorities may apply coercive measures (i.e., coercive fines, substitutive execution, or direct enforcement).[147] However, close relatives and certain professionals such as lawyers or tax consultants may refuse to surrender information under certain conditions.[148]

Whether these tools have been used in the past against exchanges or wallet providers is not in the public domain.

(b) *What measures have tax authorities undertaken in the past to ensure crypto tax compliance?*

German tax authorities have issued above-mentioned guidelines and statements regarding the application of tax law to crypto assets. Other measures are not known.

(c) *Is the tax authority cooperating with tax authorities in other jurisdictions on enforcement?*

Cooperation with other tax authorities is based on exchange of information and assistance in enforcement.

There are different options for German tax authorities to obtain information from other jurisdictions and to provide them with information vice versa.[149] For states with which Germany has concluded a double tax treaty or tax information exchange agreement, competent authorities can exchange information under the relevant treaty provisions. Under European Union law, authorities can request information from other Member States for the administration and enforcement of domestic laws.[150] Furthermore, Germany has ratified and transformed into domestic law the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters.[151]

For the purpose of assistance in enforcement, Germany is subject to EU Council Directive 2010/24/EU,[152] which requires Member States to enforce tax debts owed to Member States upon request.

Footnotes

1 *Einkommensteuergesetz*.

2 *Körperschaftsteuergesetz*.

3 *Gewerbesteuergesetz*.

4 *Umsatzsteuergesetz*.

5 *Abgabenordnung*.

6 *Handelsgesetzbuch*.

7 *Cf*. section 5(1) GITA.

8 *Gesetz über das Kreditwesen*.

9 Section 1(11) sentence 1 no. 10 of the German Banking Act.

10 Financial Authority Hamburg, 11 Dec. 2017, document S 2256-2017/003-52; Regional Financial Authority Nordrhein-Westfalen, 20 Apr. 2018, Kurzinfo ESt No. 04/2018; Bundestag, 21 Jun. 2013, document 17/14062, 25.

11 Financial Authority Hamburg, 11 Dec. 2017, document S 2256-2017/003-52; Bundestag, 21 Jun. 2013, document 17/14062, 25.

12 Regional Financial Authority Nordrhein-Westfalen, 20 Apr. 2018, Kurzinfo ESt No. 04/2018; Bundestag, 5 Jan. 2018, document 19/370, 21 f.

13 State Tax Authority Bayern, 14 Jan. 2019, document S 3812b.1.1-16/12 St 34 FMNR02a130019; Ministry of Finance Brandenburg, 6 May 2019, document 36 – S 3812b – 2018#005.

14 German Federal Ministry of Finance, 27 Feb. 2018, document III C 3 – S 7160-b/1310001 – DOK 2018/0163969.

15 The decisions concerned the interlocutory suspension of the enforcement of tax debts. In such cases, the courts only conduct a cursory examination of the merits.

16 Fiscal Court Berlin-Brandenburg, 20 Jun. 2019, Case 13 V 13100/19; Fiscal Court Nürnberg, 20 Apr. 2020, Case 3 V 1239/19.

17 German Federal Financial Supervisory Authority, *Blockchain Technologie – Gedanken zur Regulierung*, 1 Aug. 2018.

18 The German Federal Financial Supervisory Authority refers to these tokens as payment tokens.

19 The German Federal Financial Supervisory Authority refers to these tokens as equity and other investment tokens.

20 *Cf*. Oliver Christian Schroen, *Sind 'Bitcoin und Co.' Wirtschaftsgüter gemäß der gefestigten BFH-Rechtsprechung?*, 57 DStR 1369, 1371 (2019).

21 For example, Fiscal Court Berlin-Brandenburg, 20 Jun. 2019, Case 13 V 13100/19; Stefan Richter & Katharina Schlücke, *Zur steuerbilanziellen Erfassung von Token im Betriebsvermögen*, 101 FR 407, 408 (2019); Lutz Richter & Christian Augel, *Die bilanzielle und ertragsteuerliche Behandlung von virtuellen Währungen anhand des Bitcoins*, 99 FR 937, 940 (2017); Ingo Heuel & Isabell Matthey, *Im Betriebsvermögen gehaltene Kryptowährungen – Steuer- und handelsrechtliche Einordnung*, 20 EStB 342, 343 (2018). However, a different position is maintained by Oliver Christian Schroen, *Sind 'Bitcoin und Co.' Wirtschaftsgüter gemäß der gefestigten BFH-Rechtsprechung?*, 57 DStR 1369, 1375 (2019).

22 *Cf*. Fiscal Court Nürnberg, 20 Apr. 2020, case 3 V 1239/19.

23 Section 15 GITA.

24 Sections 22 and 23 GITA.

25 Note that a partnership might constitute a trade business, which is taxed non-transparently for trade tax purposes.

26 Section 23(1) no. 2 GITA.

27 Stefan Richter & Katharina Schlücke, *Zur steuerbilanziellen Erfassung von Token im Betriebsvermögen*, 101 FR 407, 408 (2019).

28 Stefan Richter & Katharina Schlücke, *Zur steuerbilanziellen Erfassung von Token im Betriebsvermögen*, 101 FR 407, 409 (2019).

29 *Cf*. section 23(1) no. 2 GITA; Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 413 (2019). The taxation of private sales of crypto assets is briefly noted in an obiter dictum of a lower fiscal court in a decision which dealt with the private sale of expensive football tickets. The Court considered the taxation of the specific sale to be unconstitutional due to a structurally prevailing lack of tax enforcement in this context and noted that the situation may be similar for crypto assets, Fiscal Court Baden-Württemberg, 2 Mar. 2018, case 5 K 2508/17. However, this argument was dismissed by the Federal Fiscal Court in second instance, German Federal Fiscal Court, 29 Oct. 2019, Case IX R 10/18.

30 Section 23(3) sentence 1 GITA.

31 Section 23 GITA. Taxable private sales notably include the sale of real estate if the time period between purchase and sale is ten years or less.

32 Section 23(3) sentence 5 GITA.

33 *Cf*. section 23(1) no. 2 sentence 4 GITA.

34 Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 416 f. (2019); Ingo Heuel & Isabell Matthey, *Im Privatvermögen gehaltene Kryptowährungen (II) – Spezialfälle und Abgrenzungskriterien zur Gewerblichkeit*, 20 EStB 300, 303 (2018); Oliver Lohmar & Juien Jeuckens, *Besteuerung von Kryptowährungen im Privatvermögen: Bestandsaufnahme und Ausblick*, 101 FR 110, 115 (2019); *cf*. Fabian Krüger, *Kryptowährungen: Gewinne aus Token-Verkäufen als Einkünfte aus privaten Veräußerungsgeschäften*, 73 BB 1887, 1891 (2018).

35 Christian Reiter & Dirk Nolte, *Bitcoin und Krypto-Assets – ein Überblick zur steuerlichen Behandlung beim Privatanleger und im Unternehmen*, 73 BB 1179, 1182 (2018); Thomas Kanders et al., *Geschäfte mit Kryptowährungen – Abgrenzung zwischen Gewerbebetrieb und privater Vermögensverwaltung und weitere Problemstellungen aus Anlegerperspektive*, ErbStB 145, 150 (2018).

36 State Tax Authority Bayern, 10 Mar. 2016, document S 2256.1.1-6/6 St 32.

37 *Cf*. e.g. Ingo Heuel & Isabell Matthey, *Im Privatvermögen gehaltene Kryptowährungen – Ertragsteuerliche Beleuchtung von Verkauf, Tausch und Schürfen von virtuellen Währungen*, 20 EStB 263, 267 (2018); Wilfried Kraus & Daniel Blöchle, *Einkommensteuerliche Behandlung von direkten und indirekten Investments in Kryptowährungen*, 56 DStR 1210, 1212 (2018).

38 Financial Authority Hamburg, 11 Dec. 2017, document S 2256-2017/003-52; Regional Financial Authority Nordrhein-Westfalen, 20 Apr. 2018, Kurzinfo ESt 03/2018.

39 Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 417 (2019); Wilfried Kraus & Daniel Blöchle, *Einkommensteuerliche Behandlung von direkten und indirekten Investments in Kryptowährungen*, 56 DStR 1210, 1212 (2018). It should be noted that section 23(1) sentence 1, no. 2 sentence 3 of the German Income Tax Act, which prescribes the 'first in, first out' method, is not applicable here, because it only applies to trading in fiat currencies.

40 *Cf*. section 255(2) of the German Commercial Code; Ingo Heuel & Isabell Matthey, *Im Betriebsvermögen gehaltene Kryptowährungen – Steuer- und handelsrechtliche Einordnung*, 20 EStB 342, 344 (2018).

41 This is because section 6(1) no. 2a GITA only allows for the “last in, first out” method to be used on inventory (*Vorratsvermögen*). Crypto assets do not constitute inventory, *cf*. Stefan Richter & Katharina Schlücke, *Zur steuerbilanziellen Erfassung von Token im Betriebsvermögen*, 101 FR 407, 411 (2019).

42 Section 4(3) GITA.

43 Specifically section 4(3) sentence 4 GITA concerning fixed assets which grant a security-like claim or right against a third party, section 15b(3a) GITA concerning current assets which are transferred without a physical handover and section 32b(1) sentence 3 and (2) no. 3 lit. c) GITA concerning effects in tax progression for cross-border income.

44 Ingo Heuel & Isabell Matthey*, Im Betriebsvermögen gehaltene Kryptowährungen – Steuer- und Handelsrechtliche Einordnung*, 20 EStB 342, 345 ff. (2018).

45 Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 413 (2019); Ingo Heuel & Isabell Matthey, *Im Privatvermögen gehaltene Kryptowährungen – Ertragsteuerliche Beleuchtung von Verkauf, Tausch und Schürfen von virtuellen Währungen*, 20 EStB 263, 269 (2018).

46 *Cf*. section 6(6) GITA.

47 Fair market values exceeding the book values.

48 *Cf*. *Hans-Joachim Kanzler*, in: Herrmann/Heuer/Raupach, 296. Ed. 02/2020, § 4 EStG margin no. 581.

49 Section 15 (2) GITA.

50 German Federal Fiscal Court, 11 Jul. 1968, Case IV 139/63, *cf*. also section 14 GGFC.

51 German Federal Fiscal Court, 20 Dec. 2000, Case X R 1/97; 24 Aug. 2011, Case I R 46/10; Julian Albrecht & David John, *Die einkommensteuerliche Abgrenzung zwischen Gewerbebetrieb und Vermögensverwaltung bei Investitionen in Kryptotoken*, 101 FR 393, 399 (2019).

52 Julian Albrecht & David John, *Die einkommensteuerliche Abgrenzung zwischen Gewerbebetrieb und Vermögensverwaltung bei Investitionen in Kryptotoken*, 101 FR 393, 400 ff. (2019).

53 *Cf*. sections 8(1) and 11(1) GITA.

54 *Cf*. for stock options German Federal Fiscal Court, 20 Nov. 2008, Case VI R 25/5.

55 *Cf*. *ibid*.

56 *Cf*. for stock options Regional Financial Authority Frankfurt, 14 Dec. 2001, document S 2256 A – 22 – St II 27.

57 *Cf*. section 6(6) sentence 1 GITA.

58 Even though a merchant will normally be obligated to use accrual-based accounting (*cf*. section 238 of the German Commercial Code, section 140 GGFC, and section 5(1) GITA), cash-based accounting can be used for merchants running small enterprises (section 241a of the German Commercial Code).

59 Section 23(3) sentence 7 GITA.

60 *Cf*. section 6(1) no. 1 sentence 2, no. 2 sentence 2 GITA.

61 German Federal Fiscal Court, 21 Sep. 2011, Cases I R 7/11 and I R 89/10. Arguing for such application: Ingo Heuel & Isabell Matthey, *Im Betriebsvermögen gehaltene Kryptowährungen – Steuer- und handelsrechtliche Einordnung*, 20 EStB 342, 344 (2018); Stefan Richter & Katharina Schlücke, *Zur steuerbilanziellen Erfassung von Token im Betriebsvermögen*, 101 FR 407, 410 (2019).

62 *Cf*. section 6 (1) no. 1 sentence 4, no. 2 sentence 3 GITA.

63 Especially, the fork does not qualify as income from services in the sense of section 22 no. 3 of the German Income Tax Act, *cf*. Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 414 (2019); Anka Hakert & Benjamin Kirschbaum, *Ether Classic und Bitcoin Cash: Bilanzierung und Besteuerung von Kryptowährungen aus einer Hard Fork*, 56 DStR 881, 882 (2018).

64 Lutz Richter & Christian Augel, *Die Spaltung des Bitcoins: Entstehung steuerfreier Veräußerungsgewinne?*, 99 FR 1131, 1132 (2017); Ingo Heuel & Elisabeth Matthey, *Im Privatvermögen gehaltene Kryptowährungen (II) – Spezialfälle und Abgrenzungskriterien zur Gewerblichkeit*, 20 EStB 300, 301 (2018).

65 Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 414 (2019); Anka Hakert & Benjamin Kirschbaum, *Ether Classic und Bitcoin Cash: Bilanzierung und Besteuerung von Kryptowährungen aus einer Hard Fork*, 56 DStR 881, 885 (2018); Wilfried Kraus & Daniel Blöchle, *Einkommensteuerliche Behandlung von direkten und indirekten Investments in Kryptowährungen*, 56 DStR 1210, 1212 (2018).

66 *See supra* 1.1.2(b).

67 Stefan Richter & Katharina Schlücke, *Zur steuerbilanziellen Erfassung von Token im Betriebsvermögen*, 101 FR 407, 410 (2019); Anka Hakert & Benjamin Kirschbaum, *Ether Classic und Bitcoin Cash: Bilanzierung und Besteuerung von Kryptowährungen aus einer Hard Fork*, 56 DStR 881, 886 (2018).

68 Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 415 (2019); Ingo Heuel & Elisabeth Matthey, *Im Privatvermögen gehaltene Kryptowährungen (II) – Spezialfälle und Abgrenzungskriterien zur Gewerblichkeit*, 20 EStB 300, 302 (2018).

69 *Cf*. for this requirement *supra* 1.1.2(i).

70 Section 23(1) sentence 3 GITA.

71 Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 415 (2019); Ingo Heuel & Elisabeth Matthey, *Im Privatvermögen gehaltene Kryptowährungen (II) – Spezialfälle und Abgrenzungskriterien zur Gewerblichkeit*, 20 EStB 300, 302 f. (2018).

72 German Federal Ministry of Finance, 18 Jan. 2016, document IV C 1 – S 2252/08/10004:017, margin no. 111 f.

73 Christian Reiter & Dirk Nolte, *Bitcoin und Krypto-Assets – ein Überblick zur steuerlichen Behandlung beim Privatanleger und im Unternehmen*, 73 BB 1179, 1182 (2018).

74 *See supra* 1.1.2(d).

75 Regional Financial Authority Nordrhein-Westfalen, 20 Apr. 2018, Kurzinfo ESt 03/2018.

76 Bundestag, 5 Jan. 2018, document 19/370, 21 f.

77 This is the case both for assets received as block-rewards and assets received as transaction fees, *cf*. Marco Brinkmann & Marius Meseck, *Besteuerung von Kryptowährungen im Privatvermögen in Deutschland*, 8 RdF 231, 234 (2018); Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 413 (2019).

78 Bundestag, 5 Jan. 2018, document 19/370, 21 f. Some voices in literature disagree and want to differentiate between block-rewards and transaction fees, *cf*. Marco Brinkmann & Marius Meseck, *Besteuerung von Kryptowährungen im Privatvermögen in Deutschland*, 8 RdF 231, 234 f. (2018).

79 Section 22 no. 3 GITA.

80 Section 22 no. 3 sentence 2 GITA.

81 *Cf*. section 5(2) GITA.

82 *Cf*. Julian Albrecht & David John, *Die einkommensteuerliche Abgrenzung zwischen Gewerbebetrieb und Vermögensverwaltung bei Investitionen in Kryptotoken*, 101 FR 393, 406 (2019).

83 *See* for a detailed analysis of different indirect investments in crypto assets under German tax law Wilfried Kraus & Daniel Blöchle, *Einkommensteuerliche Behandlung von direkten und indirekten Investments in Kryptowährungen*, 56 DStR 1210 (2018).

84 *Cf*. for options on shares German Federal Fiscal Court, 22 May 2019, case XI R 44/17.

85 *Cf*. section 20(2) sentence 1 no. 3 GITA.

86 *Cf*. section 6 of the German Investment Tax Act that defines which income of a fund is subject to corporate income taxation. The section does not include a provision that would cover income from crypto trading if it does not amount to a business. If the fund is not exercising significant active economic activity, it will also not be subject to trade tax, *cf*. section 15(2) of the German Investment Tax Act. *See* Wilfried Kraus & Daniel Blöchle, *Einkommensteuerliche Behandlung von direkten und indirekten Investments in Kryptowährungen*, 56 DStR 1210, 1214 (2018).

87 Sections 18, 16 of the German Investment Tax Act and section 20(1) no. 3 GITA

88 Section 16 of the German Investment Tax Act and section 20(1) no. 3 GITA.

89 Sections 19, 16 of the German Investment Tax Act and section 20(1) no. 3 GITA.

90 Note that the tax exemptions which normally apply for shares held as business assets do not apply, *cf*. section 16(3) of the German Investment Tax Act.

91 Articles 10(1) and 11(1) OECD-MC.

92 Articles 10(2) and 11(2) OECD-MC.

93 Article 13(5) OECD-MC.

94 *Cf*. section 6(1) no. 2 GITA.

95 Section 5(2) GITA.

96 Dirk Niedling & Florian Merkel, *Initial Coin Offerings (ICO) – Steuerliche Rahmenbedingungen einer neuen Finanzierungsform*, 8 RdF 141, 145 (2018).

97 Section 5(2a) GITA.

98 Fabian Krüger & Michael Lampert, *Augen auf bei der Token-Wahl – privatrechtliche und steuerliche Herausforderungen im Rahmen eines Initial Coin Offering*, 73 BB 1154, 1160 (2018).

99 One could consider justifying an accrual for future liabilities based on the jurisprudence of the German Federal Fiscal Court concerning non-profitable services offered by a merchant out of goodwill. If such services are accepted on a regular basis to advertise for the business, a goodwill accrual for future liabilities (*Kulanzrückstellung*) may be booked. Prerequisite for this is that the merchant may believe that the respective losses cannot be avoided from a commercial or moral (*sittlichen*) point of view, *cf*. German Federal Fiscal Court, 20 Nov. 1962, case I 242/61 U; German Federal Ministry of Finance, EStR 2012, 5.7 para. 12. Whether this applies for the issuance of tokens is at least questionable. While such treatment may be possible for commercial accounting purposes, it is very likely that the approach would not be accepted in tax accounting.

100 *See supra* 1.1.2(e).

101 Fabian Krüger & Michael Lampert, *Augen auf bei der Token-Wahl – privatrechtliche und steuerliche Herausforderungen im Rahmen eines Initial Coin Offering*, 73 BB 1154, 1157 (2018).

102 European Court of Justice, 22 Oct. 2015, C-264/14, *Hedqvist*.

103 German Federal Ministry of Finance, 27 Feb. 2018, document III C 3 - S 7160-b/1310001 – DOK 2018/0163969.

104 Council Directive 2006/112/EC of 28 Nov. 2008, as amended.

105 *Ibid*.

106 Christian Joisten, *Umsatzsteuerliche Behandlung von Token-Transaktionen – Gelöste und ungelöste Fragen*, 101 FR 421, 424 (2019).

107 Article 30a(2) VATD.

108 Article 30b VATD.

109 *See supra* 1.1.2(a).

110 European Court of Justice, 26 Jun. 2003, case C-442/01 – *KapHag*.

111 Christian Joisten, *Umsatzsteuerliche Behandlung von Token-Transaktionen – Gelöste und ungelöste Fragen*, 101 FR 421, 425 (2019).

112 *Ibid*., 426.

113 Section 44 GITA.

114 Sections 38 ff. GITA.

115 *Cf*. section 38a(2) GITA.

116 *See supra* 1.1.2(e).

117 Section 38(4) GITA.

118 Section 42d(1) GITA. The employer will however not be liable if he fulfils certain reporting requirements towards the competent authority, section 42d(2) GITA.

119 German Federal Ministry of Finance (10 Dec. 2019), https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Schlaglichter/Steuergerechtigkeit/2019-12-10-Gesetzesvorschlag-Finanztransaktionsteuer.html.

120 Section 1(2a) and (3) of the German Real Estate Transfer Tax Act.

121 *Cf*. section 12(1) of the German Inheritance and Gift Tax Act and section 9(1) of the German Valuation Act; State Tax Authority Bayern, 14 Jan. 2019, document S 3812b.1.1-16/12 St 34 FMNR02a130019.

122 Section 19 of the German Inheritance and Gift Tax Act.

123 Section 16 of the German Inheritance and Gift Tax Act.

124 German Wealth Tax Act of 1974.

125 German Federal Constitutional Court, 22 Jun. 1995, Case 2 BvL 37/91.

126 Section 1(1) no. 4 of the German Inheritance and Gift Tax Act.

127 Section 6 of the German Foreign Tax Act. Note that it is planned to modify the regulations by an Act to implement the Anti-Tax-Avoidance-Directive (*ATAD-Umsetzungsgesetz*). The Act has not been enacted yet (Apr. 2020).

128 Section 1 GITA.

129 Section 12(3) GCITA.

130 Section 4(1) sentences 3 and 4 GITA.

131 *Cf*. section 2 of the German Foreign Tax Act.

132 *Cf*. the German Race Bet and Lottery Act.

133 Section 19(1) of the German Race Bet and Lottery Act.

134 Sections 140 ff. GGFC.

135 Section 90 GGFC.

136 Section 162 GGFC.

137 Section 378 GGFC.

138 Section 370 GGFC.

139 *Cf*. Andreas Kortendick & Felix Rettenmaier, *Besteuerung von Token-Transaktionen im Privatvermögen – Ausgewählte Einzelfragen und Erklärungspflichten*, 101 FR 412, 417 (2019).

140 Section 88 GGFC.

141 Law of 31 May 2013, BGBl. II 2013, 1362.

142 Law of 21 Dec. 2015, BGBl. II 2015, 1630.

143 *Gesetz zum automatischen Austausch von Informationen über Finanzkonten in Steuersachen* (FKAustG).

144 Section 19 no. 7 FKAustG provides a list of instruments considered financial assets which does not include crypto assets. The handling of financial assets is a requirement for storage institutions to be considered financial institutions, section 19 no. 3 and no. 4 FKAustG.

145 Section 93(1) sentence 3 GGFC.

146 Section 93(1a) GGFC.

147 Section 328 GGFC.

148 Sections 101 ff. GGFC.

149 *Cf*. for the procedure sections 117 ff. GGFC.

150 *Cf*. Council Directive 2011/16/EU of 15 Feb. 2011, as amended.

151 Law of 23 Jul. 2015, BGBl. II 2015, 966.

152 Council Directive 2010/24/EU of 16 Mar. 2010.