

TAX

Can crypto assets be exported?

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The movement of crypto assets between digital wallets

The Financial Surveillance Department of the South African Reserve Bank or “[FinSurv](#)” has made its views known on exchange control issues relating to the movement of crypto assets between digital wallets on a South African crypto exchange (such as OVEX) and a foreign crypto exchange (such as Binance) via the frequently asked questions section of the Intergovernmental Fintech Working Group website.

FinSurv states that it considers this to be an unlawful export of capital in contravention of regulation 10(1)(c) of the Exchange Control Regulations and a criminal offence. This has become a topical issue as the popularity of crypto assets has soared in the last twelve months. In my view, the authority for this position is questionable, and will depend on each person’s facts and circumstances.

Cryptocurrency is an intangible asset. Traditionally, the situs of an intangible asset has been regarded as the place where it can be effectively dealt with. This was particularly relevant to assets such as shares, based on where the share register is located, or a trademark, based on where the register is maintained (see *Spier Estate v Die Bergkelder Bpk* 1988 (1) SA 94 (C)).

On the face of it, perhaps one could argue that a crypto asset can be effectively dealt with wherever the exchange carries on business, since the exchange keeps a record of ownership of the assets that it holds on behalf of investors. Therefore, arguably moving the crypto asset to an exchange in different jurisdictions may change its situs, and is therefore an export of capital.

[The FSCA declares crypto assets as financial products.](#)

Crypto assets are movable

However, in my view the position is unclear. Upon closer examination, intangible assets may also be categorized as movable or immovable, and this also has implications for the situs of an asset. In the case of a movable intangible asset, the asset has no link to any particular place, and its situs follows the domicile of a person (e.g., a debtor).

It may well be that crypto assets are movable as they may have no particular location, in which case the asset would follow the domicile of the owner of the asset, since there is no other party involved. This would make the export of a crypto asset impossible without a change in the owner’s domicile.

In the case of the immovable intangible asset, its situs follows the place where it has a physical connection (e.g., where a register is kept). In this case, the asset cannot be exported. This was the finding of the Supreme Court of Appeal in *Oilwell (Pty) Ltd v Protec International Ltd* 2011 (4) SA 394 (SCA) where it held that a trademark was not capable of being exported for the purposes of regulation 10(1)(c) of the Exchange Control Regulations.

This led to a specific amendment to the regulation to include intellectual property in the definition of “capital”. However, it appears incorrect to categorize a crypto asset as immovable, as we know that unlike a share register or a trademark register, a crypto asset’s record of ownership exists in the blockchain, which does not have a physical location.

FinSurv has not provided any detailed reasoning for its position, and in my view, it seems unlikely that its position will prevail in circumstances where all that the person has done is move the crypto asset between South African and foreign crypto exchanges, and later returns the crypto asset (or other crypto assets for which the original crypto assets were exchanged) to his or her wallet on a South African crypto exchange.

The position also creates uncertainty for investors who simply move the asset from a local crypto exchange wallet to a hardware wallet or a private wallet for security reasons. Again, in these circumstances, FinSurv would not be able to complain that the investor has exported capital. If FinSurv wants to stop this practice it should ensure that specific and clear provisions regarding crypto assets are included in the forthcoming amendments to the Exchange Control Regulations.

Of course, there are other circumstances where FinSurv is right. If the person, having moved the crypto asset to a foreign crypto exchange, sells the crypto asset for foreign currency or assets which have a physical location which is outside of South Africa as part of a pre-ordained scheme for exporting funds from South Africa, then then it would seem that there is an export of capital in contravention of regulation 10(1)(c) of the Exchange Control Regulations.

In any event, even if there is no export of capital from South Africa, an obligation arises for the person to repatriate the foreign currency or asset to South Africa in terms of regulations 6 and 7 of the Exchange Control Regulations respectively.

Regulation 10(1)(c) of the Exchange Control Regulations

Therefore, if a person finds himself or herself in hot water with FinSurv for having moved a crypto asset from a wallet on a local crypto exchange to a wallet on a foreign crypto exchange or another wallet, legal advice should be obtained based on the person's particular circumstances. There might not be a contravention of regulation 10(1)(c) of the Exchange Control Regulations, and any penalty imposed by FinSurv may be inappropriate (particularly if the penalty is equal to the entire value of the crypto asset – which is not uncommon).

For now, the safer route for investors would be to use their single discretionary allowance of R1 million per calendar year or their foreign investment allowance of R10 million per calendar year to fund their account with a foreign crypto exchange. In that case, the crypto assets purchased will form part of their authorised foreign assets and can remain outside of South Africa indefinitely.

New procedures when natural persons cease their SA tax residency, [find out more](#).

by Kyle Fyfe, Director



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