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Excon and cryptocurrencies

6 June 2018 *4 min read*

INTRODUCTION

In a recent Werksmans Tax Brief (https://bit.ly/2K2emv1) we discussed the current SARS view on the South African tax treatment of cryptocurrencies ("cryptos"). However, an area that is often overlooked is that of exchange control, and whether the acquisition or trading in cryptos may (even inadvertently) lead to a transgression under the exchange control regulations.

SARB'S VIEWS

The South African Reserve Bank ("SARB") is not unlike regulators in other jurisdictions still grappling with the regulation of cryptos, but has issued some guidance in the form of a 2014 Position Paper as well as a statement on their website.

In terms of these documents the SARB takes the view that cryptos are not recognised as legal tender in South Africa and any merchant may refuse to accept cryptos as a form of payment. Currently no specific laws or regulations exist in South Africa to govern the use of cryptos and as a result no compliance requirements currently apply to the local trading thereof. SARB does not oversee, supervise or regulate cryptos and they are therefore not guaranteed/backed.

However, should a resident natural person wish to purchase cryptos from abroad, SARB's view is that the only permissible method is by utilising the individual's single discretionary allowance (currently R1 million) and/or individual foreign investment allowance (currently R10 million with a Tax Clearance Certificate), per calendar year. It is evident that SARB will not allow a local company to utilise the foreign direct investment dispensation to invest in offshore cryptos.

Due to the nature of cryptos, the repatriation of value, for example on sale and converting to fiat currency into the country, is not a reportable transaction on the SARB's Reporting system. As such, the repatriation will not be acknowledged as a repatriation of an individual's single discretionary allowance and/or individual foreign investment allowance. Similarly, non-residents who have introduced cryptos into the country for sale locally and who want to transfer the sale proceeds abroad will be unable to do so in terms of exchange control because there is no proof that foreign currency or Rand has been introduced into South Africa.

WHAT DOES THIS MEAN IN PRACTICE?

A South African resident investor wishing to acquire cryptos locally may utilise one of the few local exchanges, say L exchange, and this exchange will then match trades between local buyers and sellers, with no currency actually leaving the country. As a result, there is no exchange control element to these transactions. However, when the local demand outstrips local supply, the local crypto price will rise to persuade holders to part with their cryptos and hence the local Rand price often trades at a premium to the global Dollar average taken from all major crypto exchanges.

If the same resident then rather wishes to acquire cryptos on an offshore exchange at the lower dollar rate, he or she will then have to use their single discretionary or foreign investment allowance to externalise the Rand value to acquire the cryptos in Dollar on a foreign exchange. This is not dissimilar to investing in shares on a foreign stock exchange.

Simple enough, right? But what about when the resident individual buys R20m worth (being in excess of the 'normal' exchange control investment thresholds) of local Bitcoin via L exchange, and then proceeds to send that Bitcoin to a wallet held with an offshore exchange?

These inter-wallet (or exchange-to-exchange) transfers only involve cryptos, and as these are not regulated by either the SARB or a local bank, no exchange control regulatory intervention takes place. Is this then a transgression or merely a loophole? Based on their statements, the SARB regards this as a transgression as the resident effectively exports (some form) of capital, without using the approved dispensations and channels. A resident should thus rather withdraw his investment from his local crypto wallet, and invest the Rand amount as per the normal channels.

A further transgression may be encountered where a resident acquires foreign crypto in Dollar and then transfers this to a local wallet, specifically to make use of the price arbitrage. It is known that the SARB has undertaken a review of these practices to consider whether further compliance intervention is required.

CONCLUSION

It is evident that further clarity and regulatory guidance is required to assist South African exchange control residents with their compliance obligations in this regard, and the SARB has indeed appointed third party advisors to assist in moving this process forward. However, in the interim, an investor should not overlook the exchange control regulations when wading into this already risky crypto environment.



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