

## **Lower tax court confirms income tax treatment of cryptocurrency transactions**

Lower tax court (again) confirms government position on taxing cryptocurrency gains as taxable income

In a decision dated 25 November 2021, which was published in May 2022, Germany's lower tax court of Cologne confirmed the tax authority's view on the taxation of cryptocurrency gains and ruled that a capital gain from the sale of cryptocurrencies qualifies as "other income" under section 23 (1) no. 2 of the income tax code (ITC). The decision of the lower tax court of Cologne confirms a similar decision of the lower tax court of Baden-Wuerttemberg dated 11 June 2021 (see [GTLN dated 02/16/22](#)) and is in line with the 17 June 2021 draft Ministry of Finance (MoF) decree on the tax treatment of virtual currencies and tokens (see [GTLN dated 06/22/21](#)).

In 2017, the taxpayer acquired Bitcoin and exchanged the Bitcoins into Ethereum and then Monero before exchanging them back into Bitcoin, and then finally sold the Bitcoins. The taxpayer declared the capital gain as taxable income in its 2017 income tax return, after which the tax authorities issued an assessment notice accordingly. Subsequently, the taxpayer filed an appeal against the assessment notice and argued that the various cryptocurrencies that were sold do not qualify as assets in terms of the other income provision of section 23 (1) no. 2 ITC, and, therefore, capital gains from the sale of such cryptocurrencies should not be taxable for income tax purposes. In addition, the taxpayer argued that as a result of a general lack of enforcement by the tax authorities regarding the taxation of cryptocurrencies and due to the violation of the principle of certainty, the taxation of cryptocurrency transactions violates constitutional principles.

The lower tax court of Cologne, in a similar fashion as the lower tax court of Baden-Wuerttemberg, rejected the arguments of the taxpayer on all counts with the same arguments as previously used by the lower tax court of Baden-Wuerttemberg. Essentially, the lower tax court explained that, based on the extensive interpretation of the federal tax court of the term "asset" in this regard and the fact that there is a general trade with and a demand for cryptocurrencies, the conditions for an asset are fulfilled. The lower court also rejected the argument that a violation of constitutional principles occurred, in particular the court rejected the argument that there is a general "lack of enforcement situation" (which would make the tax law inapplicable in a given situation) where the tax authorities do not have the right means to enforce a provision in the tax law.

The decision of the lower tax court of Cologne is the third decision of a lower tax court that confirms the view of the tax authorities on the nature of cryptocurrency gains (in addition to the rulings from the lower tax courts of Cologne and Baden-Wuerttemberg, a similar ruling was issued in 2019 by the lower tax court of Berlin-Brandenburg). Only the lower tax court of Nuremberg in a 2020 interim court order expressed doubts on the asset qualification of cryptocurrencies for purposes of section 23 (1) no. 2 ITC.

An appeal against the decision of the lower tax court of Cologne is currently pending at the federal tax court and hopefully will give the federal tax court a chance to rule on this controversial topic.

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