Tax Law Aspect of Crypto-Assets

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1. Introduction

Since no specific regulations exist, the identification of the current tax discipline to apply to transactions involving the so-called cryptocurrencies (although it would be better to define them as crypto-assets due to the multifaceted nature of such instruments) preliminarily reflects not only the absence of a structured general discipline ruling them but, even before that, the uncertainty of how they can be appropriately framed from a legal viewpoint.

Within the narrow limits of a brief (but necessary) initial observation to the reflections of strictly tax nature that I intend to develop here, I only recall how, from a definition perspective, the (weak and in constant evolution) legislative solutions and the consequent doctrinal interpretations, jurisprudential and administrative practice just help us in understanding the features that distinguish this case as to its operational connotation although fueling doubts and debates on how it can be brought back to the institutions present in our system and, therefore, regulated according to the different areas.

In Italy, indeed, Article 1, paragraph 2, letter qq) of Legislative Decree No 231/2007 established the first definition according to which a virtual currency constitutes "*the digital representation of value not issued or guaranteed by a central bank or public authority, not necessarily linked to a legal tender,* ***used as means of exchange to purchase goods and services or for investment purposes and transferred, stored and traded electronically***".

This definition was later "amended" by Article 1, paragraph 1 of Legislative Decree No 184/2021 that aimed at setting down a criminal regulation to "*fight fraud and counterfeiting of non-cash means of payment*", referred to as "*a representation of digital value not issued or guaranteed by a central bank or public entity, and not necessarily linked to a legally established currency, hence not possessing the legal status of currency or money, although accepted by natural or legal persons as means of exchange that can also be transferred, stored and exchanged electronically*".

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In this context and, as a natural consequence of the "abstractness" perceivable from the rules just shown above, there are, therefore, those who aim at identifying the regulations to use the *crypto-assets* in the different areas and propose to equalize them to currencies (and, specifically, to a foreign currency)[1] and, on the other hand, those who lean toward their framing as assets as laid down by Article 810 of the Italian Civil Code since, as known, any "*assets*" (including the intangible ones) can "*form the subject of rights*",[2] or as financial products.[3]

Coming to the specific topic of interest here, what is certain is that the use, exchange, transfer, and even the mere holding of these particular assets has various implications from the tax viewpoint pertaining, in particular, to (a) the (possible) taxation of their transfer transactions, (b) the (possible) relevance for tax purposes (both income and capital) related to their holding and economic use, and (c) the procedural profiles on monitoring and ascertaining action against the taxpayers who use and hold them.

As to all these areas of interest, the solutions currently envisaged and, specifically, those emerging from the interpretation of the Tax Administration and some initial regulation attempts, are not satisfactory and even, in some cases, entirely unreasonable for the grounds outlined above as to the qualifying uncertainty.

It deals, therefore, with a matter of starting by analyzing the solutions put forward so far and then trying to highlight reasoned solutions that can contribute to the debate on the features of a legislative intervention that does not seem to be further delayable and that only if well-defined will be able to dispel the different uncertainties that we are debating today.

2. The Tax Effects Connected to Transactions and Possession of Crypto-Assets According to the Interpretation of the Italian Tax Authority

So far, when outlining the tax consequences connected to transactions and possession of crypto-assets, the Italian Revenue Agency has equalized them to currencies and, precisely, to foreign currencies, hence applying the provisions expressly referred to the latter for tax purposes.

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1 As better examined below, this position is supported by Agenzia delle Entrate. See Resolution 72/E/2016 and Questions 956/2018 and 788/2021. In case-law, see a similar conclusion of the Court of Appeal of Brescia No 7556/2018.

2 Some case-law has recently accepted this interpretation. E.g., see the judgements of the Court of Florence No 18/2019 2019 and TAR of Lazio No 1077/2020. Likewise, the international accounting practice stuck to this concept, highlighting that when cryptocurrencies are held for sale (the proper purpose of exchanges or wallet providers) must be entered among inventories and valued at the lower value between the purchase cost and realizable value (i.e., the presumed disposal value). In contrast, if held for other purposes (e.g., investment), they must be entered among fixed assets as intangible assets and valued at cost.

3 This is the position of CONSOB, *Initial offerings and cryptocurrency exchanges, 19 March 2019*.

This decision was made through Resolution No 72/E dated 2 September 2016,[4] explicitly justified by the need to ratify the conclusions of the EU Court of Justice that, through its judgment C-264/2014 dated 22 October 2015, equalized the transactions dealing with exchanging a virtual currency into a traditional one and vice versa to those "*referred to currencies, banknotes and coins used as legal tender*" as laid down in Article 135(1)(e) of Directive 2006/112/EC.

Therefore, based on this assimilation, the Italian Tax Authority has established that: a) the trading activity of such "coins" should be qualified as a service provision for consideration free from VAT under Art.10, paragraph 1, No 3 of the Italian Presidential Decree No 633/1972; b) those who exercise this business activity are subject to income tax and IRAP whose taxable income results from a measure determined by the mechanism of "cost-revenues and inventories";[5] c) the relevant exchange of the crypto-assets held by an individual outside a business activity generates a different income of financial nature subject to 26% tax rate like for "traditional" currencies, only when a speculation hypothesis occurs and, according to the law in force, it is always deemed to exist in case of disposals: (c1) "*forward or arising from deposits or current accounts*" (art. 67, co. 1, letter c-quater of TUIR) and, (c2) thus including the "spots against forward", if "*over the tax period, the deposits and current accounts held in total by the taxpayer and calculated according to the exchange rate effective at the beginning of the reference period is higher than ITL one hundred million* (now EUR 51,645.69) *for at least seven continuous working days*" (art. 67, paragraph 1b of the TUIR).

In the subsequent Resolution No 956-39/2018, the Tax Authority after reiterating that, for income tax purposes "the general principles governing transactions involving traditional currencies apply to virtual currency exchange transactions carried out by individuals holding bitcoin (or other virtual currencies) outside their business activity", and that "*the regular professional activity of brokering traditional currencies with bitcoin constitutes a relevant activity to the effects of VAT but also of IRES and IRAP*," also added that, since investments in crypto-assets can generate taxable income in Italy, according to the provisions of the so-called anti-money laundering, the taxpayer holding them shall indicate the relevant amount in the RW box of their income tax return statement showing the code 14 in column 3 – "Other foreign assets of a financial nature". It being understood that, according to this resolution, which is an additional indication for Italian taxpayers, in any case, virtual currencies are not subject to "*taxation on the value of financial instruments, current accounts and passbooks held abroad by individuals residing in the State's territory (the so-called IVAFE, established by*

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4 This Resolution arose from a request for clarification from a company that needed to know the proper tax treatment of transactions involving the purchase and sale of bitcoin on behalf of its customers.

5 As stated in the aforesaid Resolution No 72/E dated 2 September 2016, it means that the individual carrying out the brokerage activity shall have to consider the revenues and costs on such activity valuing the crypto-assets "in inventory" at the end of the tax period according to their standard value or according to their quotation on that date.

Article 19 of the Italian Decree-Law No 201 dated 6 December 2011, converted with amendments into Law No 214 dated 22 December 2011, as amended), because this tax applies to deposits and current accounts only of banking nature". It is undisputed that this is not the condition connoting the case in question.

Finally, the Italian Revenue Agency also defined the tax rules reserved for utility tokens that enable raising funds in cryptocurrency to carry out a project by allowing the holder to get goods or services from their issuer. Due to the last feature, they were initially assimilated to vouchers, making VAT payable only at acquisition by the individual entitled to enjoy of the goods or service "incorporated" therein (Resolution No 21/E dated 22 February 2011). Then they have been the subject of a total change in interpretation.

By answering the Question No 110/2020, the Tax Authority indicated that just the token acquisition constitutes a transaction subject to VAT, at least in the case submitted, since the service availability to access the blockchain (i.e., the data structure/digital ledger that, in such specific case, allowed the companies connected to sign, encrypt and exchange among themselves commercial documents, where authorship, non-repudiation, and integrity were ensured).

3. The Critical Issues Emerging from the Solutions Proposed by the Tax Authority

The solutions just summarized and proposed by the Tax Authority show various critical issues and have, at least partly, an unclear consistency on a systematic level. They were (and still are), in fact, the focus of a substantial doctrinal debate, although their essential features were included in a recent draft law submitted to the Italian Senate.

Without prejudice to what will then be said in this regard, including the adhesion to the proposed critics, nevertheless, it should be noted that these solutions are an attempt to fill a ruling gap as to the interpretation of a phenomenon that is indeed new and constantly changing, thus making it unseizable not only as to trace it back to cases known and already regulated but also to a specific and uniform configuration that allows a consistent appreciation regarding the legal consequences it triggers.

In these terms, therefore, the effort of the Tax Authority has to be appreciated since it leads to solutions that are less unfavorable for taxpayers than others in any case conceivable.

As widely pointed out, indeed, the main limit to such reconstructions (including that they are more favorable than other conceivable solutions) is certainly represented by identifying the tax effects starting from the strict assimilation of crypto-assets to currency and, specifically, to foreign currencies. Further to appearing distorting, and considering the very nature of these values (conceived as an alternative to the instruments traditionally managed by the

banking systems and connoted by a natural non-territoriality), in fact, today, this framing also clashes with the (albeit meager) regulating reference in our legal system. For what already said the definition of Art. 1, paragraph 1 lett. d) of the Italian Legislative Decree No 184/2021, the legislator textually excluded the legal status of currency or money for virtual currencies, which is rather deemed as a "*payment instrument of conventional type*" accepted "*as a medium of exchange*". In addition, the assimilation to currencies was ruled out by the monetary authorities themselves (ECB and Bank of Italy), and it also conflicts with the accounting practice that, among other things, could generate some coordination problems when considering the taxation of entities that hold the same virtual currencies under business schemes and that, therefore, shall apply the principle of derivation from the balance sheet for tax purposes.

4. The Draft Law No 2572 Submitted to the Italian Senate

Despite what just highlighted, the proposed framing by the Tax Authority was the basis of the draft law No 2572 of 30 March 2022, as already touched upon, submitted to the Italian Senate and aimed at defining the "*Tax provisions on virtual currencies*" as well as the related "*regulation of anti-money laundering obligations*".

The core profile of this proposal is to identify the concept of cryptocurrency, defined, in this context, as a "*static or dynamic cryptographic minimum mathematical unit liable to represent rights, with autonomous circulation*". However, it should be said that this draw law is unlikely to achieve a concrete result because of the short time before the legislative body expires and other most important issues that the Parliament has to manage today.

To this aim, the relevant tax discipline is identified as to the income tax field through the introduction in TUIR of a specific case in the miscellaneous income area, providing that taxation should concern only the "*transfers for consideration*" that "*involve payment or conversion into euros or foreign currencies*", thus making irrelevant from the tax viewpoint both a mere "*withdrawal*" and "*exchange*" into other cryptocurrencies.

Just because of the substantial assimilation to the scheme already provided for foreign currencies, the relevant capital gain (26%) would be taxable only if, over the tax period, the counter value in euros of the virtual currencies owned in total by the taxpayer and calculated taking into account the cost or purchase value subject to taxation, is higher than EUR 51,645.69 for at least seven continuous business days. In this regard, the criteria to quantify the "imposable" tax cost from which deriving the same capital gain are then indicated, primarily identified according to the documents issued with a set date collected by the taxpayer and equal to zero, assuming a free acquisition.

In this framework, an assumption of revaluation of the tax carrying cost of cryptocurrencies held by taxpayers at the first application of the new rules would

also be introduced, providing (in line with what our legal system repeatedly establishes, albeit with rules extended year after year, for land and holdings) the correlated payment of a substitute tax also payable in three annual installments of the same amount and fixed at a variable rate of 8%, 9% or 10% depending on whether the value considered is, respectively, less than EUR 500,000, between EUR 500,000 and EUR 1 million or more than EUR 1 million.

For tax monitoring purposes, the same draw law then provides the mandatory filling in the RW box of the annual income tax return only for holdings of virtual currencies exceeding EUR 15,000 over the tax period, identified according to their cost or purchase value. It is, finally, provided IVAFE is not discounted on the latter since they are not qualified as financial products.

The approach just outlined is focused on the possession of the values in question by non-business individuals without setting down anything on this assumption, according to which the relevant transactions would be affected by the principle of attraction to the formation of a business income and consistently with the solution of a framing among currencies and, therefore, among components of financial nature, they shall be irrelevant for determining the IRAP taxable income.

5. Monitoring for Tax Purposes and Assessment Action

Aside from how to tax transactions involving crypto-assets, monitoring and assessment are the widely recurring aspects in the individual tax systems requiring (also) to be the subject of a careful regulation. Besides the control of the proper fulfillment of the specific tax obligations that will be introduced, it is necessary to rule the reconstruction of the taxpayer's wealth and the measurement of their assets and income performances aimed at contrasting any offenses committed, if any, as well as at identifying the territorial context where taxation takes place.

The importance of this issue is confirmed by the European Commission that, on 2 June 2021, decided to launch a public consultation aimed at expanding and strengthening the administrative cooperation to ensure adequate attention for tax purposes of this innovative case.

The objective sought here is, first and foremost, to understand how the use of crypto-assets takes place, the type of related services provided to users, and how the associated relationships are defined. In this way, the aim is to identify the reporting obligations for tax purposes similar to those now burdening the intermediaries as to cross-border mechanisms to obtain potentially undue tax advantages. This is connected to the indications given by G20 to OECD about the requirement to include the activities that use virtual currencies among those for which the information exchange between states operates, given their proven ability to evade tax transparency rules easily.

6. Possible Solutions

The approach followed by the Tax Authority and included in the draw law mentioned above appears not entirely satisfactory, as already noted in the doctrine.

If, on the one hand, the course chosen is linked to the indication given by the OECD in its 2020 report "*Taxing virtual currencies*" to try, where possible, to frame crypto-assets among the already existing taxable cases, it is evident, on the other hand, how it clashes with a misleading viewpoint of the peculiarities of this phenomenon that, indeed, the report above invites the policymakers to take into account.

Shortly, the mistake that clearly penalizes the proposed solution is, as pointed out earlier, the assimilation of virtual currencies to foreign currencies -which is improper in light of how this phenomenon expresses itself and because of the most evolved legislative provisions outlining its regulation.

Ultimately, the prior framing of this phenomenon affects the identification of the related tax structure. To really understand this aspect, it is enough to look at the solutions adopted by the countries that have already identified the appropriate relevant tax regulation. Except for the UK, which relies on a case-by-case assessment of how the token is operated, the solutions vary from assumptions of assimilating the income produced as capital gains on non-financial assets to considering the surplus value linked to the sale of intangible assets, sometimes valorizing the speculative intent, whether or not present.

On closer inspection, these solutions could also be implemented in our system since they give a more systemic consistency than those already experienced both from the interpretation and proposal viewpoint.

Although surely penalizing from the tax burden side – at least as to the solutions put forward so far- in my opinion, it is particularly persuasive the solution that starts from assimilating cryptocurrencies to the concept of intangible assets based on the framing identified for accounting purposes by IFRS. This is a reasonable solution because, on the evidence of fact, crypto-assets are not: a) a currency, as also confirmed by the legislator; b) an instrument representing the capital of another entity; c) a contractual right to receive cash or to exchange financial assets and liabilities. But they are indeed a "*thing*" that can "*form the subject matter of rights*" – hence an asset according to the meaning laid down in Article 810 of the Italian Civil Code.

Based on these considerations, on the one hand -and consistently with the general principles of our tax system, the tax discipline should ensure the taxation for income purposes of only the increase in wealth actually achieved by the individual who holds and operates crypto-assets and, on the other hand, should refer to them in terms of monitoring and relevance for ascertaining the taxpayer's

wealth and income dimension consistently with what is already in force to fight against the money laundering.

Obviously, it should be qualified the business activity and all the related consequences of brokering in the purchase and sale of crypto-assets, but for this aim, it is not required a regulatory intervention since it is possible to reach conclusions simply by applying the existing rules.

Finally, such an intervention could provide for:

a. the taxation of capital gains (in such a case with a 26% substitute rate as occurs for financial assets) arising from the "monetization" (i.e., conversion into euro or other currency having legal tender) of the crypto-asset based on the valorization of the imposable tax cost fixed according to the terms laid down in the recent draw law mentioned above (with a possible reference established by the current provision of Art. 67 paragraph 1, letter c-quinquies of TUIR), as well as assuming to exchange the crypto-activity for goods or services, which could already be traced back to the case deriving from the combined provisions of Arts. 67, paragraph 1, letter i of TUIR (qualifying as miscellaneous income arising from occasional business activities) and 71, paragraph 2 of TUIR (indicating the criterion for quantifying the relevant taxable income, providing for the latter assumption a relevance threshold for the taxable amounts);

b. the irrelevance for tax purposes of the simple crypto/crypto "exchange" not resulting in any form of new wealth and, specifically, in any "monetization" since it would rather be a simple exchange of "expectations";

c. the consistent relevance regulation of the supply for VAT purposes (that could hardly not be applicable by recurring to the additional subjective and territorial requirements, since these transactions involve goods);

d. the requirement to the taxpayer to show the amount of the crypto-asset held in the RW box of their tax income return statement as an independent fact, disregarding the consideration that they are "foreign" assets since they are a – territorial – hence excluding any problem to identify the possible "place" where these assets are held;

e. the introduction of the reference to crypto-assets in any rules (such as the "*redditometro*" – income-counter – or the discipline of financial investigations) implies implementing an assessment key of the assets identifying the taxpayer's ability to pay and/or use of their own wealth;

f. the definition of rules to quantify the value of this specific asset for the proper application of the inheritance and gift tax, taking into account that the relevant prerequisite in such a case could be deemed integrated.

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