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**TAX CONSEQUENCES OF USING ALTERNATIVE MEANS OF PAYMENT
(THEORETICAL AND LEGAL ASPECTS)**

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Introduction: the article is devoted to the analysis of the legal nature of alternative means of payment (for the purposes of taxation), in particular bitcoin, and to the study of tax consequences of their usage (theoretical and legal aspects). The academic interest of the authors is connected with law enforcement problems, which take their origin in unique technologies making it possible to use alternative means of payment. The paper analyzes the position of the Federal Tax Service of Russia on the issue, as well as foreign experience and current case law of the European Court of Justice. **Purpose:** to study the legal nature of alternative means of payment, bitcoin in particular, for the purposes of taxation; based on the analysis of foreign legal regulation experience, to reveal the most common problems in the field of taxation linked with the usage of virtual currencies and their tax assessment. **Methods:** the study is based on the methods of comparison, analysis, synthesis, generalization, and formal-logical method. **Results:** the article provides the analysis of the legal nature of alternative means of payment, in particular bitcoin, for the purposes of legal entities income tax and VAT; the substantiation for the conclusion that operations with bitcoin are subject to taxation; the analysis of tax consequences of particular situations; the formulation of the main principles of taxation. **Conclusions:** the scientific research conducted confirms that the national regulators and fiscal authorities are only at the stage of thinking over problems arising in virtual reality, including those connected with the usage of virtual currencies. There is an urgent need for legal regulation of relations which arise from transactions with cryptocurrencies. The majority of states are not ready to exclude persons using bitcoins, as well as trading platforms gaining income from the relevant transactions from the scope of potential taxpayers. Operations with bitcoins do not refer to currency operations; the authors deem it well-founded to regard (for the purposes of in-

come taxation) operations of acquiring goods (works, services) with the use of bitcoins as operations of the barter nature. When defining VAT taxation principles, it is reasonable to take into consideration the specificity of bitcoins as “virtual goods”, which combine a number of features common for services and means of payment, determining the specifics of their taxation in comparison with real goods and services.

Keywords: cyberspace; virtual currency; cryptocurrencies; bitcoin; legal means of payment; money; income; tax; price; VAT; tax authority; court

Information in Russian

НАЛОГОВЫЕ ПОСЛЕДСТВИЯ ИСПОЛЬЗОВАНИЯ АЛЬТЕРНАТИВНЫХ ПЛАТЕЖНЫХ СРЕДСТВ (ТЕОРЕТИКО-ПРАВОВЫЕ АСПЕКТЫ)

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Введение: статья посвящена анализу правовой природы альтернативных платежных средств (для целей налогообложения), в частности биткоина; исследованию налоговых последствий операций с ними (теоретико-правовые аспекты). Научный интерес авторов статьи связан с правоприменительными проблемами, которые порождены уникальными технологиями, позволяющими использовать альтернативные платежные средства. Анализируются позиция Федеральной налоговой службы Российской Федерации по данному вопросу, а также зарубежный опыт регулирования и актуальная практика Суда ЕС. **Цель:** раскрыть правовую природу альтернативных платежных средств, в частности биткоина, для целей налогообложения; выявить на основе анализа зарубежного опыта регулирования наиболее распространенные проблемы в области налогообложения, связанные с использованием виртуальных валют и их налоговой оценкой. **Методы:** формально-логический, сравнение, анализ, синтез, сопоставление, обобщение. **Результаты:** анализ правовой природы альтернативных платежных средств, в частности биткоина, для целей налога на прибыль организаций и налога на добавленную стоимость (НДС), обоснование вывода о том, что операции с биткоином подлежат налогообложению, анализ налоговых последствий конкретных ситуаций, а также формулирование основных принципов налогообложения. **Выводы:** проведенный научный анализ подтверждает, что национальные регуляторы и фискальные органы находятся еще только в стадии осмысления проблем, которые возникают в виртуальном мире, в том числе и проблем, связанных с использованием виртуальных валют. Обозначилась насущная потребность в правовом урегулировании отношений, возникающих при осуществлении операций с криптовалютами. Большинство государств не готово исключить лиц, использующих биткоины, а также торговые площадки, получающие доход от соответ-

стеующих транзакций, из круга потенциальных налогоплательщиков. Операции с биткоином не относятся к валютным операциям, авторам представляется обоснованным рассматривать (для целей налогообложения доходов) операции по приобретению с использованием биткоина товаров (работ, услуг) как операции бартерной природы. При определении принципов налогообложения НДС обоснованно учитывать специфику биткоина как «виртуального товара», который сочетает в себе ряд свойств, характерных для услуг и средств платежа, обуславливающих особенности его обложения по сравнению с реальными товарами и услугами.

Ключевые слова: киберпространство; виртуальная валюта; криптовалюты; биткоин; законное средство платежа; деньги; доход; налог; цена; налог на добавленную стоимость; налоговый орган; суд

Introduction

Modern life is characterized by a colossal interest, including that of the academic community, for the virtual sphere. Recent decades have also introduced the new phenomenon to the economic reality; the commercial activities are being progressively involved with the cyberspace. “Anonymous payments are possible since the beginning of time thanks to the cash money, – N. Popper writes, – but we were not able to carry the cash money over to the digital world” [4, p. 27]. One can report the speeding up of the money “dematerialization” process, which is accompanied by the extensive use of alternative payment means – altcoins, represented by the so-called virtual currencies, and also cryptocurrencies.

It is a widely spread opinion that the cyberspace is unique and exists beyond the geographic and national borders, which excludes the very opportunity of putting a question about taxation. It is opposed to the idea of new fiscal payments, which can simultaneously serve as a means of the alternative payment use limitation. In particular, regarding the world-known variation of the altcoin – the bitcoin – a possibility to introduce a corresponding tax [1, p. 20] is studied, together with the regulatory prohibitions of transactions affecting it. The number of operations with bitcoins increases every year, but the research on approaches to their taxation is still at the very beginning. The scientific interest of the authors of the article is associated exactly with the law enforcement issues resulting from the unique technologies that allow one to use alternative payment means.

Operations with Cryptocurrencies and Taxation

It is a known fact that cryptocurrencies as a kind of digital assets are put into circulation by the private law persons outside the unified emission center and exist only in an e-form. Throughout the

world, these “currencies” are actively used by companies and citizens as an investment tool and means of the open trade [2, pp. 130–136]. The approaches to the tax and legal regulation of the corresponding economic activity are different in countries of the world, and it is noteworthy that in the majority of cases they are not legislatively settled. In other words, so far these approaches have been stated only in documents of particular agencies. For example, tax services of a number of countries, including Australia, Great Britain, Norway, Singapore, the USA, have developed explanatory statements establishing their approaches to the issues of the bitcoin transactions taxation [10, pp. 19–20; 12, pp. 138–143]. In October 2016, the Federal Tax Service of Russia also expressed the official standpoint concerning such operations¹. The corresponding letter makes it clear that the Russian legislation has no definitions of such terms as “cash equivalent”, “cryptocurrency”, “virtual currency”. However, “the Russian Federation legislation does not contain any prohibition of performing operations with cryptocurrencies by Russian citizens or organizations”. At the same time, a conclusion is made that the operations connected with purchasing or selling cryptocurrencies and using the Russian Federation currency valuables or currency should be qualified as currency transactions regulated by Federal Law on currency regulation and currency control No. 173-FZ (adopted on December 10, 2003). The situation with the cryptocurrency usage is aggravated by the fact that separate national banks and regulatory bodies discredit the bitcoin reputation, because, in their opinion, this asset can serve illegal goals. In that context, the corresponding report of the Financial Action Task Force on Money Laundering (FATF) is conspicuous. In particular, the document runs that “the convertible virtual

¹ Letter of Federal Tax Service of Russia of October 03, 2016 No. OA-18-17/1027.

currencies that can be exchanged for real money or other virtual money are potentially assailable in relation to their possible illegal use for money laundering and financing terrorism”¹. Nevertheless, the legal reality cannot be ignored, and today the reality is the one not prohibiting transactions with cryptocurrencies. However, this does not mean that they should be qualified as currency transactions, because the bitcoin by its definition is not a currency, neither a national one nor foreign. Its common usage is not provided by the official enforcement but rests on the universal acknowledgement of the civil turnover participants and nothing more. In this sense, the cryptocurrencies, of course if we disregard the high technologies, which the cryptocurrencies owe their existence to, in our opinion, are in no way different from the cowrie shells that were also widely used as payment means in the past. It is known from the past experience that the alternative payment means usually emerged at the time when and at the place where the official money circulation “did not fully satisfy the needs of the economic turnover” [3, p. 361]. Traditionally, money served for the convenience of the exchange of goods. In the course of time, the turnover was provided by commodity money, which was gradually replaced with the legitimate payment means. Nowadays, thanks to the digital technology, the humankind returned to the forgotten practice, and year by year alternative payment means compete with national currencies more and more seriously.

In the context of our interest, it is important to define the legal nature of the bitcoin and the tax consequences of operations with its usage. The acknowledged autonomy of the taxation law partially simplifies this research task, because the civil science is still to develop a stable position concerning the phenomenon in question. The key feature of the bitcoin is that its usage is not covered by the legal regulation of the official currencies. It is noteworthy that in the overwhelming majority of jurisdictions the bitcoin is not recognized as the official payment means and is not charged to the electronic money account [14, pp. 2–25]. This circumstance is to a great extent determinative, because when taxing the corresponding operations it

is not possible to analogize the bitcoin operations to monetary transactions.

With this consideration in mind, the initial thesis will be the thesis that the bitcoin is not legally the money. For example, the taxation service of the Netherlands has prepared the explanatory statement according to which the bitcoin is not viewed as a legal payment means [9, pp. 277–278]. As the bitcoins are not legal payment means by their definition, the taxation authorities have to develop the corresponding conceptual definitions to assign income from transactions with the cryptocurrency for the purposes of taxation. As a result, the approach to the bitcoin as to an “economic asset” has been formed.

In the context when the bitcoin is not an official currency and, consequently, not a payment means, we deem it reasonable to treat operations with it as those of the barter nature. Making such a conclusion we proceed from the principle of the substance predominance over the form, which is common for the tax legal evaluation. Such an approach is used by the taxation authorities of a number of states. In particular, the taxation service of Australia does not treat the bitcoin as money or foreign currency, assigning the operations with its usage (as the means of payment) to barter arrangements. As for the activities on the bitcoin issue, the income resulting from the virtual currency transfer to the third party is recognized as taxable; the expenses for the activities aimed at the currency “extraction” can be deducted from the tax base². In 2017, the taxation service of Israel published a draft circulation order where the virtual currency was qualified as the digital unit applicable for barter or for investment purposes; for the taxation purposes, it is viewed as an asset³. In its turn Canada Revenue Agency acknowledges the parties of the deals with the virtual currencies usage as the tax payers, at the same time the taxation rules differ depending on whether the bitcoin is used as “money” for buying goods (works, services), or is purchased for the speculative purposes. In the first case, the rules

¹ See: Virtual Currencies. Key Definitions and Potential AML/CFT Risks: FATF Report. 2014. P. 16.

² Tax treatment of crypto-currencies in Australia – specifically bitcoin (last modified: 18.12.2014). Available at: <http://agov-display2.prod.atohnet.gov.au/General/Gen/Tax-treatment-of-cryptocurrencies-in-Australia-specifically-bitcoin/> (accessed 01.02.2017).

³ Available at: [https://www.bna.com/israel-seeks-tax-n73014450141/\(accessed 01.02.2017\)](https://www.bna.com/israel-seeks-tax-n73014450141/(accessed 01.02.2017)).

for barter operations are applied, in the second case – the rules typical of transactions with securities are used [10, p. 19].

Of course, the legal position established by the Supreme Arbitration Court of the Russian Federation some time ago cannot be disregarded. In accordance with that position, the contracts having works or services as the contracting items, cannot be qualified as the contracts of exchange¹. Neither can one ignore the position developed in the legal doctrine according to which the barter arrangement for the purposes of the Tax Code of the Russian Federation (Articles 40 and 154) has an autonomous role and is not an analogue of the contract of exchange regulated by the Civil Code of the Russian Federation.

It is important to note that in this case the basic taxation principles do not lose their fundamental importance, in particular – the principle of the tax economic basis [6, pp. 42–45; 7, pp. 30–32]. In this respect, the tax evaluation of the income expressed in bitcoins is of a special interest. Setting the principles of the income determination, the Tax Code of the Russian Federation acknowledges the income as the economic benefit in monetary or natural form, accountable – this is important – “in case it is possible to evaluate it and to the extent the benefit can be evaluated” (Article 41). The bitcoin has the economic, commercial value, it can be exchanged for the official currency. Therefore, for the purposes of taxation, the most common and objective evaluation can be applied – the market price or the price defined in accordance with “the arm’s length principle” [5, pp. 96–104].

Special attention should be paid to the issue of the value added tax (VAT) imposition on the operations with the bitcoin. At present, this particular aspect of taxation is of the biggest concern. The point is that the identification of the bitcoin as goods or services for the purpose of VAT does not fully comply with special features of this tax juridical construction and, in fact, with special features of the bitcoin as an object. Not incidentally that on October 22, 2015 the European Union Court (case *Skatteverket v David Hedqvist*)² ranged the bitcoin

as the contractual means of payment that plays this role in the relations between persons who came to the agreement to treat it like that. The dispute covered the issues of exchanging official currencies for bitcoins. Having analyzed the regulations of Directive 2006/112/EC “On the Common System of Value Added Tax”³, which run that operations with currencies, banknotes, coins used as the legal means of payment are not subject to taxation, the EU court came to the conclusion that the norm also covers currencies and means of payment which are not legal payment means but are used as the means of payment (alternative to the legal means of payment) and are agreed by the parties of the contract in this quality. Having studied the legal nature of the bitcoin, the court declared it to be not goods/services but a tender for the purposes of VAT imposition.

This decision influenced the formation of approaches of the tax authorities of European states. For example, in September 2016 the tax authorities of Italy issued the guidelines for the business on the VAT of the operations with bitcoins [11], which says that deals with bitcoins are qualified as non-VATable services (with no right for the tax deduction). We think that defining the principles of the VAT imposition, it is reasonable to take into account the specific character of the bitcoin as of a “virtual good”, which combines in itself a number of features typical of services and payment means providing a special method of its taxation as compared to the real goods and services.

Tax Administration

Legislative acts often lag behind the changes in public life and the technical progress. The authors of the article have touched upon just some of the taxation issues concerning the cryptocurrencies use. It is obvious for specialists that the traditional methods of combating the tax avoidance are not efficient when it comes to operations in the virtual space [13, pp. 38–47]. High anonymity makes it difficult to reveal the violations and submit tax claims. At the end of 2016, the Internal Revenue Service of the USA took actions to receive information about the users from cryptocurrency exchange company “Coinbase”, within the framework of controlling operations of 2013–2015.

¹ According to paragraph 1 of Newsletter of the Presidium of the Supreme Arbitration Court of the Russian Federation of September 24, 2002 No. 69, bilateral deals involving exchange of goods for a service of equivalent value do not refer to the contract of exchange.

² Available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=170305&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=800089> (accessed 01.02.2017).

³ Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax. Available at: <http://eurlex.europa.eu/legal-content/en/TXT/?uri=CELEX:32006L0112> (accessed 01.02.2017).

In January 2017, commenting the Service's inquiry to disclose the data about the USA residents, B. Armstrong, the head of "Coinbase", explained the company's position at the official web-site mentioning in particular that the company had earlier met all the requirements of the taxation authorities in case they had to do with separate persons and complied with the necessary standards. However, the inquiry, if met, would result in disclosing the data about all the clients' accounts (transaction history, IP-addresses etc.). In the company's opinion, the inquiry is unreasonably wide and suggests that all the users evade taxes, which is not true [8]. The company expressed its readiness to cooperate with the Internal Revenue Service of the USA to develop an optimal mechanism of reporting.

Conclusions

The performed scientific analysis proves that the national regulators and revenue bodies are only at the stage of thinking over the problems arising in virtual reality, including those connected with the usage of virtual currencies. An urgent need for the legal regulation of the relations arising from executing operations with cryptocurrencies has been revealed. At the same time, the majority of states are not ready to exclude persons using bitcoins, as well as trading platforms gaining income from the relevant transactions, from the scope of potential tax payers.

References

1. *Kuznetsov V. A., Yakubov A. V. O podkhodakh v mezhdunarodnom regulirovanii kriptovalyut (Bitcoin) v ot del'nykh inostrannykh yurisdiktsiyakh* [On Approaches to International Regulation of Cryptocurrencies (Bitcoin) in Certain Foreign Jurisdictions]. *Den'gi i kredit* – Money and Credit. 2016. No. 3. Pp. 20–29. (In Russ.).
2. *Kucherov I. I. Zakonnye platezhnye sredstva: teoretiko-pravovoe issledovanie: monografiya* [Legal Tenders: Theoretical and Legal Research: Monograph]. Moscow, 2016. 392 p. (In Russ.).
3. *Kucherov I. I. Al'ternativnye platezhnye sredstva: pravovaya storona fenomena* [Alternative Legal Tenders: Legal Features of the Phenomenon]. *Elektronnaya valyuta v svete sovremennykh pravovykh i ekonomicheskikh vyzovov* [Electronic Currency in the Light of Modern Legal and Economic Challenges]. Moscow, 2016. Pp. 360–368. (In Russ.).
4. *Popper N. Tsifrovoe zoloto: neveroyatnaya istoriya Bitkoyna* [Digital Gold: The Untold Story of Bitcoin]. Moscow, 2016. 368 p. (In Russ.).

5. *Khavanova I. A. Kategoriya rynochnoy tseny v sovremennom nalogovom prave* [Category of Market Price in Modern Tax Law]. *Zhurnal rossiyskogo prava* – Journal of Russian Law. 2016. No. 7. Pp. 96–104. (In Russ.).
6. *Khavanova I. A. Ekonomicheskoe osnovanie naloga kak printsip "nadzakonnogo" znacheniya* [Economic Ground for a Tax as a Principle of Extralegal Significance]. *Nalogi (Zhurnal)* – Taxes (Journal). 2013. No. 5. Pp. 42–45. (In Russ.).
7. *Khavanova I. A. Ekonomicheskoe osnovanie naloga, ili Homo economicus v nalogovom prave?* [The Economic Basis of Tax, or Homo Economicus in Tax Law]. *Nalogoved* – Nalogoved. 2013. No. 9. Pp. 30–32. (In Russ.).
8. *Armstrong B. Coinbase and the IRS.* Available at: <https://medium.com/@barmstrong/coinbase-and-the-irs-c4e2e386e0cf#4z5plqk7r> (accessed 30.01.2017). (In Eng.).
9. *Bal A. How to Tax Bitcoin? Handbook of Digital Currency.* Singapore, 2015. Pp. 267–282. (In Eng.).
10. *Bal A. Taxation of virtual currency.* Dissertation. Leiden University. 2014. 327 p. (In Eng.).
11. *Italian Tax Authorities clarify VAT treatment of Bitcoin transactions.* EY Global Tax Alert Library. Indirect Tax Alert. 27 September 2016. (In Eng.).
12. *Lambooj M. Retailers Directly Accepting Bitcoins: Tricky Tax Issues? Derivatives & Financial Instruments.* May/June 2014. Pp. 138–144. (In Eng.).
13. *Marian O. Are Cryptocurrencies Super Tax Havens? Mich. L. Rev. First Impressions.* 2013. Vol. 112. Pp. 38–47. (In Eng.).
14. *Regulation of Bitcoin in Selected Jurisdictions.* Report for Congress. The Law Library of Congress, Global Legal Research Center. 2014. LL File No. 2014-010233. 25 p. (In Eng.).

References in Russian

1. *Кузнецов В. А., Якубов А. В. О подходах в международном регулировании криптовалют (Bitcoin) в отдельных иностранных юрисдикциях // Деньги и кредит.* 2016. № 3. С. 20–29.
2. *Кучеров И. И. Законные платежные средства: теоретико-правовое исследование: монография.* М.: Ин-т законодательства и сравнит. правоведения при Правительстве Рос. Федерации, 2016. 392 с.
3. *Кучеров И. И. Альтернативные платежные средства: правовая сторона феномена // Электронная валюта в свете современных*

- правовых и экономических вызовов. М.: Юрлитинформ, 2016. С. 360–368.
4. *Попнер Н.* Цифровое золото: невероятная история Биткойна / пер. с англ. М.: Изд-во «Вильямс», 2016. 368 с.
 5. *Хаванова И. А.* Категория рыночной цены в современном налоговом праве // Журнал российского права. 2016. № 7. С. 96–104.
 6. *Хаванова И. А.* Экономическое основание налога как принцип «надзаконного» значения // Налоги. 2013. № 5. С. 42–45.
 7. *Хаванова И. А.* Экономическое основание налога, или *Nemo economicus* в налоговом праве? // Налоговед. 2013. № 9. С. 30–37.
 8. *Armstrong B.* Coinbase and the IRS. URL: <https://medium.com/@barmstrong/coinbase-and-the-irs-c4e2e386e0cf#.4z5plqk7r> (дата обращения: 30.01.2017).
 9. *Bal A.* How to Tax Bitcoin? // Handbook of Digital Currency. Singapore, 2015. P. 267–282.
 10. *Bal A.* Taxation of virtual currency. Dissertation. Leiden University. 2014. 327 p.
 11. *Italian Tax Authorities clarify VAT treatment of Bitcoin transactions* // EY Global Tax Alert Library. Indirect Tax Alert. 27 September 2016.
 12. *Lambooij M.* Retailers Directly Accepting Bitcoins: Tricky Tax Issues? // Derivatives & Financial Instruments. May/June 2014.
 13. *Marian O.* Are Cryptocurrencies Super Tax Havens? // Mich. L. Rev. First Impressions. 2013. Vol. 112. P. 38–47.
 15. *Regulation of Bitcoin in Selected Jurisdictions.* Report for Congress. The Law Library of Congress, Global Legal Research Center. 2014. LL File № 2014-010233. 25 p.