PARMELIA PARTNERS

Client Newsletter

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The tax treatment of cryptocurrency

Cryptocurrencies, once again surging in popularity, have a unique tax treatment that every taxpayer dealing with cryptocurrency should be aware of.

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It's been more than 10-years since the advent of bitcoin and the term "cryptocurrency" entered the public consciousness. However, neither bitcoin nor the many thousands of cryptocurrencies that have followed have become widely used for payments. Instead, people are more likely to use cryptocurrencies as a speculative high-risk investment class.

Cryptocurrency is essentially a digital representation of value that is neither issued by a central bank or a public authority, and usually not attached to a national currency. Cryptocurrency can be transferred, stored or traded electronically.

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The tax treatment of cryptocurrency cont

Essentially, there are three ways to acquire cryptocurrency:

- Buying it through an online exchange system that puts sellers in touch with buyers. Purchases are then made by transferring money via online banking. Typically, cryptocurrency is stored in an online "wallet".
- Providing goods and services in return for cryptocurrency.
- Mining — as in the process by which cryptocurrency is created, whereby a computer crunches through a set of complex mathematical exercises and the end result is a "piece" of cryptocurrency.

But broadly, what is the tax treatment of this form of currency?

CAPITAL GAINS TAX

Cryptocurrency is generally regarded as a CGT asset, and the disposal of cryptocurrency to a third-party may constitute what the ATO calls a "CGT event". Disposals can take several forms: selling or gifting the cryptocurrency; trading or exchanging it; converting it to Australian dollars; or using it to acquire goods or services.

A capital gain is made when the proceeds from the disposal of the cryptocurrency exceed the original cost base. The capital proceeds from the disposal of the cryptocurrency is the money or the market value of any other property received in respect of the disposal. The main element of the cost base is the money paid or the market value of any other property a buyer gave in acquiring that cryptocurrency. The general 50% CGT discount may also apply where the currency is held for 12 months or more, as detailed in the example below.

In the event that the cryptocurrency received cannot be valued, the capital proceeds from the disposal are worked out using the market value of the cryptocurrency disposed of at the time of the transaction.

Note that, as with shares, if a cryptocurrency increases or decreases in value while held by a taxpayer, this does not result in a capital gain or loss. This is because there is no "disposal".

PERSONAL USE ASSET

According to the tax rules operating in the area of CGT, a capital gain made from a "personal use asset" is disregarded if the first element of the cost base is $10,000 or less. In addition, any capital loss made from a personal use asset is disregarded. These provisions apply equally to cryptocurrency. The relevant time for determining whether the cryptocurrency is a personal use asset is at the time of its disposal.

Examples where cryptocurrency is held for personal use may include where it is kept or used mainly to make purchases of items for personal use or consumption, for example, clothing or music.

This personal use carve-out, however, would not apply where the cryptocurrency is kept or used mainly for the purpose of profit-making as an investment (to be sold or exchanged at a later time when the value has increased) or to facilitate purchases or sales in the course of carrying on business.

REVENUE ACCOUNT?

It may be the case that a gain on the disposal of cryptocurrency (that is not a personal use asset) is assessable as ordinary income rather than a capital gain. Where this is the case, the CGT discount will not be available.

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Example: Cryptocurrency as an investment

In September 2019, Edward buys 300 coins of cryptocurrency for $12,500. In October 2000, via a digital currency exchange, Edward then exchanged 150 of these coins for 200 coins of another type of cryptocurrency. The exchange rates at the time of the transaction put the market value of the 200 coins at $10,000. The gross capital gain will be $3,750 ($10,000 minus half of $12,500). As the currency disposed of was held for 12 months or more, the gross capital gain can be reduced by 50%, down to $1,875.

New guidance on "personal services income" rules

The ATO has recently updated its guidance material on the operation of the personal services income (PSI) and personal service businsess (PSB) rules.

These highly prescriptive rules took effect from the 2000-01 income year, after the government became concerned that the income tax base was being eroded through what it saw as an excessive incidence of individuals posing as contractors, splitting their income with associates, using another entity (usually a trust or a company) and claiming a greater range of deductions than those available to ordinary employees generally.

WHY THE PSI LURE?

You can claim deductions against PSI if an expense occurred earning this income. For example, you could claim:

- the cost of gaining work, such as advertising, tenders and quotes
- registration and licencing fees
- account-keeping fees, including bank fees
- some insurance costs, including public liability and professional indemnity insurance fees
- salary or wages and super contributions for an employee engaged at arm's length (not an associate)
- reasonable amounts paid to an associate for principal work
- a portion of home office expenses, such as heating, lighting, phone and internet. Do not claim rent, mortgage interest, rates or land taxes.

You may be eligible for other deductions depending on what your business is and your contracts.

THE UPDATES

The ATO has updated its previous rulings to reflect various court and tribunal decisions that have shed light on the PSI and PSB provisions over the last 20 years. It has also freshened up the examples used to explain the rules (there are 40 of them).

The PSI and PSB rules can apply in virtually any business sphere, but the more common examples would be lawyers and accountants, medical practitioners, architects and engineers, business consultants and IT professionals. With the gig economy on the rise, the numbers potentially affected can only increase.

THE 50% TEST

The PSI rules involve a series of tests to work out first, whether the arrangement is in substance an employment-like arrangement. The initial test is simply whether more than 50% of the consideration received in respect of a particular contract represents a reward for an individual's efforts and skills. That is a "fact and circumstances" question to be determined on a case-by-case basis.

The new guidance includes a number of examples of how to determine whether the 50% threshold is met. If it is, the income will be on the face of it PSI, unless the person being tested passes the results test (more below) or, failing that, the application of a further series of tests determines that an interposed entity (a PSE) is carrying on a personal services business (PSB).

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New guidance on "personal services income" rules cont

Personal services income is ***not***:

- **Income from the supply or sale of goods.** While some personal effort is associated with the sale of goods, sales income is derived mainly from the transfer of title in goods and is not regarded as PSI. The guidance includes a fairly straight-forward example of a partnership that designs and manufactures bespoke furniture and sells those items online and at trade fairs. The sales proceeds are from the sale of the furniture and not mainly from anyone's personal efforts and skills.
- **Income from the supply and use of income-producing assets.** Here the question is whether the income mainly represents a reward for the operator, or is for the use of equipment required to carry out the work. Relevant factors include:
  - the relative market value of the supply of the equipment as compared to the value of the operator
  - the basis for calculating the contract price
  - the significance or uniqueness of the equipment
  - the value of the asset, and
  - the role the equipment plays in generating the income.

  An example used involves the supply of trench digging services using a backhoe with special attachments controlled by a licensed operator. The backhoe is transported on a truck, which is also owned by the business. In these circumstances, the income from the contract is regarded as being mainly for the supply of the truck and the backhoe rather than for the efforts and skills of the operator.
- **Income generated by the business structure.** The new guidance provides that where income is derived by a firm or practice that has substantial income-producing assets, or a number of employees, or both, the income is more likely to be generated by the profit-yielding structure of the business rather than from the rendering of personal services by one or more of the principals. As a rule of thumb, the threshold is where the entity has at least as many non-principal practitioners (excluding support staff) as principal practitioners.

THE RESULTS TEST

An individual with what on the face of circumstances would seem to be PSI is excluded from the regime if they can satisfy the results test. The results test requires that, for at least 75% of the total PSI, the individual satisfies each of the following three conditions:

- is paid to produce a specific result
- is required to provide whatever tools and equipment are required to carry out the work, and
- is required to rectify any defects in the work at their own expense.

An example used involves an IT consultant who is paid on an hourly basis, mainly uses the client's equipment and other resources (apart from their own laptop), works under the direction of the client and is not liable to rectify any faulty work — the results test is not met in these circumstances.

However, another example used by the ATO provides details about a different IT consultant. They are paid by results when the work is completed to specifications, use primarily their own tools and equipment, and are also responsible for rectifying any defects without being able to charge any additional amounts under the contract. The conditions of the results test are met in that case, and the PSI rules do not apply.

THE PSB RULES

Where the individual has PSI and does not pass the results test, there is still scope for escaping the application of the PSI rules. This involves the PSB rules, which amount to a rough and ready test of whether the interposed entity (usually a trust or a company) is carrying on a business.

The first leg of the PSB regime is the 80% rule — no single client can represent more than 80% of the individual's total PSI. Where that is the case, the individual or entity must also satisfy at least one of three further tests:

- **The unrelated clients test.** The PSI is sourced from two or more non-associated clients and must be a direct result of the entity making offers to the public (or sections of the public). The unrelated

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Briefing a barrister

When you're faced with a complex or high-risk question in tax or super, briefing a barrister can provide you with the expertise and perspective to help you move towards a solution with confidence.

Barristers (who are also referred to as "counsel") are independent specialists in court work and legal advice. There are specialist barristers across Australia in tax, super and associated areas of law. This includes "Queen's Counsel" or "Senior Counsel", who are barristers of seniority and eminence. The barristers who practice in tax and super will particularly be familiar with the ATO, and also the decision-making approaches of the Administrative Appeals Tribunal (AAT) and the Federal Court of Australia.

Why brief a barrister?

Although barristers are best known for their courtroom advocacy, that's only part of what they offer. Barristers, through their training, experience and networks, are intimately familiar with the decision-making processes and reasoning of courts and tribunals. When barristers address complex and high-risk legal questions, they provide precise advice and practical solutions guided by how laws are interpreted and applied by courts and tribunals in practice.

You may consider briefing a barrister to provide advice on high-risk or high-value matters, or when you have limited time to answer a complex question. In those situations, it's prudent to obtain specialist advice to ensure you fulfill your duties. A barrister's expertise and objectivity will provide you with confidence as to the best approach in the circumstances.

Who can brief a barrister?

Anyone can brief a barrister. There are broadly two ways you can do it:

- directly (where you brief a barrister without engaging a solicitor), or
- indirectly (where you engage a solicitor and instruct them to brief a barrister).

Directly briefing a barrister (which is also referred to as "direct access" briefing) can provide you with cost and efficiency benefits. Generally, barristers are less expensive than solicitors of equivalent experience.

Barristers are not obliged to take direct briefs, but many do. Barristers may directly give legal advice and may prepare and advise on certain legal documents (in addition to their dispute related work). Importantly, barristers can be directly briefed to appear in the Administrative Appeals Tribunal (AAT).

There are slightly different rules in each Australian state and territory on the types of work that barristers can and can't do, and the circumstances in which you can directly brief a barrister. Generally, barristers are not permitted to undertake work traditionally performed only by solicitors, such as conducting general correspondence or other administrative tasks in relation to the client's legal affairs.

In some circumstances, barristers who have been directly briefed may later request that their client also engage a solicitor. This will occur where the absence of an instructing solicitor would seriously prejudice the client's interests (for example, where a solicitor is needed to help the client gather large amounts of evidence).

Who should you brief?

The bar associations of each state and territory maintain a website where you can view and search the profiles of every barrister in that jurisdiction. You'll be able to identify the barristers who practice in tax and super and view their background, experience level and contact details. Search "bar association" in your state or territory.

If you've engaged a solicitor, they'll be able to recommend a good barrister. If you want to brief directly, but you don't know who to brief, you can obtain guidance from barristers' clerks. The clerks act like an agent for a large group of barristers. The clerks have familiarity with the expertise, experience and availability of each barrister. The clerks' contact details are also on the bar association websites.

cont ⇨

New guidance on PSI rules cont

clients test will not be met if the entity registers with a labour hire firm or similar arrangement, because the invitation has not been made by the entity to the public.

- **The employment test.** At least 20% of the principal work by market value (not incidental administrative work) must be performed by others and/or they have at least one apprentice for at least half the year of income. Test individuals, including other partners who carry out principal work, are not counted towards the 20% employment test.
- **The business premises test.** The individual owns or leases separate business premises and uses it for the work more than 50% of the time.

The tests have to be carried out every year there is evidence of PSI, and where the interposed entity has several persons with PSI, the tests need to be applied separately for each individual.

IMPACT OF THE PSI RULES

Where the PSI rules apply (and the PSB rules do not) the PSI and related deductions are attributed to the individual whose personal efforts gave rise to the income (and those amounts are excluded from an interposed entity).

There are also limitations on the types of deductions that can be claimed by the individual in respect of the attributed PSI. Non-deductible expenses include:

- deductions that could not be claimed if they were incurred as an employee (such as the cost of travel between home and a place of business)
- mortgage interest, rent, rates and land tax on the individual's residence (or associate's residence), and
- payments, including super contributions, made to associates for non-principal work performed.

CAN ANTI-AVOIDANCE RULES APPLY?

The general anti-avoidance provisions in the ATO's arsenal can theoretically apply to an arrangement to negate any tax benefit that arises from splitting income among associates with a lower tax rate. However there is more usually an issue regarding asset protection in most instances rather than obtaining a tax benefit, which could be recorded from the outset, as well as the fact that in many cases having an incorporated entity fronting the business presents more professionally to prospective clients. ■

Briefing a barrister cont

Preparing a brief

Historically, a "brief" was a comprehensive set of papers given to a barrister to enable them to appear, advise, or draft or settle documents (as the case may be). Today, barristers are more versatile in what they receive from clients (and how they receive it).

If you've directly briefed a barrister, you should first speak to them about the nature and form of documents and information they require you to provide. For example, where you require tax advice on a legal question, your barrister may (depending on the circumstances) ask you to provide the following:

- questions upon which you require legal advice
- timeframes for the provision of that advice
- identity of all parties involved in the subject matter of the advice
- chronology of key events, and
- key correspondence, contracts and other documents.

Barristers will also have their eye on ensuring their advice is commercially acceptable. For this reason, it is useful to also inform them about:

- your purpose for engaging in relevant activities, and
- any commercial issues likely to influence your preferred approach.

Some tips

If you're going to brief a barrister, you should keep these tips in mind:

- Brief early: This will give your barrister the opportunity to read the brief, understand your circumstances and seek out any further information.
- Brief clearly: Precisely communicating what you want from your barrister (and when, how and why you want it) will provide you with the best outcome.
- Brief orderly: Where you need to provide lots of documents, speak to your barrister about the form and categorisation in which they prefer to receive, store and use them.

Barristers offer you legal expertise from a practical perspective. You should visit the website for the bar association in your state or territory if you want further information about the role of barristers or if you want to find a barrister to help you. ■

The tax treatment of cryptocurrency cont

In the case of an isolated transaction that is not carried out as part of a business operation, the ATO is of the view that a gain will generally be ordinary income where the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain.

In determining whether an isolated transaction amounts to a commercial transaction, factors to consider include:

- the nature of the entity making the transaction
- the scale of the activities
- the amount of money involved
- the nature, scale and complexity of the transaction
- the manner in which the operation or transaction was entered into or carried out, including the use of agents or professional advisers, and
- the timing of the transaction or the various steps in the transaction.

TRADING STOCK?

In some circumstances, cryptocurrency can constitute "trading stock", and will be treated as such where:

- it is held by a taxpayer carrying on a business of mining and selling bitcoin, or
- a taxpayer is carrying on a cryptocurrency exchange business, or
- it is received as a method of payment by any business that sells goods where the cryptocurrency is held for the purposes of sale or exchange in the ordinary course of the business.

Proceeds from the sale of cryptocurrency held as trading stock in a business are ordinary income, and the cost of acquiring cryptocurrency held as trading stock is deductible. The CGT rules do not apply.

FOREIGN CURRENCY GAINS OR LOSSES?

The tax law provides rules for recognising foreign currency gains and losses for income tax purposes. The ATO's longstanding position is that gains or losses made from cryptocurrencies, such as bitcoin, cannot give rise to foreign currency gains or losses because such currencies do not constitute "foreign currencies" under the existing tax legislation. High level court cases have also ruled that bitcoin and other cryptocurrencies are not a currency or foreign currency for income tax purposes.

RECORD KEEPING

Taxpayers dealing with cryptocurrency need to keep the records laid out in the table below.

Finally, for those using cryptocurrency for both personal use and for investment or business purposes, it is particularly important to keep clear records. This is because it will fall to them to show the intention behind each transaction. ■

Information that your records must show	Examples of types of records
• date of the transactions • what the transaction was for and the identity of the other party to the transaction • the value of the cryptocurrency in Australian dollars at the time of the transaction (from reputable online exchanges)	• receipts of purchase or transfer of cryptocurrency • exchange records • records of accountant, agent or legal costs • digital wallet records and keys

The ATO's eligibility requirements for SMSF trustees or directors

All members of a self-managed super fund (SMSF) must be individual trustees or directors of the fund's corporate trustee. Anyone 18 years old or over can be a trustee or director of a super fund as long as they're not under a legal disability (such as mental incapacity) or a disqualified person.

Other eligibility factors should not be overlooked. To knowingly act as a trustee, a trustee director or an office holder of a corporate trustee (such as secretary), while being a disqualified person, is an offence.

To be sure you are not a disqualified person you need to be able to answer "no" to all of the following questions.

Have you ever been convicted of a dishonest offence, in any state, territory or a foreign country?

Offences of a dishonest conduct are things such as fraud, theft, illegal activity or dealings. These convictions are for offences that occurred at any time, including convictions that have been "spent" and those that the court has not recorded, due to age or being a first offender.

Have you ever been issued with a civil penalty order?

Civil penalty orders are imposed when an individual contravenes a civil penalty provision (this can be an order to pay a fine or serve jail time).

Are you currently bankrupt or insolvent under administration?

You cannot be a trustee of an SMSF while you are an undischarged bankrupt, and you cannot remain a trustee if you become bankrupt or insolvent after you are appointed.

Have you been previously disqualified by the ATO or APRA?

The Commissioner of Taxation, as the SMSF regulator, can disqualify a trustee, which is permanent and is not just specific to the SMSF you were a trustee of at the time. The Federal Court can make an order to disqualify a trustee of an APRA fund. This is permanent and this disqualification does not allow you to operate an SMSF.

THE RESPONSIBILITIES

Whether you're a trustee or director of a corporate trustee, you are responsible for running the fund and making decisions that affect the retirement interests of each fund member, including yourself.

As a trustee or director, you must:

- act honestly in all matters concerning the fund
- act in the best interests of all fund members when you make decisions
- manage the fund separately from your own superannuation affairs
- know, understand and meet your responsibilities and obligations
- ensure that the SMSF complies with the laws that apply to it.

All trustees and directors are equally responsible for managing the fund and making decisions. You are responsible for decisions made by other trustees, even if you're not actively involved in making the decision.

You can appoint other people to help you or provide services to your fund (for example, an accountant, administrator, tax agent or financial planner). However, the ultimate responsibility and accountability for the SMSF's actions lie with you, as trustee or director.

As an individual trustee or director of a corporate trustee, you may be personally liable to pay an administrative penalty if certain laws relating to SMSFs are not followed.

Other members of the fund can take action against you if you don't follow the terms of the trust deed. Any fund member who suffers loss or damage because of a breach of any trustee duties may sue any person involved in the breach. ■