MALTA
INSTITUTE
OF TAXATION

Technical Paper 01/2018

Technical Paper on the Malta VAT implications of transactions and arrangements involving DLT Assets

2 October 2018

This Technical Paper sets out the Malta Institute of Taxation's views on the Malta VAT implications arising in connection with transactions or arrangements involving DLT Assets, specifically tokens and cryptocurrencies.

CFE

©Malta Institute of Taxation 2018

MALTA
INSTITUTE
OF TAXATION

Technical Paper on the Malta VAT implications of transactions and arrangements involving DLT Assets

This is an academic Paper which is for information purposes only. MIT Technical Papers represent the view of the MIT on the issue addressed therein and do not constitute official guidance, nor advice, and should not be relied upon as such.

Any comments or queries concerning the contents of this paper should be addressed to the Chief Technical Officer on CTO@maintax.org or MIT@maintax.org

The Malta Institute of Taxation is a professional body for advisors, practitioners and academics operating in the field of taxation in Malta, which has as its main purposes, the promotion of tax learning and ongoing professional education, as well as contributing toward the development of local tax policy and legislation. The Institute does not provide tax advice and is not a lobby group for tax professionals.

CFE

©Malta Institute of Taxation 2018

MALTA
INSTITUTE
OF TAXATION

Introduction

The VAT implications of the transactions or arrangements involving Distributed Ledger Technology Assets ("DLT Assets") have been a subject of discussion at both the EU and domestic levels. From an EU perspective, the initial focus was initially on exchange transactions involving Bitcoin[1] pending the decision of the ECJ in Hedqvist[2], which discussion was extended, subsequent to the publication of the said decision[3], to other transactions involving Bitcoin and other virtual currencies.

With the exception of the specific DLT Asset (cryptocurrencies) and the particular transaction assessed in the Hedqvist Case (exchange of cryptocurrencies for FIAT in own name and for a spread), no formal and binding guidance is available (at an EU level) in relation to the VAT treatment of other arrangements and/or transactions involving virtual currencies, nor in relation to other DLT Assets such as 'tokens'. It is noted that the Commission has expressed its (sometimes inconclusive) views in a number of Working Papers, and a number of Member States have adopted their own unilateral position on the issues.

A determination of the Malta VAT implications of a transaction or arrangement involving DLT assets, including virtual currencies, should be made on the basis of the application of the basic principles underlying VAT in terms of the Malta VAT Act, Chapter 406 of the Laws of Malta, the VAT Directive (Dir 2006/112/EC, hereinafter "EVD") and the Implementing Regulation (Reg. 282/11).

In particular, any analysis should centre on the basic premise that *Malta VAT is levied on "supplies of goods or services made in Malta for consideration by a taxable person acting as such"*:

Supply: A supply of goods is defined as the transfer of the right to use of tangible property as owner, whilst anything which is not a supply of goods is a supply of services.

Supply for consideration: It is an established principle that a supply is deemed to be effected for consideration if there is a direct link between the supply and the consideration received.[4]

[1] Working Papers 811 and 854
[2] C-264/14
[3] Working Paper 892
[4] C -154/80 Cooeperatieve Aardappelenbewaarplaats

CFE

©Malta Institute of Taxation 2018

A **Taxable Person** is any person who carries on an economic activity, as defined in article 5 of the VAT Act, whatever the purposes or results of that activity. For a transaction undertaken by a Taxable Person to fall within the scope of VAT, that Taxable Person must be "*acting as such*."

Territoriality: transactions and arrangements involving DLT Assets would fall within the scope of Malta VAT in so far as such transactions take place in Malta VAT purposes, having due regard to the general place of supply rules in item 2 of Part 2 to the Third Schedule to the VAT Act, as well as any specific rule that may apply, including, item 10 of Part 2 to the Third Schedule to the VAT Act concerning the place of supply of 'electronically supplied services' to non-taxable persons.

In a cross-border context, the assessment and classification of transactions is not only relevant for determining the Malta VAT liability thereof, but also the input tax recovery entitlement of a person established in Malta involved in such transactions or arrangements, as well as any obligation or entitlement for such persons to register for VAT in Malta.

In principle, all transactions or arrangements that satisfy the conditions set out in article 4 of the VAT Act will fall within the scope of Malta VAT and will be taxable, unless an exemption applies in terms of the Fifth Schedule to the VAT Act.

Overview of DLT Assets being considered

The determination of the nature of a DLT Asset is relevant to the Malta VAT treatment of transactions involving that asset. This paper examines DLT Assets falling broadly into two categories: tokens and virtual currencies (which include cryptocurrencies).

Tokens are a form of digital medium recordation whose utility, value or application is restricted[5]. In effect, such tokens may further be split into 'Security' or 'Securitised' tokens - those embedding either underlying assets or rights[6] and 'Utility tokens' - those providing either platform/application utility rights or protocol access rights.[7] It may also be possible for tokens to contain the features of both Security and Utility tokens, depending on the terms and conditions of the said tokens, such that in practice they are referred to as 'hybrids'.

[5] Article 2 of the Bill entitled: An Act to regulate the field of Initial Virtual Financial Asset Offerings and Virtual Financial Assets and to make provision for matters ancillary or incidental thereto or connected therewith defines a Virtual Token as "a form of digital medium recordation that has no utility, value or application outside of the DLT platform on which it was issued and may only be redeemed for funds on such platform directly by the issuer of such DLT asset"
[6] MFSA Discussion Paper on Initial Coin Offerings, Virtual Currencies And Related Service Providers
[7] Ibid

©Malta Institute of Taxation 2018

From a VAT perspective, the key questions which arise with certain transactions or arrangements involving **Security Tokens** are: (i) whether they represent equity/ownership rights in an underlying asset, and (ii) whether these would classify as 'Securities' for the purposes of determining the VAT treatment of certain transactions involving such tokens. This is analysed in further detail below.

With regard to the category of tokens referred to as **Utility Tokens**, these in effect represent a right to future access to a business's product or service. Whilst an Initial Coin Offering, pursuant to which Utility Tokens are issued, may be assimilated to Reward-Based Crowdfunding,[8] in our view, to the extent that a Utility Token, albeit not tangible, constitutes a digital representation of the right of its 'holder' to receive goods/services at a future date, a tradeable instrument which can be redeemed by the holder, it may not be appropriate to apply the VAT treatment of reward-based crowd-funding (i.e. as a pre-payment) to 'tokens' generally, without due regard to the specific characteristics.

From a VAT perspective, to the extent that the token represents *an obligation to accept it as consideration or part consideration for a supply of goods or services, and where the goods or services to be supplied or the identities of their potential suppliers are indicated on the instrument itself or in related documentation, including the terms and conditions of use of such instrument",* then, in our view, the token would qualify as a "voucher" for the purposes of the Fourteenth Schedule to the VAT Act (as of 1 January 2019), specifically:

- a "single-purpose voucher" (SPV) if the place of supply of the goods or services to which the Utility Token relates, and the VAT due on those goods or services, are known at the time of issue of the voucher; or
- a "multi-purpose voucher" (MPV) if the place of supply of the goods or services for which a Utility Token may be redeemed, and the VAT due on those goods or services, are NOT known at the time of issue of the voucher.

In the case of **Virtual Currencies**, specifically, cryptocurrencies, the ECJ has already determined[9] that, to the extent that these are essentially an alternative to legal tender and have no purpose other than to be a means of payment, they constitute 'currencies' for VAT purposes, and therefore any relevant transactions concerning cryptocurrencies should fall within the scope of article 135(1)(e) of the VAT Directive which exempts, inter alia, transactions concerning currencies.

[8] "..where the person giving funds to a crowdfunding campaign ("the contributor") receives in exchange for a contribution a non-financial reward in the form of goods or services from the person receiving funds from contributors through a crowdfunding campaign.." - See VAT Committee Guidelines resulting from the 102nd Meeting of 30 March 2015
[9] C-264/14

©Malta Institute of Taxation 2018

Whichever category of DLT Asset being considered, it would not be appropriate, given the speed of technological developments and, in particular, the ongoing growth and innovation in the sector, for any guidance to attribute to any particular class of DLT Assets, a specific description for VAT purposes. Ultimately, it is the essential features of the Asset and the transaction being undertaken therewith that will determine the classification and VAT treatment thereof. The views expressed below are based upon this premise.

VAT treatment of transactions or arrangements

1. Mining (creating new "blocks" / tokens; verification)

The issuance of new VCs is based on a "mining" algorithm which is run by "miners". It is noted that through the activity of mining, miners provide security to the functioning of the system of Virtual Currencies by validating requests for transactions in Virtual Currencies. It is understood that miners may work anonymously, on a voluntary basis, and are rewarded with (i) new virtual currencies generated automatically by the system for every block of transactions validated; and/or (ii) fees usually borne by the sender of the virtual currencies.[10] "These rewards constitute incentives to the performance of this activity".[11]

Whether any of the activities fall within the scope of VAT would, inter alia, depend upon (i) whether the miner is a taxable person acting as such and (ii) whether there is service supplied for consideration (the requirement for a "direct link").

Taxable person acting as such: A taxable person is any person which carries on an economic activity, the latter defined to include the "exploitation of tangible or intangible property with a view to obtaining income therefrom on an ongoing basis." It is understood that mining involves the execution of complex mathematical calculations on sophisticated hardware which are intrinsic to and necessary for the conduct of that activity. The ECJ has held that "exploitation" refers to all transactions, whatever may be their legal form, by which it is sought to obtain income from the goods in question on a continuing basis."[12] On this basis, it is concluded that, where a miner regularly and habitually conducts mining activities and generates income therefrom, the said miner should be regarded as a taxable person acting as such for VAT purposes.

[10] European Commission Working Paper GFV 49
[11] Ibid.
[12] Van Tiem C-186/89

©Malta Institute of Taxation 2018

Supply of services for consideration: it is a fundamental principle of VAT that a supply of services effected for consideration presupposes the existence of a direct link between the service provided and the consideration received.[13] The conclusions below have been based on this premise, as well as on the principle in the Seventh Schedule to the VAT Act and article 73 of the EVD which recognises that the consideration for a supply may be received either from the customer or any other person.

In our view:

- If the miner receives no fee or other form of remuneration (including new Virtual Currencies), then the activity cannot be said to be carried out for consideration;

- The allocation of new virtual currencies generated as a result of the mining process, could in principle be regarded as consideration for the mining service, to the extent that a direct link can be established between the mining service and the consideration received, and that a legal relationship exists between the supplier and the beneficiary or beneficiaries of that service, pursuant to which there is reciprocal performance.[14]

- Where a 'transaction fee' is received by the miner for verifying a transaction, even where such fees are 'voluntarily' paid, it is our view that the said transaction fee would constitute consideration for the services supplied[15] on the basis of the creation of a relationship between the miner and the beneficiary of the service pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.[16]

- The difficulties in establishing the identity and location of the customer are acknowledged, and we recognise that it is on this basis that it is questioned whether mining does in fact constitute 'a supply of services for consideration' for VAT purposes. The existence of an 'identifiable consumer' as a factor in determining whether there is a supply of services is noted. As stated by

[13] C-154/80 Cooeperatieve Aardappelenbewaarplaats
[14] C-16/93 Tolsma
[15] Whilst it is noted that in case C-16/93 Tolsma, the ECJ found that the amounts paid voluntarily by passers-by to a street busker did not constitute consideration for the services, it is the view that the conclusion in this decision cannot be applied to mining activities, given the lack of comparability in the fundamental features of the transactions – the Tolsma case dealt with payments which were held to be tantamount to a donation, and the Court's decision was based on the premise that the payments were entirely voluntary and uncertain, the amount was practically impossible to determine, passers-by did not request music to be played for them, and the payment was not linked to the enjoyment of the music. The same principles cannot be applied to a scenario in which verification is requested, a transaction fee may be either set or suggested, and where the quantum of the fee can be increased with a view to receiving a more expedited service.
[16] C-16/93 Tolsma

©Malta Institute of Taxation 2018

the Advocate General in the Mohr case[17] "*The scope of the tax is nevertheless limited by its character as a tax on consumption. A trader must supply goods or services for consumption by identifiable customers in return for a price paid by the customer or by a third party."* However, it cannot be ignored that in the Mohr case the activities being reviewed were being conducted for the overall benefit of a group of persons rather than for the specific consumption by one person. It is therefore contended, based on the facts of that case, that the requirement that the customer be 'identifiable' means that, for there to be a supply of services, there must be person who receives and consumes the services. In the case of mining activities, the existence of a recipient and consumer of the activities cannot be disputed.

- That said, it is recognised that, given the technological considerations, the identity and location of the said beneficiary/beneficiaries often cannot be established by the miner, then in our view it is questionable whether there can be said to be the requisite 'legal relationship' between the parties.

- Furthermore, to the extent that the activities are computer generated, and essentially resulting from an automated process which relies minimally on human intervention, the services would classify as "electronically supplied services"[18] for VAT purposes, which would require the location of the customer to be determined by the miner. In so far as the technical features of the activities are such that the beneficiary of the mining activity and their location cannot and can never be identified by the miner, then it would not be practicable to consider the supply as falling within the scope of VAT in the first place.

Ultimately, in our view, each activity would have to be examined in a case-specific basis, and the VAT implications can only be determined in the light of the specific features of the mining activity undertaken in the light of the overriding principles of VAT.

Where mining activities do constitute a supply of service for consideration, and these take place in Malta, in principle they would be chargeable to Malta VAT at 18%. However, it is recognised that, depending on the features of the activities, it cannot be excluded that the services may fall within the scope of the exemption for transactions concerning currency (art 135(1)(e) of the EVD) or transactions concerning payments or transfers (art 135(1)(d) of the EVD).

[17] C-215/94
[18] Third Schedule to the VAT Act; Article 58 EVD

©Malta Institute of Taxation 2018

2. Issuing/creating (including in the context of Initial Coin Offerings)

Security tokens

To the extent that Securitised Tokens are essentially a capital-raising tool, representing either equity rights in an underlying asset, or the right to receive repayment at a future date (akin to a debt instrument), the issuance thereof would not give rise to Malta VAT implications. The activity itself, i.e. the mere issuance of Securitised Tokens, whose purposes it is to raise finance, would fall outside the scope of VAT.

This reflects the interpretation of the ECJ in C-465/03 Kretztechnik in connection with the issuance of shares: "*…a company that issues new shares is increasing its assets by acquiring additional capital, whilst granting the new shareholders a right of ownership of part of the capital thus increased. From the issuing company's point of view, the aim is to raise capital and not to provide services. As far as the shareholder is concerned, payment of the sums necessary for the increase of capital is not a payment of consideration but an investment or an employment of capital. It follows that a share issue does not constitute a supply of goods or of services for consideration within the meaning of Article 2(1) of the Sixth Directive.*"

Utility tokens

As mentioned above, in so far as the Utility Token:

- represents an obligation to accept it as consideration or part consideration for a supply of goods or services; and
- the goods or services to be supplied or the identities of their potential suppliers are indicated on the instrument itself or in related documentation;

then in our view the Utility Tokens would be regarded as 'vouchers' and should be treated as such for VAT purposes.

It would follow that, pursuant to the provisions of the 14th Schedule to the VAT Act effective 1 January 2019:

- If the Utility Token is an SPV, the issuance would be treated as a supply of the goods/services for which it can be redeemed. That transaction would fall within the scope of Malta VAT insofar as the place of supply of the good/service to which the token relates (once the service is performed/good is delivered) will be Malta.[19]
- If the Utility Token is an MPV, subject to the provisions of item 3(2) of the Fourteenth Schedule to the VAT Act, the mere issuance of the token should not of itself give rise to a Malta VAT liability. Whether the issuer of the MPV is a 'taxable person' for Malta VAT purposes would

[19] In this scenario, the payment for the issuance of the tokens essentially represents a pre-payment (possibly at a discount) for a future supply of goods or services.

©Malta Institute of Taxation 2018

depend upon the intended activities of the issuer (including, for example, whether the issuer is the entity against whom the Utility Tokens may be redeemed).

In this regard, we recognise the cross-border nature of transactions involving Utility Tokens, specifically, the likelihood of cross-border trading of such vouchers, and the possible uncertainty around the classification of a token as a SPV or an MPV in certain cases.
A case in point is Utility Tokens which can be redeemed for a supply of 'electronically supplied services', where the place of supply would depend upon the location of the holder/redeemer at the time of redemption (this scenario is not dissimilar to that of a traditional voucher which may be redeemed for e-services which may be accessed on a cross-border basis). Arguably, in the case of such tokens, the place of supply of the service to which the tokens relate cannot be said to be known at the time of issuance, since that 'place' would vary depending upon who redeems the Utility Tokens. Such an interpretation would result in the classification of such tokens as an MPV. Ultimately, it would be reasonable to expect that the approach adopted with regard to Utility Tokens would reflect the interpretation applied to vouchers generally in the context of the application of the Fourteenth Schedule to the VAT Act.

Other DLT Assets - Virtual Currencies (including cryptocurrencies)

Where Virtual Currencies are issued pursuant to mining - see 1 above.
Where the Virtual Currencies are issued for exchange with legal tender, see 4 below.

3. Transfers (including exchange)

Security Token

The transfer or exchange of Security Tokens in return for a fee or other form of consideration (e.g. a profit) would constitute a supply of services for consideration. Such supply would fall within the scope of VAT in so far as it is made by a taxable person acting as such.

The transfer or exchange of Security Tokens by a taxable person acting as such would, in principle, classify as a taxable supply of services,[20] unless the Security Tokens classify as 'Securities' for the purposes of item 3 of Part 2 of the Fifth Schedule to the VAT Act (exemption without the right of deduction).

[20] chargeable to Malta VAT in so far as the services take place in Malta, applying the general place of supply of services rules (subject to the specific rule for financial transactions pursuant to item 11 of Part 2 to the Third Schedule of the Vat Act).

©Malta Institute of Taxation 2018

Is a Security Token a "security" for VAT purposes? Article 135(1)(f) of the VAT Directive requires Member States to exempt*: "transactions, including negotiation but not management or safekeeping, in shares, interests in companies or associations, debentures and other securities, but excluding documents establishing title to goods, and the rights or securities referred to in Article 15(2)"* The exemption refers specifically to securities conferring a property right over legal persons (shares and interests in companies - effectively, 'equity securities') and securities representing a debt (debentures), and also includes "other securities". As the ECJ has held in C-461/12, such 'other securities' falling within the scope of this provision must be *comparable in nature to the other securities specifically mentioned in that provision*.

On this basis, Security Tokens would be regarded as 'Securities' for the purposes of item 3 of Part 2 to the Third Schedule to the VAT Act, if they are comparable to shares, interests in companies or debentures, i.e. where they essentially:

(i) Confer a right of ownership over/in the issuer; or
(ii) Represent a claim by the holder against the issuer.

Where the Security Tokens are found to classify as "securities" in terms of the above, but represent an "*interest equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof*" then a transfer of those Security Tokens would not qualify for the exemption (item 3(5)(d) of Part 2 to the Fifth Schedule to the VAT Act).

Utility Token

In so far as the Utility Tokens qualify as "Vouchers" for the purposes of the Fourteenth Schedule to the VAT Act, the Malta VAT implications of the issuance thereof would depend on whether they are an SPV or MPV.

If the Utility Token is an SPV, the transfer thereof shall be treated as a supply of the goods/services for which it can be redeemed. That transaction, i.e. the transfer of the Utility Token will fall within the scope of Malta VAT insofar as the eventual supply of the good/service to which the token relates will take place in Malta. The transfer of the Utility Token in this scenario will be taxable or exempt, depending on the VAT rate/exemption applicable to the good/service to which the token relates.

If the Utility Token is an MPV, in principle (and subject to the provisions of item 3(2) of the Fourteenth Schedule to the VAT Act), the transfer thereof would fall outside the scope of VAT.

©Malta Institute of Taxation 2018

Exchange: Token for token

Applying the provisions of item 10 of the Second Schedule to the VAT Act[21], the Malta VAT implications of an exchange of tokens would require an identification of the nature and classification of the tokens being exchanged, and the VAT implications being determined accordingly. The Malta VAT treatment of each supply made in the context of the exchange should then be determined in accordance with the principles stated above.

Other DLT Assets – Virtual Currencies (including cryptocurrencies)

Pursuant to the decision of the CJEU in C-264/14 **the exchange of traditional currency for virtual currency and vice versa, in return for payment of a fee or other form of consideration** (which would include the spread/margin), constitutes a supply of services for consideration and would fall within the scope of Malta VAT if the supply takes place in Malta (applying the general place of supply of services rules). The service classifies as exempt in terms of the Fifth Schedule, Part Two, item 3(4) of the VAT Act.

The mere **exchange** of traditional currency for virtual currency and vice versa, for no fee, is an arrangement which would fall outside the scope of VAT.

4. Transfers – using to acquire goods/services

Utility Token

Where Utility Tokens represent a future right of access to a good or service, the redemption of tokens of the acquisition of specific goods or services is treated for VAT purposes as a redemption of a voucher as regulated in terms of the Fourteenth Schedule to the VAT Act.

In so far as the Utility Token classifies as an SPV, then the redemption thereof should not give rise to any Malta VAT obligations.

Where the Utility Token is an MPV then the actual handing over of the goods or the actual provision of the services in return for the tokens which are accepted as consideration or part consideration shall fall within the scope of Malta VAT in so far as, at the time of redemption the handing over of the goods or the provision of the services, as the case may be, takes place in Malta (determined in accordance with the place of supply rules set out in the Third Schedule to the VAT Act).

[21] "in a contract of exchange each of the parties shall be deemed to make a supply of any goods and any services he transfers or provides pursuant to that contract."

©Malta Institute of Taxation 2018

Other DLT Assets – Virtual Currencies (including cryptocurrencies)

Virtual Currencies which are used as a means of payment for supplies of goods or services are regarded as any other traditional form of currency, and therefore their application as a means of payment of itself should not give rise to VAT implications. The Malta VAT treatment of the supply of goods or services which are acquired with Virtual Currency would depend on the good or service being supplied, and Malta VAT would be due in so far as the supply takes place in Malta (determined in accordance with the place of supply rules set out in the Third Schedule to the VAT Act).

If a supply chargeable to Malta VAT is paid in Virtual Currency: In terms of the VAT Act, the Malta VAT charged must be expressed in euros, requiring the utilisation of the exchange rates applied by Commercial Banks in Malta or the ECB. Where the supply of goods or services which is paid for in Virtual Currency is a taxable supply, the taxable value of the supply for the purposes of calculating the Malta VAT due thereon, should likewise be determined applying the Euro value of the Virtual Currency.
We acknowledge the complexity around the accurate determination of the taxable value in euros, where the consideration for a supply is settled in virtual currency. We have considered the following alternatives:

- Applying the average of the rates offered by the three largest exchange markets (as reported by Bloomberg). It is however recognised that there may be distortions in values in so far as there are significant differences in the rates offered by exchanges.
- Applying the conversion rate applied by the supplier for accounting purposes.
- Another approach which we have considered is the application of item 5 of the Seventh Schedule to the VAT Act, i.e. regarding a supply for which the consideration is paid in virtual currency as a supply the consideration for which is paid in kind. This would consider the taxable value to be the open market value of the goods/services purchased with virtual currency. However, such an approach does not reconcile with a determination that virtual currencies are 'currency' for the purposes of the application of the Fifth Schedule of the VAT Act.

It is proposed that the taxable value in euros would be that value determined at the time the supply takes place (in accordance with the Fourth Schedule to the VAT Act).

5. Digital wallets

Digital Wallets allow Virtual Currency and Token holders and users to transact in or with their DLT Assets. The relevant information concerning the DLT Assets is stored in a Digital Wallet which is

©Malta Institute of Taxation 2018

essentially a digital system which is downloaded by the user, allowing that user to store, organise and transact in their Digital Assets.

The provision of a Digital Wallet facility in consideration for the payment of a user or transaction fee would constitute a supply of services for consideration. In so far as such services are to be regarded as electronically supplied services[22] for VAT purposes, they would be treated as supplied where the customer is located, whether the customer is a taxable person or a non-taxable person.

VAT liability where the services take place in Malta:
As a matter of principle, a supply of services falling within the scope of Malta VAT is taxable, unless an exemption applies. The Malta VAT treatment (as taxable or exempt) of Digital Wallet services would, in our view, depend on the nature of the service supplied, which would have to be determined on a case by case basis.

In so far as the Digital Wallet's services merely involve the storage of information, and the facilitation, from a technical perspective, of transfers of Digital Assets, such services should in principle be regarded as taxable. This could be the case, for example, if the Digital Wallet's function is that of storing a user's public and private keys and interfacing with the blockchain so as to enable users to monitor their balance and transfer.

It is not excluded that certain Digital Wallet services, where the function goes beyond the mere storage of information and recording transactions, may potentially fall within the exemption for: (i) transactions concerning payments and transfers (article 135(1)(d) of the EVD); (ii) transactions in currencies (article 135(1)(e) of the EVD) or (iii) transactions in securities (article 135(1)(f) of the EVD).

In these scenarios, the following principles should be considered when assessing the VAT treatment:

- The key feature of the service which brings it within the scope of the exemption is it has the effect of altering the legal and financial situation of the parties involved. The service supplied would have to be assessed to determine whether the service is capable of giving rise to changes of a legal and financial character similar to those resulting from interbank payments or transactions in securities themselves;
- the supply of a mere physical, technical or administrative service cannot be said to alter the legal or financial situation and therefore would not be covered by the exemption. The extent of
-

[22] "delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology" Art 7, Regulation 282/11

©Malta Institute of Taxation 2018

the responsibility of the service provider would have to be assessed – i.e. whether it is restricted to technical aspects or whether it extends to the specific, essential aspects of the transactions;
- the mere fact that a constituent element is essential for completing an exempt transaction does not warrant the conclusion that the service which that element represents is exempt;
- in the case of transfers, the test that makes it possible to distinguish a transaction that has the effect of transferring funds and bringing about changes in the legal and financial situation from a transaction that does not have such effects, is whether the transaction under consideration causes the actual or potential transfer of ownership of the funds concerned, or fulfils in effect the specific, essential functions of such a transfer.
- Whether the transactions are liable to create, alter or extinguish parties' rights and obligations in respect of securities.[23]

6. Trading/exchange platforms

These are online platforms which facilitate peer-to-peer trading or exchange of DLT Assets, whether such transactions involve the exchange of Virtual Currencies with fiat, the exchange of Virtual Currencies for other virtual currencies or the exchange/sale of tokens.

The provision of a trading/exchange facility in consideration for the payment of a user/transaction fee or commission would constitute a supply of services for consideration.

In so far as the trading platform is essentially automated, requiring no or minimal human intervention, then the services provided thereby would classify as 'electronically supplied services' for the purposes of the Third Schedule to the VAT Act, and as such, would be treated as supplied where the customer is located, whether the customer is a taxable person or a non-taxable person.

In principle, a supply of services falling within the scope of Malta VAT would be taxable, unless an exemption applies. The VAT treatment (as taxable or exempt) of trading/exchange platform services would depend on the nature of the service supplied, which would have to be determined on a case by case basis.

(i) In so far as the platform's services involves the provision of an electronic facility whereby holders of DLT Assets can trade/exchange, i.e. a technological service that enables and is a component of the execution of a transaction in DLT Assets by the holders/users, then such services should in principle be regarded as **taxable.**

[23] C-235/00 (CSC); C-2/95 (SDC); C-607/14 Bookit; C-350/10 Nordea Pankki

©Malta Institute of Taxation 2018

(ii) However, where the DLT Assets being traded classify as "securities" or "currency" for VAT purposes and where the platform's services go beyond the mere provision of a trading facility, with an increased level of involvement in the transfer or exchange, such services **may potentially fall within the exemption** for:

a. transactions in securities (article 135(1)(f) EVD – where the functions of the trading platform are similar to those performed by a traditional securities broker (e.g. buying and selling Security tokens); or
b. transactions concerning currency (article 135(1)(e) EVD - where the functions of the trading platform are similar to those performed by a traditional currencies exchange (e.g. buying and selling currencies);
c. intermediation/negotiation in connection with (i) transactions in securities (article 135(1)(f) of the EVD) or (ii) transactions concerning payments and transfers (135(1)(d) of the EVD). In both scenarios, the following principles apply to the assessment of the VAT treatment:
   - The term 'negotiation' in article 135 of the VAT Directive refers to the activity of an intermediary who does not occupy the position of any party to a contract relating to a financial product, and whose activity amounts to something other than the provision of contractual services typically undertaken by the parties to such contracts.
   - Negotiation is a service rendered to, and remunerated by a contractual party as a distinct act of mediation. It may consist, amongst other things, in pointing out suitable opportunities for the conclusion of such a contract, making contact with another party or negotiating, in the name of and on behalf of a client, the detail of the payments to be made by either side. The purpose of negotiation is therefore to do all that is necessary in order for two parties to enter into a contract, without the negotiator having any interest of his own in the terms of the contract.[24]

It must be noted that where an electronic platform supplies services to private consumers, it should be assessed whether that platform is in fact supplying an electronically supplied service or whether the human intervention is more than minimal, so as to establish the place of supply of that service.

****

[24] C-235/00 (CSC);

©Malta Institute of Taxation 2018