

MOF publishes final decree on tax treatment of virtual currencies and tokens

Final guidance includes some changes and clarifications compared to the initial draft decree that was published in 2021.

The German Ministry of Finance (MoF) on 11 May 2022 published its highly anticipated final decree on the income tax treatment of virtual currency transactions. After the publication of a draft decree on 17 June 2021 (see [GTLN dated 22 June 2021](#)), the MoF held a public hearing to gather comments on the draft decree, which resulted in the final decree containing various changes from the draft decree. The final decree is binding on the tax authorities, and any measures taken by the tax authorities based on this decree must be contested in a tax court procedure.

Similar to the draft decree, the first part of the final decree provides an overview and explanation of certain key elements regarding the virtual currency environment, e.g., tokens, blockchains, wallets, initial coin offerings, staking, forks, lending, and airdrops.

Also similar to the draft decree, the second part of the final decree provides guidance on the treatment of virtual currency and related transactions for income tax purposes. In particular, the final decree describes in what scenarios income derived from transactions with virtual assets would qualify as income from a trade or business, employment income, capital income, or other income. The categorization of the income depends on whether the virtual assets are being held as private assets or (deemed) business assets. The income category is relevant not only to the question of whether the income would be subject to tax in Germany, but also to the questions of how the income would be determined/calculated (on an annual basis) for income tax purposes and at what rate the income would be taxed.

One of the most noteworthy changes compared to the draft decree is that the final decree no longer provides for an extension of the general one-year holding period for tax-free dispositions of virtual currencies held as private assets to 10 years. Under German law, a taxable gain from the disposition of private assets generally is tax exempt if the holding period between the acquisition and the sale is more than one year, in certain cases the one year period is extended to 10 years (e.g., in case of real estate or if the assets are used to generate income). The original intent of the tax authorities to apply the extended 10 year period, in particular for lending and staking transactions, drew heavy criticism from tax practitioners and is now removed in the final decree. This is a welcomed development for all taxpayers in this area.

The final decree also provides additional guidance on the distinction between private asset management and trading activities in the area of virtual currencies, a matter of high interest particularly for funds that are active in this area.

Another topic where the final decree deviates from the draft decree is the treatment of token grants to employees (tokens are granted to employees on a discounted or entirely free basis as an incentive) and the timing for taxing such benefits for wage tax purposes. The final decree still includes a broad interpretation of what constitutes an "acquisition" of a virtual currency and does not take into account concerns from tax practitioners that were raised regarding this point after the draft decree was published last year.

Like in the draft decree, the final decree confirms the view of the tax authorities that virtual currencies qualify as "assets" for income tax purposes. This view has been confirmed in the meantime by two lower tax court decisions (see [GTLN dated 16 February 2022](#) and [GTLN dated 09 May 2022](#)), with an appeal currently pending at the federal tax court.

Whereas the draft decree included a placeholder for guidance regarding the cooperation

and documentation requirements for taxpayers related to virtual currencies, the final decree no longer includes such placeholder or any guidance regarding this point. The tax authorities, however, have announced that these topics will be part of a separate decree, which currently is being prepared.

The issuance of the final decree is a welcomed development and demonstrates the importance of this topic to the tax authorities. The final decree includes some favorable changes for taxpayers compared to the draft decree but still leaves many questions unanswered. For example, the final decree does not mention the treatment of nonfungible tokens or decentralized finance business models where clarifications from the tax authorities would be helpful for taxpayers. It remains to be seen what future positions the tax authorities will take regarding these points.

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