

Commentary of confirmation to the judgement of the Voivodship Administrative Court in Łódź of 30 November 2021, Ref. No. I SA/Łd 699/21

Gracjan Ciupa¹

The subject of this commentary is the judgement of the Voivodship Administrative Court (WSA) in Łódź of 30 November 2021, ref. I SA/Łd 699/21. This judgement concerns the interpretation of the Director of the National Fiscal Information of 27 July 2021. The tax authority interpreted Article 22(14) of the Personal Income Tax Act of 26 July 1991, in accordance with which it held that the purchase of electrical energy necessary for the operation of cryptocurrency mining hardware and the purchase of computer equipment for the construction of cryptocurrency mining hardware should not qualify as tax-deductible costs for the paid disposal of virtual currency. The author of the commentary takes a position in line with the judgement of the WSA, which recognizes these expenses as tax-deductible costs. The commentary presents, among other things, the author's views on the "directness" of the costs and regulations of cryptocurrencies.

Introduction

In the judgement of 30 November 2021, the Voivodship Administrative Court in Łódź² ruled that expenses incurred for creation of virtual currency should be qualified as expenses incurred directly for purchasing virtual currency, and they are tax-deductible costs of its disposal for consideration in a sense of Article 22(14) of the Personal Income Tax Act of 26 July 1991³.

Definitions used in the commentary

To avoid misunderstandings, I would like to start by defining a few terms. First of all, the term *virtual currency* used in my text is drawn from Article 2(2) point 26 of the Anti-Money Laundering Act of 1 March 2018⁴ and means: "a digital image of values other than:

- 1) legal tender issued by the National Bank of Poland, foreign central banks or other public authorities,
- 2) an international unit of account established by an international organisation and accepted by individual countries belonging to or cooperating with that organisation,
- 3) electronic money within the meaning of the Payment Services Act of 19 August 2011,
- 4) a financial instrument within the meaning of the Act of 29 July 2005 on trading in financial instruments,
- 5) a bill of exchange or cheque".

This definition is very wide and may cause problems while using it in practice. For this commentary, it is sufficient, as it can easily be considered that cryptocurrencies are, in principle, virtual currencies. This is reflected in the explanatory memorandum to the anti-money laundering law. "The lawmakers intended to include both so-called cryptocurrencies and centralised virtual currencies within the

scope of this definition"⁵. At this stage of consideration, it is worth to distinguish between virtual currency and digital money as it is known to civil law. The doctrinal definition of this concept is as follows: "digital money is a monetary value that is the electoral equivalent of cash marks. It is stored on electronic storage media and issued on a contractual basis by banks or digital money institutions in exchange for cash of a nominal value not less than that value. It is expressed in monetary units and must be exchanged for cash by the issuer upon request. The issuance of digital money takes the form of a payment instrument, i.e., a personalised device or a set of procedures agreed upon between the user and the issuer of e-money used to make a payment order"⁶.

The main difference between virtual currency and digital money is that digital money must be exchanged for cash on demand. It is also worth noting that both virtual currency and digital money are not legal tenders in the territory of the Republic of Poland. As such, they do not have a legal power to write off liabilities. Consequently, their use in business transactions requires at least the implied consent of both the creditor and the debtor⁷.

State of facts

The petitioner bought the necessary equipment to mine virtual currency in 2018 and he connected it on his own in

¹ Faculty of Law, Administration and Economics University of Wrocław. ORCID: 0000-0002-5687-1732.

² I SA/Łd 699/21

³ Dz.U. z 2022 r. poz. 2647.

⁴ Dz.U. z 2022 r. poz. 593.

⁵ See: <https://mycompanypolska.pl/artykul/waluta-wirtualna-a-kryptowaluta-czym-sie-roznia/7904> (access 27.12.2022).

⁶ Z. Radwański, A. Olejniczak, J. Grykiel, Zobowiązania – część ogólna, Warszawa 2022, s. 64–65.

⁷ *Ibidem*.

a way which enables him to mine virtual currency, in that case mostly Ethereum. His mining hardware gains force of approximately 110 Mh/s, requires 490W and downloads 11,76 kWh per day. As a result, his hardware mines daily about 0,006 ETH, which according to the currency exchange rates on 22 November 2021 after converting is \$24. Concerning that activity, he incurred the following expenses: computer bought in 2018 worth PLN10 133,56 and value of buying electrical energy worth PLN5982,61, which is essential for mining virtual currency. The petitioner does not have a separate electricity meter but based on his voltmeter it takes a lot of electrical energy to charge the mining hardware. Obtaining virtual currency, he exchanges it for different ones, e.g. Bitcoins. He mines virtual currency to sell it, when the exchange rate is satisfactory for him. Until 30 November 2021, he did not exchange any amount of virtual currency. Since 2018 he filed a tax return using PIT-37 form because he did not conduct any economic activity. Moreover, he pointed out that because of his lack of knowledge of the opportunity to qualify expenses of mining hardware and electrical energy as tax-deductible costs, he has not deducted those expenses. What is more, he has got VAT invoices, which document the fact of buying the computer and using electrical energy.

Administrative procedures

The petitioner put a question to the Director of the National Fiscal Information: “1) Are expenses incurred in connection with mining virtual currency? (For example, buying computers destined for building virtual currency mining hardware is an expense in a sense of Article 22(14) of the Personal Income Tax Act); 2)) Are expenses incurred in connection with mining virtual currency? (For example, buying electrical energy, which is necessary for the work of mining hardware, is an expense in a sense of Article 22(14) of the Personal Income Tax Act. In the mind of the petitioner those expenses are expenses in a sense of Article 22(14) of the Personal Income Tax Act.)”. The Director of the National Fiscal Information has a different opinion from the petitioner and considers the previous opinion to be wrong.

The Director of the National Fiscal Information pointed out that the revenue from trading virtual currency is the revenue of monetary capital in a sense of Article 17(1) point 11 of the Personal Income Tax Act of 26 July 1991. Moreover, he wrote that expenses incurred directly for purchasing virtual currency are a purchase price, but also a commission charged by a person broking in trading. In the decision of the Director of the National Fiscal Information, in contrast, a tax-deductible cost of virtual currency disposal for consideration is not an expense incurred indirectly. The catalogue of those expenses in that decision is closed and includes purchasing the computer, purchasing electrical energy, and the expenses

of buying “cryptocurrency mining hardware”, because it is impossible to determine which expense is affiliated to which revenue. Secondly, the Director of the National Fiscal Information has doubts in regard to purchasing virtual currency. The authority’s second argument was that the applicant would not be purchasing virtual currency from another entity but would be performing the initial mining of the currency, which by analogy compares to manufacturing. A mined currency has never been a part of trade flows, because it had not existed before. In the opinion of the Director of the National Fiscal Administration, it was assessed that if the legislator had intended to allow the taxpayer to account for all forms of entry into possession of virtual currency he would have made an appropriate entry into the law. Therefore, the applicant referred the matter to the Voivodship Administrative Court in Łódź.

The judgement of the Voivodship Administrative Court in Łódź

The Voivodship Administrative Court in Łódź ruled that the decision of the Director of the National Fiscal Information is incorrect and considered a defiance of material law in Article 22(14) of the Personal Income Tax Act of 26 July 1991, through a wrong explanation of that article. The Voivodship Administrative Court in that case used a linguistic form of explanation and quoted a definition of the word *directly* from the Dictionary of the Polish language. Viewed against it, there is no doubt that *directly* means without any intermediary and that the expenditure incurred by the appellant is incurred directly for its acquisition. The issue also arose as to whether mining virtual currency could be considered an acquisition within the meaning of the provision. The court concluded that according to the director’s interpretation, the applicant is not purchasing the currency from another entity, but rather mining it. Thus, he may be considered to be making an acquisition, but only a primary one.

The opinion of the glossator

In my opinion, the judgment of the Voivodship Administrative Court in Łódź should be regarded as correct. At the beginning of 2019, the taxation of revenue from paid disposal of virtual currency was introduced into the Personal Income Tax Act of 26 July 1991, creating a closed catalogue of them. The Director of the National Fiscal Information certified in its Individual Interpretations that expenses for the creation of virtual currency should not be qualified as expenses incurred directly for purchasing virtual currency (Compare Individual Interpretation from 2021-07-27 (Director of the National Fiscal Information) 0113-KDIPT2-1.4011.414.2021.2.MGR and Individual Interpretation from

2020-05-15 (Director of the National Fiscal Information) 0111-KDIB1-1.4010.116.2020.1.SG). A contrary standpoint is presented by the Voivodship Administrative Courts. According to them, expenses for the creation and mining virtual currency should be qualified as expenses incurred directly for purchasing virtual currency (see the judgment of the Voivodship Administrative Court in Łódź of 21 July 2020⁸).

Given these discrepancies, I think that the most important thing is to define the meaning of words *direct* and *purchasing* used by the legislator and whether, because of this, cryptocurrency mining expenses have both characteristics.

Beginning with the directness – I believe that the expenses of cryptocurrency mining can be defined as costs that have the attribute of directness through linguistic interpretation already. Here I will use the rule of presumption of the special language and reach to the accounting. According to its principles, every cost is an expense, but not every expense is a cost. Therefore, the considerations concerning the costs will certainly regard the expenses, because the term *cost* has fewer designations than the term *expense*, and in this case, I can limit my considerations to the term of direct costs. To sum up, there are two reasons why I can replace *expense* with *cost*. First and foremost, the lawmaker mixed both of these words in Act because it defines *cost* using *expense*, for example in Article 22(14) of the Personal Income Tax Act of 26 July 1991. I know that there is a difference between both of these words, but since the lawmaker did not contribute to differentiate it clearly, I am authorised to do something similar in my deliberations. Secondly, what I mentioned before, each cost is an expense – according to that rule, every analysis of costs involves expenses too. The most important target of that paragraph is making evident what *directness* means.

Moving on to the considerations – B. Micherda in *Podstawy rachunkowości* defines *direct costs* as “operating costs that are directly related to the product being manufactured”⁹. Given this definition, costs of purchasing computer and electrical energy are direct costs, because they are a direct connection to the product being manufactured, which in this case is cryptocurrency. This would not be possible without them. Moreover, as an analogy, in this case, the presumption of legal language and the Accounting Act of 29 September 1994¹⁰ can be used. Admittedly, in this case, the term *direct costs* appears in connection with the concept of costs of manufacturing a product, yet in my opinion, there is no doubt that cryptocurrencies are manufactured by miners. According to this Act, direct costs include “the value of direct materials used, acquisition and processing costs directly related to production, and other costs that are incurred in bringing the product to the form and place in which it is located at the date of valuation.” Accordingly, cryptocurrencies are produced by harnessing the calculating power of a computer, which in broad terms is converted into cryptocurrency. Hence, by way

of analogy, this can be likened to the material from which the commodity is produced under the Accounting Act of 29 September 1994. Therefore, the electricity and the computer could be regarded as acquisition and processing costs directly related to production, and thus classified as a direct cost. In this case, the Voivodship Administrative Court used a decidedly more secure option, justifying its position with the definition from the Dictionary of the Polish Language.

Moving on to the second issue that may have caused controversy, which is the matter of purchasing virtual currency by miners. In this case, only the systemic approach gives satisfactory results. One of the principles of tax law is the ability to tax income, not revenue. Therefore, if the costs of cryptocurrency excavation could not be considered tax costs, miners would be deprived of that right, because the basis of taxation of their activity would be income, not revenue. Of course, I am aware that the systemic interpretation is not used in the first place, but according to the *In dubio pro tributario* principle and given the ambiguous standardisation of the situation of “miners” of cryptocurrencies, this is an argument in favour of considering the expenses associated with mining cryptocurrency as tax-deductible costs for their disposal against payment. This statement was shared in J. Wirski’s paper *Opodatkowanie obrotu kryptowalutami na gruncie podatków dochodowych w świetle zmian od 1.01.2019 r. – zagadnienia praktyczne*¹¹. In this case, the Voivodship Administrative Court referred to the situation of a person who acquired the ownership of a movable no-man’s land by taking it into their possession, or a person who manufactured the movable from their materials. In this case, I also share the court’s standpoint, which can be seen in the example of the definitions of *direct costs* I have cited.

Moreover, as Robert Kurek rightly points out in his work *Pieniądz prywatny – status Bitcoina w Niemczech*, the status of cryptocurrency mining hardware in Germany is much better regulated. According to the terminology there, “miners” do not purchase cryptocurrency, but mine it. Miners can be either individuals or business entities that professionally engage in this practice. Income is earned on the day the bitcoin is dug, and its value is determined by the purchase price. Individuals can take advantage of the free amount of €256. In addition, the German legislator has allowed reducing the tax base by the cost of purchasing the mining equipment and the electricity consumed, which must be documented. As the above example shows, it is possible to uniformly define the

⁸ I SA/Łd 285/20, Legalis.

⁹ B. Micherda, *Podstawy rachunkowości. Aspekty teoretyczne i praktyczne*, Warszawa 2022.

¹⁰ Dz.U. z 2021 r. poz. 217.

¹¹ J. Wirski, *Opodatkowanie obrotu kryptowalutami na gruncie podatków dochodowych w świetle zmian od 1.1.2019 r. – zagadnienia praktyczne*, Przegląd Podatkowy 2019, Nr 1, s. 41–48.

problem which was the subject of the ruling referred to in the commentary¹². Postulating *de lege ferenda*, I hope that in the foreseeable future there will be an amendment of these provisions in our tax law system.

Furthermore, being aware that the website of the Minister of Finance is not a source of law in the formal sense¹³, I would like to dwell on it for a moment. On this website, you will find the guide *Settlement from the sale of cryptocurrencies*. Admittedly, the case which is the subject of the commentary has not yet involved the sale of cryptocurrency, but the facts described there are very similar. Under the subsection *Deductible costs*, it states: "If you obtain virtual currencies through so-called digging, you may not consider as deductible costs the expenses incurred for: the purchase of equipment intended for the digging of virtual currency or the purchase of electricity consumed in connection with the use of equipment for digging"¹⁴. This shows that the tax administration, despite the rulings of the administrative courts that are unfavourable to it, is still keen to convince the doctrine of its position vis-à-vis deductible costs from the sale of dug-up cryptocurrency. These actions are fully justified, as each authority will, in principle, convince other authorities to adopt its point of view. However, because of the position taken by the Voivodship Administrative Court, this is very difficult, especially as there has been no change in the legal position since the ruling which is the subject of the commentary. The actions of the Ministry of Finance are only like soft law at its weakest.

In abstracto, I believe that the legislator in the above-mentioned provision presented a too general way of classifying tax-deductible costs of paid disposal of virtual currency. In

my view the previous regulation was better, the wording of which is as follows: "expenses for the purchase of a computing service that will be used to mine cryptocurrencies (...) may be deductible costs if they are indeed in a causal relationship with the revenues obtained". (See Individual Interpretation from 2018-10-19 (Director of the National Fiscal Information) 0112-KDIL3-1.4011.350.2018.1.AN.). Here, it is obvious that the purchase of a computer as well as electricity is closely connected with the sale of cryptocurrency, as there is no doubt that without these tools cryptocurrency would not have been formed. Furthermore, I also take a negative view towards the definition that is used in the Impact Tax Act. It is taken from Article 2(2) point 26 of the Act on Anti-Money Laundering and Financing of Terrorism of 1 March 2018. According to this definition, "coins" from the game FIFA 23, or more precisely FIFA Ultimate Team, can be considered virtual currency. I believe that legislators should create separate detailed regulations because they are becoming an increasingly important element of economic turnover and sanctioning them along with other virtual currencies can lead to abuse.

To sum up, the judgement of 30 November 2021, ruled by the Voivodship Administrative Court in Łódź is correct and should be used to create a line of case law and line of administrative decisions.

¹² R. Kurek, Pieniądz prywatny – status Bitcoina w Niemczech, Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu 2017, Nr 478 s. 280–290.

¹³ W. Gromski, Formalne źródła prawa, [w:] A. Bator (red.), Wprowadzenie do nauk prawnych. Leksykon tematyczny, Warszawa 2016, s. 243–244.

¹⁴ See: <https://www.podatki.gov.pl/pit/rozliczenie-ze-sprzedazy-kryptowalut/> (access 27.12.2022).

Prekursorskie opracowanie dotyczące prawnych aspektów problematyki InsurTech



ksiegarnia.beck.pl

Zadzwon: 81 46 13 300

E-mail: kontakt@beck.pl

