BITCOIN AND THE LAW – IS IT LEGAL, WHAT ABOUT TAX, AND CAN YOU LEAVE IT TO YOUR HEIRS?

Have you joined, or been tempted to join in, the “Bitcoin frenzy”? If so, read on.

Bitcoin and Ethereum are probably the best known of the cryptocurrencies, but (as at 10 April 2018) there were over 1,565 of them, and that number is growing.

Whether Bitcoin and its cousins are good investments is a matter for you and your financial advisers to puzzle over but let’s have a look at a few legal aspects –

Expect grey areas and big changes

Governments, Tax Authorities, and Central Banks around the world are struggling to get to grips with cryptocurrencies and how to treat them. Some countries allow them; some have banned or restricted them. Expect ongoing uncertainty and a lot of future change in these official positions, including attempts to regulate alternative currencies in general.

Are cryptocurrencies legal?

The short answer seems to be yes, there’s nothing to stop you buying, holding, using or selling them. The Reserve Bank’s official position is that they can be traded and used as “a medium of exchange, a unit of account and/or a store of value”, but they aren’t “legal tender” (“bank notes and coins in RSA which can be legally offered in payment of an obligation and that a creditor is obliged to accept”). What that means is that Joe Plumber is free to accept payment from you in Bitcoin if he wants to. He just can’t insist on it, nor can you.

SARS’ view (see “Income Tax and VAT” below) is probably going to be your greater area of concern for the moment.

What if you need help from a court?

The Reserve Bank warns that you acquire cryptocurrencies at your own risk and that you “have no recourse to South African authorities”.

What that means in practice remains to be seen (would SAPS really refuse to investigate a theft of Bitcoin?), and whilst there is no precedent to confirm that our courts will indeed help you if you have to sue over, for example, a Bitcoin transaction gone wrong, the majority view seems to be that they will.

Must you pay Income Tax and register for VAT?

From the horse’s mouth so to speak, this is some of what SARS says -

It will “continue to apply normal income tax rules to cryptocurrencies and will expect affected taxpayers to declare cryptocurrency gains or losses as part of their taxable income.”

“The onus is on taxpayers to declare all cryptocurrency-related taxable income in the tax year in which it is received or accrued. Failure to do so could result in interest and penalties.”

“…cryptocurrencies are not regarded by SARS as a currency for income tax purposes or Capital Gains Tax (CGT). Instead, cryptocurrencies are regarded by SARS as assets of an intangible nature.”

“Determination of whether an accrual or receipt is revenue or capital in nature is tested under existing jurisprudence (of which there is no shortage).”

“Taxpayers are also entitled to claim expenses associated with cryptocurrency accruals or receipts, provided such expenditure is incurred in the production of the taxpayer’s income and for purposes of trade. Base cost adjustments can also be made if falling within the CGT paradigm.”

“…VAT treatment of cryptocurrencies will be reviewed. Pending policy clarity in this regard, SARS will not require VAT registration as a vendor for purposes of the supply of cryptocurrencies.”

There’s more, and you don’t want to take any chances here, so consult an expert in need.

The Endgame: Leaving Bitcoin in your Will

Your cryptocurrency holdings are assets in your estate and you will want your heirs to get them. Your executor must deal with them together with all your other assets (both physical and digital).

Remember however that your holdings will be lost forever if your heirs/executors don’t know about them or can’t access your digital cryptocurrency wallet. They will need all your digital keys - both “public” (wallet address) and “private”.

In whatever manner you plan to leave your heirs/executor a record of these keys on your death, avoid disaster with these tips –

Do it now – no one knows when they’ll die.

Do it securely – anyone with your private key can clear your wallet out, and criminals know that.