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Legal Practitioners

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Cryptocurrency as a Property

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The debate at this level needs to be centred on the determination of whether cryptocurrencies should be classified as a currency or as an intangible property. Although we have a view on this point, there are differing implications that a classification will engender. Where it is decided that cryptocurrencies be classified as a currency, CBN¹ will rightly exercise regulatory control, otherwise, not. There are also tax considerations that arise from a classification, either way. For instance, if bitcoin or other cryptocurrencies is considered a property, this classification may trigger sales tax obligations. Also, a classification as an intangible property will take bitcoins (and other cryptocurrencies) out of the Exclusive Legislative List² in the Nigerian constitution– not being a legal tender– and provide state governments with the legislative competence to regulate cryptocurrencies.

Food Insecurity in Nigeria

Legal Tender or Property?

In the case of *Nkwocha v. Governor Anambra State & Ors*, property was defined to mean ownership or title and sometimes the res over which ownership may be exercised. An intangible property, which is also referred to as incorporeal property describes something which a person or corporation can have ownership of and can transfer ownership to another person or corporation, but has no physical substance e.g., stock options.

From a property rights perspective, this classification of bitcoin establishes it as a definite form of property over which specific title can be exercised. A “currency” classification will however be considered in law as a mere claim for value³.

In September 2020, the Securities and Exchange Commission (SEC) released a statement of intent, where it recognised cryptocurrency as securities to be registered with the Commission. It stated “virtual crypto assets are securities, unless proven otherwise. The burden of proving that the crypto assets proposed to be offered are not securities and therefore not under the jurisdiction of the SEC, is placed on the issuer or sponsor of the said assets⁴.” It defined crypto asset as:

“a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value but does not have legal tender status in any jurisdiction. A Crypto Asset is – neither issued nor guaranteed by any jurisdiction and fulfils the above functions only by agreement within the community of users of the Crypto Asset; and Distinguished from Fiat Currency and E-moneys.”

Thus, we can rely on the premise that bitcoin-denominated investments are securities, a fortiori, a special class of securities, to the extent that they form a unit of investments.

However, the UK⁷ Jurisdiction Task Force (“UKJT”), a panel of expert QCs⁸ and barristers, recently addressed this exact issue. In November 2019, the UKJT, headed by Chancellor of the High Court, Sir. Geoffrey Vos published a Legal Statement on Crypto assets and Smart Contracts (the “Legal Statement”). By way of overview, the Legal Statement declared that cryptocurrency is legally equivalent to property and possesses all the necessary features or “indicia” to qualify as such. The Legal Statement explained that the novel and distinctive features of crypto assets– “intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation, rule by consensus” – do not prevent them from being treated as property⁹.

Regulatory body: SEC¹⁰ or FIRS¹¹?

In this regard, the challenge appears to be how to categorize cryptocurrencies and the specific activities involving them for purposes of taxation. This matters primarily because whether gains made from mining or selling cryptocurrencies are categorized as income or capital gains, it invariably determines the applicable tax bracket. This was reiterated by the Federal High Court in the case of *Vodacom v. FIRS*¹² where it appears to suggest that payments/ royalties arising from transacting in intangibles are subject to tax treatment.

The United States Department of Treasury defines cryptocurrency as a Money Services Business (MSB) and categorises it as a property for taxation by America’s Internal Revenue Authority. The Canadian Revenue Authority views cryptocurrency as a commodity and income generated and it is considered as business income, which may be subject to tax, same as Australia¹³. Despite not being recognised as a currency, the South African Revenue Service (SARS) has demanded that gains and losses on cryptocurrency be declared and classifies cryptocurrency as intangible assets subject to income tax in the country¹⁴.

Following from the above, it can be established that cryptocurrency as an intangible property falls under the regulation of Securities and Exchange Commission (SEC) and can be subject to the payment of capital gains or personal income tax depending on the form of transaction. This is subject to the advent of a regulatory body and law on cryptocurrency and virtual digital transactions to be established in Nigeria.

1. Central Bank of Nigeria.
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3. Balogun Harold, “Bitcoin & Cryptocurrency Law and Regulation in Nigeria”, January 11, 2018 <https://balogunharold.com/the-state-of-bitcoin-cryptocurrency-law-and-regulation-in-nigeria-2018/>
4. “Statement on Digital Assets and Their Classification and Treatment”, September 14, 2020 <https://sec.gov.ng/statement-on-digital-assets-and-their-classification-and-treatment/>
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5. Ibid.
6. Balogun Harold, “Bitcoin & Cryptocurrency Law and Regulation in Nigeria”, January 11, 2018 <https://balogunharold.com/the-state-of-bitcoin-cryptocurrency-law-and-regulation-in-nigeria-2018/>
7. United Kingdom.
8. Queen’s Counsel- senior solicitors.
9. “Legal Statement on Crypto assets and Smart Contracts”, UK Jurisdiction Taskforce, November 2019 <https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp->
10. Securities and Exchange Commission of Nigeria.
11. Federal Inland Revenue Service, Nigeria.
12. CAL/556/2018.
13. Emmanuel Paul, “Cryptocurrency in Nigeria: Too early for Regulation- Industry Players”, September 19, 2019 https://techpoint.africa/2019/09/19/cryptocurrency-nigeria-regulation/?utm_source=BenckmarkEmail&utm_campaign=TechCabal095=5=%2f02%2f21&utm_medium=email
14. SARS’ Stance on the Tax Treatment of Cryptocurrencies, <https://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx>



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