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Draft Goods and Services Tax Ruling GSTR 2014/D3: Goods and Services Tax: the GST implications of using Bitcoin

We, Taxpayers Australia Ltd, welcome the opportunity to comment on Draft Goods and Tax Ruling GSTR 2014/D3 in relation to the GST treatment of 'Bitcoin' transactions.

The Tax Office should be commended for moving quickly to provide guidance to the community regarding this emerging technology. The following submission examines some issues of construction and interpretation in relation to GST concepts that impact the way 'Bitcoin' transactions are dealt with under the GST.

Commissioner's position

GSTR 2014/D3 makes it clear that the Tax Office does not view 'Bitcoin' as 'money' as that word is defined in s195-1 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("GST Act"). The Tax Office provides an explanation of why they do not view 'Bitcoin' as satisfying this definition in Appendix 1 of your draft Ruling. This appendix refers to paragraph 26-28 of *Travellex Ltd v Federal Commission of Taxation* [2008] FCA 1961 ("*Travellex case*") to support the view made in paragraph 73 of the draft Ruling as follows:

Consistent with statutory context, policy and the wider legislative framework governing Australian currency established by the Currency Act, this is the sense in which the word 'money' is used in the section 195-1 definition.

We note that the Full Federal court decision in the *Travellex case* was subsequently reversed by the High Court in *Travellex Ltd v Commissioner of Taxation* (2010) 241 CLR 510. It is clear from the High court decision in that case at paragraph (34) that:

"a sale of foreign currency is a supply in relation to the rights that attend upon ownership of that currency."

The High court decision also brings into question a number of the findings of the Full Federal court. In light of this, we request that the Tax Office make some reference to the High court decision and explain why the concepts they have drawn from the Full Federal court decision are still to be relied upon.

We suggest that the Tax Office review their position that the legal definition of the word "currency" in the *Currency Act 1965* (Cth) ("Currency Act") is the sense in which the word "money" is used in s195-1 GST Act. The rest of our submission provides reasons as to why we feel this reconsideration is necessary.



Case Law rule

The conclusion the Tax Office has reached examines the domestic law of Australia in relation to what constitutes 'currency' to provide appropriate context in relation to the interpretation of the word money. We request that the Tax Office's reasoning should also include a more rigorous focus on determining the context in which the word 'money' is used as it sits in s195-1 of the GST Act as a whole.

In order place the word 'money' used in the GST Act within the purview of the word "currency" as used in the *Currency Act* the Commissioner has referred to a rule of statutory interpretation described in *Y.Z. Finance Company Pty. Limited v Cummings* (1964) 109 CLR 395 ("*Y.Z. Finance case*"). This case offers an alternative construction to words that are preceded by the word 'includes' (as is the case for the word 'money' in the GST Act). In the *Y.Z. Finance case* the construction of the word 'includes' was interpreted as "mean and include".

In other words, a word may have an ordinary meaning, and legislation can expand upon the ordinary meaning of a term by using the word 'includes'. On the other hand, the word may instead take on a different meaning entirely, solely with reference to that which it 'includes'.

However, as with all rules of statutory interpretation the rule in the *Y.Z. Finance case* has a caveat. This construction can only arise where the context of **the Act** sufficiently shows that this construction is preferred.

Commissioner's interpretation

The Commissioner refers to s9-85 GST Act in paragraph 18 of the Ruling where the term 'currency' is used to support characterising the word 'money' as 'currency' stating:

"the value of that taxable supply must be expressed in Australian currency or translated into Australian currency if the consideration is expressed in a foreign currency."

The Commissioner expresses how the rule in *Y.Z. Finance case* operates in paragraph 31 as follows:

"Determining whether a broader meaning is intended and the content of that meaning is informed by the statutory context in which the term 'money' appears."

The Commissioner then goes on to determine whether 'Bitcoin' falls within the definition of currency used in the *Currency Act*.

Summary of our contentions

The rule in the *Y.Z. Finance case* makes it clear that where the terms that follow the word 'include' in the statutory definition of the word 'money' **falls strictly** within the meaning of the ordinary word 'money' this would have the effect of the GST Act confining the meaning of that word. This consideration is performed in our appendix to this submission. This consideration does not seem to be dealt with in great detail within the draft Ruling.



The other issue that has not been addressed by the Tax Office in relying upon this authority is that the *Y.Z. Finance case* deals with a definition that applies to only one section of the relevant Act. The definition of the word 'money' applies to the whole of the GST Act. Therefore this case could be distinguishable on this basis.

The word "includes" used in the statutory definition, in our view, makes it clear that the ordinary meaning of the word "money" is either being expanded or clarified by the statutory provision rather than restricted when viewing the definition in the context of the other definitions made under s195-1 GST Act and when comparing the wording of the statutory definition with the ordinary meaning of the word 'money' as required under the rule espoused by *Y.Z. Finance case*. This method of interpretation is, in our view, preferred in determining the purpose of the provision because it does not rely upon definitions made in other Acts.

Finally, we refer to a recent Federal Circuit Court case in the US that expresses the view that a 'Bitcoin' falls within the ordinary meaning of the word "money" albeit in a different statutory context. This view as well as the ordinary meaning of the word "money" in our view necessitates further consideration of this draft Ruling by the Tax Office.



Appendix

Issue to be addressed

The word 'money' is a defined term under the GST Act. The proper construction of the word 'money' needs to be determined within the context in which it appears in the GST Act. The issue is how this word should be construed given this context.

Once the context of this word has been determined and the proper construction reached a further issue arises. The issue is whether a 'Bitcoin' falls within the definition of the word 'money' as it has been construed.

Relevant Law

The definition of 'money' was originally introduced by *A New Tax System (Goods and Services Tax) Bill 1998* as part of the introduction of the GST regime itself. The definition has not changed and no meaningful guidance in relation to this definition is given by the explanatory memorandum. The literal meaning of these words in isolation would encapsulate a very wide variety of things and arguably result in considerable ambiguity. The wording of the provision is as follows:

"money" includes:

- (a) currency (whether of Australia or of any other country); and*
- (b) promissory notes and bills of exchange; and*
- (c) any negotiable instrument used or circulated, or intended for use or circulation, as currency (whether of Australia or of any other country); and*
- (d) postal notes and money orders; and*
- (e) whatever is supplied as payment by way of:
 - (i) credit card or debit card; or*
 - (ii) crediting or debiting an account; or*
 - (iii) creation or transfer of a debt.**

However, it does not include:

- (f) a collector's piece; or*
- (g) an investment article; or*
- (h) an item of numismatic interest; or*
- (i) currency the market value of which exceeds its stated value as legal tender in the country of issue.*

Analysis of legal rules – Determine context & construction

The correct approach to interpreting the construction of this provision in our view is a purposive approach in the context of the provision and GST Act as a whole. In arriving at a definition of the word 'money' and how it should be read in the context of s195-1 of the GST Act, the interpretation of the word 'currency' used in other Acts, while being relevant, should not displace this interpretation in the context of the GST Act, see *R v Scott* (1990) 20 NSWLR 72.



A purposive approach is supported in common law (see Dawson J in *Mills v Meeking* (1990) 169 CLR 214, 234-5) as well as by Commonwealth Statute by virtue of section 15AA of the *Acts Interpretation Act 1901 (Cth)* which reads:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

The explanatory memorandum to *A New Tax System (Goods and Services Tax) Bill 1998* gives some insight into the purpose of Parliament in introducing the GST Act as follows:

The GST is a broad based indirect tax introduced by the Government to replace the wholesales sales tax and a number of State indirect taxes. Broadly speaking, the GST is a tax on private consumption in Australia. The GST taxes the consumption of most goods, services and anything else in Australia, including things that are imported. Generally the GST will not apply to consumption outside Australia, which is why the GST does not apply to exports.

The other general common law rules of statutory interpretation that may apply includes that of *ejusdem generis* that may limit the general words of a definition by those used in the other part of the definition. The application of this rule in this case however is limited by the observation of Spigelman CJ in *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 ("*Clark case*") at 143 and in our view interpretation of the word 'money' should more correctly consider the overall context of the GST Act itself.

Examination of text of the provision

On close examination of the text of *Y.Z. Finance case* referred to by the Tax Office we are of the view that the word that requires interpretation in order to apply a different construction to the word 'money' is not the word 'money' but the word 'includes'. McTiernan J cited with approval the rule expressed by Lord Watson in *Dilworth v. Commissioner of Stamps* [1899] A. C. 99 as follows:

"The word , 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions"

The task of statutory construction is clarified further by McTiernan J in *Y.Z. Finance case* when he goes on to quote Sugarman J in *Batchelor & Co. Pty. Ltd. v. Websdale* [1963] S.R. (N.S.W.) 46:



*"The enumeration in sub-so (2) adds nothing to the natural import of the word, security'. Indeed **all the matters enumerated are within the strictest meaning of that term and, within that meaning, the second limb of the definition is of the widest import. All the matters enumerated share the common characteristic that they relate to securities by which rights in relation to specific property of the debtor are conferred.** These considerations lead to the conclusion that 'include' in sub-so (2) is equivalent to 'mean and include' and that the definition therein given is intended to be exhaustive, or at least that the securities intended to be embraced all share the common characteristic of conferring rights against specific property"*

To correctly apply this rule therefore, one must examine each paragraph used in the statute that is said to be included in the statutory definition of the word 'money' and determine whether or not that paragraph would fall within the ordinary meaning of the word 'money'.

The Tax Office in contrast examines each paragraph of the statutory definition of the word 'money' with reference to whether a 'Bitcoin' would be included within that specific statutory paragraph or not. This analysis while it is critical in our view may be premature. We feel that before embarking upon this exercise, further consideration and thought should be directed to the statutory construction of the word 'money' itself.

We note that there would be some doubt as to whether paragraph (d) and (e) of the statutory definition could rightly form part of the ordinary meaning of the word money, even in its widest sense. The term money is described in the *Encyclopaedic Australian Legal Dictionary* as:

Any generally accepted medium of exchange for goods, services, and the payment of debts. Examples are coin, banknotes, bills of exchange, promissory notes and claims on bank deposits.

Applying the rule in *Y.Z. Finance case* the term 'money order' as appears in subparagraph (d) of the definition of the word 'money' in the GST Act is defined in that dictionary as follows:

An instrument used to remit money to the named payee, often used by persons who do not have a cheque account relationship with a financial institution, to pay bills or to transfer money to another person or to a company.

This suggests that perhaps the context in which the word 'money' is used in the GST Act is the ordinary meaning of the word rather than the more limited statutory definition. The context may also be ascertained by reference to the wider section in which the definition is placed.

Section 195-1 GST Act – use of 'includes' and 'meaning'

Turning to section 195-1 GST Act it should be noted that the word 'includes' is used in various other definitions, it should also be noted that the use of this word can be contrasted with the use of the word 'means' also used in the provision. On the whole the word 'means' is used to restrict or explain what the meaning of a word is within the GST Act and the word 'includes' is used to either expand or clarify the meaning of a word where it may be ambiguous. The *Y.Z. Finance case* makes it clear how the section uses the word 'includes' is the clearest indication of the words construction.



The following are examples from the GST Act that demonstrate the application of this interpretation:

"amount" includes a nil amount.

"business" includes any profession, trade, employment, vocation or calling, but does not include occupation as an employee.

*"carrying on" an *enterprise includes doing anything in the course of the commencement or termination of the enterprise.*

*"person" includes a *company.*

"ship" means any vessel used in navigation, other than air navigation.

*"adjustment" means an *increasing adjustment or a *decreasing adjustment.*

"Commissioner" means the Commissioner of Taxation.

Due to the nature of the ordinary meaning of the word 'money' it may be difficult to define. This may be an explanation as to why most (but not all) of the parts of the statutory definition seem to fall within the ordinary meaning of the word. To take this as meaning the context is restricted by the definition of the word 'currency' in our view is perhaps premature.

A fuller examination of the context of the GST Act and the relevant provision seem to support a wider definition for this term. This brings us to the change in the meaning of words used in statutes when technology changes.

How 'money' in the GST Act could be interpreted over time

The other relevant point to make here is the way in which the meaning of words changes over time. It is relevant to note that at the time the definition of the word 'money' was enacted in the GST Act 'bitcoins' did not exist and would not have been specifically contemplated by Parliament.

Lake Macquarie Shire Council v Aberdare County Council (1970) 123 CLR 327 ("Lake Macquarie case") at 331 is authority for the proposition that while the connotation of a word will remain fixed its denotation will change with changing technologies. In the *Lake Macquarie case* Barwick CJ states at 331:

"I can see no reason why, whilst the connotation of the word "gas" will be fixed, its denotation cannot change with changing technologies."

This analogy is undoubtedly useful in interpreting whether a 'Bitcoin' can be described as within the ordinary meaning of the word 'money' as it is used in s195-1 GST Act. It is also, in our view, a good reference to assist in determining whether the generality of the ordinary meaning of the word 'money' is a preferable construction for the purposes of the GST Act.



The ordinary meaning of the word 'money' seems to have been extended by the GST Act, this along with how the words 'include' and 'mean' are used in that Act support the use of the ordinary meaning of this word as this interpretation furthers the intended purpose of the Act. Furthermore, the inherent flexibility of the word over time is supported not only by the *Lake Macquarie case* but also by the inclusion of paragraph (e) within the statutory definition itself.

How to treat 'Bitcoin' in light of a wider definition

The definition of 'Bitcoin' as money is supported by [*Securities and Exchange Commission v. Trendon T. Shavers and Bitcoin Savings and Trust*](#)¹ in the United States District Court.

We note the purpose of introducing the GST Act was to tax personal consumption of goods and services. The use of 'Bitcoin' seems to more readily be described as a general medium of exchange. Taxpayers Australia would like to see further consideration from the Tax Office regarding whether 'Bitcoin' would constitute 'money' for GST purposes in light of the points raised within this submission and associated appendix.

¹ CASE NO. 4:13-CV-416