The Tax Institute

The Tax Summit

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Session 18.2: Crypto issues - They lost money but there is assessable income to report

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1. Background

It is said that Bitcoin, one of the thousands of types of crypto currency (crypto), was created by Satoshi Nakamoto in 2009.

Some 15 years later, in one hit, the Commissioner Taxation issued the following 4 tax determinations:

- **TD 2014/25** – Income tax: **is bitcoin a 'foreign currency'** for the purposes of Division 775 of the Income Tax Assessment Act 1997? (which has a compendium, which is a compendium for the following 4 determinations as well)
- **TD 2014/26** – Income tax: **is bitcoin a 'CGT asset'** for the purposes of subsection 108-5(1) of the Income Tax Assessment Act 1997?
- **TD 2014/27** – Income tax: **is bitcoin trading stock** for the purposes of subsection 70-10 of the Income Tax Assessment Act 1997?
- **TD 2014/28** – Fringe benefits tax: **is** the provision of **bitcoin** by an employer to an employee in respect of their employment **a property fringe benefit** for the purposes of subsection 136(1) of the Fringe Benefits Trax Assessment Act 1986?

Although these determinations have changed over time, what is startling is the fact that, since 2014, i.e. in the last (almost) 10 years, there has not been a single additional determination, public ruling, practical compliance guideline, practice statement or similar. Further, there have been very few private rulings.

Could this be because no one really cares much about the tax issues associated with crypto? I think not, given Commonwealth of Australia Gazette notice: Commissioner of Taxation – Notice of a crypto asset data-matching program – 26 April 2024. Apparently, the Government estimates that the Australian Taxation Office (ATO) will collect data from designated service providers for the 2024, 2025 and 2026 financial years in relation to approximately 700,000 to 1,200,000 taxpayers per year.

Known data matching encourages voluntary compliance and this might give rise to education pieces but the clear focus of the notice is about promoting compliance. The problem that I have with this is, how do we ensure that we comply with the tax laws when their application in crypto matters is so uncertain, especially given the near silence from the ATO?

To be fair to the ATO, there is commentary on crypto matters on its website. However, that commentary does not explain the Commissioner's reasoning for those views, it makes no reference to the authority for those views, such as legislative provisions, cases or rulings. As a result, in my view, it is of limited value.

Are the Commissioner's resources limited? Of course they are. I would however be very pleased to see more of the Commissioner's reasoning in print.

Also, to provide further balance, it seems extraordinary that there are so few private rulings on crypto matters. This suggests that tax advisers are keeping their views to themselves or perhaps more likely, there are a number of tax issues that have either not been identified or they have not been explored or made public by tax advisers generally. If so, we should not drop all of this at the Commissioner's feet.

Let's explore the above four TDs, the private rulings that followed them and what the Commissioner has had to say on his website, with the aim of drawing out a number of the issues (still) to be resolved.

Please note that sometimes I will refer to crypto generally and other times I will refer to Bitcoin specifically. Perhaps when I use the term Bitcoin, the same issues will arise if other crypto currency is used.

2. The use of crypto as remuneration

I have encountered situations where:

- Australian tax resident shareholder/directors have provided services;
- Australian tax resident and non-tax resident companies mine crypto;
- services have been provided in Australia and overseas
- individual tax residence has changed;
- both directors and purportedly non-employee contractors and a personal services entity have been engaged to "do the work";
- in each case, the reward for the services provided has been crypto;
- crypto was transferred to natural persons only after it came into being (obviously?) and even then, at a set percentage per month, i.e. there was a vesting formula that applied to the release of a set percentage of the crypto each month; and
- at any time before 100% of the crypto had vested, the mining company could buy back the crypto from the employee for nominal consideration.

2.1 Will FBT apply?

How many of the tax issues raised by the above can be resolved by reference to TD 2014/28? Unfortunately, the answer is, very few.

TD 2014/28 assumes an employment relationship, it doesn't distinguish between resident and non-tax resident employers or employees, it makes no reference to whether where the services were performed impacts the Australian tax outcome or the possible impact of a tax treaty.

This TD states only the most obvious of propositions, i.e. that the provision of Bitcoin (one of the many types of crypto) by an employer to an employee in respect of their employment is a property fringe benefit for the purposes of s136(1) of the Fringe Benefits Tax Assessment Act 1986 (Clth) (FBTAA)

Essentially, the reasoning is that, according to s136(1) of the FBTAA, a property benefit is a benefit referred to in s40 of the FBTAA, not being a benefit under Divs 2-10 of Part III of the FBTAA, i.e. the provision of property.

What is property? **Property** is defined in s136(1) to mean tangible and intangible property.

Tangible property is defined (in s136(1)) to mean goods and includes:

(a) animals, including fish; and
(b) gas and electricity (although s156 of the FBTAA carves out gas and electricity provided through a reticulation system).

Intangible property (again s136(1)) means:

(a) real property (yes, really);
(b) a chose in action and
(c) any other kind of property other than tangible property;

but does not include:

(d) a right arising under a contract of insurance; or
(e) a lease or licence in respect of real property or tangible property.

In para 5 of TD 2014/28 the Commissioner says that Bitcoin is not a chose in action and in para 9 he says that bitcoin holding rights are not a chose in action, without explaining why he holds those views (or what holding rights are).

I expect that we will hear more on this and we will consider other related issues such as whether crypto is currency or an asset for CGT purposes.

For FBT purposes however, a question is whether Bitcoin in particular is a chose in action, i.e. was the Commissioner correct in concluding that it is not a chose in action.

A chose is a thing or a right and it could be a chose in possession, being a thing of which the owner has actual enjoyment, or a chose in action, being a thing of which a person does not currently have present enjoyment but a mere right to sue to recover if it is withheld.

What is crypto? Crypto has been described as a series of zeros and ones. Perhaps the result of these zeros and ones is a chose in possession rather than a chose in action, in which case the Commissioner's conclusion was correct but perhaps we will hear more on this.

In para 9 of TD 2014/28 the Commissioner concludes that intangible property includes any other kind of property other than tangible property and that we therefore have a property benefit. It seems highly likely that Bitcoin is not a chose in action, it is property and therefore intangible property, in which case the Commissioner is correct.

2.2 The PAYGW rules

That is not the end of the matter.

To have a property fringe benefit (s136(1)), we need a fringe benefit (s136(1)) that is a property benefit (s136(1)). We have considered what a property benefit is but what is a fringe benefit?

Broadly, a fringe benefit (s136(1)) is a benefit (s136(1)) provided by an employer (s136(1)) to an employee (s136(1)) in respect of employment (s136(1)), not being salary or wages (s136(1)) – setting aside arrangements, associates, etc.

In essence, salary or wages is defined (s136(1)) to mean payments from which PAYG amounts must be withheld under Schedule 1 to the Taxation Administration Act 1953 (TAA).

So, must pay as you go withholding (PAYGW) be remitted where there are non-cash benefits?

The most commonly arising provision requiring PAYGW is s12-35 of the TAA. Broadly, it requires withholding from payments of salary or wages, etc, paid to an individual as an employee.

However, s12-10 of the TAA provides that Div 12 does not apply to non-cash benefits, which is a defined term.

Section 3AA(2) of the TAA tells us that an expression in Schedule 1 has the same meaning as in the Income Tax Assessment Act 1997 (ITAA 97). Section 995-1(1) of the ITAA 97 tells us that a non-cash benefit is property (or services) in any form except money.

Is crypto, those zeroes and ones, property? I will proceed on the basis that it is. I note that the Commissioner says, in para 16 of TD 2014/28, that Bitcoin is property.

2.3 Is Bitcoin money for PAYGW purposes?

Is crypto money, which is not defined in s995-1(1), at least for these purposes? That is perhaps a harder question which we will come back to. In the meantime, I note that, again in para 16 of TD 2014/28, the Commissioner says that Bitcoin is not money, without explaining why he reached that view.

The Commissioner's conclusion, which it is convenient to accept, is that the PAYGW rules do not apply to the provision of Bitcoin to an employee. Rather, a property fringe benefit would arise, in which case the income derived by the employee would not be assessable in light of s23L(1) of the Income Tax Assessment Act 1936 (ITAA 36).

2.4 Is Bitcoin foreign currency?

Above, I questioned whether Bitcoin is money. The Commissioner considered a different but related question in TD 2014/25, i.e. whether Bitcoin is a foreign currency. This question arose in light of the operation of Div 775 of the ITAA 97, which provides rules for recognising foreign currency gains and losses.

Foreign currency is defined in s995-1(1) of the ITAA 97 to mean a currency other than:

(a) Australian currency;
(b) digital currency; or
(c) anything prescribed by the regulations for the purposes of that paragraph.

It should be noted that paragraphs (b) and (c) above were added in 2023, after TD 2014/25 was released

Digital currency is defined in s995-1(1) to have the same meaning as in the A New Tax System (Goods and Services Tax) Act 1999 (GST Act).

2.5 Is Bitcoin Australian currency?

Neither of the terms currency nor Australian currency are defined, so do they take their ordinary meanings?

The answer seems to be no, because when a term has acquired a legal meaning there is a presumption that the legislature intended to pick up that meaning, unless the contrary intention appears (***Attorney-General (NSW) v Brewery employees Union of New South Wales (1908) 6 CLR 469 at 531***), which it does not seem to in this instance.

As a result, I tend to agree with the Commissioner in para 28 of TD 2014/24, that the term currency picks up its Currency Act 1965 (Clth) meaning, i.e. that only the Australian dollar is the recognised form of payment for discharging monetary obligations.

If this is right, it seems that Australian currency is the monetary unit established by that Act.

2.6 Is Bitcoin digital currency

Section 195-1of the GST Act provides that digital currency means digital units of value that:

(a) are designed to be fungible; and
(b) can be provided as *consideration for a supply; and
(c) are generally available to members of the public without any substantial restrictions on their use as consideration; and

(d) either:
  (i) are not denominated in any country's currency; or
  (ii) are denominated in a currency that is not issued by, or under the authority of, an *Australian government agency or a foreign government agency (within the meaning of the *5*); and
(e) do not have a value that depends on, or is derived from, the value of anything else; and
(f) do not give an entitlement to receive, or to direct the supply of, a particular thing or things, unless the entitlement is incidental to:
  (i) holding the digital units of value; or
  (ii) using the digital units of value as consideration;

but does not include a thing that, if supplied, would be a *financial supply for a reason other than being a supply of:

(g) one or more digital units of value to which paragraphs (a) to (f) apply; or
(h) *money.

It would therefore seem that, unless Bitcoin is money, it will be digital currency for the purposes of s195-1 of the GST Act, in which case it will not be foreign currency for the purposes of s995-1(1) of the ITAA 97. So, what is money for GST purposes?

2.7 Money (under the GST Act)

Section 195-1 of the GST Act defines money to include:

(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; or
(j) one or more digital units of value to which paragraphs (a) to (f) of the definition of *digital currency* apply.

It would seem that para (j) of the s195-1 of the GST Act definition of money would catch Bitcoin, in which case Bitcoin would not be money, Bitcoin would be digital currency and Bitcoin would not be foreign currency for Div 775 of the ITAA 97 purposes.

In para 43 of TD 2014/25, which (importantly) dealt with the old law, the Commissioner considers that Bitcoin is not foreign currency and therefore Div 775 of the ITAA 97, i.e. the foreign exchange gain and loss rules, do not apply.

He went on to say that transactions involving Bitcoin give rise to the same tax consequences as other barter transactions (see Taxation Ruling IT 2668). As a result, in the Commissioner’s view, if we receive or use Bitcoin for payment for goods or services we should include the Australian dollar value of the Bitcoin at that time.

He also noted, in para 36, that fluctuations in the value of Bitcoin over time could give rise to gains or losses which could be on either income or capital account, which we will consider shortly.

2.8 Do the SGC rules apply to crypto benefits?

Any superannuation guarantee shortfall is calculated under Part 3 of the Superannuation Guarantee (Administration) Act 1992 (SGAA), in particular under s19.

The formula in s19 of the SGCA refers to the payment of salary or wages, which term is defined inclusively in s11(1). It includes salary or wages applying the ordinary meaning of that term, and directors fees (s11(1)(b)) and (in s11(1)(ba)) it picks up s12(3) of the SGAA, that infamous provision that refers to payments that are wholly or principally for the labour of a person.

Importantly for these purposes, s11(3) provides that fringe benefits for FBTAA purposes are not salary or wages for superannuation guarantee purposes.

It seems to follow that, as one would expect, if the provision of crypto is subject to FBT, it ought not be taken into account in calculating any superannuation guarantee obligation or shortfall.

3. Crypto volatility and the proposed $3M super cap

Broadly, it is proposed (see Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023) that tax will be payable under a new Div 296 of the ITAA 97, from 1 July 2025, where a member's total superannuation balance (TSB) exceeds $3M and there has been an increase in their TSB at the end of the relevant year.

The calculations can be complex but the amount to be subject to tax is called taxable superannuation earnings (TSE) and TSEs will be assessed to the member at the rate of 15%.

A major concern, that so far seems to have fallen on deaf ears, is that TSE will include unrealised gains.

If an SMSF holds crypto, it is not difficult to imagine Div 296 tax arising on revaluation at year end, which might require asset sales to fund the tax payment, even though no gain has been realised and might in fact never be realised.

This proposal has been subject to widespread condemnation and at the time of writing there is a suggestion that this aspect of the proposed amendments will not proceed. Unfortunately, we will have to wait and see what Parliament decides.

Apart from the above, superannuation aspects of crypto are outside the scope of this paper.

4. Is Bitcoin a CGT asset?

We have just considered whether Bitcoin might be foreign currency, Australian currency, digital currency or money. There are also questions as to whether it is a CGT asset for the purposes of s108-5 of the ITAA 97 and, if so, whether it might be a personal use asset for the purposes of s108-20 of the ITAA 97.

In TD 2014/26, the Commissioner considers that what is sometimes referred to as a series of zeroes and ones will be a kind of property and therefore a CGT asset.

What is more, he considers that a dealing in either individual Bitcoin or the Bitcoin wallet could be a dealing in property. However, in para 14 of TD 2014/26, he prefers the view that the wallet is merely the aggregation of the individual Bitcoin.

Why is Bitcoin property, according to the Commissioner? He considers that in identifying property it is necessary to weigh up a number of factors, none being definitive. He notes a judicial willingness to regard property that is valuable in commerce as being property for legal purposes and he notes that Bitcoin is treated as valuable and transferrable. More particularly, Bitcoin holding rights are definable, identifiable by third parties and capable of assumption by third parties.

With this in mind, he considered the relationship between:

a) the object or thing, Bitcoin, being the digital representation of value constituted by three interconnected pieces of information (a Bitcoin address; the Bitcoin holding or balance in that address; and the public and private keypair associated with that address), and
b) the bundle of rights (referred to as 'Bitcoin holding rights') ascribed to a person with access to the Bitcoin under the Bitcoin software and by the community of Bitcoin users.

In doing so, he considered that the most important of these Bitcoin holding rights are the rights of control over one or more Bitcoin in the holder's Bitcoin wallet, e.g. the capacity to trade a Bitcoin for other value or use it for payment.

He added that, in his view, these rights, do not amount to a chose in action, as a Bitcoin holding does not give rise to a legal action or claim against anyone.

Does the Commissioner's reasoning and his conclusion that Bitcoin constitute assets for CGT purposes sit comfortably with me? Yes, they do.

4.1 CGT consequences of disposing of crypto

There are some relatively straightforward consequences of disposing of crypto, e.g.:

a) if it is a personal use asset (s108-20(2) of the ITAA 97), any capital loss on disposal will be disregarded (s108-20((1));
b) again if it is a personal use asset, if the first element of the asset's cost base is $10,000 or less, any gain on disposal is disregarded (s118-10(3) of the ITAA 97);
c) if a gain is brought to account as income under another provision, e.g. s6-5 of the ITAA 97, the capital gain is reduced by that amount (s118-20 of the ITAA 97);
d) if the asset disposed of is trading stock, any capital gain or loss is disregarded (s118-25 of the ITAA 97); and
e) if the gain or loss is a balancing adjustment that happens to a depreciating asset, any capital gain or loss is disregarded (s118-25 of the ITAA 97).

Obvious questions arising from the above include, when will crypto be a personal use asset, can crypto be trading stock and when will gains on the disposal of crypto be either income according to ordinary concepts or statutory income?

4.2 When will crypto be a personal use asset?

The key question in answering the above seems to be when will crypto be taken to be used or kept mainly for you or your associate's personal use of enjoyment. Note the use of the term "mainly" and the inclusion of your "associate".

The most obvious example where this test might be satisfied is provided by the Commissioner (in para 19 of TD 2014/26), i.e. where Bitcoin is kept or used mainly to make purchases for personal use or consumption.

The TD 2014/25EC – Compendium is quite helpful in setting out the Commissioner's views on this topic generally. For example, he says that if we purchase Bitcoin with the intention of holding it for a number of years so that it appreciates in value and we can spend it in retirement, then it is held for a profit-making purpose and it is not a personal use asset. Do I agree? I am not convinced that the Commissioner is correct but it is useful to understand his position.

He also considered the use of Bitcoin as a medium of exchange to buy a house and concluded that the intended use of the house would determine whether the Bitcoin was a personal use asset. Again, do I agree with the Commissioner? On balance, I agree.

However, what if your intention changes or if the use to which you have put your Bitcoin changes? There is a page on the ATO website, "Crypto asset as a personal use asset" (QC 69954), which acknowledges that the way you keep or use crypto might change and that it is the main use, determined at the time of disposal that determines whether it was a personal use asset. I agree, although it still leaves open how we determine main use when there are multiple uses and where they vary, e.g. how do you weigh time, importance, value increments from time to time, etc?

Unsurprisingly, in the webpage "Crypto to crypto exchange or swap" (QC 69949), the Commissioner says that if you exchange say Coin A for Coin B, there will be a CGT event. Further, he says that the disposal proceeds of the Coin A tokens will be the market value of Coin B.

4.2.1 Gift and debit cards

On the page on the ATO website, "Crypto asset transactions with gift cards or debit cards" (QC73646), the Commissioner rather states the obvious, i.e. that there will be a CGT event when you use crypto to buy or top up gift or debit cards.

Similarly, he says that whether the personal use asset rules might apply might be determined in accordance with the above.

4.3 Can crypto be trading stock?

It seems quite evident that crypto can be trading stock, when trading stock is given its s70-10(1) of the ITAA 97 meaning, not restricted by s70-10(2) of the ITAA 97.

I say excluding s70-10(2) as I will not consider whether holdings by superannuation funds might be trading stock and I will assume that the Taxation Of Financial Arrangements (TOFA) rules in Div 230 of the ITAA 97 do not apply.

Applying s70-10(1)(a) on its own then, it seems clear enough that crypto generally or Bitcoin more specifically might be "anything" produced (e.g. mined) or acquired and held for the purpose of manufacture, sale or exchange in the ordinary course of business.

In TD 2014/27, the Commissioner takes the same view.

However, we should look further. What if Bitcoin is acquired to use as a medium of exchange in the conduct of a business, specifically to pay for trading stock or components making up trading stock?

It seems that when we apply a full absorption costing system we should take into account both direct and indirect costs of producing trading stock.

However, in doing so, perhaps interest and other financial expenses (such as losses on crypto) should not constitute production overhead expenses and they should not be included in the cost of trading stock.

I note that when ruling IT 2350, which has stood since 1986, was released, crypto did not exist. In that ruling the Commissioner takes the same view that I expressed above in relation to interest and other financial expenses, i.e. that they do not form part of the cost of trading stock, albeit that that ruling dealt with the trading stock rules in the ITAA 36. I see no reason why the same principles should not apply under Div 70 of the ITAA 97.

You might look for support for this treatment in the accounting standards, such as Australian Accounting Standards Board AASB 102, at para 15 and following. However, I note that this can be a complex issue and capitalising borrowing costs into the cost of assets such as trading stock is contemplated in AASB 123. As a result, whether such costs should form part of trading stock might not be quite as straight forward as contemplated by IT 2350.

4.4 Gains on disposal of crypto will be subject to income tax?

It is surprising how often people seem to jump to the conclusion that gains on the disposal of crypto will be subject to CGT rather than income tax, perhaps without properly considering all of the income the tax issues.

If we need a warning, it is to be found in para 21 of TD 2014/26, where the Commissioner says that Bitcoin cannot be a personal use asset where it is held for a number of years with the intention of selling at an opportune time. He then goes on, in para 22, to remind us that any gain will be ordinary income where the intention or purpose in entering into the transaction was to make a profit of gain and the transaction was entered into in carrying out a commercial transaction. This is different to carrying on a business where the crypto might be trading stock.

Given the limited opportunities to derive a return on crypto, e.g. by staking, and even then, the possible modest returns that those opportunities might produce, the possibility if not probability that any gain on disposal might be on revenue account, as ordinary or statutory income, rather than on capital account, seems glaringly obvious.

It might be argued that the crypto was acquired to use as a medium of exchange and that any gain or loss on the disposal of the crypto takes on the character of the gain or loss on the (other) asset disposed of or activity undertaken. However, while I prefer that argument, I can see a contrary argument.

4.4.1 Specialised software to report crypto gains and losses

There is specialised software that calculates gains and losses on crypto transactions but consideration of that software is outside the scope of this paper.

4.5 Avoiding double tax (of the employer/miner and the employee)

Above, I contemplated that an employee might receive crypto as a fringe benefit and that his or her miner employer might be subject to FBT. This assumed that the benefit was crypto, which I will return too.

I also contemplated that a gain on the disposal of crypto, say by that employee, might be on either income or capital account.

Let us assume that the employee receives crypto, the employer pays FBT on the provision of that benefit of say $100,000, and the gain on disposal of the crypto by the employee is subject to income tax in light of say s6-5 of the ITAA 97 (the ordinary income provision) or s15-15 of the ITAA 97 (if there is a profit-making undertaking or plan on the part of the employee). If the sale proceeds on disposal of the crypto by the employee are say $500,000, how is the assessable gain calculated?

This is a simple question and instinct suggests that the answer should be $400,000 because the employer has paid FBT of $100,000 but is that the result that the income tax legislation achieves?

I note that the income tax provision that typically prevents the same amount being taxed twice, s6-25 of the ITAA 97, only prevents an amount being included in "your" assessable income more than once.

Unlike the anti-overlap rules in Div 7A of the ITAA 36 (in s109ZB), we do not seem to have a general anti-overlap rule which applies when we are dealing with gains that are on revenue account and FBT has been paid on the relevant asset, unless s23L of the ITAA 36 applies.

Unfortunately, s23L(1) excludes from assessable income, income which is derived by way of the provision of a fringe benefit. So, if it is only the net profit on the disposal of crypto that is brought to account as income, it seems that s23L would fail to provide the required shelter.

Perhaps the way to get a "credit" for the FBT paid by the employer is to argue, in line with the decision in ***FC of T v Whitfords Beach Pty Ltd 82 ATC 4031***, that in doing our profit calculation we should "pick-up" a market value cost for the relevant asset on the day that the profit-making undertaking commences, which might be the time that the fringe benefit arises.

It seems to me that this is an important issue on which the Commissioner might express a (favourable) view (to achieve an equitable outcome).

Even (or especially) FBT specialists might prefer that the FBT legislation be repealed but that is too much to wish for.

4.6 What is the benefit for FBT purposes and how is it valued?

In the above example, I assumed that the fringe benefit was the crypto and, to be clear, if the employer was a miner, the benefit might be an external property fringe benefit (s43 and s136(1) of the FBTAA).

This is because it could not be an in-house property fringe benefit (s42 and s136(1) because only tangible property can give rise to an in-house property fringe benefit).

It seems likely that the value of the benefit should be its notional value (s43(c) and s136(1)), being the amount that the employee could otherwise have been expected to pay for the crypto.

I qualified the above, in part, because of the question raised above as to how the employee calculates the gain that he or she makes on disposal of the crypto. If the employee would have been entitled to a deduction for the cost of the crypto (in light of the intended sale at a profit), might the otherwise deductible rule in s44 of the

FBTAA reduce the taxable value of the fringe benefit to nil? Unfortunately, that doesn't seem to be the better view.

Perhaps no such deduction would have been available. Rather, it might be that the income tax rules would bring the net profit on disposal of the crypto to account, rather than accounting for the sale proceeds and the cost of acquisition separately.

Another assumption that I made above was that the benefit was the crypto.

The term benefit is defined very broadly in s136(1) of the FBTAA, to include any right, etc.

Might a benefit arise when the employment agreement or salary packaging arrangement (s136(1)) is entered into, being the rights under that agreement?

Alternatively, might a benefit arise when the crypto comes into existence, or only to the extent that it vests each month, or only after the company's right to buy the crypto back expires?

My preferred view is that a relevant benefit arises as crypto vests monthly, and the right of the company to buy it back, perhaps for nominal consideration, goes to the value of the benefit.

Having said that, I would be delighted to see something on point from the Commissioner.

4.7 Payroll tax

Consideration of payroll tax is outside the scope of this paper.

5. Resident v non-resident employees and contractors

Above, I contemplated that an employee involved in crypto mining might be either an Australian tax resident or a non-resident. Further, his or her tax residence might change while the crypto is being "earned".

That Australian tax resident individuals might be taxed in Australia on their worldwide income hardly comes as a surprise (s6-5(2) and s6-10(4) of the ITAA 97).

On the other hand, if you are a foreign resident, only income from an Australian source might be subject to tax here (s6-5(3) and s6-10(5)), although these general rules are subject to exceptions and sometimes impacted by double tax agreements (DTAs) with other countries.

Involvement in crypto mining, where individual tax residence changes during the process, can complicate the Australian tax position, especially where crypto is provided as a fringe benefit.

5.1 Ceasing to be an Australian tax resident individual

Before exploring more of the FBT rules, let us recall that on ceasing to be an Australian tax resident, CGT event I1 might apply, in which case, broadly, the individual could be taken to dispose of their CGT assets, other than taxable Australian property (TAP), at their market value.

What if the employee ceases to be an Australian tax resident before he or she has unrestricted ownership of the crypto?

This could make determining whether rights under a salary sacrifice agreement are an asset for CGT purposes, if so when such rights or assets come into existence and what their value might be, of considerable importance.

What is more, if the individual is taxable on the crypto in another country, say because they are a tax resident of another country on the vesting of the crypto, they might not be entitled to a credit in that country for any FBT paid by their employer in Australia.

Also, query whether they will be entitled to a credit overseas for tax paid in Australia as a result of CGT event I1 happening?

5.1.1 Individual tax residence - proposed change in legislation

In the 2021-22 Federal Budget it was announced that the individual tax residence rules are to be amended (from 1 July after Royal Assent), but we are still waiting on those amendments.

5.1.2 Temporary tax residence

For simplicity, I have not considered temporary tax residence.

5.2 Becoming an Australian tax resident individual

On the other hand, if the employee becomes an Australian tax resident before the crypto vests, he or she might benefit from a CGT cost base equal to the market value of their (post) CGT assets other than TAP (s855-45 of the ITAA 97) but what would the asset, if any, be and what would its value be?

What if the person becomes an Australian tax resident shortly before the crypto vests? What if there is not yet a CGT asset or the value of an unvested entitlement is minor? Might the individual be taxed in Australia on a large gain that was generated from their personal exertion, in the main, while they were a non-resident?

Alternatively, might the non-resident employer be subject to FBT, just like an Australian resident employer would, which could come as a very nasty surprise to the non-resident employer.

5.3 FBT on non-Australian resident employers

So, how do the FBT rules work where we have a non-resident employer?

At the risk of oversimplifying matters, it seems that to calculate the fringe benefits taxable amount (which is akin to taxable income for income tax purposes) under the FBTAA (see s72 of the FBTAA), often, s5B(1A) will take us to s5B(1B), which will take us to s5B(3) , which will take us to s5C(3), where we identify fringe benefits in respect of each employer's employees (that are GST creditable benefits).

If so, we need fringe benefits that are "in respect of" an employer's employees.

The definition of fringe benefit (in s136(1)) seems to add little in this context.

An employer means a current, future or former employer (s136(1)), and a current employer includes someone who or which pays salary or wages (s136(1)), which includes a payment from which PAYGW must be withheld under the TAA.

A former employer is someone who or which was a current employer.

So, did the non-resident employer have a liability, at some time, under the PAYGW rules?

Div 12 of the TAA, which contains the PAYGW rules, does not distinguish between Australian tax resident or non-resident employers.

This makes sense because the Australian branch of a foreign company would be a non-tax resident of Australia but it is appropriate that it be subject to the PAYGW rules.

More particularly, s12-35 of the TAA simply refers to withholding from salary or wages paid to an employee.

What prevents the PAYGW rules from applying too broadly is, in part, the exemptions in s12-1(1) and (1A) of the TAA, which exclude the PAYGW rules where the income is exempt income, or not assessable income and not exempt income, of the recipient.

Where this seems to take us is that non-Australian tax resident employers can be subject to both the PAYGW and FBT rules.

However, to be subject to FBT, the fringe benefit must be "in respect of" the employee's employment.

"In respect of" is defined in s136(1) of the FBTAA, to include, i.e. it is not an exhaustive definition, by reason of, by virtue of, or for or in relation directly or indirectly to, that employment.

It is interesting that there is no inclusion of a term such as "to the extent to which".

It would therefore seem that a non-resident employer could face an Australian FBT liability if the relevant benefit is provided to an Australian tax resident employee, where the non-resident employer was subject to PAYG and the benefit is “in respect of” that employment.

Is a benefit such as crypto in respect of employment if an employee was a non-resident of Australia and working outside Australia for say 3 years and they then continued their employment in Australia for say one month to finish a project off?

I would be more comfortable that we would get an equitable outcome if we had an “extent to which” rather than an “in respect of” test.

Somewhat similarly, if we had an Australian tax resident employee who gave up his or her Australian tax residence and the benefit was provided soon after they ceased to be an Australian tax resident, it would seem that FBT could apply for the same reasons outlined above, again without the benefit of any prorating in line with the period that they provided services as an Australian tax resident.

Should TD 2014/28 be expanded or replaced to deal with the above important issues? In my view, yes it should.

6. The impact of DTAs on individuals

I referred above to tax resident and non-resident individuals. There might be a tendency to consider the tax residence of an individual in line of the definition of residence for individuals in s6(1) of the ITAA 36.

Remember that an individual could be a tax resident of more than one country and if so, if we have a DTA with the other country, we would go to the tie-breaker rules in the relevant DTA. For example, in the case of the DTA between Australian and the United States, we would have regard to Article 4.

What if an employee, who is a tax resident of one country (which we established under say Article 4), performs services in another country with which we have a DTA? If the other country was the United States, we would have regard to the dependent personal services rules in Article 15.

What if the individual is not an employee? Then, we might have regard to the independent personal services rules, being Article 14 in the case of the DTA with United States.

What if an individual sells their crypto in another country, i.e. a country that they are not a tax resident of? If so, we might have regard to an alienation of property (not of real property) article, or if there is not one, an “other income” article such as Article 21 in the DTA with the United States.

You might also consider how the DTA deals with capital gains.

Where a tax offset or credit might be allowable for income tax paid in the other country, it will typically be limited to income tax, not FBT. For example, see Article 22 of the DTA with the United States.

This might drive planning to minimise FBT.

7. Might the tax residence of the mining company change?

It is clear enough that a company incorporated in Australia will always be an Australian tax resident (s6(1) of the ITAA 36), unless the company is also a tax resident of another country with which Australia has a DTA and the tie-breaker rule in the relevant DTA results in the company being taken to be a tax resident of the other country.

However, what if the shareholders or directors of a company incorporated outside Australia become Australian tax residents?

Particularly after the decision of the High Court in ***Bywater Investments Ltd v FC of T; Hua Wang Bank Berhad v FC of T [2016] HCA 45 (Bywater)***, and in the absence of amending legislation to overcome that decision, there must be a concern that foreign incorporated companies have become or will become Australian tax residents, as a result of directors and owners becoming Australian tax residents

In my experience, the owners of and employees of crypto miners are very mobile, so the above issues could be particularly relevant for them.

I do not have a solution for them. It seems that a legislative remedy is required.

In the meantime, a brief "roadmap" to some of the pronouncements, if you are concerned that you might be impacted by issues, includes:

i) TR 2014/15 reflected the Commissioner's views on corporate tax residence pre ***Bywater***;
ii) TR 2014/15 was withdrawn and replaced with TR 2018/5 and PCG 2018/9 post ***Bywater***;
iii) PCG 2018/9 DCI amended PCG 2018/9 and it reminds us that the transitional compliance approach that the Commissioner adopted expired on 30 June 2023.

8. The impact of DTAs on companies

DTA’s might impact us in other ways. For example, crypto mining work might be done by employees or contractors anywhere in the world. Indeed, these people might be highly mobile.

Further issues that this raises include whether the presence of a “significant” individual or individuals in a place might constitute a permanent establishment (PE) of say a company in that place.

Article 5 of the DTA with the United States considers when a PE might exist.

In my experience, determining whether a PE exists is often problematic and not clearly resolved by reference to the commentary on the OECD model agreement.

If a PE might exist, there is then the matter of determining the business profits attributable to that PE – see for example Article 7 of the DTA with the United States.

Again in my experience, the answer to this question is often not clear.

9. What if a service provider incorporates – the PSI rules?

What if, rather than becoming an employee of a crypto miner, the individual incorporates a company (a personal services entity or PSE), which provides his or her services?

The personal services income (PSI) rules in Divs 84 to 87 of the ITAA 97 most commonly apply (or would apply), in my experience, where the end user of the services pays (or would pay) money to the PSE as consideration for the services provided.

Broadly, the PSE rules then encourage us to treat the PSE as a conduit and to flow (most of) the PSI through the PSE to the relevant individual.

What if the PSE is rewarded for these services by way of the provision of crypto, rather than cash?

Divs 84 to 86 contemplate that PSI is ordinary income or statutory income.

I am not aware of any primacy or anti-overlap rule in the PSI rules, unlike say s109ZB(3) in Div 7A of the ITAA 36 which can result in the FBTAA overriding Div 7A.

Perhaps the combination of s21 and 21A of the ITAA 36, where consideration is not in cash, might apply to treat the crypto as income of the PSE.

If so, when the crypto is passed on by the PSE to the individual who has done the work, it would seem that FBT might be payable by the PSE but where would it get the cash to pay the FBT if the PSI rules effectively require it to pass on the PSI that it receives to the individual who provides the services?

Also, would the PSE be entitled to a deduction if it passed the crypto that it received on to its employee, particularly in light of the deduction limitation provision, s86-60 of the ITAA 97, whatever that provision means?

If, by way of alternative, the end user of the services transfers crypto directly to the individual who does the work, in my view it is likely that the PSE would be taken to have derived the income and the PSE might also face an FBT liability under one or more of the associate, arranger or participation or facilitation provisions in s136(1) ***fringe benefit*** (d), (e) or (ea) of the FBTAA.

In light of the above, I would dearly like to see something from the ATO on point. In the meantime, I would be disinclined to establish or use a PSE, if it might receive crypto as a consideration for personal services.

10. GST

Consideration of GST aspects of crypto is outside the scope of this paper.

11. Gambling and losing

11.1 Loss or theft

A good example of why we need tax determinations, preferably in draft for comment, is the ATO webpage on "Loss or theft of crypto assets" (QC 69951).

To say that we can claim a capital loss if your crypto asset is lost or stolen is pretty obvious.

On the other hand, what of it was held on income account?

It goes on to say that you have to work out whether it is lost. Not surprisingly, there is no guidance as to how you determine whether you have lost it (rather than say having misplaced it for a period).

It gets worse, we know that if you lose your private key you lose access to your crypto assets and that with any CGT asset, of course, you need to establish both ownership and cost base. However, the web page goes on to say that you need evidence of the date that you lost the private key.

I would like to know the authority for this requirement and why it is not sufficient to specify a date range within which you haven't accessed, or you found that you have been unable to access or locate, the private key.

The same page says that if a crypto asset exchange goes into administration, you may suffer a capital loss (again, on capital, not income account) but only when the administration is finalised.

This seems unexceptional but for the focus on CGT consequences alone.

11.2 Gambling

While we are on the loss theme, the ATO has a webpage on crypto and gambling, "Crypto asset prizes and gambling winnings" (QC 73647).

Why did the Commissioner consider it an appropriate use of resources to tell us that crypto that we win through gambling or as a prize is not ordinary income, and that we don't make capital gains or losses from gambling, games or competitions?

It seems self-evident that a crypto asset that you win might then be held as an investment but query whether the Commissioner is correct in saying that the market value substitution rule would give you a market value cost base (s112-20 of the ITAA 97).

12. Gifts and donations of crypto

Instead of losing crypto, you might give it away.

Assuming that crypto is a CGT asset, that would constitute a disposal and there would be a CGT event.

If the asset is a personal use asset, no CGT might arise if the first element of the cost base of the crypto (s118-10(3) of the ITAA 97) is $10,000 or less.

If there is a gift to a related party, be aware that the market value substitution rule might apply to deem you to have disposed of the crypto at market value (s116-30(1) of the ITAA 97).

If the crypto is trading stock, there might be a disposal outside the ordinary course of business, in which case the disposal would be taken to occur at market value (s70-90 of the ITAA 97).

If instead the crypto was held as part of a profit-making undertaking, there is no market value substitution rule for income tax purposes.

A capital gain might be disregarded under s118-60(2) of the ITAA 97, if a gift is made to a deductible gift recipient (DGR) under the Cultural Gifts Program (see s30-15 Items 4 and 5 of the table, in the ITAA 97).

You might also have regard to the deduction rules in s30-15, where there is a gift of property. The rules differ between type of DGR, the value of the property and how long it has been held.

There is a page on the ATO website, “Gifts and donations of crypto assets” (QC69687), which considers some of the above but which provides no authority for the views expressed.

13. And the Commissioner said (but not in a ruling)

13.1 Staking rewards

I have tried to minimise the use of crypto technical terms and descriptions because I have heard people complain that they have not understood what people were talking about when a lot of jargon was used. With this in mind, I will not adopt the Commissioner's description of staking in his webpage "Staking rewards and airdrops" (QC 69950) or "Crypto assets glossary" (QC 69956).

Instead, let us imagine that staking refers to an arrangement where you transfer crypto to another party for a period of time in order to receive a reward for doing so, e.g. some additional tokens.

In the above page on staking rewards, the Commissioner says that the money value of the additional tokens will be ordinary income of yours when you receive the tokens. Further, he says that the cost base of the additional tokens is their market value when you receive them. Consistent with other mere webpage guidance, he doesn't explain why he considers that (presumably) s112-20 of the ITAA 97 achieves that result.

People who create new blocks are called forgers. This is my description. They might receive additional tokens as a reward. It is hardly surprising that the Commissioner says that the money value of such additional tokens is ordinary income at the time the tokens are received.

13.2 Airdrops

The same webpage also deals with airdrops. I would describe airdrops as a marketing tool whereby crypto is given/airdropped to existing token holders to build their use and popularity.

The Commissioner says that the money value of an **established** token that you receive by way or airdrop is ordinary income at the time that you receive it and that its cost base will be its market value when you receive it.

Unfortunately, once more, there is no explanation of the Commissioner's reasoning.

Alternatively, you might receive an airdrop of tokens that is part of the **initial distribution** of those tokens, i.e. where there has been no trading in the project's tokens.

In this case, the Commissioner says that you don't derive ordinary income or make a capital gain at the time that you receive them and that their cost base will be zero ($0).

Even if you have reservations about the Commissioner's view(s), you might be happy to adopt this approach.

Here is a warning. The Commissioner's examples assume that it is CGT rather than the ordinary income tax rules that will apply on disposal. Clearly, that will not always be the case, so be careful not to simply follow the webpage examples uncritically.

I note that on the webpage "What are crypto assets" (QC 69946), the Commissioner says that as a general rule, for investors, crypto assets are taxed as CGT assets and rewards for staking are ordinary income. He then mentions the trading stock rules and the possible exclusion of capital gains on personal use assets.

It concerns me that any analysis by taxpayers and advisors might be incomplete, as there is no reminder about the possibility that gains might be on income account (as a result of there being a profit-making undertaking).

13.3 Crypto chain splits

I would describe a blockchain as a record of transactions, made up of blocks, of a particular type of crypto. New blocks might be added to the chain. There might then be a split, e.g. Bitcoin holders might receive Bitcoin Cash.

In the webpage "Crypto chain splits" (QC 69953), the Commissioner says that, when the split happens, you don't derive ordinary income or make a capital gain. However, he doesn't explain why he holds this view.

He also says that when you sell the new crypto asset, you will have a nil cost base ($0) for that asset.

He provides no reasoning but you might infer that he considers that the merged or split asset rules in s112-25 of the ITAA 97 do not apply (but we do not know why he holds that view).

Again, the income tax implications are barely considered.

The Commissioner also said that, after a split, the original crypto asset might no longer exist, if none of the crypto assets that you hold after the split have the same rights as the original. If so, he says that CGT event C2 might happen.

This might come as a surprise, i.e. that, at first blush, changing rights might result in the disposal of the original asset and the creation of a new asset.

However, the example provided by the Commissioner helps explain his reasoning.

He contemplated that, on the splitting of Bitcoin Cash into Bitcoin Cash ABC and Bitcoin Cash SV, there was a change to the core consensus rules in the original Bitcoin Cash protocol. Further, neither Bitcoin Cash ABC nor Bitcoin Cash SV existed on the original blockchain. As a result, miners using pre-split software would not find blocks on either ABC or SV chains.

He therefore concluded that there was no continuity of the original asset.

However, I would still have liked to have seen his consideration of the split asset rule in s112-25 of the ITAA 97.

13.4 Wrapping tokens

As I understand it, wrapping refers to the process of converting crypto into a new token that is compatible with a different blockchain.

This might be done to facilitate liquidity and cross-chain compatibility. For example, Wrapped Bitcoin is a token on the Etherium blockchain that represents Bitcoin. This allows Bitcoin holders to participate in Ethereum based decentralised finance (DeFi), without selling their Bitcoin.

I understand that this happens by locking the original Bitcoin in a smart contract or with a custodian and minting an equivalent amount of wrapped tokens on the other blockchain.

On the webpage "Decentralised finance and wrapping crypto" (QC 73649), the Commissioner says that when you wrap or unwrap a crypto asset you exchange one crypto asset for another and a CGT event happens.

While I do not claim to understand the intricacies or details of the smart contracts, my sense is that the Commissioner is likely to be correct.

13.5 Decentralised finance

I understand that decentralised finance or DeFi is a form of blockchain based peer to peer finance.

It seems that the terms of the relationship can vary between apps, protocols and platforms, in which case the tax consequences could differ also.

I also understand that terms such as lending, borrowing and interest might be used in such arrangements but be careful because those terms might not take their usual meaning.

As a result, in the Commissioner's view on his webpage "Decentralised finance and wrapping crypto" (QC 73649), he says that to determine the CGT treatment, we have to analyse the terms and conditions of the protocol and its actual operation.

I would add that we ought to consider the income tax consequences as well.

Essentially, the Commissioner considers that a CGT event might happen if we exchange one crypto asset for another crypto asset, or one crypto asset for a right to receive an equivalent number of the same crypto assets in the future. In part, the reasoning is that a CGT happens if you transfer a fungible crypto asset to an address that you don't control that already has a balance of the same fungible crypto asset.

The Commissioner says that the income tax rules that apply to the lending of shares and similar securities don't apply to crypto "lending".

The Commissioner provides an example of Sasha who "lends" 50 Xcoin. Because she doesn't maintain beneficial ownership over the Xcoin, a CGT event is said to happen.

In another example, Mika transfers ZYX coins costing $100 each to a DeFi platform pool.

They are worth $90 at the time of transfer to the platform and the Commissioner says that she has made a capital loss of $10.

He does not explain what provision(s) he relies upon to support that conclusion, in particular how the considers that the actual consideration or the market value substitution rules work in such a case.

He goes on to say that Mika would make a capital gain when the ""loan" is repaid" if the value of the coins transferred to her is greater than the value of the coins when she disposed of the original coins to the platform.

Again, I would be interested to understand the Commissioner's reasoning,

13.6 Liquidity pools

I understand that a liquidity pool is an arrangement where crypto assets are gathered and locked in place under a smart contract. This might be done to facilitate decentralised lending.

The party transferring the crypto into the pool is called the liquidity provider.

In exchange for their deposit, they receive new crypto assets or rights.

Not surprisingly then, on his webpage "Decentralised finance and wrapping crypto" (QC 73649), the Commissioner says that a CGT event happens when you deposit your crypto assets into the liquidity pool. The capital proceeds are said to equal the value of the asset that you receive in return for that deposit.

He also says that when you withdraw crypto assets from the liquidity pool, another CGT event happens, this time to the crypto asset that you received when you made the original deposit. That seems logical.

It is disappointing that the Commissioner did not consider the income tax consequences of profits or gains on such arrangements.

13.7 DeFi interest and rewards

Given the absence of consideration of the income tax consequences above, it is noteworthy that the Commissioner says, on his webpage, “Decentralised finance and wrapping crypto” (QC 73649), that periodic rewards in the form of a crypto asset from a DeFi platform would be assessable income.

Such a reward might arise where you place your crypto assets in a DeFi platform account.

14.Some private binding rulings (PBRs)

14.1 1052205739577 on non-commercial losses

The above PBR is a reminder that we could consider that we are conducting a business, but we might make a loss, and if we are a natural person, either alone or in partnership, the non-commercial loss rules in Div 35 of the ITAA 97 might apply.

This PBR dealt with an application for the application of the Commissioner’s discretion under s35-55 of the ITAA 97 not to apply s35-10(2), the loss deferral rule, for certain years while the taxpayer was involved in mining Bitcoin and Ethereum.

Perhaps the reasons that the Commissioner decided that it would not be unreasonable to apply s35-10(2) are less important than his reliance on ruling TR 2007/6 generally, as we are likely to have regard to both that ruling and the above PBR if we are faced with such a loss.

14.2 1052192526297 on smart contract issues

This PBR considered a situation where crypto was sent (say by you) to a burn address and burnt under a smart contract.

Under such arrangements, when the stake period ends, you get newly minted tokens which includes an amount by way of yield or reward.

Not surprisingly, particularly in light of the above, the Commissioner considered that a CGT event happened when the original crypto was sent to the burn address and burnt.

The CGT event was considered to be an event C2, more particularly that the crypto was abandoned, surrendered or forfeited (s104-25(1)(d) of the ITAA 97).

The ruling went on to say that the cost base of the new crypto was the market value of the old crypto that was burnt, based on s110-25(2) of the ITAA 97.

It did not explicitly consider whether the rights to a ”reward” for entering into the smart contract constitutes property and if so whether the value of that property should form part of the cost base of the new crypto.

Further, the Commissioner’s conclusion that the “reward” did not constitute income according to ordinary concepts was, in my view, surprising. With respect, I did not find his reasoning on this point satisfying.

In addition, while not asked, the Commissioner could have commented on whether s15-15 of the ITAA 97 applied, i.e. the profit-making undertaking rule, if s6-5 of the ITAA 97 didn’t apply to treat the “reward” as income.

14.3 1051781223882 on using crypto to fund gambling

In this ruling the Commissioner considered that the taxpayer was not carrying on a business of gambling.

The gambling was funded by crypto, which was deposited on a betting website.

Consistent with determination TD 2014/26 (above), the Commissioner considered that crypto was a CGT asset and, not surprisingly, that its cost base was the amount paid for it.

While perhaps not expressed terribly elegantly, it seems that the Commissioner considered that there was a CGT event A1 when the crypto was transferred to the gambling website and that the relevant disposal (on the transfer to the website) was taken to happen at market value under s116-20(1) of the ITAA 97.

The Commissioner considered that the crypto transferred to the gambling website by the taxpayer and the taxpayer's winnings, which were also in crypto, were all personal use assets.

15. Should the ATO provide guidance on constantly evolving technology?

Should the ATO provide guidance on constantly evolving technology? The answer, yes, seems self-evident, both generally and more specifically given the non-exhaustive list of issues raised above.

In the absence of rulings and the like, where the Commissioner's reasoning and the authority for his views are set out, we are left with massive questions during a time that he reviews the transactions of an estimated 700,000 to 1,200,000 taxpayers, each year for the next 3 years.

Also, where rulings and the like are withdrawn or amended, there is a clear trail. That is not the case where he merely updates commentary on the ATO website, and that is not satisfactory as it has the potential to leave taxpayers and advisors exposed.

Lest I be seen to be overly critical of the "product" produced by the Commissioner on crypto matters, I should add that the ATO employs some of the smartest and most reasonable people that I have known. What I would greatly appreciate however is to have more of that knowledge and skill directed at providing guidance, including authority for the positions taken, in the crypto space.

Also, if advisors had explored these and a raft of other crypto related issues and then applied for private rulings, we would no doubt have a greater body of knowledge, or at least a better understanding of the issues, so our current dilemmas should not land solely at the feet of the Commissioner.

END