Bitcoin: Opportunities for Aruba

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The webinar title mentions Bitcoin, but I will extend my lecture to cryptocurrencies in general but will limit it to the Aruba regulatory framework. Does that framework offer opportunities for Aruba? Except in as far and to the extent relevant for this lecture, I will not discuss what cryptocurrencies are neither will I discuss whether you should invest in them. The other speakers will take care of that and it would not surprise me if several of the attendees know better how to buy, sell and invest in cryptocurrencies than I do.

Bitcoin was the first decentralized cryptocurrency developed in 2009. Everyone who has an internet connection with access to the world wide web has access to cryptocurrencies, Bitcoin included. If you search for "Bitcoin and Aruba", you will be surprised! One of the first items popping up is an article from the Freeman Law, a Dallas-Forth Worth Texas law firm, with title "Aruba and Cryptocurrency" and subtitle "Aruba Cryptocurrency Laws". That article heavily relied on the 2019 IMF Working Paper titled "Fintech in Latin America and the Caribbean: Stocktaking", and mentions that Aruba lacked a specific comprehensive law providing a concrete regulatory framework for the cryptocurrency technology but that digital currencies were allowed. The article is outdated. On September 8, 2021, a major part of the overall revision of the AML (Anti-money laundering) and CFT (combatting of terrorism financing) ordinance AB 2021 no. 143 entered into force.

AB 2021 no. 143 introduced terms like "virtual currency" (virtuele valuta) that is defined as "a digital representation of value that is not issued or guaranteed by a central bank or a government, that is not necessarily linked to a legally established currency and that does not have the legal status of currency or money, but that is accepted by individuals or legal persons as a medium of exchange and that can be transferred, stored and traded electronically". Sounds familiar?

According to Investopedia: "A cryptocurrency is a digital or virtual currency that is secured by cryptography, which makes it nearly impossible to counterfeit or double- spend. Many cryptocurrencies are decentralized networks based on blockchain technology—a distributed ledger enforced by a disparate network of computers. A defining feature of cryptocurrencies is that they are generally not issued by any central authority, rendering them theoretically immune to government interference or manipulation."

Because they are used as "means of exchange" and, especially Bitcoin, since it was created has often been in the news when spectacular gains, but also spectacular losses were reported, it is not a surprise that cryptocurrencies have drawn the attention of governments. Some have banned them (China, India), some try to regulate them. That should not be a surprise because over 200 countries in the world have committed to combat money laundering and terrorist financing within the framework of the Financial Action Task Force (FATF) AB 2021 no. 143 is a result thereof.

AB 2021 no. 143 introduced two new categories of non-financial service providers – the people that are not financial service providers like banks and insurance companies – but are nevertheless required to identify their clients and know their client's business to help combat money laundering and terrorism financing like lawyers, accountants, tax advisers, realtors, jewelers, casinos, etc. The two new categories of non-financial service providers are: (a) persons who professionally or commercially engage in the exchange of virtual currencies and fiat currencies (fiduciaire valuta), and (b) persons who professionally or commercially offer custody wallets (bewaar portemonnees). Do you recognize the crypto currency exchange and the cryptocurrency wallet? A person providing services on behalf of clients to secure cryptographic private keys to hold, store or transfer virtual currency is designated a provider of cryptocurrency wallets.

A non-financial service provider organizing currency exchange transactions with a value of Afl. 1.750, = or more in and from Aruba as a business, falls within the scope of the Aruba AML/CFT and will be required to perform ongoing client due diligence investigations. That is also required from the non-financial service provider offering cryptocurrency wallet services.

The purchase of cryptocurrency by a resident of Aruba from a non-resident is for foreign exchange purposes a so-called capital transaction. For such a transaction in principle a foreign exchange license is required. However, the Central Bank has granted a general license whereby resident individuals and businesses are allowed to conduct capital transactions up to values of Afl.300.000 and Afl.750.000, respectively.

For smaller cryptocurrency investors the capital transaction limits do not appear too burdensome. Of course, if one would want to invest larger sums one would have to request a special license form the Central Bank. Within that regulatory framework you are free to invest in cryptocurrencies.

Does Aruba's regulatory environment offer opportunities? According to US IRS Notice 2014-21, virtual currency is treated as property for US federal tax purposes. That should also be the case for Aruba tax purposes. Cryptocurrency property is either movable property (roerend kapitaal) or business property (bedrijfsvermogen). If cryptocurrency property qualifies as business property, capital gains will be taxable, but capital losses should be tax deductible. If the cryptocurrency qualifies as non-business movable property – you are investing as an individual private investor - the normal rules of taxation of movable property apply: capital gains are not taxable, but capital losses are not tax deductible.

Let us assume that you set up a VBA company to invest in cryptocurrency. If you do nothing the assets of that company will be business assets subject to profit tax and dividend tax. What happens, however, if the VBA company were to opt for transparency? In that case the company will not be subject to profit, dividend or income tax, but its assets and income would be attributed to you. You will be taxed as if you were the individual private investor: capital gains would not be taxable, but capital losses would not be tax deductible. However, it appears that the Afl. 750.000 capital transaction limit would now apply to the cryptocurrency investments undertaken through that transparent VBA company.

Now let us assume that an individual private foreign investor would set up such a transparent VBA company to invest in cryptocurrencies. Would that be possible? In 2019 Aruba had to amend its tax legislation to comply with its so-called Base Erosion and Profit Shifting (BEPS) commitments. Under those amendments, a company will only be treated as transparent if, regarding its "relevant activities", it meets the conditions of real economic presence in Aruba. The real economic presence conditions are laid down in the Decree designation real economic presence of transparent company (AB 2019 no. 22).

If a transparent company engages in one or more of the relevant activities mentioned in Article 3 of that decree, the related core income generating activities must be undertaken in or from Aruba. Relevant activities are head office activities, distribution and other services, financing and leasing activities, asset management activities, banking and insurance activities, shipping activities, pure holding activities and intellectual property activities. Unless they would qualify as asset management activities, the mere investing in cryptocurrencies is not mentioned. With respect to asset management core income generating activities, the Decree mentions (1) taking decisions regarding the holding and selling of investments; (2) calculating risks and reserves (3) taking decisions regarding currencies, interest rate fluctuations or hedge positions, and (4) the preparation of regulatory and other reports for government institutions and investors. Asset management activities therefore appear to refer to and are limited to diversified active asset portfolio activities and not to passive investment in cryptocurrencies. A transparent company passively investing in cryptocurrencies appears therefore not be required to meet the real economic presence test and should qualify as a transparent company and the Aruba profit, dividend and income tax should not apply to it.

The Base Erosion and Profit Shifting legislation did not change the Foreign exchange transactions ordinance (AB 1990 no. GT 6). Therefore, a transparent company owned by non-residents wishing to invest in cryptocurrencies could apply for a foreign exchange exemption and such exemption would also exempt it of foreign exchange tax. According to me this could be a marketable product offering opportunities for Aruba, in particular, for our corporate and financial services sector. Should this not deserve to be investigated by the private sector?

We must comply with international commitments. I hope to have shown that implementation of those commitments in our laws not only increases the reliability and international acceptance of our legal system, but also may create opportunities if we are willing to look for them. As you know, until recently I was a lawyer and tax advisor. It is still in my blood to analyze regulatory environments within that framework, but my lecture is not intended as a legal or tax advice. You should be aware that there are many issues that I have not discussed such as taxation of mining rewards, deductibility of transaction fees, etc. Please consult with your own lawyer and tax advisor.

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