4.4 Is a crypto investor speculating?

4.4.1 General principles

Gambling transactions are specifically exempt from CGT by virtue of TCGA 1992, s. 51:

> "It is hereby declared that winnings from betting, including pool betting, or lotteries or games with prizes are not chargeable gains, and no chargeable gain or allowable loss shall accrue on the disposal of rights to winnings obtained by participating in any pool betting or lottery or game with prizes."

A professional gambler is outside the scope of tax (*Graham v Green* and *McMillan v HMRC*).

Cases: *Graham v Green* (1925) 9 TC 309; *McMillan v HMRC* [2020] UKFTT 82

4.4.2 Original HMRC guidance

It is perhaps here that HMRC have a lot to answer for in their original 2014 guidance. If we go back to that short guidance it set out the following position:

> "Depending on the facts, a transaction may be so highly speculative that it is not taxable or any losses relievable."

Of course, the statement does begin with "depending on the facts". In the current market, there are some exceptional transactions that could arguably amount to gambling. However, this would be letting HMRC off the hook. In 2014, HMRC were only talking about Bitcoin and the buying and selling of coins. It is perhaps difficult to see how they ever came to this conclusion.

4.4.3 Applying the legislation

It would be reasonable to conclude that, at first glance, a crypto transaction would not fall within the exemption above. Certainly, not in a satisfactory manner. However, bearing in mind HMRC's original statements, and the fact the exemption was drafted well before the ascent of cryptocurrency, it is perhaps worth taking a more detailed look.

To be in this exemption, there must be “winnings” from “betting” or some other kind or, alternatively, it is necessary to identify a “prize” from a “lottery” or “game”.

The first question is “what is a bet?”. The very old case of *Carbolic Smoke Ball* provides the following definition:

> “It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering contract from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent on that event, one shall win from the other, and that other shall pay or hand over to him a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he or she will so win or lose, there being no other real consideration for the making of such contract by either of the parties.”

Emphasis here is placed on the fact that the parties to the contract should have no interest in “that contract” other than the sum or stake they will win or lose. Of course, we must recognise that the case law is well over a century old (albeit that it remains good law). It should be noted that the *Gambling Act* 2005, s. 9 seemingly sets out no requirements regarding interest under the contract.

In respect of the purchase of cryptocurrency, it seems to the author that one certainly acquires an intangible asset under the transaction.

Perhaps a closer parallel might be financial transactions that fall within the “spread-betting” category. A gain on such a contract will also be exempt from CGT. HMRC state the following at CG 56105:

> **“CG 56105 – Futures: financial futures: financial spread-betting**
>
> Instead of buying and selling financial futures or options an individual may simply gamble on the future direction of prices or indices. There are a number of spread-betting companies in the UK with which such bets may be placed.
>
> For example, you might choose to bet on movement in the FTSE 100. If the index stands currently at 5400, the company might

> offer a ‘buy’ price of 5401 and a ‘sell’ price of 5399; the difference is the company’s ‘spread’. Buying with a stake of £5 per point you win £5 for every point the then selling price exceeds 5401 when you close your bet, but lose £5 per point if the index instead has fallen. Similarly, if you bet on the market falling, you win if on closing your bet the then buying price is below 5399, but lose if the market has risen.
>
> The spread-betting company normally requires only a small deposit. Winnings or losses may well exceed this sum.
>
> Though the terminology used in spread-betting frequently echoes that of the derivatives market, no assets are acquired or disposed of and no chargeable gains or allowable losses arise from spread-betting, see CG12602.”

Perhaps an argument could be made that a cryptocurrency holding is little more than a spread-bet. For example, if one forgets any notion of currency, one buys a token at a particular price (buying the spread) and one makes a profit or loss when closing out one’s position on the sale of the coin.

However, this analysis is problematic as the trade has no “end date”. It is the author’s understanding that a spread-bet will always have an end-date, albeit that end date might be a few days or a number of quarters. But it will be for a finite period. This is perhaps the essence of a bet: there must be a time when it can be determined whether the person has “won” or “lost” the contract. Clearly, one has never won or lost until one sells the coins.

Of course, it is not beyond the realms of possibility that an investor might invest indirectly in cryptocurrency using a spread-betting index. In such a scenario, returns could be tax-free and any losses would not be allowable.

Case: *Carlill v Carbolic Smoke Ball Co* (1893) 1 QB 256

4.4.4 Speculation

The issue of “speculation” was considered in *Lewis Emmanuel*:

> “The word ‘speculation’ is not, I think, as a matter of general language, an accurate antithesis either to the word ‘trade’ or to the word ‘investment’: either a trade or investment may be speculative. On the other hand, it is certainly true, at any rate

> in the case of an individual, that he may carry out the whole range of financial activities which do not amount to a trade but which could not be described as an investment, even upon a short term basis. These activities include betting and gambling in a narrow sense. They also include, it seems to me, all sorts of Stock Exchange transactions. For want of a better phrase, I will described this class of activities as gambling transactions."

In this extract, the judge, Pennycuick J, is expressing that in addition to the narrow sense of gambling (as espoused in *Carlill* above), there is a wider category that takes in riskier financial transactions.

It might well be that certain cryptocurrency transactions could fall within this extended class of transaction. It is perhaps difficult to plot whereabouts on the spectrum such a transaction might take place. However, it is clear that the courts believe there is such a point on the spectrum and, at least originally, HMRC believed this was the case for cryptocurrency transactions.

The principles of this case were followed in *Manzur*.

Cases: *Lewis Emmanuel & Son v White* (1965) 42 TC 396; *Manzur v HMRC* [2010] UKFTT 580 (TC)

4.4.5 Updated guidance

HMRC have expanded on the statements set out in their original guidance:

> **"CRYPTO10450 – Introduction to cryptoassets: why HMRC does not consider buying and selling cryptoassets to be gambling**
>
> HMRC does not consider the buying and selling of cryptoassets to be the same as gambling. The term 'gambling' is not defined in the Income Tax or Corporation Tax Acts, or in the Taxation of Chargeable Gains Act 1992."

However, the guidance then seems, in part, to contradict this statement:

> "Whether a transaction can be characterised as betting or gambling is a question of fact. It will be down to the caseworker to consider the particular facts of any transaction involving

> cryptoassets and conclude whether that transaction had the character of betting or gambling.
>
> Where a [taxpayer] considers that their transactions involving cryptoassets amounted to gambling please make a referral following the process at CRYPTO 100500."

It may well be that the guidance is saying that the normal buying and selling of cryptocurrencies will not constitute gambling transactions. However, there might be certain types of other crypto transactions that could, based on the facts, constitute a gambling or speculative transaction. If this is the case then the author agrees.