

# STEP JOURNAL

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## UK FOCUS

Legislative updates, HMRC guidance and the latest must-know case law

## PHILANTHROPY AND CHARITY

Including legacy issues, structures to meet clients' goals and US private foundations

## SOCIETY UPDATES

Founder's Award winners, STEP's EDI principles, diary dates and more



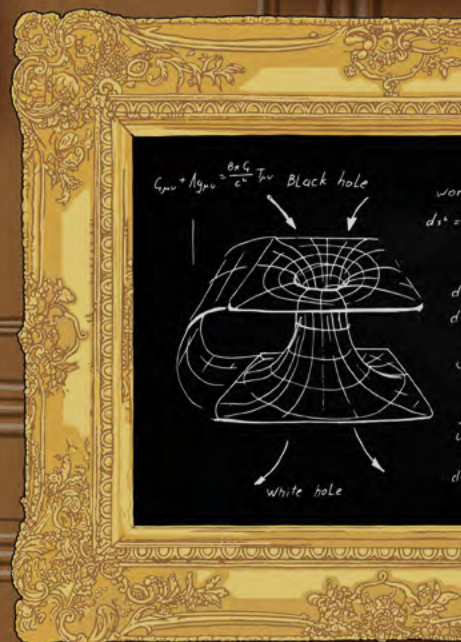
EMPEROR MUHAMMAD SHAH HUNTING CRANE WITH HAWKS



PORTRAIT OF A GIRL



DAVID LLOYD GEORGES' BIRTHPLACE, MANCHESTER



DRAWING OF A BLACK HOLE

## A brief history of cultural heritage reliefs

TAX RELIEFS AVAILABLE TO PRESERVE THE ARTISTIC, SCIENTIFIC AND HISTORIC FABRIC OF ENGLAND AND WALES



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## KEY POINTS

**What is the issue?**

As the world's attention turns to cryptocurrencies, the Italian legislature appears out of pace. Further, the Italian tax authority has shown limited interest, particularly towards direct taxes and anti-money laundering issues.

**What does it mean for me?**

With the acceptance of cryptocurrencies as payment and increasing global mobility, practitioners should be aware of the tax considerations.

**What can I take away?**

An understanding of some critical issues with regard to cross-border inheritance, transmission and donation matters, with an emphasis on digital assets and the application of current indirect taxes and gift levy in Italy.



# Time to modernise

## MAURIZIO DI SALVO AND PIERGIOORGIO BRUGNARA CALL FOR A NEW ITALIAN TAX POLICY ENVIRONMENT IN THE AGE OF DIGITAL FINANCIAL ASSETS AND CRYPTOCURRENCY

### CRYPTOCURRENCY IN THE ITALIAN LEGAL ENVIRONMENT

The explosion of social networks and the increasing digital presence in the global population's everyday life have changed the way people perceive digital assets.

Beginning with how social networks exploited the 'big data' of their customer bases, what used to be merely personal information now has economic relevance. By way of illustration, McAfee values the average social network account at USD35,000.

Despite the inherent value of such material, Italian people (following the European trend) tend to consider digital materials as non-economic assets. Nevertheless, some of these assets contain information with undisputed economic relevance: electronic banking accounts, electronic payment accounts (e.g., PayPal), cryptocurrency wallets and gaming or social media accounts. The user's anonymity, and the ubiquity and transnational mobility of their assets, has put pressure on the Italian legislature.

The Italian legal environment has shown its stance towards this incoming matter, despite its history of only dealing with physical goods linked to a territory. Some help comes from intellectual property legislation, *Law n. 433/1941*, which protects personal writings and creative works, but there is little legislation regulating digital economic assets or cryptocurrencies.

For anti-money laundering (AML) purposes, *Legislative Decree No. 125 of 4 October 2019* defines cryptocurrencies as: *'digital representation of value not issued by a central bank or a public authority, not necessarily linked to a legal tender currency, used as a medium of exchange for purchases of goods and services, electronically transferred, stored and traded.'*

On the other hand, Italian case law considers cryptocurrencies to be 'goods', and so subject to rights. This uncertainty has not stopped customers from using digital currencies.

### Recent uptake

In 2018, an Italian public notary oversaw the first real estate selling operation paid completely in bitcoin. Later, a northern Italian corporation successfully raised capital by entirely using cryptocurrencies.



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In December 2020, a well-known Italian bank announced its new customer service of bitcoin custody, following an agreement with a digital assets open platform, confirming the convergence of traditional and digital finance.

On 9 February 2021, a historic date for the Italian legal system, the Civil Court of Milan issued the first 'digital-inheritance' related precautionary measure, formally recognising personal digital data belonging to a deceased as 'goods' (as per art.810 of the Italian *Civil Code*) forming part of the deceased's estate and therefore to be transferred to heirs.

### ITALIAN LEGAL INSTRUMENTS FOR DIGITAL LEGACIES

The transmission of digital currencies is not yet regulated by the Italian legal system. Consequently, professionals have considered possible solutions using available instruments provided by the current legislation.

The main issues arise when considering the method in which wills and gifts are traditionally drafted, which are non-compatible with the nature and structure of digital currency due to the way these currencies are stored; i.e., physically as tokens or virtually in the Cloud. These characteristics jeopardise the secure and safe transition of such assets, due to the fact that Italian wills and gifts must be published in hard copy, often before witnesses.

This issue could be resolved by depositing relevant passwords in a safe to preserve their secrecy; however, this method is not without difficulties, as passwords change, can be stolen or can be easily misplaced.

Another issue is the use of a will executor. Although not a common role in Italy, the executor may access and manipulate digital assets contained in the will, endangering their economic consistency.

The *mandato post mortem exequendum* is a useful tool for transmitting the password of digital assets and accounts to chosen beneficiaries, while maintaining its secrecy until the death of the assignor. In addition, in this case, the presence of economic dispositions, in contrast with the Italian prohibition of succession agreements, suggests a conscious use.

Finally, the most efficient instrument would result in the setting up of a trust fund.

Although the Italian legal system does not regulate trusts directly, Italy has signed the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, so trusts are legally recognised. Due to their flexibility in structure, variegated powers attributable to trustees and the segregation of property that they provide, trusts may be a valid alternative.

## 'The lack of specific fiscal rules in the inheritance and gift tax arena with respect to crypto-assets as a digital representation of value ... would imply discretionary interpretations'

Trusts could also guarantee a safe and automatic transfer of the crypto-asset by the use and execution of efficient smart contracts.

### TAX CONSEQUENCES AND AML PROCEDURES

The only definition of cryptocurrencies provided by the Italian legislator has to do with AML; even so, the Italian Tax Revenue (ITR) considers such assets to be subject to income tax and value-added tax (VAT).

In its *Guidance n. 72/E/2016*, the ITR addressed the application of Italian direct taxes and VAT to exchanged cryptocurrencies, considering cryptocurrencies as foreign currencies.

This definition led to several consequences: individuals directly owning cryptocurrencies are taxed on capital gains only when the equivalent in fiat currency, held in the relevant bank accounts, is higher than EUR51,645 for more than seven working days.

With respect to VAT, Italy seems consistent with the international taxation community,<sup>1</sup> so considers the use of cryptocurrency to be exempted under Italian VAT provisions, as per art.10, para.1 n.3 of *Presidential Decree 633/1972*.

Although taxpayers and professionals struggle with the application of direct and consumption taxes on crypto-assets, issues arise with the taxation of transmission *mortis causa* or *inter vivos* of such assets, directly or indirectly owned, as the Italian tax policy environment in such a field appears uncertain.

Assuming the cryptocurrency transaction is subject to VAT, registration tax would typically be levied at a lump sum of EUR200 each.

Moreover, *Legislative Decree 346/1990* (the *Italian Inheritance and Gift Tax Code*, IGTC) disposes that transfers of any valuable assets as a result of death or donation, and the creation of liens on such assets for a specific purpose, are subject to inheritance or gift tax.

The taxable event is death in the case of inheritance tax (IHT), and the formal

deed of donation in the case of gift tax. The IGTC states that if the deceased/donor is resident in Italy, then the inheritance and gift tax is due on all the properties and rights transferred at the time of death/gift, regardless of *situs*.

If the deceased/donor is not a resident of Italy at the time of death/gift, the inheritance and gift tax is due only on the properties and rights situated in Italy, at the date of death/gift.

Therefore, the concept of *situs* in the case of digital estate planning is crucial.<sup>2</sup> When it comes to ownership of digital assets in personal electronic wallets, fitting them into a legal framework conceived for physical goods linked to a determined territory can be very challenging.

Even though it can be fairly said that the transmission of digital assets produces taxable wealth, falling within the scope of the IGTC, the anonymity and ubiquity typically linked to cryptocurrencies make it hard for the tax professional to correctly apply the tax regime to their transfers.

### INTERNATIONAL TAX PLANNING

The global mobility of cryptocurrency investors will increase cross-border successions and estates comprising digital assets. Therefore, the tax professional's duty is to deal with such successions with the instruments provided by the national and international legal systems.

From an Italian perspective, such duty could result in steeper taxes, as the lack of specific fiscal rules in the inheritance and gift tax arena with respect to crypto-assets as a digital representation of value, typically traded in the 'infosphere', would imply discretionary interpretations.

Moreover, the differences in the legal and tax framework when it comes to taxing cross-border inheritances, estates and gifts of cryptocurrencies could lead to double taxation or, predictably, to evasion.

The Italian tax treaty network in this field appears old and inadequate,<sup>3</sup> and the domestic legislation in relation to foreign IHT credits is inapplicable as it supposes a physical estate *situs*, while no foreign tax credit is expressly provided for gift tax.

Consequently, specific pre-death planning could be insufficient in scope, as professionals see cases in this arena becoming increasingly complex.

#### #DIGITAL ASSETS

#### #INTERNATIONAL CLIENT #ITALY

#### #TAXATION

<sup>1</sup> And compliant with the Court of Justice of the European Union ruling in *Case C-264/14 (Hedqvist)* <sup>2</sup> For a detailed analysis of the concept of *situs* in an Italian domestic and treaty environment for inheritance and gift tax, see Nicola Saccardo TEP, 'Inheritance, Estate and Gift Tax Treaties—Italy', *Trusts & Trustees*, 26:1 (2020), pp.41–48 <sup>3</sup> At the time of writing, Italy has concluded only seven IHT treaties (with Denmark, France, Greece, Israel, Sweden, the UK and the US).