

Expect IRS Crypto Guidance On Basis, Hard Forks, Attys Say

By **Amy Lee Rosen**

Law360 (June 5, 2019, 7:40 PM EDT) -- Highly anticipated IRS guidance on cryptocurrency will likely address cost basis and the treatment of hard forks, or the splitting of cryptocurrency blockchain, and will likely be more authoritative than guidance put out in 2014, a tax attorney said Wednesday.

Commissioner Chuck Rettig said in **recent public remarks** that upcoming cryptocurrency guidance will likely take the form of a revenue ruling and revenue procedure carry more regulatory weight than a regulatory notice, according to Steven Richard Toscher of Hochman Salkin Toscher Perez PC, who spoke during a webinar on the tax treatment of cryptocurrency.

"At a time when we don't see many revenue rulings anymore ... I think [this] telegraphs something that the guidance is going to be very significant," he said. "There are differences in the weight of a notice versus a revenue ruling versus a revenue procedure."

A notice is a public announcement that may have guidance on substantive interpretations of the tax code, while a revenue procedure is an official statement of a procedure that affects the rights of the taxpayer and a revenue ruling is an official IRS interpretation of the Internal Revenue Code that's designed to serve as guidance for taxpayers, according to the IRS.

"While taxpayers can generally rely on notices for purposes of penalties, revenue rulings and revenue procedures are higher in the hierarchy of authority and carry more weight in their binding nature on the IRS and in some cases may be deemed more authoritative by courts," Toscher told Law360 in an email.

Michel R. Stein of Hochman Salkin, who presented with Toscher, told Law360 that the very nature of issuing a revenue procedure suggests that the IRS will allow taxpayers to make certain elections for the tax treatment of a cryptocurrency transaction.

"It was very encouraging that there is both a revenue ruling and a revenue procedure coming up, which means that the government is truly, squarely addressing this issue," he said during the webinar.

Currently the **2014 notice** is the only virtual currency guidance on the books and says any capital gain or loss from the sale or exchange of cryptocurrency was to be reported the same way as any other payments made with property.

The IRS made a solid attempt to create guidance on virtual currencies, but this notice was issued before the explosion of more users and an increase in value to virtual currencies such as bitcoin, which hit its highest value of more than \$20,000 in April 2018, Stein said.

Since 2014, not only have virtual currencies grown in value, but the nature of how they have been used has changed as people began doing hard forks, going forward with initial coin offerings, using virtual currencies for **Section 1031** like-kind exchanges and doing air drops, which occur when a cryptocurrency token or coin is distributed, usually at no cost, to many wallet addresses to attract new followers, he said.

These concepts and methods that exist today were not necessarily contemplated by many people five

years ago, which is why new guidance would be helpful, Stein said.

Right now it is more likely that the IRS will issue guidance on hard forks but not on like-kind exchanges, due to the **Tax Cuts and Jobs Act**'s elimination to defer income on anything other than real estate, he said. So even though there have been many transactions where one type of virtual currency is exchanged for another that a taxpayer could have theoretically used a Section 1031 like-kind exchange to defer the gain before 2018 because the law was changed to only allow real estate assets, this tax benefit may be limited to transactions before 2018, he said.

Plus, Rettig has not mentioned Section 1031 concerns in his public speeches about the cryptocurrency guidance and so far only has said the rules would address cost basis and hard forks, Toscher said.

Rettig **said in testimony** to Congress in May that the IRS intends to focus its guidance on acceptable methods for calculating cost basis, how to treat its assignment and the tax treatment of forks. But practitioners have **debated whether a hard fork is a taxable event** because it is unclear whether the split in currency to two or more core coins results in the new coin being a taxable event and if so how to determine its basis.

The IRS could apply the reasoning of a U.S. Supreme Court case from the 1920s called **Eisner v. Macomber**, which said a pro rata stock dividend was not taxable income since the shareholder did not receive additional cash and had the same proportionate share of ownership, but Stein said he did not believe that reasoning would apply well to virtual currencies because when a hard fork occurs the currency owner receives a new coin, which is not a share of the same stock.

"We don't really think [Eisner] is the best analogy because in dealing with the stock split the amount is diminished with more shares," he said. "To liken it to a stock split doesn't do it justice, but if it's not a stock split then what is it?"

Hopefully, the IRS will provide practical guidance on this issue, Stein said.

--Additional reporting by Joshua Rosenberg. Editing by Vincent Sherry.