

Contents lists available at [ScienceDirect](#)

# Journal of Accounting and Economics

journal homepage: [www.journals.elsevier.com/  
journal-of-accounting-and-economics](http://www.journals.elsevier.com/journal-of-accounting-and-economics)

## Comment on Cong et al., “Tax loss harvesting with cryptocurrencies”

Reuven Avi-Yonah

*The University of Michigan, United States*

### ARTICLE INFO

*Article history:*  
Received 26 April 2023  
Accepted 19 May 2023  
Available online xxx

### ABSTRACT

This comment explains that while taxpayers may increase loss harvesting in crypto, they are wrong if they believe such losses will be upheld if challenged by the IRS.

© 2023 Elsevier B.V. All rights reserved.

In this important article, Cong, Landsman, Maydew and Rabetti break new ground in showing how increased IRS enforcement of tax rules relating to cryptocurrencies has led to two opposite reactions: An increase in tax compliance as evidenced by tax loss harvesting (which is only possible if the sale of cryptocurrencies is reported on a tax return), and a migration to foreign exchanges which are presumably less likely to cooperate with IRS enforcement efforts.

This article makes an important contribution not just for accountants and economists but also for lawyers, because there have been many claims in the legal literature (e.g., [Marian 2013](#); [Marian 2015](#); [Marian 2019](#); [Alm et al., 2020](#)) that cryptocurrencies are a “super tax haven” because of their anonymity and lack of intermediaries who can be subjected to information reporting requirements by the IRS. I have written elsewhere that these claims are unlikely to be true because the IRS has the legal means to overcome both anonymity and decentralization ([Avi-Yonah and Salaimi, 2022](#)), but this article is as far as I know the first empirical demonstration that IRS compliance efforts have had a significant and measurable effect in increasing tax compliance regarding cryptocurrencies.

Having said that, I do have one major quibble with the article, which is its assumption that tax loss harvesting with cryptocurrencies will be sustained in court if it is challenged by the IRS. The authors write in the pre-conference version of the paper that –

What makes tax-loss harvesting in cryptocurrency particularly attractive to investors during the period of our study is the absence of the wash sale rule from crypto asset transactions. In securities markets (e.g., stock trading), the wash sale rule disallows losses for tax purposes from the sale of stocks and securities when the taxpayer has purchased the same asset within 30 days before or after the sale. Because the most commonly traded crypto assets (e.g., Bitcoin) are generally not considered securities, they are free from the wash sale rule, which in crypto markets enables traders to recognize a tax loss and immediately repurchase the same crypto asset.

There are two problems with this statement. First, it is true that the SEC has declared that Bitcoin and Ether are not securities for securities regulation purposes, although it has also argued that many other forms of crypto are securities ([Hinman, 2018](#)). But this declaration is not binding on the IRS. Internal Revenue Code (IRC) section 1091, which disallows losses from wash sale, does refer to “stock or securities” (as opposed to IRC section 1092, the straddle rule, which refers to “positions”, a much broader term that likely includes all crypto). But “securities” in tax law is not the same as “securities” for security regulation purposes. For example, in the corporate tax provisions (e.g., Code IRC 354) “securities” has been defined by the

*E-mail address:* [aviyonah@umich.edu](mailto:aviyonah@umich.edu).

<https://doi.org/10.1016/j.jacceco.2023.101612>

0165-4101/© 2023 Elsevier B.V. All rights reserved.

Please cite this article as: R. Avi-Yonah, Comment on Cong et al., “Tax loss harvesting with cryptocurrencies”, *Journal of Accounting and Economics*, <https://doi.org/10.1016/j.jacceco.2023.101612>

courts much more narrowly as only long-term bonds, because the purpose of that section is to limit tax-free reorganization treatment to transactions meeting the continuity of investor interest rule. A court is therefore likely to interpret “securities” in IRC section 1091 as similar to “positions” in IRC section 1092, precisely because not applying the wash sale rule to crypto would defeat the purpose of the rule, namely to prevent taxpayers from harvesting losses while maintaining their economic interest in the property being sold and repurchased within 30 days.

Second, even if “securities” is interpreted narrowly to exclude Bitcoin and Ether, the loss may still be disallowed. Treasury Regulation 1.165–1(b), which governs losses, states that “[o]nly a bona fide loss is allowable. Substance and not mere form shall govern in determining a deductible loss.” In the leading case of *Fender v. United States* (577 F.2d 934, 5th Cir. 1978) the court relied on this language in holding that a transaction in which bonds were sold at a loss to a party that was owned 40.7% by the seller and then repurchased within 42 days was not allowable even though it avoided the literal application of IRC section 267 (which disallows losses from sales to over 50% related parties) and IRC section 1091 (because the sale and repurchase did not take place within 30 days).

In tax loss harvesting using cryptocurrencies, the taxpayers sell and then repurchase within 60 s. I find it hard to imagine that even a “textualist” judge would determine that such a loss is “bona fide” under the regulation.

None of this detracts from the authors’ contribution, because clearly the taxpayers engaging in tax loss harvesting do so because they believe the transactions would be upheld if challenged by the IRS. Alternatively, they may believe the literature that suggests anonymity protects them from being caught even if their transactions are visible on a public ledger. Neither of these beliefs is likely to be true for large loss harvesting transactions which the IRS is more likely to focus on, but that is yet to be tested.

Other taxpayers migrate to foreign exchanges, as demonstrated in this article. But that migration as well may be based on mistaken beliefs. The OECD has just issued the Crypto Asset Reporting Framework (CARF) which is likely to be adopted by most jurisdictions in the world because it represents an expansion to crypto of the Common Reporting Standard (CRS), which has been adopted by over 100 countries (OECD, 2022). CRS provides for automatic exchange of information between countries of information gathered from financial institutions, and CARF expands this to cover crypto exchanges. While the US has not adopted the CRS, it has unilaterally applied the Foreign Account Tax Compliance Act (FATCA) to US citizens and residents holding financial assets offshore. FATCA is generally viewed as even stronger than the CRS in terms of the penalty imposed if it is disregarded, and it has been implemented by over 100 intergovernmental agreements which likely cover most foreign crypto exchanges. While both CRS and FATCA can be avoided with high transaction costs, these may be too high for most taxpayers investing in crypto.

The article shows that as the IRS increases its focus on crypto, taxpayers are increasingly likely to comply with the law. That result suggests that improving the tax treatment of crypto while ensuring that the rules cannot be avoided by going offshore is the best way to regulate this important emerging industry. Such improvement could include amending the Code to clarify that section 1091 does apply to crypto, while at the same time clarifying the proper tax treatment of crypto to crypto exchanges (which in my opinion should be tax exempt because of the high volatility of crypto; for this and other suggestions for legal reform see [Avi-Yonah and Salaimi 2022](#)).

## References

- Alm, James, Beebe, Joyce, Kirsch, Michael S., Marian, Omri Y., Soled, Jay, 2020. New technologies and the evolution of tax compliance (May 18, 2020). Spring Va. Tax Rev. 39 (3). UC Irvine School of Law Research Paper No. 2020-42, Available at: SSRN. <https://ssrn.com/abstract=3604507>.
- Avi-Yonah, Reuven S., Salaimi, Mohanad, March 31, 2022. A New Framework for Taxing Cryptocurrencies. U of Michigan Public Law Research Paper No. 22-014, Available at SSRN. <https://ssrn.com/abstract=4071391>. <https://doi.org/10.2139/ssrn.4071391>.
- Marian, Omri Y., October 1, 2013. Are Cryptocurrencies ‘Super’ Tax Havens?, 112 Michigan Law Review First Impressions 38 (2013), Available at SSRN. <https://ssrn.com/abstract=2305863>.
- Hinman, William, June 14, 2018. Digital asset transactions: when howey met gary (plastic). In: Remarks at the Yahoo Finance All Markets Summit: Crypto, San Francisco. <https://www.sec.gov/speech/speech-hinman-061418>.
- Marian, Omri Y., 2015 (October 23, 2014). A Conceptual Framework for the Regulation of Cryptocurrencies, 53. 82 University of Chicago Law Review Dialogue. Available at SSRN. <https://ssrn.com/abstract=2509857>.
- Marian, Omri Y., 2019. Blockchain havens and the need for their internationally-coordinated regulation (march 20, 2019). N. C. J. Law Technol. 20. Forthcoming, UC Irvine School of Law Research Paper No. 2019-14, Available at SSRN. <https://ssrn.com/abstract=3357168>.
- OECD, October 10, 2022. Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard.