

Cryptocurrency: Key GST Aspects in India and Path Ahead

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1. Background

The conversation around cryptocurrency in India is expected to gain significant impetus now, with Coinbase Global Inc., the largest Bitcoin exchange in the US, having gone public this week at a staggering valuation of around one hundred billion US dollars.

India has had a complicated relationship with cryptocurrency. The Reserve Bank of India (RBI) initially reacted with effectively a ban on cryptocurrency trading in India vide circular dated 6 April 2018 which was overturned by the Supreme Court of India in March 2020. In the last few months, there has been a lot of conversation around potential introduction of a new law which envisages issuance of an 'official' digital currency by the RBI and, more importantly, prohibition of all other forms of cryptocurrency. However, more recent news reports indicate a possible softening of stand with statements being made about the government keeping an 'open mind' and adopting a 'calibrated approach' towards digital assets^[1].

This uncertainty, however, does not seem to have dented India's enthusiasm for cryptocurrency. As per a report from Reuters of March 2021^[2], "In India, despite government threats of a ban, transaction volumes are swelling and 8 million investors now hold 100 billion rupees (\$1.4 billion) in crypto-investments, according to industry estimates".

It is in this backdrop that it becomes imperative to examine the key GST aspects of cryptocurrency transactions.

2. Key GST aspects

A. Nature of cryptocurrency?

Unlikely to qualify as 'Security': Securities are specifically excluded from the definitions of both 'goods' and 'services' under GST. Section 2(101) of Central Goods and Services Tax Act, 2017 (CGST Act) read with explanation to section 2(h) of the Securities Contracts (Regulation) Act, 1956 defines "securities" as:

"Securities include-

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivatives;

(ib) units or any other instruments issued by any collective investment scheme to the investors in such schemes;

(ii) government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

(iii) rights or interest in securities.”

While the definition begins with ‘include’, given the very specific enumerations thereafter, it appears that the word ‘securities’ has to be understood in light of the specific categories mentioned above. All these categories, stripped to their bare essence, envisage certain rights that the recipients obtain over the issuer of ‘securities’. Given that cryptocurrencies do not have a centralized issuing authority who undertakes to repay the value represented by a unit of cryptocurrency, cryptocurrencies are unlikely to qualify as ‘securities’ and thus get excluded from GST.

Unlikely to qualify as ‘actionable claim’: Schedule III of the CGST Act specifies “Actionable claims, other than lottery, betting and gambling” as “Activities Or Transactions Which Shall Be Treated Neither As A Supply Of Goods Nor A Supply Of Services” and thus not be liable to GST. Section 2(1) of the CGST Act read with section 3 of the Transfer of Property Act define ‘actionable claim’ to envisage two scenarios: (i) an enforceable claim to an unsecured debt, and (b) an enforceable claim to a beneficial interest in a movable property which is not in possession of the claimant.

Given that cryptocurrencies do not have a centralized issuing authority which undertakes to repay the value represented by a unit of cryptocurrency, cryptocurrencies clearly do not fall under (i) above. Further, given that cryptocurrencies are themselves likely to qualify as ‘movable property’ (which would typically be in ‘possession’, in the relevant cryptocurrency ‘wallet’), it would be difficult to argue that cryptocurrencies represent claim to a beneficial interest in a movable property which is not in possession. Thus, cryptocurrencies are unlikely to qualify as ‘actionable claim’ either.

‘Goods’ or ‘Services’? - Section 2(52) of the CGST Act defines ‘goods’ to mean “....every kind of movable property other than money and securities but includes.....”. Section 2(36) of the General Clauses Act defines ‘movable property’ in a rather catch-all manner - “movable property shall mean property of every description, except immovable property”. The word ‘property’ has also been interpreted in a wide manner by courts in various contexts to be a bundle of rights which the owner has over or in respect of a thing, tangible or intangible, or the thing itself over or in respect of which the owner may exercise those rights. Given the foregoing, cryptocurrencies are likely to qualify as ‘goods’ under GST laws in India, albeit intangible ones.

B. Using cryptocurrency to pay for goods/services?

The term ‘consideration’ has been defined under Section 2(31) of the CGST Act to include “...any payment made, whether in money or otherwise, in respect of the supply of goods or services...”. Here, it would be necessary to make a reference to the definition of the term ‘money’ as provided under Section 2(75) of the CGST Act.

As per the definition money means “...the Indian legal tender or any foreign currency,....or any other instrument recognised by the Reserve Bank of India...”. Thus, it can be stated that a currency would qualify as ‘money’ under the CGST Act only if the said currency has been recognised by the RBI. While the initial ban by RBI was overturned by the Supreme Court, the RBI has obviously not recognised cryptocurrency (like Bitcoin etc) in any manner. Therefore, as on date, ‘cryptocurrency’ cannot be classified as ‘money’ under the CGST Act.

At this juncture, it may be noted that the phrase “or otherwise”, which is occurring in the definition of the

term 'consideration', would include situations / transactions like 'barter'. This is because typically in 'barter', the recipient of supply does not make payment to the supplier by paying 'money'; instead, the 'consideration' is paid by the recipient in 'kind'. Meaning thereby, that the supply is received either in lieu of some other specific goods or services. Thus, using cryptocurrency to pay for goods/services may lead to the transaction being treated as if it's a barter transaction (supply of goods/services against receipt of intangible goods ie., cryptocurrency) and accordingly, be made liable to GST.

GST law in India is not quite settled apropos certain aspects of barter transactions. Accordingly, if a transaction qualifies as a 'barter' under GST, following issues may require greater analysis:

- a. Which leg of the transaction would qualify as a 'consideration' and which leg of the transaction would qualify as a 'supply'? Ambiguity in this regard may lead to a scenario where GST authorities in India may argue that transfer of / payment in cryptocurrency received by Indian parties is a separate 'supply of intangible goods', thereby, making the parties (located in India) liable to deposit tax / GST^[3].
- b. If payment through cryptocurrency is construed to be the 'consideration', how will value be ascribed to such 'consideration' for the purpose of levying GST?

Practically, if an Indian customer uses cryptocurrency to pay for goods/services, GST can apply at two levels - (i) GST borne by the customer for acquiring cryptocurrency upon payment in money; and (ii) GST applicable on the purchase of goods/services which have been paid for using cryptocurrency.

Impact on 'export' position under GST: One of the key conditions for availing the benefit of 'zero rating' for exports under GST is the receipt of the consideration in 'convertible foreign exchange'. The term 'convertible foreign exchange' will have to be interpreted in light of the provisions stipulated in Indian foreign exchange laws. As the laws stand today, it would be difficult for cryptocurrency to qualify as a 'convertible foreign exchange' thereby jeopardizing the tax benefits of 'export' transactions under GST.

C. Relevant references from Australia and the United Kingdom ('UK')

Australia: Till July 2017, the position in Australia was similar to what has been discussed above. As per the ruling no. GSTR 2014/3 from the Australian Tax Office (ATO), using cryptocurrency to pay for goods/services would have led to the transaction being treated as if it's a barter transaction. GST was to be paid on the value of the cryptocurrency in Australian dollars, at the time of the transaction. The problem of dual-level taxation (as mentioned above in the Indian context) was identified in Australia too and the position was reviewed.

From 1 July 2017, the guidance note provided by ATO^[4] states that: "Sales and purchases of digital currency are not subject to GST from 1 July 2017. This means that you do not charge GST on your sales of digital currency and similarly, you are not entitled to GST credits for purchases of digital currency." Basically, a treatment comparable to 'exempt supplies' under Indian GST laws have been prescribed.

The note further prescribes: ".....No GST consequences arise when you use digital currency to pay for goods and services in your business. Digital currency is a method of payment and the consequences of using it as payment are the same as the consequences of using money as payment.....If you receive digital currency as payment for your sales of goods and services normal GST rules apply."

UK: The UK HMRC has recently released its internal Crypto-assets Manual^[5], to provide guidance for tax treatment of crypto-assets for its staff and to assist professional advisors and customers in understanding HMRC's interpretation of law.

The manual clarifies: "VAT is due in the normal way on any goods or services sold in exchange for cryptoasset exchange tokens. The value of the supply of goods or services on which VAT is due will be the pound sterling value of the exchange tokens at the point the transaction takes place.....no VAT will be due on the supply of the token itself". Effectively, the position seems similar in UK and Australia today.

D. Recent proposals in India

Media reports suggest that the Central Economic Intelligence Bureau (CEIB) has raised a proposal to the Central Board for Indirect Taxes and Customs (CBIC) to bring cryptocurrency exchanges and platforms under the GST purview. The salient features of CEIB's proposals in this regard, as available in public domain^[6], are excerpted below:

- The act of cryptocurrency mining could be treated as a supply of service as it generates cryptocurrency and charges transaction fees, and as such, should classify as an intangible asset and attract a GST of 18%
- Taxpayers operating as cryptocurrency miners will be required to register under GST if their annual revenue exceeds ₹20 lakh. GST will be liable on the transaction fee and/or the reward viz. currency mined.
- Consider bringing wallet service providers under the GST purview.
- Trading of cryptocurrency and other related transactions like transfer, storage, accounting etc are also likely to be considered as an act of supply and could be taxed.
- The transaction value in INR or an equivalent freely convertible foreign currency will be used to determine the value of cryptocurrency and thereby the transaction and subsequent tax liabilities.
- In cases where the buyer and seller are registered as Indian residents and operators, the transaction should be treated as a supply of software.
- International cryptocurrency transactions by companies registered in India will be treated as import or export of goods and as such will be liable to IGST. Another major reason to consider bringing cryptocurrencies under the GST purview is to curb money laundering and undermining of legitimate currencies.

Some of these proposals do not seem to be in sync with the global best practices and would hopefully be reconsidered.

One hopes that, like in Australia and UK, clear and progressive guidelines will soon be issued in India apropos GST (as well as in general vis a vis various other aspects of crypto-currency) so that India becomes well-placed to ride the 'cryptocurrency wave' in the coming days.

The views of the authors in this article are personal and do not constitute legal / professional advice of Khaitan & Co. For any further queries or follow up please contact us at editors@khaitanco.com.

^[1] <https://www.livemint.com/news/india/will-ensure-interest-of-crypto-investors-is-protected-anurag-thakur-11618215067597.html>

See:

^[2] See: <https://www.reuters.com/article/uk-india-cryptocurrency-ban-idUSKBN2B60QP>

^[3] GST law is also not very clear as to whether GST is applicable on import of intangible goods into India given the World Trade Organization's (WTO) moratorium against levy of import duty on import of intangible goods. This aspect too may require separate analysis.