Cryptocurrency- Key GST Questions Post Budget 2022

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1. Background

While the legality of cryptocurrency / assets in India remains under a shadow of doubt, the following developments in the recent past have once again put a spotlight on the Goods and Services Tax (GST) implications vis a vis various transactions in cryptocurrency / assets:

i. Proposal in Finance Bill, 2022 to introduce a new scheme of taxation of 'virtual digital assets' (VDAs) to levy income tax and mandate tax withholding at source (TDS) on transfer of VDAs: VDAs have been defined in a wide manner to cover all varieties of cryptocurrencies, NFTs, etc.,

a. income arising from transfer of VDA's taxable at 30 % (plus applicable surcharge and cess) with no deduction of expenses or set-off of any losses except for the costs incurred in acquiring the VDA's; and

b. persons making payments to Indian residents towards the transfer of a VDA, to withhold tax at 1 % on such sum.

ii. Inspections conducted against 5 (five) crypto-exchanges by the Directorate General of GST Intelligence (**DGGSTI**) in the last few months resulting in recovery of more than INR 80 (eighty) crores of GST in back-taxes. Per the media reports on the said inspections, the key issue seems to have been non-payment of GST on commissions / facilitation fees earned by such exchanges in certain scenarios, viz.,

a. commissions for facilitating transactions by foreigners; and

b. transactions where commission was earned in native crypto.

Given the proposal to introduce a new scheme of taxation of VDA's to levy income tax, a question arises as to whether, it is now possible to infer that under the GST regime, cryptocurrencies / NFTs will qualify as 'intangible goods' and therefore, will be liable for payment of GST accordingly. The same has been examined below.

2. Nature of cryptocurrency from a GST perspective

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

"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 that undertakes to repay the value represented by a unit of cryptocurrency, cryptocurrencies are unlikely to qualify as 'securities' and thus get excluded from GST accordingly.

The foregoing conclusion is based upon the law as it stands today. The lawmakers may, as a policy decision, decide to amend the definition of 'securities' under GST to include cryptocurrencies, thereby taking it out of the ambit of levy of GST on its own.

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 will not be liable to GST. Section 2(1) of the CGST Act read with Section 3 of the Transfer of Property Act 1882, defines '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 that 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 do not appear to 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 all-encompassing 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 – unless otherwise clarified by the Government**.

The introduction of 'virtual digital assets' as a new category for income tax purposes can be referred to under GST laws as well to buttress the foregoing conclusion in as much as 'digital assets' as a class would qualify as 'intangible goods'.

3. GST implications if cryptocurrency qualifies as 'intangible goods' for GST purposes

In the wake of media reports about inspections against crypto exchanges, most of the discourse has focussed on potential implications on such exchanges. However, before going into that, it is pertinent to examine the GST implications when cryptocurrency is used to pay for goods / services, in a scenario where cryptocurrency qualifies as 'intangible goods' for GST purposes.

A. Implications when cryptocurrency is used 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 refer 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 Reserve Bank of India (RBI). The initial ban by RBI was overturned by the Supreme Court, however, the RBI has not recognised cryptocurrency (like Bitcoin, etc.) in any manner whatsoever. 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 is a barter transaction (supply of goods / services against receipt of intangible goods i.e., 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. There is ambiguity as to which leg of the transaction would qualify as a 'consideration' and which leg would qualify as a 'supply'. This 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[1].
b. In the case where payment through cryptocurrency is construed to be the 'consideration', it is unclear as to how value will 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 currently, it would be difficult for cryptocurrency to qualify as a 'convertible foreign exchange' thereby jeopardizing the tax benefits of 'export' transactions under GST.

B. Implications vis a vis cryptocurrency exchanges

In this regard, it is pertinent to quote Mr Vivek Johri, Chairman, Central Board of Indirect Taxes and Customs (CBIC) - "*Our interpretation is that there is clarity in the law and the commission paid to the operator or an exchange, which is providing a platform for transaction in digital*

currency, is in a view of service he provides to the users of that platform and, therefore, it is the supply of service which is chargeable to GST." (Source: Link)

As per the media reports, the crypto exchanges do not seem to be disputing that they are providing services to traders and that the said services are liable to GST. The dispute appears to have arisen vis a vis valuation of such commission in as much as whether the value of that part of the commission which was being received in cryptocurrency. Since 'transaction value' constitutes the taxable base for levy of GST and given the wide definition of 'consideration', there doesn't seem to be any scope to exclude the portion of commission received in modes other than money (including in crypto currency). Nonetheless, it would be ideal, from a certainty of tax position perspective, for the CBIC to issue a formal clarification to this effect.

C. Lessons 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 at par with 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[2] 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 HM Revenue and Customs (HMRC) released its internal Crypto-assets manual[3], 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.

4. Concluding thoughts

With some level of clarity emerging under income tax as proposed vide Finance Bill 2022, the next few GST council meetings would be crucial to see if similar clarifications are announced for GST as well. In any case, the budgetary announcements have certainly made it clear that

crypto currencies / assets would not escape Indian taxation.

One hopes that akin to Australia and UK, clear and progressive guidelines will soon be issued in India apropos GST.

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[1] 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.

[2] Available at https://www.ato.gov.au/business/gst/in-detail/your-industry/financial-services-and-insurance/gst-and-digital-currency/

[3] The VAT portion is available at https://www.gov.uk/hmrc-internal-manuals/cryptoassets-manual/crypto45000