

WHETHER CRYPTOCURRENCY IS GOODS OR SERVICE & TAXABILITY UNDER GST ACT,2017

Dear Friends,

As you are aware taxable event in GST is supply of goods or services or both. Various taxable events like manufacture, sale, rendering of service, purchase, entry into a territory of State etc. have been done away with in favour of just one taxable event i.e. supply.

The constitution defines “goods and services tax” as any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption. The Central and State governments have simultaneous powers to levy GST on Intra-state supply. However, the Parliament alone have exclusive power to make laws with respect to levy of goods and services tax on Inter-state supply.

The term, “supply” has been inclusively defined in the Act ,2017;

SUPPLY *includes all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.*

The meaning and scope of supply under GST can be understood in terms of following parameters, which can be adopted to characterize a transaction as supply:

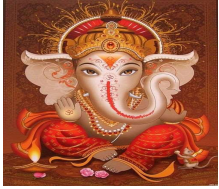
- Supply of goods or services or both(Supply of anything other than goods or services does not attract GST).*
- Supply should be made for a consideration.*
- Supply should be made in the course or furtherance of business.*

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- Supply should be a taxable supply.

While these parameters describe the concept of supply, there are a few exceptions to the requirement of supply being made for a consideration and in the course or furtherance of business.

Any transaction involving supply of goods or services without consideration is not a supply, barring few exceptions, in which a transaction is deemed to be a supply even if it is without consideration. Further import of services for a consideration, whether

IMPORT OF GOODS OR SERVICES : Under the GST regime, Article 269A constitutionally mandates that supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce. So import of goods or services will be treated as deemed inter-State supplies and would be subject to Integrated tax. While IGST on import of services would be leviable under the IGST Act, the levy of the IGST on import of goods would be levied under the Customs Act, 1962 read with the Custom Tariff Act, 1975. The importer of services will have to pay tax on reverse charge basis. However, in respect of import of online information and database access or retrieval services (OIDAR) by unregistered, non-taxable recipients, the supplier located outside India shall be responsible for payment of taxes (IGST). Either the supplier will have to take registration.

IMPORT OF SERVICES To be treated as supply

- if received for a consideration, whether for personal use or business use.*
- However if import of services is received without any consideration, then it will be treated as supply if it is received by a Taxable person from a*

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related person or from any of his other establishment outside India, and it is in course or furtherance of business.

A CRYPTOCURRENCY is a digital or virtual currency that is secured by cryptography, which makes it nearly impossible to counterfeit or double-spend. Many cryptocurrencies are decentralized networks based on blockchain technology—a distributed ledger enforced by a disparate network of computers. A defining feature of cryptocurrencies is that they are generally not issued by any central authority, rendering them theoretically immune to government interference or manipulation.

Bitcoin is one of the earliest forms of cryptocurrency, forming part of the worldwide peer-to-peer payment system. **Cryptocurrency** is digital money. It is considered to be more secure than the real money. Cryptocurrency uses something called cryptography to secure its transactions. Cryptography, to put it in simple words is a method of converting comprehensible data into complicated codes which are tough to crack.

Cryptocurrencies are classified as a subset of digital currencies, alternative currencies and virtual currencies.

Bitcoin was the first ever cryptocurrency created in the year 2009. Subsequently, there has been a rapid increase in the number of cryptocurrencies that have been created some of which are Litecoin, Ethereum, Zcash, Dash, Ripple etc.

Bitcoins, in India, have slowly started gaining popularity, given the efforts of the government to move towards a cashless economy.

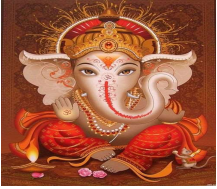
However, one should know that bitcoins, as of today, are not centrally administered or regulated by any specific body like the RBI which administers physical currency in India.

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In fact, peer-to-peer transactions with bitcoins are managed using something known as the blockchain technology which serves as a public ledger for all transactions.

1. WHETHER CRYPTO CURRENCY FALLS UNDER DEFINITION OF “GOODS” OR “SERVICE”.

Therefore it becomes imperative to understand if the Cryptocurrency falls within the meaning of " Goods or Services" under the GST laws. This classification would further be important to understand the treatment of transactions in terms of provisions such as place of supply , time of supply , rate of tax, valuation ,reverse charge etc.

MEANING OF GOODS; Section 2(52) of CGST Act 2017

“goods” means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply”.

It means that : Goods in GST means every kind of movable property like pen, car, food, animals etc. It also includes actionable claims and growing crops or grass, although these things are not normally construed as movable and are attached to earth. Reason for the same being, these things can be sold separately or sold under a combined contact with land.

But, goods in GST does not include

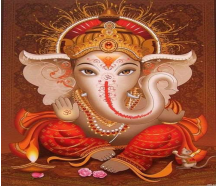
- Money
- Securities.

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LET'S ANALYSE ABOVE DEFINITION: The term “Movable Property” is not defined under GST ACT,2017 and hence reference has been taken from provisions of General Clauses Act, 1897 ,where it is defined as “ Property of every description other than Immovable Property”.

Thus to fall within the meaning of goods, , the property should not be immovable in nature. Since Cryptocurrency is not satisfying above definition of immovable property. The “ Movable” means something that has ability to move. If we use word property with the move, then we can say that any property, which is movable is a “ Movable Property”, comes within definition of “Goods” under GST,2017.

Please note that : property may be tangible or intangible property or it also includes rights ,which can be traded in the market.

Let's consider Supreme Court's Judgment in case of **Vikas Sales Corporation Vs. Commissioner of Commercial Taxes 1996 taxmann.com 1126(SC)** . The Question before the Apex Court was whether the transfer of import license ,i.e. REP License or Exim Scrip constitute the sale of goods for the purpose of the Sales Tax Laws of Tamil Nadu, Karnataka and Kerala.

In this regard, the Supreme Court had made following observations ;

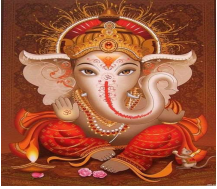
- 1. The term property is extended to every species of valuable right and interest;*
- 2. It also covers the unrestricted and exclusive right to a thing; more specifically ,ownership , the right to dispose of a thing in every legal way, to possess it, to use it and to exclude everyone else from interfering with it;*
- 3. Property embraces everything which is or may be the subject of ownership , whether legal ownership, or whether beneficial or a private ownership;*

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4. *The word is commonly used to denote everything which is the subject of ownership , corporeal or incorporeal , tangible or intangible ,visible or invisible , real or personal, everything that has an exchangeable value or which goes to make up wealth or estate;*
5. *It also includes real and personal property;*
6. *Even incorporeal rights like trademarks , copyrights ,patents and rights in personam capable of transfer or transmission ,such as debts, are also included in its ambit.*

THE APEX COURT further said in relation to REM License:

“ REM licenses have their own value. They are bought and sold as such. The original licence or purchaser is not bound to import the goods permissible thereunder. He can simply sell it to another and that another to yet another person. In other words , these license /Exim Scrips have an inherent value of their own and are traded as such.

They are treated and dealt within the commercial world as merchandise , as goods. A REP License/Exim Scrip is neither a chose-in-action nor an actionable claim. It is also not in nature of a title deed. It has value of its own. It is by itself a property, and it is for this reason that it is freely bought and sold in the market. For all purposes and intents, it is goods”.

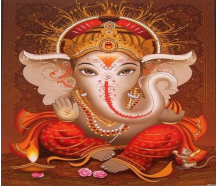
IT MEANS THAT: *the property term includes all species of valuable right and interest. It would not be restricted to tangible items but also include Incorporeal Rights.*

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The Apex Court in **Tata Consultancy Services Vs. State of Andhra Pradesh 2004 taxmann.com101(SC)** held that the transaction sale of computer software would be considered as sale of goods. The court provided that the Indian Laws does not make any distinction between tangible property and intangible property. Therefore “Goods” may be a tangible or an intangible one, and the property would become goods provided it has the attributes thereof having regard to ;

- (a) Its utility;
- (b) Capable of being bought and sold; and
- (c) Capable of being transmitted , transferred , delivered , stored and possessed.

PLEASE NOTE THAT the CBIC has also clarified that the Priority Sector Lending Certificate (PSLC) is taxable under GST as goods. The PSLC certificate is traded on E-KUBER **Portal of the RBI and it is sold from one bank to another bank.**

The **CRYPTOCURRENCIES** has an inherent right and is capable of being bought and sold or we can say that these Virtual Asset is marketable just like goods. These VDA can be transferred from one person to another and can be utilised as medium of exchange.

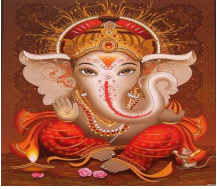
IFRS IAS 38 defines -Intangible Assets , which are non-monetary assets without physical substance and identifiable (either being separable or arising from contractual or other legal rights). Intangible assets meeting the relevant recognition criteria are initially measured at cost, subsequently measured at cost or using the revaluation model , and amortised on a systematic basis over their useful lives(unless the asset has an indefinite useful life , in which case it is not amortised).

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The International Financial Reporting Interpretations Committee(IFRIC) said that Virtual Currency fits the definition of an Intangible Assets as;

- (a)It is capable of being separated from the holder and sold or transferred individually; and*
- (b)It does not give the holder a right to receive a fixed or determinable of unit's currency.*

PLEASE NOTE THAT *Many European Countries follow Court Judgement in case of **Skatterverket Vs. David Hedqvist Case C-264/14** in which it was held that exchange of Cryptocurrency against Fiat Currency to be treated as Supply of Service. The Court held that Cryptocurrencies used in settlement or payment in the course of trade fulfils conditions of Legal Tender. In these countries supply of Intangible or tangible goods come under Supply of Goods and hence taxable.*

WHAT IS ACTIONABLE CLAIM;

Actionable claim is defined in Section 3 of the Transfer of Property Act, which was included in the Act by the Amending Act II of 1990. Actionable claim is an intangible movable property, and its transfer is dealt with in Chapter VIII of the Act.

According to Section 3 of the Act, actionable claim means:

- 1. Claim to an unsecured debt*
- 2. Beneficial interest in a movable property.*

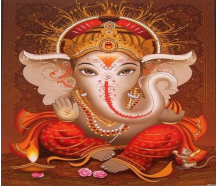
These are both claims that are recognized in the Courts of law as affording relief. There are other types of claims also that afford relief and are actionable in the Courts of law, such as secured debts and tortuous suits like defamation or nuisance. But those are not categorized under the meaning of actionable claim. The term actionable claim only covers the above mentioned two types of claims.

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Section 2(1) of CGST Act, 2017 defines Actionable Claims as the one having the same meaning as assigned to it in Section 3 of the Transfer of Property Act, 1882.

As per the Transfer of Property Act, Actionable Claim means:

- a claim to any debt other than a debt secured by mortgage of immovable property or hypothecation or pledge of movable property or
- Claim to any beneficial interest in the movable property not in the possession, either actual or constructive, of the claimant.

Further, such actionable claims are recognized by the civil courts as affording grounds for relief. This is irrespective of the fact whether such debt or beneficial interest is existent, accruing, conditional or contingent.

In a nutshell, there are two parts to the definition of actionable claims:

- A claim to unsecured debt or
- Any interest in the movable property which is not in the possession of the claimant.

Actionable Claims are applicable only for goods and not for services. Section 2(52) of the CGST Act defines goods as every kind of movable property other than money and securities but includes actionable claims, growing crops, grass and things attached to land which are agreed to be severed before supply.

2. WHETHER CRYPTOCURRENCY IS AN ACTIONABLE CLAIM

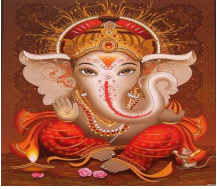
- (a) The first limb of the above definition intends to cover the claim in the nature of debt other than secured debt i.e. unsecured debt.
- (b) The second part refers to the claim to any beneficial interest in movable property, not in the possession of the claimant.

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From above it is clear that cryptocurrency is not a debt , as there is no such type of transfer. That is there is no lender or borrower. Since holder of a cryptocurrency is the owner of the movable property in the cryptocurrency and movable property is always in his possession and hence second part of above definition is not also satisfied. At last cryptocurrency is not an “ Actionable Claim”.

3. WHETHER CRYPTOCURRENCY IS MONEY the money has been excluded from the definition of “Goods.

Section 2(75) of the CGST,2017 provides that - It means the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any other instrument recognised by the Reserve Bank of India when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value.

The RBI defines legal tender as – “ Legal Tender is a coin or a banknote that is legally tenderable for discharge of debt or obligation.”

PLEASE NOTE THAT: Coins of any description not lower than one rupee note shall be legal tender for any sum not exceeding Two Thousand Rupee. The definition of bank notes covers both physical and digital notes issued by RBI. By inserting the meaning, the Government included CBDC within the meaning of Bank Notes. A CBDC is a legal tender issued by a Central Bank in digital form and it is same as Fiat Currency . A CBDC is denominated in the currency of the issuer country and is intended to maintain same value as is physical counterpart.

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As cryptocurrencies are not in form of coins or bank notes and also RBI has not issued the same and hence it does not fall under definition of Coins or Bank Notes and hence it is not money. The cryptocurrencies are also not treated as foreign currency.

From above discussion it is clear that cryptocurrencies do not satisfy conditions to be called as “ Money” and hence cannot be treated as “ Money”. Since “ Money” has exclusively out of preview of GST ACT,2017.

4. WHETHER CRYPTOCURRENCY IS SECURITIES

SECTION 2(h) of the Securities Contract Regulation Act ,1956

(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) derivative;

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

(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(id) units or any other such instrument issued to the investors under any mutual fund scheme;

(ida) units or any other instrument issued by any pooled investment vehicle;

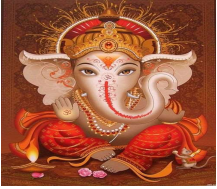
(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and

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acknowledging beneficial interest of such investor in such debt or receivable including mortgage debt, as the case may be;

(ii) Government securities;

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

(iii) rights or interests in securities;

LET'S ANALYSE *since cryptocurrencies freely traded on the Crypto Exchanges , may still not be referred to as securities for GST law because these are not covered under definition of Securities and also not declared by the government as such.*

SERVICES *under Goods and Service Tax means anything which is NOT- Section 2(102) of CGST Act 2017.*

As per Section 2(102) of CGST Act, 2017 services means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

It means that : *Service includes all things other than*

- Goods,*
- Securities,*
- Money*

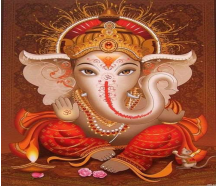
But activities like the conversion of money-by-money exchanges or authorized dealers for a service charge or fee is included under the ambit of Service.

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GST ACT,2017 defines service means anything other than goods, money and securities but include activities relating to the use of money or its conversion by cash or by any other mode, from one form ,currency or denomination , to another form ,currency or denominated for which a separate consideration is charged. Since in previous discussion we have analysed that Cryptocurrencies are goods and hence these are not falls under category of service.

CONCLUSION: *from above discussion we may conclude that Cryptocurrency does not falls within ambit of specific exclusions in the definition of “Goods”. We can say that Cryptocurrency is covered under definition of “ Movable Property”, and hence Cryptocurrency would qualify as goods for the purpose of GST Act, 2017. Since government has till date not recognised Cryptocurrency and transactions in Cryptocurrency.*

DISCLAIMER: *the article presented here is only for sharing information and knowledge with the readers. The views are personal ,shall not be considered as professional advice. In case of necessity do consult with tax professionals for more clarity and understanding on subject matter.*

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Footnotes:

As per the Finance Bill, 2022, the cryptocurrencies are classified as a capital asset for the purpose of taxation and hence, income under the head capital gain will arise on transaction of the same.

Tax on income from Cryptocurrencies [Section 115BBH]

- i) Income from transfer of cryptocurrencies will be taxed at the rate of 30%;*
- ii) Deduction – No deduction of any expenditure except for cost of acquisition will be allowed;*
- iii) Set off/ Carry forward of losses – No set off of losses against any income is allowed as well as carry forward of losses in this respect is also not allowed.*

Please Note That: *The following should be ignored while computing capital gains on transfer of cryptocurrencies*

- i) Cost of improvement relating to the asset;*
- ii) Selling expenses i.e. the expenditure incurred in connection with the transfer of virtual digital asset;*
- iii) Indexation of cost of acquisition*
- iv) Any exemption under section 54F.*

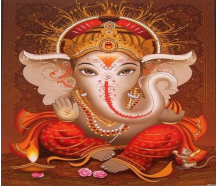
Further, no deduction under Chapter VI-A shall be allowed. However, relief under section 87A i.e. rebate can be claimed.

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Applicability of TDS provisions [Section 194S] A new section 194S is proposed to be inserted in The Income Tax Act, 1961 w.e.f. 01.07.2022 regarding TDS.

Deductor – Any person responsible for paying any sum by way of consideration for the transfer of cryptocurrency.

Deductee – Tax is required to be deducted if amount is payable to a resident person Rate of TDS – 1% of consideration.

When to deduct – At the time of payment or at the time of credit of such sum to the account of resident, whichever is earlier.

Exemption from TDS –

1. If consideration is payable by any person (other than a specified person) and its aggregate value does not exceed Rs. 10,000 during the financial year.
2. If consideration is payable by a specified person and its aggregate value does not exceed Rs. 50,000 during the financial year.

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