

GST NEWSLETTER

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ARTICLE

GST Implication On 'Virtual Digital Assets'

✓ Background:

Developments in the recent times have taken a limelight on GST implications on various transactions entered around virtual digital assets/crypto assets when the legality of crypto assets remains under a shadow of doubt in India.

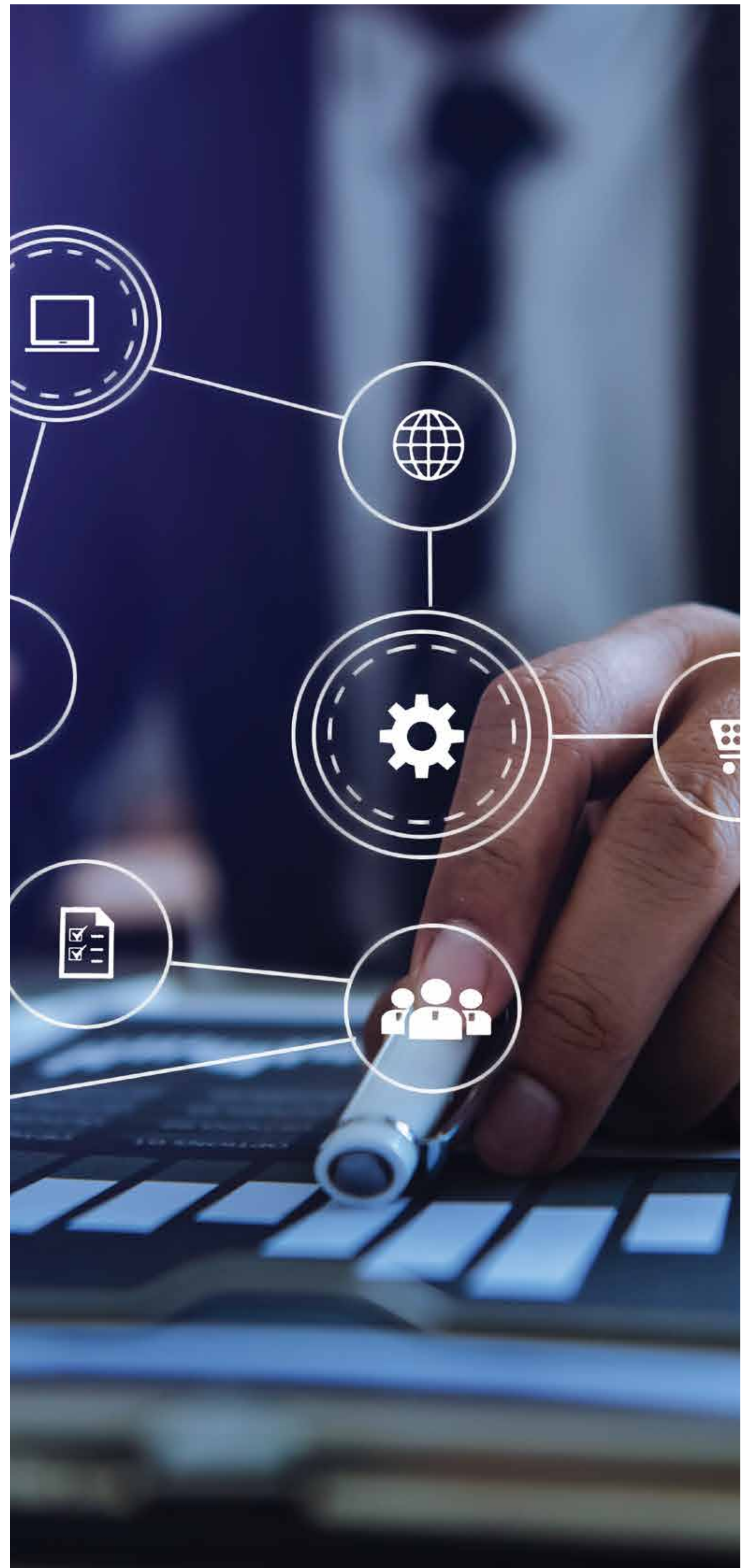
Finance Minister in Union Budget 2022 has voiced some important developments in relation of Virtual digital Assets ('VDA') under Income tax law, similar clarifications must be expected to bring clarity about VDA under GST law.


Further, Finance Minister announced introduction of RBI backed- Central Bank Digital Currency (CBDC) and tax regime under which VDA, which includes non-fungible tokens (NFT) and crypto-assets, shall be taxed. However, it doesn't specify whether the CBDC shall be under the category of VDA or not.

✓ Applicability Under GST:



Currently, the provisions under GST law do not specifically define / cover crypto assets. However, Finance Bill, 2022 has defined VDA as under:

- a** Any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having





inherent value, or functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; and can be transferred, stored or traded electronically;

-  A non-fungible token (NFT) or any other token of similar nature, by whatever name called;
-  Any other digital asset, as the Central Government may, by notification in the Official Gazette

Further, Central government is empowered to include/exclude any digital assets from the definition of VDA subject to satisfaction of conditions by way of notification. It is important to note that the said definition makes no difference between the different types of crypto assets specified by the Organisation for Economic Co-operation and Development (OECD) in its report in the month of October 2020 which are listed below:

- **Payment tokens** are intended to operate similarly as currencies
- **Security tokens** are designed as tradeable assets which can be held for investment purposes and classified as 'securities'
- **Utility tokens** facilitate the exchange or access to certain goods /services.

It is evident from this definition that both crypto assets and NFTs falls under the scope of VDA and have accordingly brought under the Income tax laws. Therefore, cryptocurrencies and NFTs should be deemed capital assets and will be treated as virtual digital assets. The provisions introduced by the Union Budget, 2022 seem to cover only 'Payment Tokens' and their corresponding tax impacts. The process and purpose of each token are different, different token have different impact under the GST law. Accordingly, specific definition covering the various kinds of crypto assets may ensure that the different types are brought in GST bracket. However, it is very likely that concept of VDA introduced by the Union Budget, 2022 may be adopted from consistency perspective.

Potential Classification Under GST Law:

Union Budget 2022 has also provided for taxing rights wef 1st April, 2022 by defining comprehensively 'VDA' under Income Tax Law wherein a specific provision for dealing with taxation on special cases, provided for a flat rate of tax @ 30% and TDS @ 10% has been prescribed. Further, it has also provided for taxation on VDAs which are gifted/transferred.



Union Budget has also specially clarified that any loss arising from dealing with VDAs will not be entitled to be carried forward and no deduction will be allowed other than the original cost of acquisition.

It is evident that Indian Tax Laws have considered crypto-assets/VDA in lines with winnings from lottery/speculative gains from commodity transactions, which may be owing to the volatility in the prices of cryptocurrencies with an aim to discourage transaction of private crypto-assets. A similar effect may also be expected under GST law.

✔ Possible Implications Expected Under GST:

When it comes to GST, in relation to GST rates applicable can be treated by applying applicable GST rate of 18% under normal category.

Alternatively, considering the VDAs transaction in the same bracket of lottery, casinos, betting, gambling, horseracing then they could be treated as supply of goods and may be taxed at 28% on the entire transaction value.

Currently, 18% GST is levied on services provided by crypto exchanges, and it is categorised as financial services.

Sl. No.	Particulars	Tax Effect	Comments
1	Purchase of goods or services in exchange of private digital asset (for ex. Bitcoin)	Regarded as goods for goods / services.	Considering VDA (bitcoin) to be goods and transferring VDA (bitcoin) in exchange of goods for goods /services may be termed as 'barter', as digital assets are not classified as such as, the general rate of GST will be applicable on such transactions. Alternatively, bitcoins may be regarded as 'intangible assets'.
2	Purchase of private assets (bitcoin) on payment of money (INR or any foreign currency)	Seller of private digital asset will be subject to GST.	Considering private digital assets in nature of goods, the seller of bitcoin ought to be liable to charge GST at general rate for sale of private digital assets in exchange of payment in money.





3	Services provided in connection with sale or purchase or exchange of private digital assets	Treated as Supply of services	Supply of services in relation to purchase or sale or exchange of digital assets for consideration, charged as service fee will be subject to GST at standard rate applicable to services
4	Sale of non-fungible tokens	Treated as an intangible asset other than software	NFT which are sold on digital markets will be treated in the same manner as sale of intangible assets and ought to be taxed at the rate applicable for such intangible assets.

It is to be noted that people selling these cryptocurrencies in course /furtherance of business may be required to be registered under GST Law based on the annual threshold limit.

✓ **Potential Issues Under GST Law:**

● **Mining of VDAs**

'Mining' is a process in which some distributed ledger protocols by which transactions are verified and recorded. The first 'miner' to successfully verify the transactions may be entitled to mining rewards which are paid through tokens/transactional fee. This fee may be a % on value of transaction being mined/processed. An issue may arise whether to treat 'mining' as goods or services? In which category from GST point of view should be placed? A clear and separate notification is required in order to avoid any ambiguity.


● **Tokens**

'Utility tokens' indicate receipt / direction for the supply of goods or/and services from specific person and cease to function as a medium of exchange after they have been used to redeem goods or services. Such tokens can be treated as similar to vouchers for tax purposes.

● **Input tax Credit**

Claim of Input Tax Credit is the most crucial and most important part of GST law. It is the backbone of GST Law and always played a very significant role in determining the status of GST. In provide a supply of goods/ service through VDA, a taxpayer would have use various input and input services like electricity, cost of acquisition (in case of sale), IT infrastructure (in case of mining), etc.





Set-off of appropriate inputs and input services used in relation to VDA transaction would have to be provided in law specifically if supply of VDA is brought into the tax gambit under GST law. However, considering the volatility in value of known VDAs, restrictions in ITC claim cannot be ruled out.

- **Valuation**

If the Crypto-currencies and NFT's are exchanged, then the value at which they are exchanged is crucial to identify the value of the supply. Normally, if the price is the sole consideration and the parties unrelated then the price paid is the value of supply. However, if there is a barter of good / services for crypto currencies / NFT, then the valuation may be based on the value of such crypto currencies rather than the value of the goods / services provided. This is dependent on the agreement and the barter that is being provided in lieu of consideration.

- **Way-forward:**

Upon introduction of digital currency by RBI, the industry will be split between private digital assets and digital currency/assets backed by Government. India's digital currency will be regarded as money under GST and cannot be taxed as such. While transactions in private digital assets may be taxed as goods/service as notified or specified unless they are banned / appropriately regulated.

It may be imperative for the unorganised Crypto industry to make a representation to the GST council/department so that there are rules/provision introduced to allow discharge of GST liability at nominal rates for the transaction entered in past year or along with an appropriate amnesty scheme.

This helps to ensure that delay in introduction of regulation under GST law does not impact an ignorant but willing taxpayer. Given the number of assessee's engaged and the volume of such transactions, this may be in the interest of justice, equity and good conscience.

There are number of questions left unanswered around this law. Given the immense volume of transaction related to crypto assets it is hoped that rational tax regime under GST is introduced soon covering the entire spectrum of transaction in virtual digital assets, so the next few GST council meeting would be crucial to see if the similar clarification is announced for GST as well.

CASE LAWS

Valuation Of Land In Construction Agreement

Facts Of The Case

Munjaal Manishbhai Bhatt versus Union of India – Gujrat High Court (SCA 1350/2021, 6840/2021 & 5052/2021 dated 06/05/2022)

The Petitioner purchased a plot of land and also intended to obtain construction services for a bungalow on the plot of land. For this, the petitioner entered into two different agreements with the builder; one for purchase of land and the other for construction services of bungalow. The builder, in terms of Notification No. 11/2017 CT-(R) considered the deeming provision of allocating 1/3rd of the total contract value to land and the remaining 2/3rd for construction services. The GST was also charged on the 2/3rd value of construction services.

The Petitioner approached the Hon'ble Gujrat High Court disputing the deeming applicability of 1/3rd value on land regardless of the actual cost of land transferred in the agreement. The petitioner has requested the High Court to declare the entry 3(if) of Notification No. 11/2017- CT-(R) as well as Entry 3(if) of Notification No. 11/2017 – ST-(R) along with paragraph no. 2 of both the notifications as ultra-vires to the GST acts and Article 246A and violative of Article 14 of the Constitution of India.

The Petitioner has also contended that entry 3(if) of Notification No. 11/2017-Central Tax (Rate) is only applicable for sale of flats/building units wherein undivided share in land is transferred along with constructed flats/units without separate consideration being fixed towards sale of land.

Provision Of Law

As per entry 3(if) of Notification No. 11/2017- CT-(R) read with paragraph no. 2 of explanations – supply of construction services involving transfer of land or undivided share of land, then the value of such services will be the total value of the supply less value of land which is deemed to be one third of the total amount charged for such supply

As per Article 14 of the Constitution of India - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

As per Article 246A of the Constitution of India – the power to make the laws in respect to goods and services tax shall be with State Legislature and the Parliament and in case of inter-state trade or commerce, then only the Parliament has powers to make laws.

Ruling of AAR

The Hon'ble Gujrat High Court held that the applicability of 1/3rd value of land is not mandatory on the following grounds:

- Sale of land as per Schedule III of the CGST Act includes developed land as there is no distinction between developed and undeveloped land.
- As per judgements by the Supreme Court in Gannon Dunkerley and Larsen and Toubro cases, mandatory application of deeming fiction of 1/3rd value as land even when the actual value of land is ascertainable is ultra-vires the statutory provisions.
- The deeming fiction is arbitrary as it uniformly applies to all cases regardless of the size of plot of land. Further, the 14th GST Council meeting minutes speaks of mandatory deduction only in the context of flats wherein it was difficult to ascertain the value of the undivided share of land. Hence, this is violative of Article 14 of the Constitution of India.
- The arbitrary deeming fiction has resulted in tax being imposed when there is no nexus with the charge of tax on the supply of construction.
- In case of inflation of price of land to claim exemption, then valuation may be done as per Section 15(4) and Rule 30 & 31. Hence, inflation of land prices is not a hindrance and cannot be a reason to levy deeming fiction of 1/3rd value.

Exemption Of Telecommunication Services Provided To Hyderabad Municipality

Facts Of The Case

M/s. Bharti Airtel Limited - Appellate Authority for Advance Ruling, Telangana (TSAAR Order No.20/2021 dated 01/11/2021)

The Applicant, M/s. Bharti Airtel Limited is providing telecommunication services to Greater Hyderabad Municipal Corporation (GHMC) by way of data/voice telecommunication. These services provided to GHMC are not related to any specific project or specific scheme of Government and are provided to GHMC to be used by employees for general office and administrative purposes

Hence, based on this, the Applicant has approached the AAR for obtaining a ruling on the following:

Whether telecom services provided by Airtel to GHMC are Nil rated under GST as per the S. No. 3 of Notification No. 12/2017- Central Tax (Rate) dated 28-6-2017 by considering the service as a pure service in relation to functions entrusted under article 243W - Powers, authority and responsibilities of Municipalities? And whether the Invoices for telecommunication services are to be issued with (or) without GST?

Provision Of Law

Notification no. 12/2017 Sl. No. 3 states that - Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.

Under the article 243W of Constitution of India, municipalities may be entrusted with the responsibilities for:

Urban planning including town planning.	Slum improvement and up gradation.
Regulation of land-use and construction of buildings.	Urban poverty alleviation.
Planning for economic and social development.	Provision of urban amenities and facilities such as parks gardens, playgrounds.
Roads and bridges.	Promotion of cultural, educational and aesthetic aspects.
Water supply for domestic, industrial and commercial purposes.	Burials and burial grounds; cremations, cremation grounds and electric crematoriums.
Public health, sanitation conservancy and solid waste management.	Cattle ponds; prevention of cruelty to animals.
Fire services.	Vital statistics including registration of births and deaths.
Urban forestry, protection of the environment and promotion of ecological aspects.	Public amenities including street lighting, parking lots, bus stops and public conveniences.
Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.	Regulation of slaughter houses and tanneries

Ruling Of AAR

The learned Telangana AAR held that:

The services provided to GHMC do not qualify for exemption under Notification No. 12/2017 as applicant is providing data and voice services to GHMC and to the employees of the municipalities for general office and administrative purposes. Thus, there is no direct relation between the services provided by the applicant and the functions discharged by the GHMC under Article 243W read with schedule 12 to the Constitution of India. Therefore, Airtel has to raise invoice with GST.



DUE DATES OF GST FOR THE MONTH OF MAY 2022

MAY

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3	4	5	6	7
8	9	GSTR-7, GSTR-8 10	* GSTR-1 11	12	* IFF, GSTR 6 13	Generation of Form GSTR 2B 14
15	16	17	18	19	* GSTR-3B, GSTR-5,5A 20	21
22	23	24	* PMT-06 25	26	27	28
29	30	31				

2022

* Monthly return for taxpayers with Annual Turnover more than Rs.1.50 Crores or Taxpayer who has opted Monthly return option.

* For taxpayers with Annual Turnover less than Rs.1.50 Crores and Taxpayer who has opted quarterly return option (QRMP).



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