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## **CRYPTOCURRENCY TAXATION IN INDIA**

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### **ABSTRACT**

Every new revolution that comes up in the world, is at first seen as something unusual, and a certain hesitation is shown towards its acceptance. Countries try to accept this revolution by regulating it closely and after some time going flexible with regulations for its full development when its scope is realized. Cryptocurrency is one such revolution that has been introduced in this era and around which almost a parallel economy has been created. Countries are trying to regulate it in their ways- some regulating it as an asset and some as securities. Cryptocurrency comes in a digital form, a decentralized system operating without any third party. So this cryptocurrency market runs by the users for the users. As there's no single regulatory body that is regulating this market it has become difficult especially for regulatory bodies like the Reserve Bank of India to regulate this market. Now one of the problems that are coming up due to its decentralized and unregulated characteristics is its taxation. Recently some clarity is given by the authorities in the Finance Bill, 2022 regarding the same but a lot has been left which needs to be looked into for a better regulatory mechanism when it comes to its taxation. This paper focuses on some issues which need to be resolved in the taxation system concerning cryptocurrency and seeks some clarity on the same. In this paper, the focus is on cryptocurrency and other digital assets like Non-fungible tokens are kept outside its scope. The researcher has included the study of proposed regulations in the Finance Bill concerning cryptocurrency and Income Tax Act, 1961 along with some problems in the framework of Goods and Service Tax when it comes to its regulation of the cryptocurrency.

## I. Introduction

Who would have thought thirty-four years ago that humans would be able to create their human-made world, a virtual reality where social connections are made- like in our world and the economy can be grown around this man-made world. But here we are today talking about the scope of a metaverse in the coming few years. Non Fungible Tokens (NFT) and certain cryptos are popular examples of the property that would be owned in the metaverse. While crypto tokens like SAND can be used throughout the Sandbox ecosystem for interaction and transaction, the other form of cryptos which is a cryptocurrency (crypto/s) is already in use in the physical world to trade and transact<sup>1</sup>. Now because it has become a popular entity (asset, property, or other forms) to gain profits through trading and investing on it<sup>2</sup>, it has come under the eyes of the income tax regime of the country. If we look at the journey of the acceptance of cryptos, especially by the authorities in India since its inception, we have come far ahead. Indian tax regimes have tried to ban the transaction in these entities in the past but thanks to the intervention of the judiciary, the notification of the Reserve Bank of India (RBI) was quashed,<sup>3</sup> and from there we have reached now where the tax authorities have recognized cryptos as a different form of the asset class. So before going further to understand the scenario of cryptos in India and whether the crypto industry has any future in our country, first let's understand what it means.

Crypto is defined as encrypted decentralized digital money that's based on blockchain technology and its maintenance and management have been distributed among the crypto users via the internet<sup>4</sup>. It started with being used as an asset or stock and is now expanding its nature to the form of currency. Countries like El Salvador<sup>5</sup> have made it legal tender within their jurisdiction which means it can be used as money to buy and sell goods and services.

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<sup>1</sup>. Felicia Huo, How to shop in the metaverse: The cryptocurrencies you'll need to buy, and how to get them, FORTUNE (Dec. 11, 2021), <https://fortune.com/2021/12/10/metaverse-shopping-cryptocurrency/>.

<sup>2</sup>. Koustav Das, Decoded | What's driving demand for cryptocurrencies in India, INDIA TODAY (Aug. 25, 2021), <https://www.indiatoday.in/business/story/decoded-why-more-indians-are-investing-in-cryptocurrencies-bitcoin-ether-dogecoin-1845122-2021-08-25>.

<sup>3</sup>. Internet and Mobile Association of India v. Reserve Bank of India, SCC OnLine SC 275, (2020).

<sup>4</sup>. Kate Ashford, John Schmidt, What Is Cryptocurrency?, FORBES ADVISOR (Jan. 25, 2022), <https://www.forbes.com/advisor/investing/what-is-cryptocurrency/>.

<sup>5</sup>. Oscar Lopez and Ephrat Livni, In Global First, El Salvador Adopts Bitcoin as Currency, New York Times (Sept.7, 2021), <https://www.nytimes.com/2021/09/07/world/americas/el-salvador-bitcoin.html>.

Some countries have made its transaction legal within their jurisdictions by regulating them partially or completely<sup>6</sup> while some have completely banned them to be used for any kind of purpose<sup>7</sup>.

Now let's talk about the scenario of India. A few days ago, in the budget session of 2022, our Finance Minister announced that the transfer of income of *virtual digital assets* (VDA) would be taxed under the flat rate of thirty % without providing any exception/s to the rule. Even the gifts received in the form of VDA would be taxed at the receiver's end. No deductions can be claimed by the taxpayers except the cost of acquisition. Also, Tax Deduction at Source (TDS) of one % would be applied to the transactions of these VDAs and the losses in their transactions won't be set off by any other income. This decision has come as a bittersweet decision for crypto investors and traders as now, the government is recognizing the cryptos for the first time, though the word *cryptos* wasn't mentioned even once in the budget session speech and neither in the Finance Bill, 2022 (The Bill); but the flat rate of taxation without any exemptions and deduction has been a big blow for the community. So all types of cryptos which will not be regulated by RBI would come under the definition of VDA- which is mentioned in Clause 3 of The Bill- proposing its insertion under Section 2 of the Income Tax Act, 1961 (ITA). As per this clause, a VDA means '*any information or code or number or token (not being Indian currency or any foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value which is 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 and includes its use in any financial transaction or investment, but not limited to, investment schemes and can be transferred, stored or traded electronically. Non-fungible tokens and; any other token of similar nature are included in the definition*'. This definition is wide enough to include any crypto (either token or coin) and NFT under its purview.<sup>8</sup>

The proposals are given in the budget session and The Bill for the legal framework of cryptos, but a lot of intricacies have been left out which would hopefully, be talked about and cleared

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<sup>6</sup>. Shreya Mehra, Explained: How Cryptocurrencies Are Regulated Around The World, OUTLOOK (Dec.11, 2021), <https://www.outlookindia.com/website/story/business-news-explained-how-cryptocurrencies-are-regulated-around-the-world/404710>.

<sup>7</sup>. Marco Quiroz-Gutierrez, Crypto is fully banned in China and 8 other countries, FORTUNE (Jan. 5, 2022), <https://fortune.com/2022/01/04/crypto-banned-china-other-countries/#:~:text=When%20it%20banned%20crypto%20last%20year%2C%20China%20did%20so%20in,outl,awed%20cryptocurrencies%20outright%20in%20September>.

<sup>8</sup>. THE FINANCE BILL, CHAPTER III, Clause 3, sub clause (b) BILL No. 18 OF 2022.

about in the coming days. In this paper, the researcher will start by understanding how investors and traders of cryptos were paying their taxes under ITA before the introduction of The Bill. In the next chapter, the researcher would try to study some of these intricacies that have been left out in The Bill and the void in ITA that needs to be filled for regulating cryptos. The last chapter would be dedicated to the Goods and Service Tax (GST) aspect of cryptos under which the researcher would try to find out whether present provisions of indirect taxation are enough to regulate this asset or if some changes are required to be made.

## II. Crypto Taxation Under ITA Before The Bill

Before The Bill was introduced, taxation of crypto could be seen in mainly two ways- under *business income* if the user is a trader and *capital gains* if the user is an investor<sup>9</sup>. Briefly stating the difference between an investor and trader- if a person is using the crypto market to constantly buy and sell cryptos and sales and purchases of the cryptos made by that person are almost equal then the person would be considered a trader whereas if a person transacts in cryptos not so frequently and the purchases are more than sales then the person can be considered an investor. So as no specific regulations under taxing laws provided for crypto taxation, with the help of general laws they were getting taxed. Now that we have understood some basics, let's understand how crypto was taxed as a business income and under capital gains.

### A. Crypto as business income

Traders generally make business by scalping the market and they get attracted to the crypto market because of its high volatility. Provision under ITA provides for income of business or profession carried on by the assessee<sup>10</sup>. Definition of *business* includes- '*any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture*'<sup>11</sup>. Under the business income, all the costs and selling price would have to be calculated at the end of the financial year and the differential between the cost and price would be profit and this profit is to be disclosed under business income. This profit income used to be taxed according to the income tax slabs. So putting simply income from business (crypto

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<sup>9</sup>. Madana Prathap, Tax implications of investing in cryptocurrencies — here's how you can make the most of your investment, BUSINESS INSIDER INDIA (Dec. 24, 2021), <https://www.businessinsider.in/investment/news/tax-implications-of-investing-in-cryptocurrencies-heres-how-you-can-make-the-most-of-your-investment/articleshow/85101639.cms>.

<sup>10</sup>. The Income Tax Act, §28 (1961).

<sup>11</sup>. The Income Tax Act, §2(13) (1961).

trading) and other income heads (except long-term capital gains) could be combined and taxed together according to the income slab.

### *B. Crypto as capital gains*

For the income to be taxed under capital gains the first criterion to be checked is whether the income is arising from a capital asset<sup>12</sup>. Definition of the *capital asset* means any kind of property held by the assessee whether tangible or intangible<sup>13</sup>. According to this definition, cryptos can come under this. The second criterion is whether the transfer of such capital asset has taken place<sup>14</sup>. This definition of transfer is quite inclusive so ‘*sale, exchange or relinquishment*’ of crypto will come under it. After this, computation of income from capital gains was done by taking differentials of ‘*fair value consideration, cost of acquisition (COA), cost of improvement, and expenses incurred in connection with the asset*’<sup>15</sup>. Then the period of holding that is whether the asset is *short-term*<sup>16</sup> or *long term*<sup>17</sup> was decided and on this basis, the tax rate was applied. If the cryptos were held as short-term capital gain then the tax would be calculated according to general income tax slabs but if it's long-term capital gain then it should be taxed separately.

This was the practice that was done for paying the taxes under ITA before The Bill but after its introduction and till further rules are made regarding the taxation of cryptos, every crypto transaction is going to be taxed at thirty %<sup>18</sup> and because cryptos form a different class of asset it could be taxed under the head of *Income from Other Sources*.

## **III. Crypto, The Bill, And ITA**

Under this chapter certain issues and questions that have arisen after the introduction of The Bill, are covered. So let's start with understanding what issues are arising under ITA with The Bill proposing amendments, concerning the taxation of crypto.

### *A. Cost of acquisition*

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<sup>12</sup>. The Income Tax Act, §45 (1961).

<sup>13</sup>. The Income Tax Act, §2(14) (1961).

<sup>14</sup>. The Income Tax Act, §2(47) (1961).

<sup>15</sup>. The Income Tax Act, §48 (1961).

<sup>16</sup>. The Income Tax Act, §2(42A) (1961).

<sup>17</sup>. The Income Tax Act, §2(29A) and §112 (1961).

<sup>18</sup>. THE FINANCE BILL, CHAPTER III, Clause 3, sub clause (b) BILL No. 18 OF 2022.

It can simply be defined as the cost which is paid during the transfer of the asset. Section 55(2) of the ITA defines the same<sup>19</sup>. Section 2(47) of ITA defines transfer which includes an exhaustive list of what is considered a transfer<sup>20</sup>. Now if we talk about The Bill- it proposes to insert Section 115BBH in the ITA which talks about tax on income from VDAs<sup>21</sup>. Under this Section, it is mentioned that no expenditure other than COA can be deducted while calculating income from VDA. COA can be realized if the investors or traders are transacting in the crypto market but the problem comes in *Crypto Mining*. So first let's understand what crypto mining means- it is a process in which the *miners* while verifying new transactions in the crypto world generate new coins<sup>22</sup>. Miners are those users who use a vast, decentralized network of computers and mining machines not only to verify transactions but also to secure blockchains, they run algorithms in their computers on specific software which is used to verify the transactions, these transactions are then added to a public ledger which in turn rewards the miners in the form of new coins; whoever verify the transaction first gets the reward<sup>23</sup>.

Now let's come to the problem of COA for miners. As of now, miners don't have any COA because as explained above their rewards include the newly generated coins while mining. They don't have any capital outflow to acquire the assets, the outflow here is the cooling cost (cooling of equipment used for mining), electricity cost, heating cost, and likewise<sup>24</sup>. Generally, these outflows are considered incidental expenses which are not allowed if we go by the provision of 115BBH<sup>25</sup>. The result is the whole income without taking out any expenditure would be taxed and this would wipe out the mining industry in India as the chances would be that they will incur losses without any deduction of high-cost expenditure. This would be bad news for around forty organizations and three hundred miners who are operating in this mining market<sup>26</sup>. So it's with the authorities to decide whether the outflow to acquire the assets for the miners will be considered a cost incurred or incidental expenditure incurred.

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<sup>19</sup>. THE FINANCE BILL, CHAPTER III, Clause 28, sub clause (1) BILL No. 18 OF 2022.

<sup>20</sup>. The Income Tax Act, §55(2) (1961).

<sup>21</sup>. THE FINANCE BILL, CHAPTER III, Clause 28, sub clause (1) BILL No. 18 OF 2022.

<sup>22</sup>. What is mining?, coinbase, <https://www.coinbase.com/learn/crypto-basics/what-is-mining#:~:text=Mining%20is%20the%20process%20that,ledgers%20that%20document%20cryptocurrency%20transactions>.

<sup>23</sup>. Chapter 8. Mining and Consensus, OREILLY, <https://www.oreilly.com/library/view/mastering-bitcoin/9781491902639/ch08.html>.

<sup>24</sup>. Hatim Hussain, Reinventing Regulation: The Curious Case of Taxation of Cryptocurrencies in India, NUJS Law Review 131, 140 (2017).

<sup>25</sup>. THE FINANCE BILL, CHAPTER III, Clause 28, sub clause (1) BILL No. 18 OF 2022.

<sup>26</sup>. Mimansa Verma, India is missing out on the huge potential to use its green energy for mining cryptocurrency, QUARTZ (Nov. 18, 2021), <https://qz.com/2088411/should-india-use-its-burgeoning-green-energy-for-crypto-mining/>.

### B. Set off losses

As mentioned in The Bill, if the losses have occurred by the taxpayer on the transactions of VDA then the same won't be set off against any other income of the taxpayer<sup>27</sup>. For example, if I have incurred a loss while transacting in the crypto market but I have made a profit by investing in shares, the crypto loss can't be adjusted against the profits gained from investing in shares. While incurring losses in crypto won't obligate the person to pay tax on that but the same can't be carried forward in the subsequent years<sup>28</sup>. While this may seem clear, an issue does arise in terms of lack of clarity with respect to the setting of losses of crypto with crypto profits or of profits of any other assets mentioned under VDA definition like NFTs. The words used under the provision of 115BBH(2)(b) is- '*no set off of loss from transfer of the virtual digital asset computed under clause (a) of sub-section (1) shall be allowed against income computed under any other provision of this Act to the assessee...*'<sup>29</sup>. Now as no provision of the ITA talks about income computation of the crypto or VDA, it seems that loss of crypto with crypto profits can be adjusted but clear provisions need to be made regarding this so taxpayers can take benefit of it. Furthermore, Ajeet Khurana, a leading name in the crypto industry and former head of the Blockchain and Cryptocurrency Committee<sup>30</sup> tries to speculate why the government hasn't allowed for set off<sup>31</sup>. He says- '*one of the reasons could be the making of fake profits and losses by the users of crypto market to create set offs because most of the transactions does take place outside or in entities working outside the jurisdiction of India, that's why this isolation for set off could be justified*'<sup>32</sup>. So if the government has done this for the above-mentioned reason, then chances are that these rules would, later on, be amended to be less rigid and more pro-crypto but if not, then the whole crypto industry would shatter into pieces.

### C. Tax deducted at source

Clause 194S of The Bill talks about payment on transfer of VDA<sup>33</sup>. This provision provides for TDS. It was introduced for collecting tax from the source of income where the deductor deducts the amount at the specified rate as soon as it credits the amount to the deductee's

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<sup>27</sup>. THE FINANCE BILL, CHAPTER III, Clause 28, sub clause (1) BILL No. 18 OF 2022.

<sup>28</sup>. Id., at sub clause 2.

<sup>29</sup>. Id.

<sup>30</sup>. Ajeet Khurana, crunchbase, <https://www.crunchbase.com/person/ajeet-khurana>.

<sup>31</sup>. Id.

<sup>32</sup>. Supra note. 30.

<sup>33</sup> THE FINANCE BILL, CHAPTER III, Clause 59 BILL No. 18 OF 2022.

account and the authority can keep track if someone evades the tax<sup>34</sup>. The same deducted amount has to be deposited to the government. In crypto transactions, the deductor shall deduct one percent from the crediting amount to the deductee. The issue arising here is that the proposed provision says the responsibility to deduct the TDS amount is with the one who is paying the consideration to the resident<sup>35</sup>. Now in general this provision is posing a responsibility towards every citizen or entity to deduct TDS. Though the implementation of the same could be easier with exchanges if the guidelines had<sup>36</sup> hinted that the onus would be on these Indian exchanges to deduct TDS<sup>37</sup>. The problem could arise when the trading or investments are done through foreign exchanges, whether foreign exchanges would also be made liable to cut TDS and deposit it with the government and if yes then how? Will the government have the jurisdiction to direct them? Also how this provision is going to work out when there's a peer-to-peer transaction and the user doesn't know the other party and government has no means to track them? These scenarios bring a lot of confusion themselves and an immediate response to these situations is needed.

#### *D. Why no to slab rates*

This question has been asked by many in the crypto industry- why not go for the slab rate system and what was the reason for the flat thirty % tax? Was it based on a misinformed decision that only a small portion of the country with high financial stability is coming into this industry<sup>38</sup> and thus it won't impact them much, or the government is trying to disincentive people from going towards the crypto industry because of its decentralized nature and crypto being high-risk assets? Whatever the reason, by this first step towards the regulation of the crypto market it seems that the government is reluctant as of now to open the gates for this industry completely but at the same time, doesn't want the profit-making users to evade the tax authorities. We can speculate that it's because of the hesitation toward this industry that the govt. first came out with the taxation of VDA, rather than coming up with regulations which have been in the talks now for the past couple of years. Talking about the reason to not

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<sup>34</sup> . Income Tax Department, TDS ON SALARIES, <https://www.incometaxindia.gov.in/booklets%20%20pamphlets/tds-on-salaries.pdf>.

<sup>35</sup> . THE FINANCE BILL, CHAPTER III, Clause 59 BILL No. 18 OF 2022.

<sup>36</sup> . Id.

<sup>37</sup> . Payaswini Upadhyay, Budget 2022: CBDT Clarifies Crypto Tax, Cash Credit, Perquisite And Reassessment Provisions, Bloomberg Quint (Feb. 4, 2022), <https://www.bloombergquint.com/business/budget-2022-cbd-clarifies-crypto-tax-cash-credit-perquisite-and-reassessment-provisions>.

<sup>38</sup> . Swati Rathor, Cryptocurrency exchanges net tier-2, 3 investors, in their languages, THE TIME OF INDIA (Nov. 22, 2021), <https://timesofindia.indiatimes.com/business/cryptocurrency/bitcoin/crypto-exchanges-net-tier-2-3-investors-in-their-languages/articleshow/87837175.cms>.

introduce slab rates for crypto taxation, industry specialist Ajeet Khurana gives his views on it while understanding that though people having a thirty percent income tax slab might not be affected much by this rule, a large chunk of society is going to carry this burden, especially those who used to have lowest or no tax rate for the income slab that they are in as they now have to go from zero to directly thirty %. He said- *‘the reason could be that most of the transactions under the crypto market can’t be traced- like that of international transactions and software like metamask can be used for the transaction which aims to decentralize control over personal data and increase user privacy. Now because the authorities are still trying to figure out different scenarios that could take place under this asset class, this could be changed later on when all these scenarios are studied by the authorities’*<sup>39</sup>. So apart from the reasons like the government is trying to protect small investors and traders by not letting them go for crypto transactions<sup>40</sup>, studying the market is a valid excuse to give and it seems authorities are in no hurry in implementing regulations specified for this asset class.

Another point that can be looked into here is whether a rebate under Section 87A of ITA would be applicable under crypto transactions as well<sup>41</sup>. As The Bill doesn’t exclusively deny claiming of rebate it can be said that taxpayers of income slab up to five lakhs can get this benefit. This could be of little help for at least a portion of people who can claim under it.

#### **IV. GST Taxation On Crypto**

Now that we have seen certain issues arising due to the proposed amendment to the ITA in The Bill, it’s also important to understand the aspect of indirect taxation of crypto as this area has a lot to work upon and no clarifications and regulations as such are provided by the authorities except the direction of authorities that supply of services by exchanges would be charged under GST on commissions earned<sup>42</sup>. So let’s look into some issues arising under the GST laws.

##### *A. Crypto as export service*

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<sup>39</sup>. Supra note. 30.

<sup>40</sup>. Prasad Banerjee and Abhijit Ahaskar, Govt faces an uphill task if it wants to keep cryptocurrencies at bay, mint (Nov. 25, 2021), <https://www.livemint.com/market/cryptocurrency/govt-faces-an-uphill-task-if-it-wants-to-keep-cryptocurrencies-at-bay-11637774808262.html>.

<sup>41</sup>. The Income Tax Act, §87A (1961).

<sup>42</sup>. Pradeep Thakur, Govt weighs imposing 18% GST on bitcoin trade, THE TIMES OF INDIA (Dec. 29, 2020), <https://timesofindia.indiatimes.com/business/india-business/govt-weighs-imposing-18-gst-on-bitcoin-trade/articleshow/80001885.cms>.

Under the Integrated Goods and Services Tax Act, 2017, exports of goods and services are included under *zero-rated supply*- meaning that no GST would be applied on exports of goods and services from India<sup>43</sup>. One of the features of exports of services is that the payment for the service is received in convertible foreign exchange<sup>44</sup>. *Convertible Foreign Exchange* is a foreign exchange that is for the time being treated by the RBI as convertible foreign exchange for the Foreign Exchange Management Act, 1999<sup>45</sup> (FEMA). The question on basis of which all these terms and definitions are being studied is whether the services of crypto transactions supplied outside India would be zero-rated. For this, first, try to understand what is *foreign exchange* and what is *crypto* according to The Bill. FEMA defines *foreign exchange* as ‘*foreign currency and includes,— (i) deposits, credits and balances payable in any foreign currency....*’<sup>46</sup>. Clause 3 of The Bill defines VDA as ‘*any information or code or number or token (not being Indian currency or any foreign currency), generated....*’ (crypto not being considered either Indian or foreign currency). Now keeping in mind these definitions it could be said that if the transaction of crypto is taking place between a seller in India and a buyer living outside India and the consideration received is in currency (either Indian or foreign) by the exchange then it’d be export of services and GST would be zero. Again take the same situation but instead of paying commission in a currency, the exchange has been paid by crypto- then in this case the supply of service won’t be considered zero-rated because as mentioned earlier for services to be export services the payment should be received in convertible foreign exchange and because cryptos aren’t considered any kind of currency under the VDA definition this supply of service won’t be zero-rated. So this can be solved either by exchanges where they might not allow the payment to them on crypto or certain amendments can also be made for this which can allow these kinds of exports of services zero-rated.

### B. Supply

As of now no new regulations or amendments have been made with respect to transactions in crypto and whatever GST is paid by the exchanges is because of the probes that were conducted by the indirect tax department on these exchanges<sup>47</sup>. This kind of set precedent that exchanges

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<sup>43</sup>. The Integrated Goods and Services Tax Act, §16 (2017).

<sup>44</sup>. The Integrated Goods and Services Tax Act, §2(6)(iv) (2017).

<sup>45</sup>. Foreign Investment in India, Reserve Bank of India (May 7, 2018), [https://m.rbi.org.in/scripts/FS\\_FAQs.aspx?Id=26&fn=5](https://m.rbi.org.in/scripts/FS_FAQs.aspx?Id=26&fn=5).

<sup>46</sup>. The Foreign Exchange Management Act, §2(n) (1999).

<sup>47</sup>. Sachin Dave, GST probe may set precedent for crypto taxation, THE ECONOMIC TIMES (Jan. 4, 2022), <https://economictimes.indiatimes.com/news/india/gst-probe-may-set-precedent-for-crypto-taxation/articleshow/88676925.cms>.

will have to pay GST of eighteen % on their transaction fees<sup>48</sup>. So these exchanges do have some kind of direction when it comes to payment under GST laws. Similarly, small crypto traders can follow this direction for paying their GST. The issue comes with the class of crypto industry users who are neither in exchange nor traders. This class can be called investors who make profits from crypto transactions in the form of side money and it may not be their business or sole income. So for this class eighteen % GST rate can't be applied because purchase and sale by investors won't come under the definition of supply. The Central Goods and Services Tax Act, 2017 defines *supply* as the inclusion of- '*(a) all forms of supply of goods or services or both 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; (b) import of services for a consideration whether or not in the course or furtherance of business.....*'<sup>49</sup>. Under this definition clause (a) to (d) provides for what all will include under the definition of supply and all these provisions from (a) to (d) have to be fulfilled to make the act supply. Clause (a) says that consideration should be paid in the '*course or furtherance of business*'- investors don't invest in the furtherance of their business and thus clarity is sought here. As their crypto transactions won't come under the definition of supply, it won't be a supply of services and hence no GST in this case<sup>50</sup>.

### C. Other implications

- a) No specific entry to tax: Another reason as to why crypto transactions between the individuals can't be considered as supply of goods or software (*Tata Consultancy Services v. State of Andhra Pradesh*<sup>51</sup>- Supreme Court observed three-part test for software to classify as goods- (a) its utility (b) capable of being bought and sold (c) capable of being transmitted, transferred, delivered, stored and possessed) is that no specific entry to tax crypto as goods is mentioned in GST laws. Even in the residual entry for goods, no such good or entry named 'cryptocurrency' is mentioned<sup>52</sup>. So in

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<sup>48</sup>. Id.

<sup>49</sup>. The Central Goods and Services Tax Act, §7 (2017).

<sup>50</sup>. Dilasha Seth and Gireesh Chandra, GST on transaction fees, not on crypto's value, says centre, mint (Feb. 4, 2022), <https://www.livemint.com/politics/policy/gst-on-transaction-fees-not-on-crypto-s-value-says-centre-11643914370337.html>.

<sup>51</sup>. SCC OnLine SC 1419, (2004).

<sup>52</sup>. CA Dr. Arpit Haldia, #GSTCase-66- Interpretation and Classification of Goods in residual entry No. 453 of Schedule III of Notification No. 01/2017-Central Tax (Rate) containing "Goods which are not specified in Schedule I, II, IV, V or VI" and taxable at 18%-AAR West Bengal, GST- online.com (July 3, 2020), <https://gst-online.com/gstcase-66-interpretation-and-classification-of-goods-in-residual-entry-no-453-of-schedule-iii-of-notification-no-01-2017-central-tax-rate-containing-goods-which-are-not-specified-in-sc/>.

no case can the said crypto transactions be considered the supply of goods or supply of software.

- b) Location of parties to the transaction is unknown: As mentioned earlier, crypto transactions can't be tracked as parties' identities and locations are hidden. This could lead to the issue of whether the transaction was interstate or intrastate and how to decide the GST rate and which GST law shall apply. While studying regulations proposed by The Bill and ITA regulations in the previous chapter- we saw that TDS is being charged at one %. The main reason for proposing this regulation is to regulate and identify parties to the transaction so that by this mechanism know-about of parties can be obtained<sup>53</sup>. If the crypto transaction happens through an exchange we can see the possibility that the exchange could ask for their identities before facilitating the transaction and maybe this process can help the parties to realize GST but the problem again comes with peer-to-peer transactions. How users in this system could get the identity of buyer and seller and how are the authorities going to regulate it?
- c) Initial coin offering (ICO): This is a process to raise funds for creating a new coin, app, or service in the crypto industry. The process is similar to an Initial Public Offering where interested investors can buy into an ICO to receive a new crypto token issued by the company<sup>54</sup>. According to the data, around 100 crypto startups launched last year and there are more to come<sup>55</sup>. So the process of ICO seems relevant in the present. So will GST be applicable in the issuance of ICO? Under this process what generally happens is that the company promises to provide coins or its digital asset in the future so in exchange for funds the company allots tokens which will be used by the investors to get the coins once the company starts off<sup>56</sup>. Now because the ICO is at the concept level and no transaction as such is happening at the time of issuance of ICO the GST shouldn't apply here.

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<sup>53</sup>. Rajeev Kumar, How will 1% TDS on crypto transactions impact crypto traders? Experts explain, FINANCIAL EXPRESS (Feb. 14, 2022), <https://www.financialexpress.com/money/income-tax/how-will-1-tds-on-crypto-transactions-impact-crypto-traders-experts-explain/2433421/>.

<sup>54</sup>. Jake Frankenfield, Initial Coin Offering (ICO), Investopedia (Jan. 3, 2022), <https://www.investopedia.com/terms/i/initial-coin-offering-ico.asp>.

<sup>55</sup>. Debangana Ghosh, Crypto boom in India: Despite regulatory concerns, over 400 start-ups jump onto crypto ecosystem, BusinessLine (Nov. 21, 2021), <https://www.thehindubusinessline.com/money-and-banking/despite-regulatory-concerns-over-400-start-ups-jump-onto-crypto-ecosystem/article37614676.ece>.

<sup>56</sup>. Lyle Daly, What Is an Initial Coin Offering (ICO)?, THE MOTLEY FOOL (Jan. 21, 2021), <https://www.fool.com/investing/stock-market/market-sectors/financials/cryptocurrency-stocks/initial-coin-offering/>.

## V. Conclusion

The future of the crypto market is still unsettled with the government imposing hefty tax rates on the investors and traders but what is important right now is to provide unambiguity in terms of regulations that would help the people who are thinking of entering into the crypto market to make informed decisions. Not only that, but it would also help the startups which are based in this market to take the next steps accordingly as these startups can affect the economy of the country. Certain issues with taxation of crypto have been taken in the chapter of '*crypto, The Bill and ITA*' under which the issue with COA concerning the mining industry has been shown, issue with no set-off allowance provision is discussed while studying the reasons as to why set-offs wouldn't have allowed for the crypto industry, the provision of TDS has also been discussed with respect to peer to peer transactions and other inadequacy of compliance, and in the last section of the chapter it's discussed that what could have been the reasons for not allowing general slab rates for crypto taxation and have made it liable to be separately taxed. In the chapter '*GST taxation of crypto*', export supply of crypto is discussed and while studying definitions of the terms it's realized that in certain cases of crypto transaction exports supply won't be zero-rated, then in the next section the word supply has been studied and it's discussed that whether tax rate would also be applied in peer to peer transactions and whether in these cases the transactions would be considered supply; lastly, other implications like the absence of specific entry for crypto taxation were discussed along with the unknown location of parties to the transaction leading to the problem of realizing inter or intra state GST or which rate to be applied. The last subsection talked about the issuance of ICO and whether GST should be applied here.

There are other concerns as well which have been not discussed in this paper and which haven't been foreseen yet. Many issues have been raised in this paper solutions to which have to be obtained by proper regulatory mechanism. These concerns shall also be looked into to provide for better apprehension for what scenarios to be taken into account while making regulations and making regulations flexible enough so that if the prospect of the crypto market is considered, the regulations are enough to provide for unknown circumstances.