



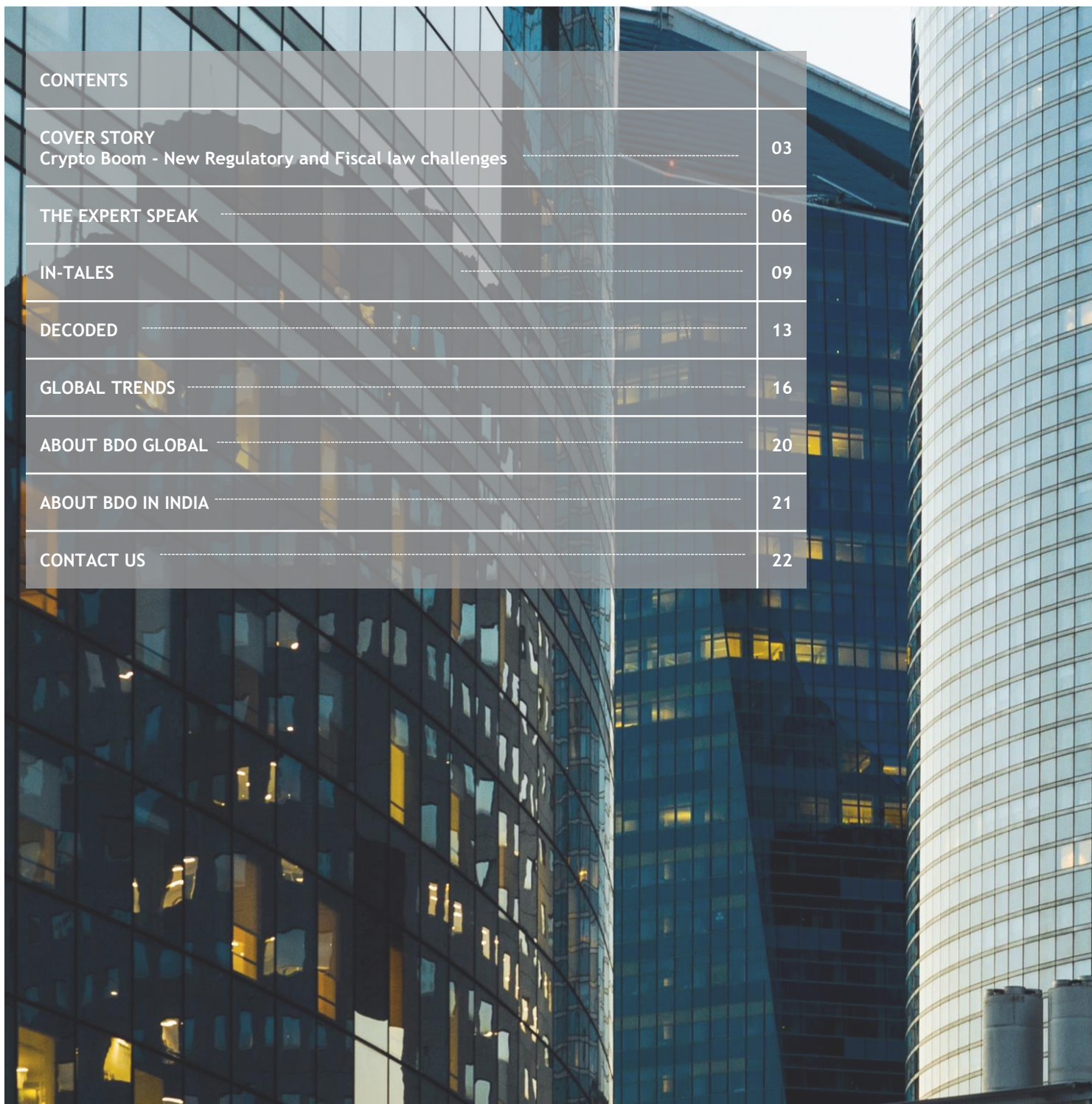
# The **TAX** POST

A bimonthly bulletin on the world of Indirect Taxes

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# PREFACE

At the outset, we would like to wish all our readers the best wishes for the Year 2022.

As we enter the new year and the 3<sup>rd</sup> year of the COVID-19 pandemic, economic developments have been both encouraging as well as troubling, clouded by health outcomes and unimagined uncertainty.

The encouraging signs are that the output in many countries rebounded in 2021 after a sharp decline in the previous year. Advanced, as well as middle-income economies have achieved substantial vaccination rates. The 3<sup>rd</sup> wave of the pandemic, though highly infectious, has remained in control largely, with the world having gathered the experience. Against the mix of encouraging and troubling news, it is clear that challenging times lie ahead for the global economy, and particularly for developing countries like India, as economic stimulus slows, health concerns rise, and credit conditions tighten.

The signs emanating from the domestic front continue to remain encouraging, despite an uptick in the new variant of COVID infection rates.

As we write this, the Union Finance Ministry is busy drafting the Union Budget 2022 with the objective of dispelling the pandemic inflicted gloom and crafting long-term sustainable strategies to catapult the country to the next level of growth. All eyes are fixed on the policy initiatives that would be unveiled by the finance minister in February 2022. It is expected that some of the key regulatory and fiscal aspects would be addressed in the Union Budget.

From an outright ban on cryptocurrencies to an upcoming Bill for regulation, the Government's stance on digital assets has changed considerably over the past few years. The Cover Story of this edition of The Tax Post discusses the hurdles in the crypto transactions from a regulatory and tax law angle.

Supporting policy architecture is imminent for the country to gather a larger share of the service trade in the global market. The section 'In Tales' discusses the important role the service sector has played in development on the global platform and on the domestic front. Transaction between 'related' parties have been a bone of contention when it comes to tax treatment; the section 'Expert Speak' sheds light on challenges associated with certain service transactions.

This edition of 'Decoded' focuses attention on the vexed issue of the denial of principle of 'natural justice' by governmental authorities and how Courts emphasised on the aspect, time and again. News from other jurisdictions is captured in the section 'Global Trends'.

We hope you would continue to enjoy reading The Tax Post.



**GUNJAN PRABHAKARAN**

Partner & Leader  
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# COVER STORY

## Crypto Boom - New Regulatory and Fiscal law challenges

### The Backdrop:

From an outright ban on cryptocurrencies (crypto) to an upcoming Bill for regulation, the Union Government's stance on digital assets has changed considerably over the past few years. The Reserve Bank of India's (RBI) order banning banks from supporting crypto transactions, was reversed by the Supreme Court order of March 2020.

The Union Finance Minister had indicated the constitution of a high level inter-ministerial Committee to study issues related to virtual currencies including cryptos. The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 also seeks to prohibit all private cryptocurrencies in India, however, it allows for certain exceptions to promote the underlying technology of cryptocurrency and its uses as per the tentative list of Government Legislative and Financial Business expected to be taken up during the Seventh Session of Seventeenth Lok Sabha.

### Crypto-currency Transactions:

Crypto is a collection of binary data which is designed to work as a medium of exchange. Individual coin ownership records are stored in a digital ledger, which is a computerised database using strong cryptography to secure transaction records, to control the creation of additional coins, and to verify the transfer of coin ownership. Cryptos are generally fiat currencies, as they are not backed by or convertible into commodities. Some crypto schemes use validators to maintain the crypto. Generally, they get ownership in the token over time via network fees, newly minted tokens or other such reward mechanisms.

Crypto does not exist in physical form (like paper money) and is typically not issued by a central authority. Cryptocurrencies typically use decentralised control as opposed to a central bank digital currency (CBDC). When a cryptocurrency is minted or created prior to the issuance or issued by a single issuer, it is generally considered centralised. When implemented with decentralised control, each cryptocurrency works through distributed ledger technology, typically a blockchain, that serves as a public financial transaction database.

A crypto is a tradable digital asset or digital form of money, built on blockchain technology that only exists online. Cryptos use encryption to authenticate and protect



transactions and hence their name. There are currently over a thousand different cryptocurrencies in the world.

Thus, Cryptos can be obtained by using one's computer prowess to crack computationally difficult puzzles. The process of cracking such puzzles, which are integral to the blockchain technology to help maintaining them, is called 'mining'. As a reward for this, the 'miner' gets new bitcoins which is nothing but creation of Crypto.

Everyone cannot be a 'miner'. Hence, one can buy cryptos from exchanges and store them in an online wallet in digital form. Such cryptos would be purchased in consideration for real currency. The other way of earning crypto is by accepting bitcoins (instead of real currency) on sale of goods or services, they deal in.

#### GST Law:

While the GST law leaves many questions unanswered with regard to the levy of tax on transactions in cryptos, the tax authorities have been very active in its attempt to tax it and extract revenue.

Definition of the term 'Supply' takes in its ambit "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."

'Goods' as per the Central Goods & Services Act, 2017 (CGST Act), encompasses 'every kind of moveable property, other than money and securities but includes actionable claim...'. The definition of 'money' and 'securities' prima facie does not cover cryptos; it is thus likely that the tax authorities might argue that cryptos are 'goods', the supply of which would be exigible to GST. If cryptos are even assumed to be 'actionable claim', it stands outside the scope of GST levy in the light of specific exclusion through Schedule III of the CGST Act.

\*The term 'Service' is defined in an expansive manner in the CGST Act to cover "anything other than goods...". Further, an amplitude of the term 'consideration' under the CGST Act, is very wide to include "any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of the supply of goods or services or both..." Thus, even payments in non-money too stands included in the sweep of the definition of the term 'consideration'.

#### GST on Cryptos:

In the absence of special dispensation similar to the one that exists for foreign exchange transactions and cryptos not being regarded as 'money', it is likely that trading of cryptos would continue to be under the cloud. Miners of cryptos and the suppliers of goods or service who receive consideration in cryptos also may find themselves in a difficult situation to defend tax demands, if they have not discharged the tax liability already.

It appears that emboldened by the broad contours of the legislative scheme as discussed above, GST authorities have come down heavily on crypto exchanges operating in the country. It is reported that many operators have paid significant amounts as tax arrears for the past periods, while investigations are progressing in many other cases.

Clarity is required with respect to following important questions, in order to draw any conclusion as regards the taxability of the transactions and quantification of the tax liability:

- What would be treatment of 'trading' in crypto, which is not recognised as 'money'? Whether it is 'goods', which can be argued to be moveable property or 'service' under GST law?
- While one may literally interpret that cryptos are not 'money', it cannot be disregarded that crypto is akin to money. If so, would law-makers consider a special dispensation, similar to trading in foreign currency which is taxed only on difference between selling and buying price?
- Would trading be subject to GST of 18% or any other?
- Can 'mining' be construed as a 'Service'?
- Would wallet service be subjected to GST?
- What is the 'Place of supply' of these transactions, when it takes place within India or when either of the supplier or recipient is located outside India?
- Taxability in the hands of the exchanges and intermediaries.
- Does an individual, who buys and sells crypto, need to be registered under the GST law?



### Crypto Global outlook

Crypto assets and associated products and services have grown rapidly over the recent years. Further, interlinkages with the regulated financial system are rising.

Determining valuation is not the only challenge in the crypto ecosystem; identification, monitoring, and management of risks defy regulators and firms. These include, for example, operational and financial integrity risks from crypto asset exchanges and wallets, investor protection, and inadequate reserves and inaccurate disclosure. Moreover, in emerging markets and developing economies, the advent of crypto can accelerate when these assets replace domestic currency and circumvent exchange restrictions and capital account management measures.

Crypto's cross-sector and cross-border remit limits the effectiveness of national approaches. Countries are taking very different strategies, and existing laws and regulations may not allow for national approaches that comprehensively cover all elements of these assets. Importantly, many crypto service providers operate across borders, making the task for supervision and enforcement more difficult. Uncoordinated regulatory measures may facilitate potentially destabilising capital flows.

The world is increasingly thinking to license or authorise crypto-asset service providers who deliver critical functions. These would include storage, transfer, settlement, and custody of reserves and assets, among others, similar to existing rules for financial service providers. It is felt that services and products for payments should have requirements similar to those of bank deposits, overseen by the central bank or the payments oversight authority.

It may also be necessary that authorities provide clear requirements on regulated financial institutions concerning their exposure to and engagement with crypto. For example, the appropriate banking, securities, insurance, and pension regulators should stipulate the capital and liquidity requirements and limits on exposure to different types of these assets and require investor suitability and risk assessments.

There is an urgent need for cross-border collaboration and cooperation to address the technological, legal, regulatory, and supervisory challenges. Setting up a comprehensive, consistent, and coordinated regulatory approach to crypto is a daunting task. But if we start now, we can achieve the policy goal of maintaining financial stability while capitalising on benefits that are underlying in technological innovations.

With the Union Budget just a week away and the vigour with which the tax authorities are conducting investigations<sup>1</sup> against several crypto exchanges, it is expected that the Union Budget would carry important announcements and legislative proposals to address the gaps in the regulatory framework.



<sup>1</sup> <https://economictimes.indiatimes.com/news/india/gst-probe-may-set-precedent-for-crypto-taxation/articleshow/88676925.cms>

# THE EXPERT SPEAK



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## RELATED PARTY TRANSACTIONS UNDER THE GST REGIME

Till date, the transactions with 'related' parties have been areas of special consideration for regulatory, tax authorities and various stakeholders including auditors. This may be due to the general assumption that related party transactions often create conflict of interest, used as a conduit to unduly benefit certain persons, or often construed to be undertaken with an ulterior motive.

However, it is important to understand that transactions with related parties are not always designed to suppress underlying transactions or defraud tax authorities. Transactions between related parties are dealt with special importance under any law mainly due to the reason that when the parties are related, the prices may not be determined by market factors and they would sometimes not reflect the prices that would have been charged commercially, had the parties been unrelated.

The Goods and Services Tax (GST) law also considers transactions with related parties of special importance and has introduced several provisions to build safeguards against any possible revenue leakages. Although, given that the GST law is still evolving there are a host of areas in this domain that need a special mention and consideration.

### Intermediary Services

Several MNCs have established BPOs and back offices in India, for assisting their group companies located outside India for undertaking various support functions such as IT support, accounting/book-keeping functions, data entry operations, etc. These units face several difficulties when tax authorities treat them as intermediaries and deny export benefits.

Sometimes tax authorities consider the support functions provided by these units to their parent/group companies situated outside India, as intermediary services. In such case, the 'place of supply' would be the location of supplier

(i.e., place within India in the instant case) and thus cannot be considered as exports.

By virtue of an advance ruling in the case of Vserve Global Private Limited, it was held that services of back office administrative and accounting support to a foreign entity shall be considered as Intermediary services<sup>2</sup>.

In order to clear the ambiguity caused in interpretation and to provide relief to the trade and industry, CBIC had issued circular no:159/15/2021-GST clarifying the 'scope of intermediary services and primary requirements of intermediary services', wherein it is clarified that the role of intermediary is only supportive.

The intermediary only plays a subsidiary role in a contract to arrange or facilitate some other supply being the main supply and does not include a person who supplies such goods or services or both or securities on his own account. Additionally, to qualify as an intermediary service, there should be a minimum of 3 parties involved (i.e., two parties transacting the main supply and an intermediary facilitating the main supply)

Thus, an intermediary does not include persons like offshore service centres, BPOs, subcontractors, etc. who supply goods or services or both or their own account. Further, the circular aims to clarify the intent of the legislature through various scenarios. However, there is still room for interpretation and each case needs to be evaluated on its own facts and given the lack of understanding of technicalities of law, the lower-level authorities continue to take an adverse tax position and classify such services as intermediary services.

### Export of services

Another area of dispute is with respect to services rendered by an establishment of a company in India to another establishment located outside India. The debate is with respect to the ambit of Section 2(6)(v) of the IGST Act, 2017, that defines 'export of services'. The said provision places a condition that the services provided by one establishment of a person to another establishment of the same person, considered as establishments of distinct persons, cannot be treated as export of services.

In other words, any supply of services by an establishment of a foreign company in India to any other establishment of



the said foreign company located outside India will not be covered under definition of export of services.

In recent times, a host of back offices of multinational companies in the financial sector face a tough situation, with GST authorities denying them refunds of amounts paid on inputs, saying the work done for parent companies can't be considered as exports and will be considered as a service to the same entity which falls outside the scope of export.

In this regard, CBIC has issued circular no:161/17/2021-GST clarifying whether the supply of service by a subsidiary/sister concern/group concern, etc. incorporated in India, to the holding company, a foreign company incorporated under laws of a country outside India, will be hit by condition of section 2(6)(v) of IGST Act.

The circular explains that a company incorporated in India and a foreign company incorporated outside India, are separate "persons" under the provisions of CGST Act and accordingly, are separate legal entities. Thus, a subsidiary/sister concern/group concern of a foreign company, which is incorporated in India, then the said company incorporated in India will be considered as a separate 'person' under the provisions of CGST Act. Accordingly, it would be considered as a separate legal entity than the foreign company.

Therefore, as a way forward, all the shared service offices which are providing services to their foreign counterpart would be eligible for GST refunds as such services would be treated as export of services if the two counterparties are separate legal entities incorporated in their respective countries of operation and fulfil other conditions as provided under sub-section (6) of section 2 of IGST Act.

#### **Brand Names and Logos**

Another prominent issue raised by tax authorities is applicability of GST on use of brand name and logos by subsidiary or group companies across India. Many foreign banks and Indian conglomerates have received notices to explain why use of brand name and logo does not tantamount to supply and should not be subjected to GST. Its common industry practice for companies to have master agreements wherein all support services and common services are cross charged to subsidiary companies across the globe. The idea seems to be farfetched that a company having global operations needs to charge its subsidiary companies/representative offices a fee for use of brand name. However, given that all related party transactions, whether with or without consideration, fall within the ambit of 'supply' and therefore subject to GST. Therefore, to avoid any disputes companies chose to ascribe a value to such services and pay taxes as applicable.



Although it is pertinent to note that valuation of brand names and logos would be a challenge since most of them do not have a cost of acquisition or purchase price. They derive their value over time when consumers gain confidence regarding the quality of products and services supplied by the brands.

### Valuation

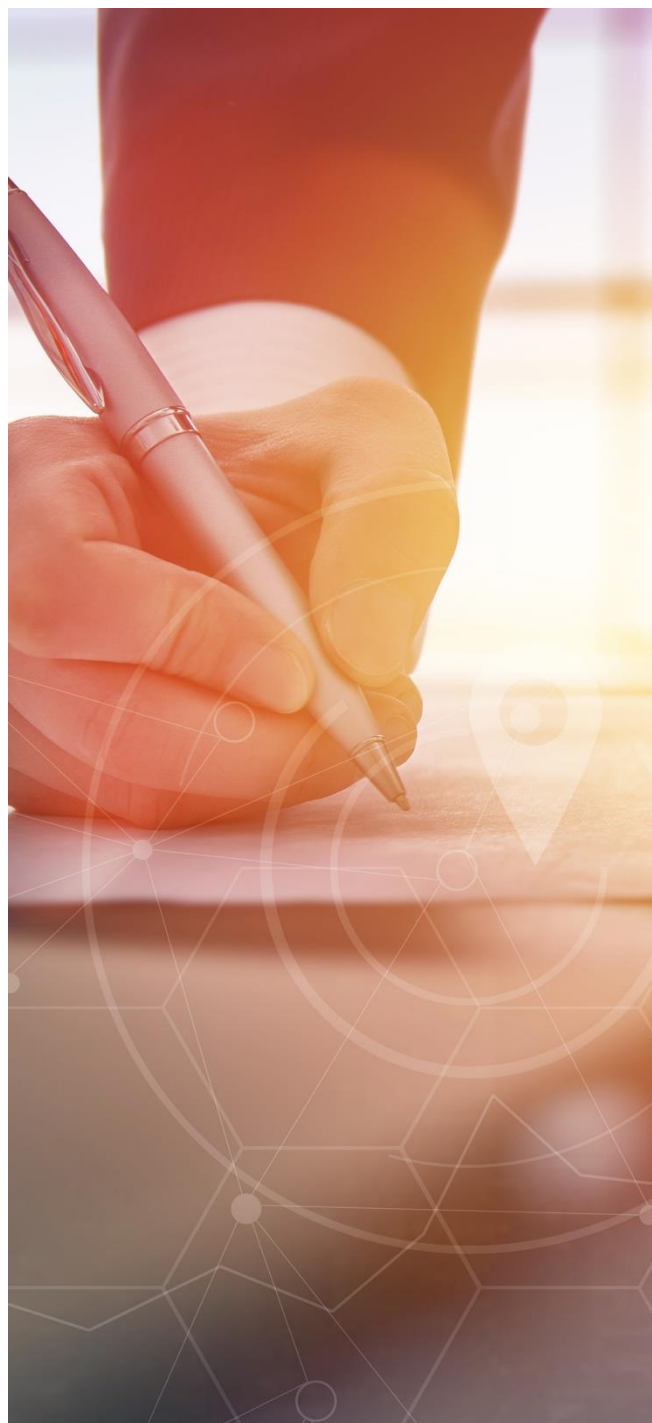
When we talk about valuation of transactions between related parties several, doubts arise regarding the method to be followed as per the two provisos under Rule 28 of the CGST Rules, 2017 to determine the “Open Market Value”.

The first proviso provides an option to the supplier to adopt a value, which is equal to 90% of the value at which the recipient supplies similar goods to unrelated customers, where the goods are intended for further supply. The second proviso provides that the value given in the invoice would be termed to be the ‘open market value’ where the recipient is eligible for full input tax credit.

In a recent Advance Ruling given by the Tamil Nadu Advance Ruling Authority it was held<sup>3</sup> that a plain reading of the proviso gives an option to the person supplying to distinct or related person and does not mandate that the value of supply should be 90% of the ultimate sale value. Further, proviso 2 states that when the tax paid is available as full input tax credit, then the invoice value is the ‘Open Market Value’.

There is nothing to show that the second proviso is subordinate to the first. It independently deals with a scenario where the recipient is eligible for full input tax credit. Thus, it can be inferred that, when the goods supplied by the taxpayer are ‘intended for further supply’ and ‘where the recipient is eligible for full input tax credit’, the taxpayer has the option to adopt either of the two methods for valuation.

It is evident from the above that taxability of related party transactions will continue to be litigative given that there is no firm prescription or clear guidelines/classifications prescribed enumerating taxability of a given transaction. To make matters worse whether a bouquet of such support services will qualify as an export or import of services will be furthermore litigative. The thumb rule appears to be, to treat each related party transaction as taxable (unless specifically outside the ambit of GST law) and adopt an arm’s length price for both transfer pricing and GST purposes.



# IN-TALES

## Need of evolved national policies - the catalyst to drive India's global service trade

### Globalisation of Services:

Services are often largely overlooked in discussions on global trade, yet they account for majority of trade in many developed economies and are growing rapidly in many developing economies as well. This is perhaps because services are less tangible and the issues surrounding services trade are often more complex. Developing countries' share of global services trade has grown by more than 10 percentage points since 2005, reaching 25% of world services exports and 34.4% of world services imports in 2017.

Services have already transformed national economies on a massive scale. Not only are services indispensable for running increasingly complex and sophisticated industrial economies - from logistics, to finance, to informatics - but the services sector is the fastest growing economic segment in its own right - from business services, to healthcare, to entertainment. Services generate more than two-thirds of economic output, attract over two-thirds of foreign direct investment, and provide almost two-thirds of jobs in developing countries and four-fifths in developed ones.

### Service Digitization:

As per WTO's World Trade Report - 2019, Services trade is evolving quickly with digital technologies, demographic changes, rising per capita income and climate change acting as disruptors, potentially reducing trade costs, creating shifts in demand, and creating new markets. Digital technologies are likely to have a particularly significant impact as they change the ways that companies do business, allowing them to access a global marketplace and creating new channels through which to deliver services which were once provided face-to-face.

Thanks to digitisation, the internet and low-cost telecommunications, many services sectors that were once non-tradable due to face-to-face delivery in fixed locations, have become highly tradable since they can now be delivered remotely over long distances. Digital technologies can be a driver of inclusivity in services trade, by dramatically cutting costs and lowering barriers to entry. Services exports support a huge number of jobs around the world, but there is tremendous untapped potential.

Other services too are in the cusp of radical change. Not too long ago, most medical services were delivered by local doctors and hospitals to local patients. Accessibility was limited, competition was constrained, and quality could vary dramatically across countries, regions, or even



neighbourhoods. Now, medical information is accessible to anyone with an internet connection anywhere in the world; medical procedures, such as diagnostics, analyses, and even some types of surgery, are increasingly performed remotely; and medical tourism is becoming more common, as increasing numbers of patients seek more affordable or advanced treatment abroad.

This seismic shift is in turn exposing many services sectors to the same process of specialization, competition and scale economies that previously drove massive productivity gains in the manufacturing sector. This helps to explain why information, finance and telecommunications services have experienced such fast productivity growth in recent decades - faster even than many manufacturing industries. Further expansion of services trade will be reliant on a number of factors. The quality of institutions in the importing country is particularly significant. Driving new

services trade reforms through trade agreements is also important, although progress in this area has often proved difficult. What is clear is that services represent a highly significant part of global trade - one which will be increasingly important in determining economic growth, development and job creation around the world.

### Global Trade - Evolution

The way services are transforming the global economy is a delayed reflection of the way services have already transformed national economies. During the 19th century, agrarian economies gradually evolved into increasingly industrial economies, a transformation so profound that it is termed as the 'Industrial Revolution'. Then, during the 20th century, industrial economies evolved into increasingly services-based economies: an equally profound, even more rapid evolution.

The progression from farms to factories to urban offices was driven largely by productivity-enhancing innovations, skills and technologies. As economies learned to produce more agricultural and industrial output with less labour, human resources were freed up to supply an expanding range of services - from improved healthcare, to better schooling, to more entertainment.

Just because the services sector is playing a bigger role in national economies, this does not mean that the manufacturing sector is shrinking or declining. Just as an efficient services sector helps to fuel manufacturing growth, so too does an efficient manufacturing sector help to fuel services growth. In essence, all economies, whether agrarian or manufacturing-based, are 'service economies', to the extent that producing any goods necessarily involves a service.

This line between manufacturing and services activities, which is already difficult to distinguish clearly, is becoming even more blurred across many industries. Automakers, for example, are now also service providers, routinely offering financing, product customisation, and post-sales care. Likewise, on-line retailers are now also manufacturers, producing not only the computer hardware required to access their services, but many of the goods they sell on-line. Meanwhile, new processes, like 3D printing, result in products that are difficult to classify as either goods or services and are instead a hybrid of the two. This creative intertwining of services and manufacturing is one key reason why productivity continues to grow.

### India and the Service Sector

The services sector is not only the dominant sector in India's GDP, but has also attracted significant foreign investment, has contributed significantly to exports and has

provided large-scale employment. India's services sector covers a wide variety of activities such as trade, hotel and restaurants, transport, storage and communication, financing, insurance, real estate, business services, community, social and personal services, and services associated with construction.

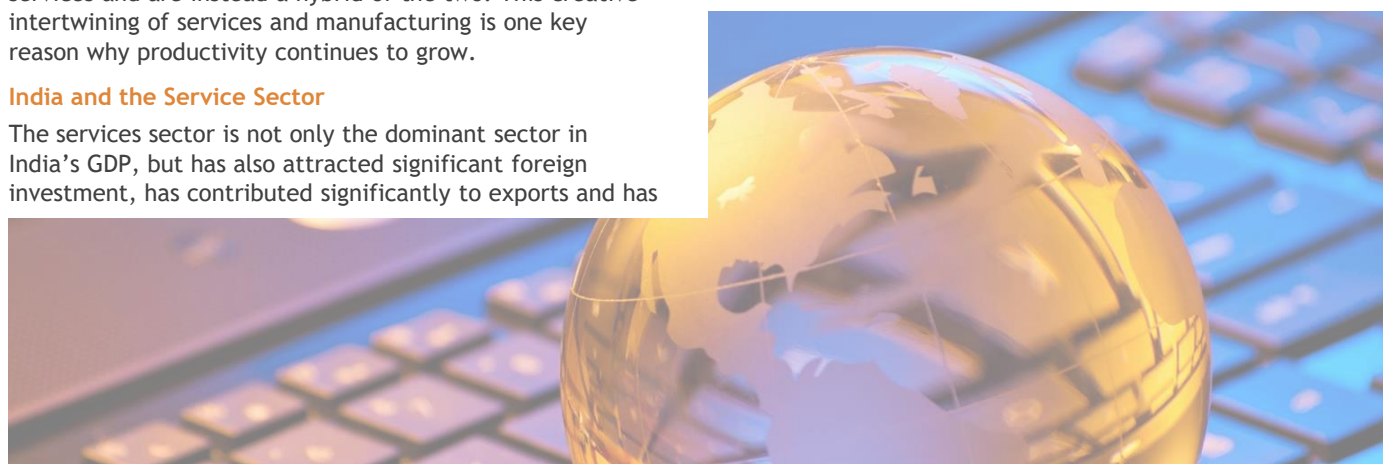
The services sector accounted for 54% of the total Gross Value Add (GVA) in FY21. India's services sector GVA increased at a CAGR of 11.43% to INR 101tn (USD 1,439bn) in FY20, from INR 69tn (USD 1,005bn) in FY16. Between FY16 and FY20, financial, real estate and professional services augmented at a CAGR of 11.68%. India's IT and business services market is projected to reach USD 20bn by 2025<sup>4</sup>.

The Indian services sector was the largest recipient of FDI inflows worth USD 89Bn between April 2000 and June 2021. The services category ranked 1st in FDI inflow as per data released by the Department for Promotion of Industry and Internal Trade.

The Government of India recognises the importance of promoting growth in services sector and provides several incentives across a wide variety of sectors like health care, tourism, education, engineering, communications, transportation, information technology, banking, finance and management among others. The implementation of GST has created a common national market and reduced the overall tax burden on goods. It is expected to reduce costs in the long-run on account of availability of GST input credit, which will result in the reduction in prices of services.

The Government's move to launch 'Start-up India' aims to create an inclusive ecosystem for entrepreneurs and push for innovation. Services are a big part of this system. The technology infrastructure required for such an ecosystem has increased the potential for the sector in India. Low set-up cost makes this sector an attractive investment destination. All these factors make the Indian services sector an attractive ecosystem for both the entrepreneurs and the investors.

A large pool of skilled IT manpower has transformed India into a global outsourcing hub. It now commands a 55% share in the global outsourcing market. Further, India is the digital capabilities hub of the world with presence of 75% of



global digital talent. In the next five years, the Ministry of Electronics and Information Technology is working to increase the contribution of the digital economy to 20% of GDP. The government is working to build cloud-based infrastructure for collaborative networks that can be used for the creation of innovative solutions by AI entrepreneurs and start-ups.

India is the export hub for software services and the Indian IT outsourcing service market is expected to witness 6 - 8 % growth between 2021 and 2024. India's software service industry is expected to reach USD 1 trillion by 2030.

### Service trade and need of coherent policies:

Although technology is driving the expansion of services trade, both within and among economies, it is not the only factor. More open and enabling national policies, as well as greater international regulatory co-operation, are critical as well. But while the world trading system has been highly successful in opening up goods trade - thereby helping to drive 20th century globalisation - it has so far proved less successful at keeping open trade in services, the driver of 21st century globalisation.

This need for new approaches to services trade - as well as for greater policy coherence - was recognised when the WTO's General Agreement on Trade in Services (GATS) was first negotiated during the Uruguay Round between 1986 and 1995. The GATS set out four 'modes' in which services can be supplied internationally: mode 1 describes "cross-border trade" (e.g. through the internet); mode 2 describes "consumption abroad" (e.g. through tourism); mode 3 describes "commercial presence" of an enterprise (e.g. through foreign direct investment); and mode 4 describes the "movement of natural persons" (e.g. through temporary labour mobility). This novel architecture clearly reflected the insight that opening services trade required a complex nexus of different but related policies and regulations.

The GATS represented a major step towards creating an open and secure global policy framework for services - especially in the context of the ground-breaking negotiations of the 1998 WTO Agreement on Basic Telecommunications Services and the 1999 WTO Financial Services Agreement, which helped to lay the groundwork for the global expansion of finance and telecommunications in recent decades. But these major advances in global services regulation took place over two decades ago, when the internet was in its infancy and Google had yet to be invented. There is a risk that multilateral rules are falling behind the fast-globalizing services market they helped to create, leading to uncertainty about future progress.

The globalisation of services has the potential to scale up growth, deepen integration, and level the economic playing

field in ways that go beyond the changes brought by the globalisation of manufacturing in recent decades. It holds out the promise of a major expansion not just of trade, but of the essential enablers of trade, development, and economic growth, from transport, logistics and information technology, to finance, healthcare and education.

Where services were once secondary to a country's industrial strength, they are now central determinants of productivity, competitiveness, and rising living standards. Services-led growth strategies are becoming as important as manufacturing-led growth strategies - indeed, they need to go hand-in-hand. The ability to access and export efficient, affordable, and innovative services will be a game-changer for development.

The globalisation of services raises domestic, as well as international, policy challenges. The same technological shifts that make it possible for services suppliers to reach global markets more easily, also leave the previously protected services sectors more exposed to new competitive and adjustment pressures. There is a risk that, even as technology opens up and integrates services markets, government policies will restrict or fragment them. Equipping workers with the skills needed for a more services-oriented, knowledge-based global economy, while simultaneously helping existing services sectors to adjust to the coming wave of competition, will be important. Domestic reform will need to go hand-in-hand with global reform.

Increased FDI in key infrastructural services such as transport, telecommunications and energy can promote inclusive growth by increasing capacity and enabling access to these essential services. Trade in health services through the movement of health professionals, medical tourism, or telemedicine can address inadequacies in healthcare infrastructure and quality, thereby enabling more equitable access to healthcare.

The tourism services trade has the potential to generate huge positive social and economic externalities by creating jobs and raising incomes across the skill spectrum, improving infrastructure and standards, creating rural-urban linkages and improving connectivity. Trade in IT and BPO services can increase economy-wide efficiency and productivity and can help bridge geographical, gender and other divides within and across countries by improving access to both goods and services.

The realisation of these sustainability and inclusiveness objectives, however, is neither automatic nor guaranteed. It depends on the domestic policy and regulatory environment which shapes the extent to which and how the benefits from services trade are distributed and adverse outcomes are mitigated. In the absence of sound domestic policies and regulations, trade in services could widen

inequality by aggravating the divide between regions, between the skilled and less skilled, between urban and rural areas, the rich and the poor, and between those with access to services and those without.

Policies that are conducive to human resources development and management in the health sector can go a long way in addressing the issue of brain drain. More efficient allocation of expenditures in the health sector and improved regulatory governance can help prioritise spending in line with local needs and conditions of demand and can mitigate adverse consequences such as cream-skimming, dualism, and the crowding out of local patients that can arise with trade and FDI in this sector.

The issues are similar in the context of education services. While opening the sector to foreign educational providers can augment capacity and create employment, and the entry of foreign students can enhance incomes, these may also lead to profiteering, higher costs, excessive focus on commercial specialisations, and fewer available seats for domestic students. Hence, alongside trade and investment there needs to be adequate regulatory capacity to govern education service providers, along with complementary domestic policies regarding fees, standards, partnerships, and recognition, among others.

Thus, supporting policies that develop human resources and infrastructural and regulatory capabilities for services trade are essential to capitalise on the opportunity unlocked by the global trading in service.



# DECODED

## Unending saga of denial of natural justice

Celebrated French philosopher Victor Cousin once remarked that “the universal and absolute law is that natural justice which cannot be written down, but which appeals to the hearts of all”. While the principle is deeply embedded in the Indian jurisprudence, this important principle is lost sight-of, by tax authorities leaving a jarring note in the administration of law.

The principles of natural justice are adopted by the judiciary to protect public rights against the arbitrary decision of the administrative authorities. At all the stages of the proceedings the main motive of the principles of natural justice is to prevent miscarriage of justice. One must keep in mind that in order to hold the decision of the adjudicating authorities as valid, principles of natural justice is equally important in procedure.

In India the principles of natural justice are embodied through Article 14 and 21 of the Constitution of India. With the introduction of concept of substantive and procedural due process in Article 21, all that fairness which is included in the principles of natural justice can be read into article 21. The violation of principles natural justice results in arbitrariness and such decision is said to be void or voidable.

### Principles of Natural Justice

According to traditional English law natural justice classified into the following two principles:

- **Nemo iudex in causa sua** (rule against bias)
 

It is the first principles of natural justice which says no man shall be judge in his own cause or a deciding authority must be impartial and neutral while deciding any case. Thus, the principle signifies that in a circumstance where a judge or deciding authority is suspected to be biased and partial then he/she shall be disqualified from determining any case before them. It formulates that justice should not only be done but seen to be done. Proceedings before any adjudicating authority must be according to the principles of natural justice.

The different types of bias could be personal bias (relationship between the decision maker and the party), pecuniary bias (when the adjudicator has monetary or financial interest in the dispute) and subject matter bias (when the Judge has general interest in the subject matter in dispute).
- **Audi alteram partem** (rule of fair hearing).
 

It means “hear the other side” or “let the other side be heard as well”. This is the second most fundamental rule of natural justice that says no one should be condemned unheard. In a circumstance where a person against whom any action is sought to be taken and his



right or interest is being affected, shall be given an equal opportunity of being heard and defended himself. It envisages that no party shall be made to suffer without giving not only a fair opportunity of being heard but to correct any relevant statement/documents submitted or made.

Component of a fair hearing includes issue of a notice, right to know evidence against him, cross examination, representation by lawyer, right to know evidence, etc.

Natural Justice requires that the party has a right to know not only the decision but also the reasons. This is not a universally established law although it might be provided in statutes. Where the duty is required by the statute then the authority is bound to give reasoned decisions in all cases to which the provision applies. But in the absence of statutory requirement, the courts advise the judicial or quasi-judicial bodies to assign reasons, so that it justifies the order.

Rules of natural justice is a well-recognised concept and oft-tested matter before various courts in India and is read well into all fiscal statutes. Every authority is obliged to follow the principle of natural justice in the absence of which the decisions/orders are depreciated and rejected by Courts. While this is a well-recognised concept under various fiscal laws, this principle is given a go-by by adjudicating authorities leading to adverse remarks by Supreme Courts and High Courts.

#### **Court ruling under GST**

We are discussing one such judgment<sup>5</sup> under the GST law, requiring attention of the taxpayers and due care by tax administrators.

The taxpayer, an exporter of software and information technology, filed an application for refund of accumulated Input Tax Credit (ITC) under section 54 (3) of Central/State Goods & Services Tax Act, 2017 (CGST Act, 2017) read with Section-20(xiii) of Integrated Goods & Services Tax Act, 2017 (IGST Act). By an order dated 22-10-2019 the said refund claim was rejected by the State GST authorities on the ground that the refund claimant has not submitted required documents in hard copies for verification.

The taxpayer, referring to Rule 92(3) of the Central Goods and Services Tax Rules, 2017 (CGST Rules), submitted that when a claim for refund is made and if the proper officer is satisfied for reasons to be recorded in writing that the claimed refund is not admissible or is not payable, then he is required to issue a notice in the prescribed form, in which event, the claimant must furnish a reply. The proper officer is under an obligation to consider such a reply before accepting or rejecting the claim of refund. As per the proviso, no application for refund shall be rejected without giving the applicant an opportunity of being heard and the taxpayer placed reliance on a Division Bench decision of the Bombay High Court in *BA Continuum India (P) Limited v. Union of India* (2021-VIL-185- BOM).

The High Court observed that section 54 of the CGST Act deals with refund of tax. Sub-section (1) says that any person claiming refund of any tax and interest may make an application before the expiry of two years from the relevant date in the prescribed form and manner. As per sub-section (5), if on receipt of any such application, the proper officer is satisfied that the whole or part of the amount claimed as refund is refundable, he may make an order accordingly. In terms of sub-section (7), the proper officer shall issue the order under sub-section (5) within 60 days from the date of receipt of the application, complete in all respects.

The Court also noted that chapter X of the CGST Rules deals with refund. Rule 89 forming part of Chapter X provides for filing of application for refund of tax, interest etc., in the prescribed electronic form. Rule 92 which is also part of Chapter X deals with an order sanctioning refund.

According to the Court, it is evident that in a case where the proper officer is satisfied for reasons to be recorded in writing that the whole or any part of the amount claimed as refund is not admissible or is not payable, he shall issue a notice to the applicant requiring filing of reply within 15 days of receipt of notice and after considering the reply make an order sanctioning the amount of refund in whole or in part or rejecting the refund claim which order shall be made available to the applicant. As per the proviso, an application for refund shall not be rejected without giving the applicant an opportunity of being heard. Therefore, there is a clear legal mandate that if an application for refund is to be rejected, the same can only be done after giving the applicant an opportunity of being heard.

The expression 'opportunity of being heard' is not an expression of empty formality. It is a part of the well-recognised principle of *audi alteram partem* which forms the fulcrum of natural justice and is central to fair procedure. The principle is that no one should be condemned unheard. It is not necessary to delve deep into the expression save and except to say that by way of judicial pronouncements the said expression has been made central to the decision-making process, breach of which would be construed to be a violation of the principles of natural justice thus adversely affecting the decision-making process; a ground for invoking the power of judicial review.

Relying on *BA Continuum India (P) Limited* judgement supra, in the facts and circumstances of that case, the Court came to the conclusion that as no hearing was granted to the petitioner, rejection of refund order would be in violation of the proviso to sub-rule (3) of Rule 92 of the CGST Rules and also in violation of the principles of natural justice. It is a settled law that if there is a violation of the principles of natural justice, then the High Court will invoke its extraordinary jurisdiction under Article 226 of the Constitution of India notwithstanding the availability of the alternative remedy of appeal.

#### **Comments:**

Courts have been consistent in its disposal of matters where the principal issue revolves around the denial of principle of natural justice, whether under the legacy tax laws or otherwise, which would be equally applicable in the successor GST law. Disregard to this well-settled principle would result in arbitrariness, unproductive litigation and hardship to the taxpayers, which serves no purpose.

While the rules of natural justice may not be carved in stone, it cannot be elevated to the position of fundamental right either. Their aim is to secure justice or to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principle of natural justice, they should be followed. But if a statutory provision either

specifically or by necessary implication excludes the application of any rules of natural justice, then Courts cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principle of natural justice<sup>6</sup>.

Natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness shown by the decision maker to the man who proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. None shall be hit below the belt and we cannot look at law in the abstract or natural justice as a mere artefact. Nor can we fit into a rigid mould the concept to reasonable opportunity.

Natural justice cannot be perverted into anything unnatural or unjust and cannot therefore be treated as a set of dogmatic prescription applicable without reference to the circumstances of the case. The question then would be, in all conscience, have you been fair in dealing with a man who is proceeded against. If you have been arbitrary, absent-minded, unreasonable or unspeaking, you cannot deny that there has been no administrative fair play.

The rule that a party to whose prejudice an order is intended to be passed is entitled to hearing applies alike to judicial tribunal and bodies or person invested with authority to adjudicate upon matters involving civil consequence. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice are ignored and an order to the prejudice of a person is made, the order is a nullity<sup>7</sup>.

Fortescue J in *R Vs Chancellor of Cambridge* (1723-1 Strange 557), quote from Marshall on Natural Justice observes:

“The laws of God and man both give the party an opportunity to make his defence, if has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou should not eat? And the same question was put to Eve also”!

It is appalling to see that despite court interventions in cases involving denial of natural justice, the authorities continue to conclude matters without following the dictate of the Court, leading to miscarriage of justice and unproductive and costly litigations.

The hope is for better sense to prevail sooner than later.





# GLOBAL TRENDS

## VAT/GST News:

### International:



#### United Kingdom: UK's Sunak plans to cut income tax or slash VAT before next election

Britain's finance minister Rishi Sunak is preparing to cut income tax by 2 pence to the pound or to slash rates of Value Added Tax (VAT) before the next election.

Sunak has told officials to draw up detailed plans to reduce the tax burden, with a third option to cut inheritance tax is also under consideration.

(Source : <https://www.reuters.com/world/uk/uks-sunak-preparing-cut-income-tax-or-slash-vat-before-next-election-the-times-2021-12-03/>)



#### UK's Plastic Packaging Tax (PPT) from 1 April 2022: Increase in the price of the product to cover the cost of PPT, VAT will still be payable on the whole price charged for the goods you sell.

The UK Government has introduced a UK-wide PPT vide the Finance Bill 2021 that will come into force on 1 April 2022. PPT applies to finished plastic packaging components manufactured in or imported into the UK containing less than 30% recycled plastic when measured by weight. The rate of the tax will be 200 GBP per metric tonne of plastic packaging.

(Source: <https://www.globalvatcompliance.com/uk-plastic-packaging-tax-arpil2022/>)



#### Extension of Making Tax Digital (MTD) to all UK VAT registered businesses from April 2022

With effect from 1 April 2022, MTD for VAT will be extended to all UK VAT registered businesses, regardless of their size and whether they are registered for VAT purely on a voluntary basis. This will affect approximately 1.1 million VAT registered businesses with taxable turnover below the current VAT threshold (which is set at £85,000 until 31

March 2024) that are not currently required to meet MTD requirements for VAT reporting and record keeping.

(Source: <https://www.avalara.com/vatlive/en/vat-news/extension-of-the-uks-making-tax-digital-for-vat-from-april-2022.html>)



#### Angola: 2022 General State Budget Law is approved - VAT for certain food products reduced from 14% to 7%

Under the 2022 State Budget, the VAT for certain food products will be reduced from 14% to 7% tax rate. In addition to that, to control inflation and to protect national production amidst the ongoing global pandemic, existing tax benefits will be extended.

(Source : <https://www.globalvatcompliance.com/angola-2022-budget-law-food-products-reduced-to-7-percent/>)



#### Poland: Poland cuts VAT on natural gas as prices surge

Poland cuts VAT on natural gas to address sharply rising energy prices. Poland's government is cutting VAT on gas from 23% to 8%. The government is also providing direct cash relief to households. The allowance will be means tested and determined according to household income.

Polish authorities are also lowering taxes on petrol for a limited time. Petrol taxes will be lowered to the minimum level permitted by EU regulations.

(Source: <https://www.vatglobal.com/poland-cuts-vat-on-natural-gas-as-prices-surge/>)



#### Turkey: The Parliament reduces VAT on Legal Aid Services from 18% to 8%

The Turkish Parliament has reduced VAT rate applied for "advocacy services provided within the scope of legal aid and legal counsel in the Law on Civil Procedure No.6100 and Law on Advocacy Law No.1136" from 18% to 8%. The legislation is effective as of 1 December 2021.

It aims to help taxpayers with insufficient finances to afford representation on legal services.

(Source: <https://www.globalvatcompliance.com/turkey-reduces-vat-on-legal-aid-services-from-18-to-8-percent/>)



#### Slovakia: New obligations for taxpayers as Slovak Parliament amends the VAT Act

The Slovak government (Národná rada) introduced a bill aimed at amending the Slovakian VAT Act and improving VAT collection. The legislation includes requirements for new and existing VAT payers to report bank account numbers from 15 November 2021 onwards. It also covers changes to the VAT guarantee, introduction of split VAT payment, as well as new rules for the refunding of excess input tax deductions, and cancellation of VAT Registration Certificates.

(Source: <https://www.globalvatcompliance.com/slovakia-new-obligations-for-taxpayers-as-slovak-parliament-amends-the-vat-act/>)



#### Philippines: Preparing for VAT on digital transactions - 12% VAT to Digital Service Providers (DSP) that operate through online platforms

On 21 September 2021, the Senate of the Philippines imposed 12% VAT to DSP that operate through online platforms. It aims to generate new funding sources to assist the government's COVID-19 response efforts. Bureau of Internal Revenue (BIR) has been tasked to establish a simplified automated registration system for non-resident digital service providers to improve efficiency and reduce administrative burden.

(Source: <https://www.globalvatcompliance.com/philippines-preparing-12percent-vatdigital-services/>)



#### Cyprus: Reduced VAT rates on electricity supply for households

The Cypriot Ministry of Finance (MoF) has directed the imposition of a reduced VAT rate for the supply of electricity. The rates applicable for households are as follows: A reduction of the VAT rate on electricity consumption in vulnerable households, from 19% to 5%, for a period of 6 months. The legislation applies to the period from 1 November 2021 until 30 April 2022 and a reduction of the VAT rate on electricity consumption for other households, from 19% to 9%, for a period of 3 months.

(Source: <https://www.globalvatcompliance.com/cyprus-reduced-electricity-rate-for-households/>)



#### The Chilean IRS issued a clarification on VAT exemption for exported services

The Internal Revenue Service (IRS) of Chile published a document Letter No.2511 containing the clarifications on VAT exemption for export services. Accordingly, a Chilean consultancy company offering administrative business management services to a foreign company is exempt from VAT as stated in the list of export services by virtue of Article 12, letter E, No. 16, of the Law on Sales and Services Tax (LIVS) maintained by the National Customs Service.

According to the National Customs Service, a service is VAT exempt if the export is carried out totally or partially in Chile to the residents of other countries for overseas use, the services are included in the list of exempt services, the services are subject to VAT and the service provider is a VAT taxpayer.

(Source: <https://www.globalvatcompliance.com/chile-irs-vat-exemption-export-services/>)





### Germany: Self-employed teachers providing services for schools as freelancers are not VAT exempt

The Federal Fiscal Court of Germany ruled that self-employed teachers providing services for schools as independent teacher are not VAT exempt. Freelancers are only exempt from trade tax (Gewerbsteuer), and not from VAT (Umsatzsteuer or Ust).

(Source: <https://www.globalvatcompliance.com/germany-self-employed-teachers-freelancers-not-vat-exempt/>)



### Vietnam: Hanoi's Tax Department explains the ruling of 5% VAT rate on e-commerce activities

The Hanoi's tax department is exerting efforts to address questions and concerns of taxpayers. Aside from the 2% personal income tax, social media influencers are also subject to pay 5% VAT. Social media influencers are individuals and companies that earn income from social media websites (e.g., Meta Platforms or formerly known as Facebook, Inc., Google, and YouTube).

(Source: <https://www.globalvatcompliance.com/vietnam-hanoi-tax-department-explains-the-ruling-of-the-5-vat-rate-on-e-commerce-activities/>)



### Bahrain's VAT treatment rules during the one-year transitional period towards the full implementation of the 10% VAT rate

The legislation to raise the VAT rate from 5% to 10% was ratified and took effect on 1 January 2022 with a one-year transition period ending 31 December 2022. Suppliers will continue to charge 5% VAT on items throughout the transition period, however, specific requirements must be met. Compliance on the transitional rules is mandatory.

(Source: <https://www.globalvatcompliance.com/bahrains-vat-treatment-rules-during-the-one-year-transitional-period-towards-the-full-implementation-of-the-10-vat-rate/>)



### Sri Lanka announces new Goods and Services Tax (GST)

Sri Lanka is introducing a Special GST that will apply to specified goods and services. The new GST does not replace

Sri Lanka's existing VAT system. Rather, it is an additional special tax.

(Source: <https://www.vatglobal.com/sri-lanka-announces-new-goods-and-services-tax/>)



### France: Changes to import VAT in France come into effect 1 January 2022

Use of the import VAT reverse charge will become compulsory in France with effect 1 January 2022. To administer this change, the management and collection of import VAT in France will be transferred from French Customs (DGDDI) to the French Tax Authority (DGFiP).

(Source: <https://www.avalara.com/vatlive/en/vat-news/changes-to-import-vat-in-france-come-into-effect-january-1-2022.html>)

## India

### India could levy GST on cryptocurrency exchanges

India will classify cryptocurrency exchanges as e-commerce platforms, some analysts expect. The move has important potential tax implications. Under the anticipated new regulations, the Indian government will impose 1% GST on platforms used to exchange cryptocurrencies such as Ethereum and Bitcoin.

(Source: <https://www.vatglobal.com/india-could-levy-gst-on-cryptocurrency-exchanges/>)

### GST Council defers tax hike on textiles

The Goods and Services Tax Council deferred its decision to raise tax on textiles from 1 January 2022, but the bulk of footwear may become costlier as GST on low-end products is set to jump from 5% to 12% on the first day of the new year.

(Source: <https://www.hindustantimes.com/india-news/gst-council-defers-tax-hike-on-textiles-101640971008831.html>)

### Indian government urged to implement 18% GST rate on all auto components

Industry body, Automotive Component Manufacturers Association (ACMA) has urged the Central Government to implement a uniform GST rate of 18% on all auto components.

In its recommendations for the forthcoming Union Budget, the ACMA requested the government to consider the upward vision of 'RoDTEP' (Remission of Duties and Taxes on Exported Products) rates along with adopting measures for enhancing investments, including that for R&D.

(Source: <https://www.timesnownews.com/auto/car-news/article/indian-government-urged-to-implement-18-gst-rate-on-all-auto-components/848663>)

**Customs News:****International:****Ivorian Customs develop their organizational culture based on integrity**

As partners of the Anti-Corruption and Integrity Promotion (A-CPI) Programme since January 2020, Ivorian Customs have committed to promoting integrity by strengthening their organizational culture. This initiative is based on the appropriation and implementation of good practices in terms of change management, work organisation and team commitment.

(Source:

<http://www.wcoomd.org/en/media/newsroom/2021/november/ivorian-customs-develop-their-organizational-culture-based-on-integrity.aspx>)

**WCO Secretary General meets with the President of Uzbekistan and opens a new Regional Customs Laboratory**

From 24 to 26 November 2021, Dr. Kunio Mikuriya, the Secretary General of the World Customs Organization (WCO) visited Tashkent, Uzbekistan to participate in various activities. On 26 November, along with H.E. Shavkat Mirziyoyev, the President of Uzbekistan, reviewed the progress of Customs reform during the past two years as well as the development of a roadmap for the upcoming two years. A Memorandum of Understanding (MoU) on the establishment of a WCO Regional Customs Laboratory (RCL) was signed.

(Source:

<http://www.wcoomd.org/en/media/newsroom/2021/november/wco-secretary-general-meets-with-the-president-of-uzbekistan-and-opens-a-new-rcl.aspx>)

**India****Sino-India trade at record USD 125bn for 2021 amid border tension; deficit widens**

Trade between India and China reached a record USD 125 Bn in 2021 despite the worst chill in bilateral ties in decades. Two-way trade between India and China in 2021 stood at USD 125.66bn, up 43.3% from 2020 when bilateral trade was worth USD 87.6bn.

The widening trade deficit with China, according to an explanatory note published online by the Indian embassy, can be attributed to two factors: narrow basket of commodities, mostly primary, for exporting to China and the lack of market access for most India's agricultural products and the sectors where India is competitive in, such as pharmaceuticals, and IT.

(Source: <https://www.hindustantimes.com/world-news/sinoindia-trade-at-record-125bn-for-2021-amid-border-tension-deficit-widens-101642166288374-amp.html>)

**Tesla working through a lot of challenges with Indian government: Elon Musk**

United States-based Tesla is working through a lot of challenges with the government to launch its products in India. Responding to a tweet on the company's plans to launch its products in India, Mr. Musk said: "Still working through a lot of challenges with the government".

The Heavy Industries Ministry had asked the electric car major to first start manufacturing its iconic electric vehicles in India before any tax concessions can be considered. The government sources had noted that they were not giving such concessions to any auto firm and giving duty benefits to Tesla will not send a good signal to other companies that have invested billions of dollars in India.

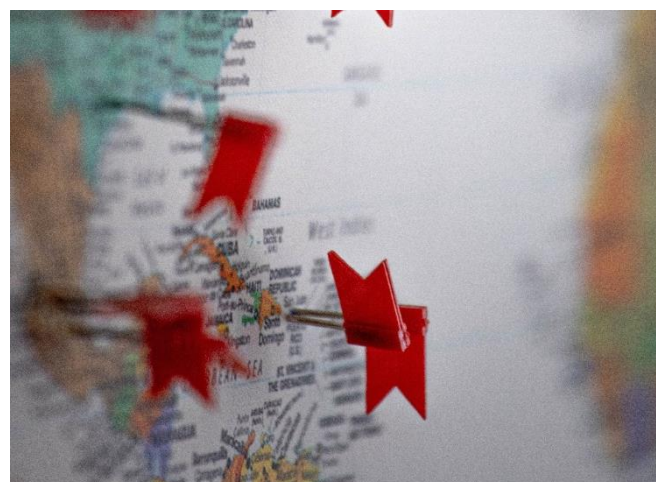
(Source: <https://www.thehindu.com/news/national/tesla-working-through-a-lot-of-challenges-with-indian-government-elon-musk/article38265210.ece>)

**Updates on India's FTAs with UK, UAE, Australia, and Other Trade Engagements in 2022**

India is pushing for more FTAs with multiple countries and regional blocs in 2022 as it chases an ambitious export target of USD 450-500Bn by next fiscal. It is also aggressively seeking trade concessions with major economies like the US.

The Indian Government hopes to conclude trade agreements with the UAE, UK, and Australia by as early as 2022 and is reportedly close to signing early harvest agreements with them. A growing list of countries and regional blocs negotiating trade deals with India now includes Russia, Oman, Canada, the GCC, and the Southern African Customs Union.

(Source: <https://www.india-briefing.com/news/india-fta-bilateral-uk-uae-australia-others-status-update-2022-23513.html/>)



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