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# NFT and Taxation Policy of India

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## ABSTRACT

*Non Fungible Tokens (NFTs) are gaining a lot of popularity in India. So far it is noticed that different countries have very little specific legislation for regulation of NFTs. Most of the countries such as USA, UK and Australia have imposed tax on NFT transactions in their jurisdictions including India as NFTs, are considered as property for tax purposes attracting different tax rates. In India certain notable changes were made by the government in the Companies Act, 2013, CGST Act, 2017 and Income Tax Act, 1961 for NFT transactions. NFT is not defined but is included in the definition of 'Virtual Digital Asset' under Income Tax Act 1961. There is no specific law for regulation of NFT in India and hence, there is a need to pass the Cryptocurrency and Regulation of Official Digital Currency Bill 2021 to prevent future issues resulting from NFT transactions.*

**Keywords:** NFT, Tax, India, Cryptocurrency, virtual digital asset.

## I. INTRODUCTION

Non Fungible Tokens (NFTs) are a new trend in the field of creative arts and copyrighted works and are gaining a lot of popularity in India. Many celebrities are issuing NFTs. However, NFTs raise many different policy issues, including those related to financial regulation, intellectual property (IP) rights, consumer protection, energy consumption, privacy, and content moderation.<sup>2</sup> NFTs are also a tool for commercializing Intellectual Property.<sup>3</sup> There is a growing interest in NFTs from the copyright perspective, in part because many of the works being traded as NFTs such as works of art, are copyright protected, and also because there is a lack of clarity regarding what exactly is acquired when purchasing an NFT.<sup>4</sup> Questions relating to copyright ownership and infringement was made in *Tarantino v. Miramax*, however, due the out of court settlement by the parties the question remained unanswered.

### (A) Meaning of NFT

NFTs are cryptographic units of data having metadata which is unique. NFTs can be traded with

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<sup>2</sup>NFTs: US Policies and Priorities in 2023, By Daniel Castro|April 24, 2023 <https://itif.org/publications/2023/04/24/nfts-us-policies-and-priorities-in-2023/>, accessed on 17-11-2024

<sup>3</sup>Andy Ramos, The Metaverse, NFTs and IP Rights: To Regulate or not to Regulate?, June 2022, available at [https://www.wipo.int/wipo\\_magazine/en/2022/02/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2022/02/article_0002.html), accessed on 30/01/2023

<sup>4</sup>Hamed Taherdoost, Non Fungible Tokens (NFT): A Systematic Review, Information 2023, 14(1), 26, available at <https://doi.org/10.3390/info14010026>, published on 31 December 2022) accessed on 14/09/2023

a digital register where all such transactions are registered.<sup>5</sup> Sam Dean defines NFT as a unit of data that is stored on a digital ledger called a blockchain that certifies a digital asset to be unique.<sup>6</sup> The NFTs are digital certificates ensuring authenticity which cannot be replicated. They represent ownership of unique items and are stored on a distributed ledger or on a blockchain.<sup>7</sup>

NFTs harness the capabilities of technology of blockchain to create digital files that are non-fungible, for example for the entertainment industry- an image, or video embedded in the token, which decides its value in the market.<sup>8</sup>

There are broadly two types of NFTs- namely NFT 1.0 and NFT 2.0. The first generation of NFTs is known as *static* NFTs or NFT 1.0. The metadata in NFT 1.0 were defined when the token was generated and could not be changed afterwards. NFT 2.0, known as *dynamic* NFTs introduces the possibility to interact with NFTs, compose and enhance them, update their metadata, and add a degree of randomness. NFT 2.0 has widened the scope of their application thereby enabling new use cases, such as video games, dynamic collectibles and ID cards; and improve the user experience.<sup>9</sup>

## II. TAX POLICY ON NFT TRANSACTIONS IN USA, UK AND AUSTRALIA

There is ambiguity about the legal rights linked with NFTs. So far it is noticed that different countries have very little legislation for regulation of NFTs, however most of the countries have imposed tax on NFT transactions in their jurisdictions. NFTs, are considered as property for tax purposes attracting different tax rates.

### (A) USA's Tax Policy

In the USA, transactions involving digital assets have tax implications both for individuals and

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<sup>5</sup>Andy Ramos, The Metaverse, NFTs and IP Rights: To Regulate or not to Regulate?, June 2022, available at [https://www.wipo.int/wipo\\_magazine/en/2022/02/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2022/02/article_0002.html), accessed on 30/01/2023

<sup>6</sup>Ifeanyi E. Okonkno, International Journal of Law and Information Technology, p. 297, vol. 29, issue 4, Winter 2021, available at [academic.oup.com/ijlit/article/29/4/296/6433295](https://academic.oup.com/ijlit/article/29/4/296/6433295), accessed on 1-08-2023, <https://doi.org/10.1093/ijlit/eaab010>, published on 22 November 2021. Also available at <https://academic.oup.com/ijlit/article-pdf/29/4/296/42880552/eaab010.pdf>

<sup>7</sup>Andrei-Dragos Popescu, Non-Fungible Tokens (NFT) – Innovation beyond the craze, p. 1, 5<sup>th</sup> International Conference on Innovation in Business, Economics & Marketing research (IBEM-2021) Proceedings of Engineering & Technology – PET - Vol 66, 2021, ISSN 1737-9334 26, accessed on 24-11-2024, available at [https://d1wqtxts1xzle7.cloudfront.net/68796447/PET\\_Journal\\_NFTs\\_Innovation\\_beyond\\_the\\_craze-libre.pdf?1629291510=&response-content-disposition=inline%3B+filename%3DNon\\_Fungible\\_Tokens\\_NFT\\_Innovation\\_beyon.pdf](https://d1wqtxts1xzle7.cloudfront.net/68796447/PET_Journal_NFTs_Innovation_beyond_the_craze-libre.pdf?1629291510=&response-content-disposition=inline%3B+filename%3DNon_Fungible_Tokens_NFT_Innovation_beyon.pdf)

<sup>8</sup>Andy Ramos, The Metaverse, NFTs and IP Rights: To Regulate or not to Regulate?, June 2022, available at [https://www.wipo.int/wipo\\_magazine/en/2022/02/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2022/02/article_0002.html), accessed on 30/01/2023

<sup>9</sup>Barbara Guidi, Andrea Michienzi, From NFT 1.0 to NFT 2.0: A Review of the Evolution of Non-Fungible Tokens, *Future Internet* 2023, 15(6), 189; <https://doi.org/10.3390/fi15060189>, accessed on 24-11-2024

businesses.<sup>10</sup> The Internal Revenue Service (IRS) has specific rules for collectibles. The IRS's policy treat an NFT as a collectible if the NFT confers ownership or rights to another asset meets the IRS's definition of a collectible, such as a gem. In USA, there is tax for capital gains on collectibles. In addition, creators who make their own NFTs may treat that revenue as ordinary income. Tax payers are required to report digital asset activity on their tax returns, including those involving NFTs. The IRS revised its tax forms since 2022, which now includes a question on digital assets in the Form 1040 (the primary form used for individual income tax returns). The Infrastructure Investment and Jobs Act, 2021 (law to increase investment in infrastructure) requires crypto exchanges to send an annual tax form to the IRS reporting yearly profits or losses from digital assets. It requires businesses to report to the U.S. government all transactions involving \$10,000 or more in digital assets, extending existing rules that apply to cash transactions.<sup>11</sup>

### **(B) UK's Tax Policy**

NFTs are not specifically regulated in the UK, they are treated as a type of cryptoassets and are regulated through the Financial Services and Markets Act 2000 ("FSMA"), the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.<sup>12</sup> Also, HM Revenue and Customs (HMRC) provides guidance relating to crypto assets but has classified NFTs as a separate entity. The official position in the UK is not clear whether the profits and losses relating to NFT's would be liable for capital gains tax, and that whether the NFTs would be treated assets for the purposes of other taxes.<sup>13</sup>

The Financial Conduct Authority distinguishes three kinds of crypto-assets – a security token (provide rights and obligations specified investment which includes shares, deposits, insurance), an e-money token (electronically stored monetary value) or an unregulated token. NFT fitting the criteria of security token will be considered as specified investment under FSMA (Regulated Activities) Order 2001 whereas NFT fitting the criteria of an e-money token will be regulated under the Electronic Money Regulations 2011. For the NFTs falling in the categories of security token and e-money, authorization from FCA is required for their marketing.<sup>14</sup> Moreover, if an NFT is brought as an investment and sold, any profit or gain from

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<sup>10</sup>Daniel Castro, NFTs: US Policies and Priorities in 2023, April 24, 2023 <https://itif.org/publications/2023/04/24/nfts-us-policies-and-priorities-in-2023/>, accessed on 17-11-2024

<sup>11</sup> Ibid

<sup>12</sup>Written evidence submitted by Outlier Ventures, DCMS Committee Inquiry - Non-fungible tokens (NFTs) and the blockchain [https://committees.parliament.uk/writtenevidence/115627/html/#:~:text=The%20UK's%20light%2Dtouch%20regulatory,\(%E2%80%9CFsMA%E2%80%9D\)%20apply.](https://committees.parliament.uk/writtenevidence/115627/html/#:~:text=The%20UK's%20light%2Dtouch%20regulatory,(%E2%80%9CFsMA%E2%80%9D)%20apply.,), accessed on 17-11-2024

<sup>13</sup>NFT's (Non-Fungible Tokens) - Risks, Regulation and The Law, <https://www.Rahmanravelli.co.uk/expertise/nfts-non-fungible-tokens-risks-regulation-and-the-law/>, accessed on 17-11-2024

<sup>14</sup> The NFT Collection: A Brave NFT World - A Regulatory Review of NFT's (Part 2) Blog IP Law Watch, K&L

such sale will attract Capital Gains Tax in UK. For businesses trading in NFTs attracts Corporation Tax on any profits. VAT will be required to be paid if Goods and Services are sold in or via NFTs.<sup>15</sup>

### **(C) Australia's Tax Policy**

The tax treatment of an NFT in Australia depends on the:

- circumstances,
- way an NFT is used,
- reasons for holding and transacting with the NFT.<sup>16</sup>

Income tax on the NFT is levied:

- as a CGT asset under the capital gains tax (CGT) regime
- on revenue account as trading stock
- as part of a business
- as a profit-making scheme.

In rare circumstances in Australia an NFT could be held as a personal use asset for ex. Bitcoin<sup>17</sup>

Under the GST rules, an NFT is not a form of digital currency and hence NFT transaction will be subject to GST if it meets the requirement of being a GST free supply or a taxable supply. An entity operating an NFT marketplace as an electronic distribution platform (EDP), will be responsible for GST on NFT sales that is facilitated for offshore sellers to Australian consumers.<sup>18</sup>

### **III. INDIA'S TAX POLICY AND NFTS**

There is no clear definition of NFT in Indian legal framework and there is no specific law for regulation of NFT in India. However, certain changes were made by the government in some laws The case between Digital Collectibles and Galactus Funware Technology is about the use of names and images of sportspersons for creating digital player cards which functions as NFTs. The case was filed by Digital Collectibles and Indian Cricketers alleging use of players' names

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Gates LLPh<sup>https://www.lexology.com/library/detail.aspx?g=b01c6df4-7b4a-4cad-a0ba-a3cee48a0ca5</sup>, accessed on 17-11-2024

<sup>15</sup> Ibid The NFT Collection: A Brave NFT World - A Regulatory Review of NFT's (Part 2) Blog IP Law Watch, K&L Gates LLPh<sup>https://www.lexology.com/library/detail.aspx?g=b01c6df4-7b4a-4cad-a0ba-a3cee48a0ca5</sup>, accessed on 17-11-2024

<sup>16</sup> <sup>https://www.ato.gov.au/individuals-and-families/investments-and-assets/crypto-asset-investments/transactions-acquiring-and-disposing-of-crypto-assets/non-fungible-tokens</sup>, accessed on 17-11-2024

<sup>17</sup> Ibid

<sup>18</sup> Ibid

and images is without authorization amounting to violations of various legal rights including unfair competition and interference of economic interests. The Delhi High Court held that use of names and images of celebrities for satire, parody and art fell within the meaning of freedom of speech and expression under Art. 19 (1) (A) of the Constitution of India and that it did not violate right to privacy.<sup>19</sup>

In 2018, the RBI issued circular prohibiting national/organized/cooperative banks and NBFCs from operating with virtual currency. However, the Supreme Court struck down this order in the case of *Internet and Mobile Association of India vs Reserve Bank of India*.<sup>20</sup>

The earlier Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019 seeks to ban cryptocurrency is now replaced with the Cryptocurrency and Regulation of Official Digital Currency Bill 2021 following the decision of Supreme Court in the above case and is under discussion.<sup>21</sup> This Bill prohibits all private cryptocurrencies in India however, it allows certain exceptions that promote the technology of cryptocurrency. Also, it creates a framework for digital currency to be issued by the Reserve Bank of India.<sup>22</sup>

Recently a few changes were introduced by the Government of India in the Companies Act, 2013, CGST Act, 2017 and Income Tax Act, 1961 for NFT transactions.

- **Changes in the Companies Act, 2013**

Schedule III of the Companies Act 2013 is amended through notification w.e.f. 1-04-2021, by the Ministry of Commerce Affairs/ Central Government wherein it specifies that the details of transactions relating to Crypto currency or Virtual currency to be declared by the companies in their financial statements.

- **Changes in the Income Tax Act, 1961**

The Income Tax Act 1961 was also amended by the Finance Act 2022 wherein section 2 (47A) is inserted for defining 'Virtual Digital Assets'. The definition of 'Virtual Digital Assets' includes crypto currencies and NFTs. The Notification of Ministry of Finance (Department of Revenue) Central Board of Direct Taxes dated 30, June, 2022 specifies that a token which

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<sup>19</sup>Personality rights and NFTs – is your digital doppelganger protected under Indian law? BTG Advaya, <https://www.lexology.com/library/detail.aspx?g=ecea0d63-5163-4938-9ac0-c48ac6c72c9e>, accessed on 17-11-2024

<sup>20</sup>Prashant Kataria, **NFTs in India: Legal implications**, <https://www.thehindubusinessline.com/business-laws/nfts-in-india-legal-implications/article65636218.ece>, accessed on 22-07-23, Updated - July 18, 2022 at 12:21 PM., See, [https://main.sci.gov.in/supremecourt/2018/19230/19230\\_2018\\_4\\_1501\\_21151\\_Judgement\\_04-Mar-2020.pdf](https://main.sci.gov.in/supremecourt/2018/19230/19230_2018_4_1501_21151_Judgement_04-Mar-2020.pdf)

<sup>21</sup>[https://prsindia.org/files/parliament/session\\_track/2021/session\\_alert/Parliament\\_Session%20Alert\\_Winter%20Session%202021.pdf](https://prsindia.org/files/parliament/session_track/2021/session_alert/Parliament_Session%20Alert_Winter%20Session%202021.pdf), accessed on 17-12-2024

<sup>22</sup>ibid

qualifies to be a virtual digital asset as non-fungible token within the meaning of clause 47 A(a) of Section 2 of the Income Tax Act 1961, but shall not include a Non-Fungible Token whose transfer results in transfer of ownership of underlying tangible asset and if such transfer of ownership is legally enforceable.<sup>23</sup>

It defines the expression “virtual digital asset” as- (a) *any information, code, number or token which is not an Indian or foreign currency, and generated by cryptographic means or otherwise and which has a digital representation of value that is exchanged with a consideration or without a consideration containing a promise or representation of having an inherent value or functions as a store of value or as a unit of account. It also includes its usage in any financial transaction or investment, but not limited to an investment scheme. It can be transferred, stored, or traded electronically;* (b) *A non-fungible token or any other token of similar nature by whatever name called;* (c) *Any other digital asset as may be notified by the Central Government in the Official Gazette on this behalf;*<sup>24</sup>

In other words, Virtual Digital Assets includes any information, code, number, and token cryptographically generated or otherwise having digital representation of value, NFT or other similar token and notified digital assets.

Section 115BBH is inserted in the Income Tax Act 1961 by the Finance Act 2022 with effect from 1-4-2023 which provides for inclusion of income from the transfer of any virtual digital asset and that the income tax shall be payable on such transfer at the rate of 30%. However, no deduction shall be allowed in respect of any expenditure, allowance or set off of loss from the transfer of such virtual digital asset.

Hence, the income earned from the sale of NFT is taxable. Additionally, virtual digital assets given as “gifts” are also covered in the taxation regime.<sup>25</sup>

- **Treatment of NFT under GST Act**

‘Goods’ is defined under the Central Goods and Services Tax Act, 2017 to include moveable property other than money and securities, and services include anything other than goods. In 2023 an amendment in Section 2 the CGST Act 2017 added a clause 117 A after the clause 117 wherein it is stated that “Virtual Digital Asset” to have the same meaning as given to it under

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<sup>23</sup>See, <https://incometaxindia.gov.in/communications/notification/notification-no->

<sup>24</sup><https://www.indiafilings.com/learn/cbdt-notifies-non-fungible-token-nft-as-virtual-digital-assets/>, accessed on 17-12-2024

<sup>25</sup>Union Budget 2023: The way forward for cryptocurrencies in India SECTIONSUnion Budget 2023: [https://economictimes.indiatimes.com/news/economy/policy/union-budget-2023-the-way-forward-for-cryptocurrencies-in-india/articleshow/97270237.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/economy/policy/union-budget-2023-the-way-forward-for-cryptocurrencies-in-india/articleshow/97270237.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst), accessed on 17-12-2024

the Income Tax Act 1961. However, there may be additional complications in cases of cross-border NFT transactions.

NFT seller will be charged with GST at the residual rate of 18% as NFTs are not mentioned in the scheme of classification of services.<sup>26</sup> Moreover, the Finance Act, 2020 provides an equalisation levy (EL), which charges a 2% fee on corporations based out of India but having operations within the country. If an e-commerce operator is considered as a marketplace, then the 2% EL may apply on the gross value of the NFT, or the gas fee charged by these marketplaces, or both.<sup>27</sup>

#### **IV. CONCLUSION**

It is believed that NFTs can truly revolutionize the world of ownership and will reshape different industries like gaming, media and arts.<sup>28</sup> The recent trend in NFT transactions indicate that there has been an increasing interest in NFTs in the field of artistic creative works, and in the other fields of IP such as patent and trademarks, gaming, etc. all over the world and India is no exception to it. The Government of India wanted to ban cryptocurrency through 2019 Bill but the decision of the SC which declared the RBI circular of 2018 banning cryptocurrency transactions as invalid changed the stand of the Government towards regulating the Cryptocurrency through the Cryptocurrency and Regulation of Official Digital Currency Bill 2021. The absence of specific regulation of NFT in India and making NFT transactions taxable will create legal issues in future so, there is a need to fill the legal vacuum by passing the Bill of 2021 at the earliest to bring in clarity and stability.

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<sup>26</sup><https://cleartax.in/s/tax-on-nfts>, accessed on 17-12-2024

<sup>27</sup>A comparison of regulations surrounding NFTs, *Asia Business Law Journal*, 1 December 2021, <https://law.asia/nft-regulations-comparison/>, accessed on 24-11-2024

<sup>28</sup>Andrei-Dragos Popescu, Non-Fungible Tokens (NFT) – Innovation beyond the craze, p. 5, 5<sup>th</sup> International Conference on Innovation in Business, Economics & Marketing research (IBEM-2021) Proceedings of Engineering & Technology – PET - Vol 66, 2021, ISSN 1737-9334 26, accessed on 24-11-2024, available at [https://d1wqtxts1xzle7.cloudfront.net/68796447/PET\\_Journal\\_NFTs\\_Innovation\\_beyond\\_the\\_craze-libre\\_Pdf?1629291510=&response-content-disposition=inline%3B+filename%3DNon\\_Fungible\\_Tokens\\_NFT\\_Innovation\\_beyon.pdf](https://d1wqtxts1xzle7.cloudfront.net/68796447/PET_Journal_NFTs_Innovation_beyond_the_craze-libre_Pdf?1629291510=&response-content-disposition=inline%3B+filename%3DNon_Fungible_Tokens_NFT_Innovation_beyon.pdf)