

Anti-Profiteering & Transitional issues in GST

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**Anti-
Profiteering**

Background

- “**Profiteering**” make or seek to make an excessive or unfair profit, especially illegally.
- Que taken from the Study Report titled ‘Implementation of Value Added Tax (VAT) in India-Lessons for transition to GST’ released by the (C&AG) of India in June, 2010.
- *The above C&AG report, after checking the records of 13 manufacturers in a State in three initial months of implementation of VAT, found that the manufacturers did not reduce the MRP of the goods despite sharp fall in the tax rate post-VAT implementation.*
- Introduced first in Australia, Singapore. Retail inflation in Australia increased from 1.9% to 5.8% post implementation of GST - 'Net Dollar Margin Rule'.

Background

- Malaysia installed the authority 4 months prior to the implementation;
- Due to rise in inflation, the new elected Government in Malaysia withdrew GST w.e.f. June 1st 2018 and substituted with erstwhile Sales and Service Tax;
- It is mainly to curb the exorbitant rise in prices and inflationary effects;
- It is effective if significant lead in time allowed and proper education and training is given to all the stakeholders;
- Whether pricing can be monitored/ regulated within the scope of article 246A of the Constitution which only gives authority to levy and collect taxes.

Anti-Profiteering

SECTION 171. Anti-profiteering measure:

- Any reduction in rate of tax;
 - on any supply of goods or services; or
 - the benefit of input tax credit;
 - shall be passed on to the recipient;
 - by way of commensurate reduction in prices.
-
- Any registered person who has profiteered, shall be liable to pay penalty equivalent to 10%. of the amount so profiteered;
 - Registered person availing transitional credit on stocks u/s 140(3) shall pass on the benefit of such credit by way of reduced prices to the recipient.

Anti-Profiteering

- Article 246A of the Constitution of India states as under:
 - (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to **goods and services tax** imposed by the Union or by such State.*
- Chapter XV (Rule 122 to 137) of CGST Rules deals with Anti-profiteering measures.
- Lay down details about the selection of the members of the NAPA and the other committees that will assist the NAPA, the procedure to be followed the powers given to the authority.
- The rules don't prescribe the formula based on which the extent of profiteering can be determined this task has been left to the NAPA.

Constitution of Anti-Profiteering Authority (NAPA)

Term of Authority extended for 2 more years – To be functional till Nov 30, 2020 – 35th GST Council meeting;

The National Anti-Profiteering Authority consists of:

- a. A Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India;

- b. Four **Technical members** who are or have been Commissioners of State tax or central tax [for at least one year] or have held an equivalent post under the existing law, to be nominated by the Council.

There is no judicial member in the NAPA – **[Jubilant Food Work Ltd V/s. UOI]**

Operational Mechanism

Application by
Consumer

State
screening
committee to
confirm the
prima facie
evidence of
profiteering

Standing
committee to
confirm the
prima facie
evidence of
profiteering

Matter
referred to
Director
General of
Anti-
Profiteering
for
Investigating
Profiteering

National Anti-
Profiteering
Authority to
determine the
profiteering
and passing
appropriate
order

Constitution of Standing Committee & Screening Committee

- The Council will constitute a Standing Committee and a State level Screening Committee on Anti- profiteering.
- Standing Committee will comprise of such officers from the State and Central Government as nominated.
- The State level Screening Committee shall be constituted in each State. It will consist of-
 - ✓ One officer of the State Government, nominated by the Commissioner and
 - ✓ One officer of the Central Government nominated by the Chief Commissioner.

Appointment of Chairman and other members

- The Chairman and other members of the Authority shall be appointed by the Central Government on the recommendations of a Selection Committee to be constituted for the purpose by the Council.
- The Chairman shall be paid a monthly salary of Rs. 2,25,000 (fixed) and other allowances and benefits as are admissible to a Central Government officer holding posts carrying the same pay.
- Central Government with the approval of the Chairperson of the Council may terminate the appointment of the Chairman or the Technical Member at any time.
- Authority needs to furnish a performance report to the Council by the tenth day of the close of each quarter.

Power to determine methodology

- The Authority **may** determine the **methodology and procedure** for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices.


Chairman, NAA addressing industry at CII, Mumbai:


- *“Industry voiced concerns regarding the mechanism of calculating benefits to be passed on to the end consumers on an impromptu basis along with logistic hassles associated with it. Industry members requested for sector specific guidelines. They also expressed concerns over the mechanism of changing MRP on an instantaneous level.”*
- *“Mr. Sharma further elaborated that it is simple to decide the profiteering by comparing the corresponding invoices of pre-revised rates to post revision **which is an accounting procedure and no legality is required.** By reduction of rates, Government sacrifices revenue but commensurate reduction should be passed on to the end consumers.”*


Making complaint against Profiteering

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Language Register Login

 **NAA**
NATIONAL ANTI-PROFITEERING AUTHORITY

 GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
सत्यमेव जयते




Home About NAA Legislation App Contact Us

Wake Up Consumers!

To make complaint against Profiteering is Your Right

NAA has started a Helpline No.
To resolve all the queries related to the
registration of complaints against profiteering.



**Helpline No.
011-21400643.**

- Guidelines to register the complaint
- Information
- Resolve Queries

Between 9:30 AM to 1:00 PM
And
Between 1:30 PM to 6:00 PM.
On working Days

Advertisement reg. empanelment of Advocates

WHAT'S NEW

Guide to register complaint

Anti-Profiteering Application Form (APAF-1)

Anti-Profiteering Application Form (APAF-1)

[To be filed before Standing Committee/State level Screening Committee in terms of Rule 128 of CGST Rules, 2017]

A. General information about the Applicant		
A.1	Name	
A.2	Address	
A.3	Contact Number	
A.4*	E-mail ID	
A.5	Proof of identity (Please Tick-√)	Aadhaar Card
		Voter ID
		Permanent Account Number (PAN) Card
		Driving Licence
		Passport
		Ration Card having photograph of the applicant
		Any other proof of Identity (Specify)
B. General information about the Supplier who has not passed on the benefit		
B.1	Name	
B.2	Address	

Making complaint against Profiteering

- Whether one form is sufficient for multiple goods or services – How about composite/ mixed supplies..?
- The complainant should submit a duly filled in application form APAF-01 along with his identification document and evidence of profiteering. The instructions for filling the said form are contained in form APAF-01.
- Even a person in a same line of business can initiate a complain.

Order of the Authority

The Authority can pass the order for-

1. Reduction in prices;
2. Return to the buyer, the benefit amount not passed on along with 18% interest from the date of collection of the higher amount till the date of deposit of such amount;
3. Where the eligible person does not claim return of the amount or is not identifiable, Deposit 50% in the Consumer welfare fund of CG and balance 50% in the Consumer welfare fund of the respective State Government;
4. Imposition of penalty;
5. Cancellation of registration.

Order of the Authority

- A minimum of three members of the Authority shall constitute quorum.
- Any order passed shall be immediately complied failing which action shall be initiated to recover the amount in accordance with the provisions of this act.
- The Authority shall cease to exist after the expiry of **Four** years from the date on which the Chairman enters upon his office unless the Council recommends otherwise. May be extended if required. Present chairman appointed from Nov 2017.
- **“Adjudicating authority”** means any authority, appointed or authorized to pass any order or decision under this Act, **but does not include** the Central Board of Indirect Taxes and Customs, the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority, and the Appellate Tribunal and the **Authority referred to in subsection (2) of section 171.**

Anti-Profiteering - Key Decisions

1) Hindustan Unilever Limited (HUL)

- HUL had not reduced the MRP of number of products sold by it, even though the GST rate has reduced from 28% to 18% or from 18% to 12% on number of items. Instead of reducing the price, HUL increased the base prices of their products which ultimately results in same amount of MRP pre & post change in rate of tax.
- As benefit was not passed on to the customer, after investigation HUL deposited Rs. 383.35 Crore in Consumer Welfare Fund (CWF). {2018-TIOL-19-NAA-GST}
- Presently matter is pending before the Delhi HC, wherein HUL has taken the following grounds:
 - *Amount denied on extra grammage being claimed – Rs. 27.77 Cr;*
 - *Amount refunded to Modern Trade Dealers but being denied – Rs. 26.37 Cr;*
 - *Loss in North East Exemption being denied - Rs. 45.31*
 - *Packing material with old MRP written off – Rs. 7.80*
 - *Tax on Tax demanded – Rs. 36.25*
 - *TRAN-2 credit - Rs. 78.97*
 - *Amount recovered from Dealers and deposited with the Government being demanded again – Rs. 36.25*

Anti-Profiteering - Key Decisions

2) Nestle

- It was alleged that despite of reduction in GST rate from 28% to 18% w.e.f. 15/11/2017, Nestle has not reduced the prices of *Nestle Munch Nuts* and *Cadbury Dairy Milk Chocolates* and benefit was not passed on to the consumers.
- Hence profiteering made illegally should be deposited with CWF along with the interest @ 18% within 3 months. {2018-TIOL-16-NAA-GST}

Submissions:

- Benefit is passed on by way of reduction in MRPs;
- For price point products, where the MRPs were not changed, benefit was passed on by increasing the quantity of the products; and
- Where there were operational and/or legal constraints to pass on the benefit on account of issues of coinage, taste preferences or manufacturing constraints, additional benefit was passed on other packs/SKUs in the same product category;
- Communication was also sent to all the distributors reminding them of their obligation to pass on the benefit to their recipient i.e. retailers;
- Advertisements on GST benefits being passed on select products indicating the reduced MRPs of the products were also published in the national and regional newspapers.

Anti-Profiteering - Key Decisions

DIRECTOR GENERAL ANTI-PROFITEERING Vs JUBILANT FOODWORKS LTD 2019-TIOL-04-NAA-GST

Facts:

Respondent had purchased 1 Stuffed Garlic Bread and 1 Med NHT Veg Extrava (Medium Veg Pizza) after paying Rs. 129/- and Rs. 440/- per item respectively dated 20.10.2017. He had also purchased the above 2 items again dated 19.11.2017 by paying an amount of Rs.139/- and Rs. 485/- respectively from the Respondent. He had alleged that though the (GST) rate on restaurant services was reduced from 18% to 5% w.e.f. 15.11.2017, the price has been increased, thereby profiteering the additional GST.

Respondents argument & Decision:

Respondent contented that various factors like Competition pricing, Strategies for market penetration, inflation, regular yearly increase in the price, Profit margins for sustaining in market, Life cycle of the product, Economic and political conditions, Credit period offered to vendors and Costs of procurement etc. had influenced pricing of his products.

Anti-Profiteering - Key Decisions

- No methodology has been prescribed for determination and calculation of profiteering, law was illegal due to the absence of the method of computation of quantum of tax.
- 'Netting off' the increase and decrease from the optimum price in respect of all the SKUs which were above and below the optimal price to arrive at the profited amount.
- DGAP had not taken into account the prices of 223 items on which the Respondent had reduced the prices.
- Rule 133 did not stipulate issuance of a show cause notice to the violators of Section 171 before passing of an order under the above Rule and hence it was violative of the principle of audi alteram partem as the person against whom any action is proposed to be taken must be informed in writing of such action.
- He has also claimed that the Authority has treated the Report of the DGAP as the show cause notice which was not correct.

Anti-Profiteering - Key Decisions

WRIT Petition before Delhi High Court - JUBILANT FOODWORKS LTD Vs UoI 2019-TIOL-1017-HC-DEL-GST

- The Chairman and Members of the NAPA are to be nominated by the GST Council. In other words, there is no judicial member in the NAPA.
- It is further pointed out that under the CGST Rules there is no provision for constitution of an appellate authority to review the orders passed by the NAPA.
- Petitioners deal in as many as 393 products, and even according to the NAPA they are compliant in regard to the price of many of such products, the NAPA has been selective in drawing an adverse conclusion
- It is accordingly directed that subject to the Petitioners depositing the sum of Rs.20 crores with the Central CWF within a period of four weeks from today, there shall be a stay of the impugned order dated 31st January 2019 of the NAPA.

Anti-Profiteering - Key Decisions

SHRI RAVI CHARAYA Vs M/s. HARDCASTLE RESTAURANTS PVT LTD 2018-TIOL-13-NAA-GST

- Hardcastle Restaurants, a franchisee of fast food chain McDonald's, guilty of not passing on GST rate cut benefits of over Rs 7.49 crore to consumers.
- Any such change cannot amount to automatic change in the price unless it was agreed to by both the parties as per Section 64A of the Sale of Goods Act, 1930.
- Any attempt to regulate the sale price of the products being sold by him would violate the right to carry on trade as per Article 19(1)(g) of the Constitution
- Section 171 were not similar to the laws framed for controlling prices.
- Denial of ITC w.e.f. 15.11.2017 is not factored while alleging the profiteering.
- The variable portion of rent for the restaurants in the shopping malls was payable at the end of the year and they would not be eligible to claim ITC on such variable rent.

Anti-Profiteering - Key Decisions

DGAP Vs M/s TTK PRESTIGE LTD 2019-TIOL-29-NAA-GST

- Allegation is that the respondent on the supply of 'Glass Kit Hood Curved Black - 90cm GHK 900CS Electric Chimney' did not pass on the benefit of reduction in GST from 28% to 18% w.e.f. 15.11.2017.

Held:

- Submission of the respondent that the price of the product was not increased at the time of implementation of GST.
- Effective tax rate prior to GST in the VAT period was close to 18% and post 15.11.2017, the GST rate was 18% and he had maintained the original price of the product when migrating from VAT to GST.
- Sales promotion scheme called "Ponnona Mahotsavam" where consumer was offered products at reduced prices to commemorate the celebration of Onam festival during the period 10.08.2017 to 31.10.2017.

Anti-Profiteering - Key Decisions

DIRECTOR GENERAL OF ANTI-PROFITEERING Vs M/s MAK PLYWOOD INDUSTRIES PVT LTD 2019-TIOL-26-NAA-GST

Facts:

- In the pre-GST era, the applicable tax rate was 28.81% (CEX duty @12.5% and VAT @14.5%) and on implementation of GST the same was fixed at 28%, the respondent had reduced the per unit base price of the product (excluding tax) from Rs.1028.07 (without discount) to Rs.1021.73 (with 17.05% discount) that when the GST rate was reduced from 28% to 18% w.e.f 15.11.2017, the respondent did not increase the per unit base price of the product (excluding GST) which remained unchanged at Rs.1021.73 (with 17.05% discount)

Held:

- There was a reduction in the per unit base price (excluding tax) in the post-GST era as compared to the pre-GST era and when the GST rate was reduced from 28% to 18% w.e.f. 15.11.2017, the per unit base price (excluding GST) had remained the same at Rs.1021.73 and, therefore, there has been no contravention of the above section 171, that the allegation of profiteering is not established.

Anti-Profiteering - Key Decisions

M/S A B V AND COMPANY Vs THE PROFESSIONAL COURIERS 2019-TIOL-27-NAA-GST

There was no reduction in the rate of tax on supply of 'Courier Service' after implementation of GST - Instead, there was an increase in the rate of tax from 15% pre-GST regime to 18% in the post-GST regime

-

Fact that respondent has increased his base price for providing courier service from Rs.69.50 to Rs.80/- has no relevance in view of the fact that there has neither been a reduction in the rate of tax nor increased benefit on account of Input Tax Credit (ITC) - Provisions of s.171 of the CGST Act, 2017 cannot be invoked

- Application dismissed: NAA

Anti-Profiteering - Key Decisions

Director General Anti Profiteering Vs JP And Sons- [2018-TIOL-15-NAA-GST](#)

Facts:

- Tax rate changed from 28% to 18% w.e.f .15.11.2017 in respect of Johnson & Johnson Baby Shampoo 100 ml and Johnson & Johnson Baby Powder 200 gms.
- Respondent submitted that **he was only an intermediary** between the company and the customers and was ready to pay difference of tax, if any, but no penalty should be imposed since the **circumstances were beyond his control** and he had no intention to retain the profit on revised rates.
- Calculation of the alleged profited amount should be done on the stock which was lying on 14.11.2017 and not in respect of the total sales made from 15.11.2017 to 31.03.2018

Held:

- Respondent cannot deny his legal liability by shifting his accountability on the manufacturer J&J.
- Argument of respondent that the profiteering amount should be calculated only in respect of stock lying on 14.11.2017 is fallacious since they had made illegal profits on all supplies during the period ending 31.03.2018.

Anti-Profiteering – Key Decisions

DIRECTOR GENERAL ANTI-PROFITEERING Vs M/s SATYA ENTERPRISES 2019-TIOL-03-NAA-GST

- Invoices issued by respondent for supply of 'Beauty cream 50gms' manufactured by M/s Patanjali Ayurveda Ltd. sent to DGAP for further action. Respondent stated that he was getting fixed commission of 5% on purchases made from the manufacturer and was getting a discount of approximately 33% when the rate of tax was 28% and which was reduced to approximately 22% when the rate of tax had come down to 18%.
- Argument advanced by the Respondent is that the MRPs were fixed by the manufacturer viz. M/s Patanjali Ayurveda Ltd. Which he was bound to charge and he could not reduce the same on his own.

Anti-Profiteering - Key Decisions

- There is no evidence produced to show that they had made any correspondence with J&J informing that they were bound to reduce the prices due to reduction in the rate of tax asking J&J to not to increase the base prices or compensate them for the benefit he was bound to pass on to his customers.
- It is, therefore, apparent that respondent had deliberately charged the enhanced prices with an intention to pocket the amount which he was bound to pass on to the recipients.

Anti-Profiteering – Key Decisions

NEERU VARSHNEY Vs LIFESTYLE INTERNATIONAL PVT LTD 2018-TIOL-7-NAA-GST

- It is alleged that the respondent had not passed on the benefit of reduction in the rate of tax by lowering the price of “Maybelline FIT Me foundation”.
- Respondent had enhanced the basic price of the product which was exactly equal to the amount by which the GST on them had been reduced and hence there is no doubt that the Respondent had resorted to profiteering.
- Respondent cannot claim that since the amount of profiteering was miniscule no penalty should be imposed as each breach of the law has to be visited with penalty.

Submissions:

- Respondent stated that they had no direct influence over the revision of MRP of external brands.
- Statutory provisions required only a broad correlation between the reduction in taxes and the pricing of products.

Anti-Profiteering – Key Decisions

- It is clear from the word, "commensurate" which showed that the intent was to take the overall facts and circumstances into consideration, as otherwise the word "equivalent" would have been used to mandate exact measurement of benefit to be passed on.
- Benefits arising on an individual product could not be seen in isolation and the same were to be considered in terms of the regime introduced, the overall costs of GST implementation, other businesses carried out by the dealer and upon factoring in of various costs/ losses incurred at an entity level on his range of products.

Anti-Profiteering – Key Decisions

DIRECTOR GENERAL ANTI-PROFITEERING Vs M/s ABBOTT HEALTHCARE PVT LTD 2019-TIOL-15-NAA-GST

- DGAP in its report has stated that the total tax incidence on the product was 30.06% in the pre-GST which was reduced to 28% w.e.f 01.07.2017 and later @18% w.e.f 15.11.2017, however, the average base price (excluding taxes) was Rs.202.06 which was increased to Rs.230.90 and thus it was clear that the cum-tax price charged from the recipients post GST the benefit of GST rate reduction was not passed on to the customers.
- The term 'tax' employed therein does not apply on the Central Excise duty, CST or VAT as it applies only on the 'supply' of goods and services.

Anti-Profiteering – Key Decisions

Sh RISHI GUPTA Vs M/s FLIPKART INTERNET PVT LTD 2018-TIOL-4-NAA-GST

Facts:

- Applicant had ordered a Godrej Metal Almirah on 04.11.2017 and a tax invoice dated 07.11.2017 was issued for an amount of Rs. 14,852/- by M/s Godrej & Boyce Mfg. Co. Ltd. At the time of delivery, another invoice dated 29.11.2017 was issued for an amount of Rs. 14,152/-. The Applicant alleged that he had paid an amount of Rs. 14,852/- to the Respondent and the excess amount charged should have been refunded to him.

Held:

- It is apparent from the record that the Supplier had not changed the base price of Rs. 11,993.75/- which was prevalent at the time of booking on 04.11.2017, at the time of delivery on 29.11.2017.
- Hence, the supplier has not resorted to profiteering by increasing his base price or appropriated the excess amount of tax charged from the Applicant and hence the allegation of violation of Section 171 of the above Act is not established.

Anti-Profiteering – Key Decisions

Sh RISHI GUPTA Vs M/s FLIPKART INTERNET PVT LTD 2018-TIOL-4-NAA-GST

Held:

- It is also apparent that the Respondent was not the Supplier/manufacturer of the Almirah and was only an agent who had offered his platform to the Supplier to sell the Almirah by charging commission, and was also not responsible for collection or refund of GST and hence he cannot be held accountable for contravention of Section 171 of the CGST Act, 2017.
- There may be several such cases in which the e-platforms had collected excess GST from the buyers and have not refunded the same after the tax was reduced on various products on 15.11.2017,
- Therefore, National Anti-Profiteering Authority had directed the Director General of Audit, Central Board of Indirect Taxes and Customs to audit the major e-platforms and submit it's findings to the Authority.

Anti-Profiteering – Key Decisions

Director General Anti-Profiteering Vs Pyramid Infratech Pvt Ltd (Dated: September 18, 2018) (2018-TIOL-06-NAA-GST)

- When compared to the Pre-GST period where 86% of the tax liability was paid in cash after availing ITC, in the post GST period the entire amount of tax liability had been paid through ITC, **which shows that the entire 12% GST liability was paid through ITC while 12% GST was being collected by him.**
- ITC to Turnover Ratio a relevant criteria
- Builder directed to reduce price to be realized from buyers of flats commensurate with the benefit of ITC received by him.
- Escalation cannot be adjusted when the same was not part of the agreed contract.

Anti-Profiteering – Key Decisions

Sahil Mehta v Salarpuria Real estate Pvt ltd- 2019-TIOL-35-NAA-GST

- Applicant alleges profiteering by the Respondent in respect of purchase of flat in the project 'East Crest' - Respondent had charged 12% GST on 2/3rd agreement value and 12% GST, the project was 55% completed as on 01.07.2017 and the benefit of ITC had not been passed on to him by way of commensurate reduction in the price of the flat after GST implementation w.e.f. 01.07.2017.

Held:

- The ratio of ITC to the taxable turnover during the pre-GST period was 3.06% as compared to 4.51% in post-GST period. Thus, there was a net benefit of 1.45% of ITC to the Respondent. Respondent had not passed on the benefit of ITC.
- Need to pass on the benefit, not only to the applicant but to all the other home buyers in the said project.
- Repay the 'base profiteered' amount plus the 'applicable GST' collected thereon by supplier
- It appears to be a deliberate and conscious violation of the provisions of the CGST Act, 2017 and they are liable for imposition of penalty, why penalty prescribed u/s 122(1) of the Act should not be levied.

Anti-Profiteering – Key Decisions

DIRECTOR GENERAL OF ANTI-PROFITEERING, INDIRECT TAXES AND CUSTOMS Vs M/s ELDECO INFRASTRUCTURE AND PROPERTIES LTD 2019-TIOL-34-NAA-GST

Facts:

- Sale of a built up house located in 'Eldeco Country' project launched by the respondent - The said ready-to-move-in villa was sold at a base price of Rs.98,28,312/- at the time of execution of agreement on 15.07.2017 and GST also charged on the same price and the benefit of Input Tax Credit was not passed on to the applicant.

Held:

- It is observed that the ratio of ITC to the taxable turnover during the Pre-GST period was 0.61% as compared to 3.45% in post-GST period. Thus, there was a net benefit of 2.84% of ITC to the respondent. However, the respondent had not passed on the benefit of ITC to the home buyers.
- That the benefit of additional ITC of 2.84% of the taxable turnover which had accrued to the respondent was required to be passed on to the applicant and other recipients.

Press Release – Anti-Profiteering by Builders

Press Release F. No.296/07/2017-CX.9 Dated 15.06.2017

- Under GST, full input credit would be available for offsetting the headline rate of 12%.
- As a result, the input taxes embedded in the flat will not (& should not) form a part of the cost of the flat.
- The input credits should take care of the headline rate of 12%.
- The builders are expected to pass on the benefits of lower tax burden under the GST regime to the buyers of property by way of reduced prices/ installments.
- They should not ask customers to pay higher tax rate on instalments to be received after imposition of GST.
- Despite this clarity on law position, if any builder resorts to such practice, the same can be deemed to be profiteering under section 171 of GST law.

GST Council Recommendations

Recommendations made by the GST Council in its 25th Meeting held on 18th January, 2018 at Delhi for the housing sector:

- It may be recalled that all inputs used in and capital goods deployed for construction of flats, houses, etc. attract GST of 18% or 28%.
- As against this, most of the housing projects in the affordable segment in the country would now attract GST of 8% (after deducting value of land).
- As a result, the builder or developer will not be required to pay GST on the construction service of flats etc. in cash but would have enough ITC (input tax credits) in his books to pay the output GST, in which case, **he should not recover any GST payable on the flats from the buyers.**
- **He can recover GST from the buyers of flats only if he recalibrates the cost of the flat after factoring in the full ITC available in the GST regime and reduces the ex-GST price of flats.**
- The builders/developers are expected to follow the principles laid down under section 171 of the GST Act scrupulously.

Anti-Profiteering – Key Decisions

Ms HERMEET KAUR BAKSHI Vs M/s CONSCIENT INFRASTRUCTURE PVT LTD 2019-TIOL-33-NAA-GST

Facts:

- Applicant alleges profiteering by respondent in respect of purchase of a flat in the respondent's project 'Habitat-78' Respondent had charged 12% GST on the demand raised on 17.04.2018 i.e. after 25.01.2018 when the rate was reduced from 12% to 8% in case of affordable housing projects.

Held:

- DGAP has submitted that the project '**Habitat-78**' was not in existence before the implementation of GST and was launched only in the GST regime and the agreement was executed on **17.11.2017**, there was no price history of the units sold in the pre-GST era which could be compared with the post-GST base price to determine whether there was any profiteering or not, no merit found in the application, same is dismissed: NAA.

Anti-Profiteering – Key Decisions

State Level Screening Committee on Anti-Profiteering Kerala Vs Zeba Distributors [2018-TIOL-18-NAA-GST](#)

Facts:

- Alleging profiteering by the respondent on the supply of "Eastern Meat Masala" by not passing the benefit of reduction in the rate of tax at the time of implementation of GST w.e.f. 01.07.2017 - DGAP in its report stated that in the pre-GST era, the applicable VAT was @5% & there was no CEX duty; that in the post GST era, the rate of tax was also @5%
- The respondent did not increase the per unit base price (excluding tax) which was retained at Rs.238/-.

Held:

- Application dismissed as there is no profiteering.

Anti-Profiteering – Key Decisions

Kumar Gandharv Vs KRBL Ltd (Dated: May 04, 2018) (2018-TIOL-02-NAA-GST)

Facts:

- India Gate Basmati Rice sold by respondent was not liable for tax before implementation of GST and after coming into force of CGST Act, 2017, it was levied @5% w.e.f. 22.09.2017 with eligibility to avail ITC. Maximum retail price had been increased and hence margin of profit had also been increased by respondent.

Held:

- ITC available to the respondent as a percentage of the total value of taxable supplies was between 2.69% to 3% whereas GST on the outward supply of Basmati Rice was 5% which was not sufficient to discharge the tax liability.
- There was an increase in the cost of purchase price of paddy - there has been no net benefit of ITC available to the respondent which could be passed on to the consumers.
- No case of profiteering made out. Case dismissed.

Anti-Profiteering – Key Decisions

M/s ELDECO INFRASTRUCTURE AND PROPERTIES LTD 2020-TIOL-43-NAA-GST

Held:

- Since no penalty provisions were in existence between the period 01.07.2017 to 31.08.2018 when the respondent had violated the provisions of s.171(1), the penalty prescribed u/s 171(3A) cannot be imposed on the respondent - Therefore, notice dated 27.05.2019 issued to respondent for imposition of penalty u/s 122(1)(i) is hereby withdrawn and the present penalty proceedings launched are accordingly dropped: NAA

Other General Observations

- No methodology prescribed to arrive at the Benefit position.
- Benefits to be passed on at SKU level – Identification of particular product/ person [Kunj Lub Marketing Pvt. Ltd.]
- The trader cannot contend that price control was the authority of the manufacturer – He has to pass on the benefit [JP and Sons]
- The benefit to be passed only by way of reduction in the price, issuing additional material is not provided for in the law as benefit passed on.
- If the product is returned and buyer is refunded – Profiteering not to be determined [Sharma Trading Company]

Other General Observations

- In a contract spread over pre GST and post GST regime, benefit can only be passed on to the extent Invoicing occurring in GST regime [Schindler India Pvt. Ltd.]
- Legal metrology act states that the MRP must be rounded off to avoid coinage issues - Clinic plus is Rs. 1 and can be reduced to Rs. 0.92 paise;
- Passing on of the benefit by way of reimbursements through debit/ credit notes not being considered.
- Impact of additional costs mainly due to implementation of GST is not being considered - For ex: removal of area based incentives;
- Profiteering on the goods that are exempted must be excluded from the profiteering - viz sales to CSD, CRPF etc.

Other General Observations

- Merely because the respondent had made a voluntary offer of reducing the price - Can the same be mis-construed that there is a profiteering.
- Whether the term ITC also covers the Pre- GST elements must be looked into.
- Quantity of the vaseline product increased from 300% to 400% is of no use.
- Benefit on account of return of goods after supply is not given stating that the factum of supply got completed.
- For the fact that there is no methodology prescribed under the GST law, it states that such an exercise involve simple maths.
- Certain products viz., construction sector, agri products, the price is dynamic and changes based on market condition

Other General Observations

- Pre-GST ITC ratio to Turnover is compared with post-GST ITC ratio to Turnover to arrive at the additional credit (refer Pyramid Infratech, KBRL Ltd, S3 Infra Reality etc.).
- Whether the benefit should be computed at product level or organization level. For example, what should a manufacturer of say soap and shampoo do, if more credits are available in one product (say shampoo) and lesser credits in another product (say soap).
- What if the supplier was in losses before GST. Should it continue the loss post GST as well?
- Whether taxpayer is required to compute the benefits available at the vendor level and then pass on the gross benefit to the customer.
- In case amount is to be credit to consumer welfare fund then NAA has asked the suppliers to deposit the anti-profiteering amounts along with interest within 3 months. This amount is to be deposited in the ratio of 50%:50% to Central and State Consumer Funds.

High Court Orders on Anti-Profiteering

Petitioner	Order
M/s PATANJALI AYURVED LTD V/s UNION OF INDIA AND ORS	Since, no grounds of financial hardship are pleaded in the present case, the petitioner is directed to pre-deposit the principal profiteered amount - Such amount be deposited in six instalments - Recovery of interest and penalty is stayed till further orders - Matter listed for hearing on Aug 24, 2020: HC
M/s SAMSONITE SOUTH ASIA PVT LTD V/s UNION OF INDIA & ORS	Considering the ongoing pandemic, the petitioner is permitted to deposit the profiteered amount in six instalments - The interest amount as well as the penalty proceedings initiated by the Revenue are stayed till further orders - Matter listed for hearing on Aug 24, 2020: HC
M/s PYRAMID INFRATECH PVT LTD Vs UNION OF INDIA AND ORS	<p>Petitioner had offered to pay an amount of Rs.5,11,60,450/- to resolve the issue amicably with the customers. Be that as it may, as an interim arrangement, we direct the petitioner to deposit of Rs.5,11,60,450/- with the respondent authorities within 3 weeks from today.</p> <p>On the deposit being made, the same would be converted into an interest bearing FDR for a period of nine months. The FDR amount and the interest accrued thereon would abide by further orders of this Court. It is made clear that this is only an interim arrangement and the Court has not expressed any firm and final view.</p>

Action Points for Passing on benefit

Computational Mechanism:-

- Practically it is very difficult to establish one to one correlation between ITC on inward supplies and Tax payable on outwards supplies. So ultimately it comes on margins or prices of supply. How the margins and prices are to be checked is a subjective matter.

There may be various ways like:

- Profit on product in absolute terms.
- Profits percentage on Cost of Product.
- Profit percentage on Sale price.
- Mere comparison of the price pre and post change.
- Comparison of ITC as a percentage to Sales.
- % ITC available prior to change and after change.

Action Points for Passing on benefit

- Identify actual benefit due to reduction in tax rate + ITC eligibility.
- Factors leading to passing benefits:
 - Credit on interstate purchases. CST 2% was cost
 - Credit reversals on stock transfer
 - Credit of SBC /KKC was not eligible
 - Credit of entry tax paid earlier restricted
 - Credit on goods exempted earlier but taxable now
 - Credit for service providers on goods [SAD + VAT restricted earlier]

Thought to Ponder upon....

Making Profit is not a sin!!!

**Law must be certain, clear & fair to punish only
those making
un-reasonable profits in the name of taxes!!**



**Transitional
issues**

Transitional Credit - Issues

Issues in transfer of Transitional Credit:

- Whether transitional credit is a vested right?
- Whether retrospective amendment made to section 140 is valid?
- Whether the time limit specified in rule 117(1A) is valid?
- Whether accepting TRAN-1 now only in case of Technical glitches is valid?
- Whether the time limit as provided under the law is given?

Transitional Credit - Issues

M/s. Siddharth Enterprises Vs NODAL Officer (Gujarat High Court):

- The right to carry forward credit is **a right or privilege, acquired and accrued** under the repealed Central Excise Act, 1944 and is saved u/s 174(2)(c) of the CGST Act, 2017 and, cannot be allowed to lapse for failure to file declaration form GST Tran-1.
- The timelimit prescribed under Rule 117 is arbitrary, irrational and unreasonable and, therefore, it is violative of Article 14 of the Constitution.
- Not allowing the right to carry forward the CENVAT credit for not being able to file the form GST TRAN-1 within the due date may **severely dent the writ-applicants working capital and may diminish their ability to continue with the business and such action violates the mandate of Article 19(1)(g) of the Constitution.**
- The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would **lead to double taxation on the same subject matter** and is, therefore, arbitrary and irrational.
- The phrase “**technical difficulties on the common portal**” to be given liberal interpretation, it cannot take away with one hand what the policy gives with the other.

Transitional Credit - Issues

- **Brand Equity vs UOI - Delhi HC**
 - There is nothing sacrosanct about the time limit so provided. **The period of 90 days has no rationale**
 - **Extensions have been granted** by the Government from time to time, largely on account of its inefficient network.
 - Restricting the benefit only to taxpayers whose cases are covered by “**technical difficulties on common portal**”, is **arbitrary, vague and unreasonable**.
 - Rule 117 is read down as being **directory in nature**, insofar as it prescribes the time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights.
 - The credit standing in favour of the assessee is a **vested property right** under Article 300A of the Constitution and cannot be taken away by prescribing a time-limit for availing the same.

Transitional Credit - Issues

- **Mangla Hoist Pvt Ltd. Vs. Union of India (Delhi High Court)**
 - Division Bench in Brand Equity Treaties Ltd (supra), has held that the time limit of 90 days prescribed in Rule 117 of the CGST Rules is not mandatory but directory in nature. It was also held therein the judgment is to be publicised by uploading it on the respondent's website and that all the assesseees, who were unable to upload TRAN-1, **could do so on or before 30th June, 2020.**
- **SKH Sheet Metals Components Vs Union of India & Ors. (Delhi High Court)**
 - **Both the Act and Rules do not provide any specific consequence** on failure to adhere to the timelines. Since the consequences for non-compliance are not indicated, the provision has to be seen as directory.

Transitional Credit – Principles from various judgments

- Transitional credit is a vested right and is protected under Article 300A of the Constitution which cannot be taken away due to procedural lapse.
- Denying the transitional credit violates Article 14 of the Constitution.
- There is nothing called ‘technical glitches’ in the GST provisions. That should not be the criteria to allow the taxpayers to file the TRAN-1.
- Denial of the transitional credit affects the working capital and may diminish the ability of the taxpayers to continue with the business and such action violates the mandate of Article 19(1)(g) of the Constitution.
- Amended Sec 140 does not specify the time limit to file TRAN-1, Rule can be amended upon recommendation of the GST Council.

Transitional Credit - Principles from various judgments

- The GST Act has not defined Technical glitch;
- Excessive delegation of legislation – No mention in the act;
- GST is a new law;
- No dispute with regard to deficiency in the performance of GST portal;
- Compliance under GST is highly technology based, cannot expect everyone to be familiar with that in the initial period of introduction;
- Complete time as provided under the act not granted.

Transitional Credit - Issues

The Delhi High Court, in the case of **SKH Sheet Metal Components (*supra*)** went on to criticize the functioning of the department as under;

- *“We may just add that we do not derive any pleasure when we make such observations, as comments of the Court affect the reputation of the administration in the country. Such remarks are made only when we are constrained to do so. The case before us is one where there is a complete lack of understanding and fairness on the part of the Tax Department. The fact that Respondents have done nothing to solve the problem faced by the Petitioner, fueled with the adamant stand before us, contributes to skepticism of GST technical infrastructure, which we feel should and can be easily avoided. Only if Respondents were to engage with the taxpayers with a genuine intention to solve the problems, confidence in the system can be built up and such matters would not reach courts.”*

Transitional Credit – Other High Court Rulings

Few other decisions wherein similar views were expressed are as under;

- (a) Krish Automotors Private Limited Vs Union of India & Ors. (Delhi High Court)
- (b) Ganapati Advisory Ltd. Vs. Union of India (Allahabad High Court)
- (c) Arora & Company Vs. Union of India (Delhi High Court)
- (d) Mrinal Ghosh Vs Union of India & Ors (Calcutta High Court)
- (e) Soni Traders Vs. Union Of India (Delhi High Court)
- (f) SRC Aviation (P) Ltd. Vs Union of India & Ors. (Delhi High Court)
- (g) Jakap Metind Pvt Ltd Vs Union of India (Gujarat High Court)
- (h) Tara Exports Vs Union of India (Madras High Court, Madurai Bench)
- (i) Uninav Developers Pvt Ltd Vs Union of India And Ors (Delhi High Court)
- (j) The Tyre Plaza Vs Union of India & Ors. (Delhi High Court)
- (k) Blue Bird Pure Pvt. Ltd. Vs Union of India & Ors. (Delhi High Court)

Transitional Credit - Issues

- Transition of education cess/ SHE Cess, KKC etc - **Assistant commissioner of CGST and Central excise Vs. M/s Sutherland global services (Madras High Court)**;
- ITC reflecting in the books/ CENVAT register and not transferred in Form TRAN 1 – **Broadcom India Research Pvt. Ltd. Vs Commr. of S.T., Bangalore 2016 (42) S.T.R. 79 (Tri. - Bang.)**;
- Transition of balance ITC in respect of Capital Goods;
- Documentation of stocks in case of ITC transitioned in respect of goods held in stock;
- ITC denied for credit claimed in incorrect field in Form TRAN 1;
- ITC in respect of inputs held in stock in case of builders;
- ITC in respect of inputs held in stock beyond 1 year in case of 1st/ 2nd stage dealers;

Transitional Credit - Issues

- Reflection of details of the goods lying at the job workers premises in Form TRAN 1 and matching of the same with the details as furnished with the job workers;
- Refund of CVD/ SAD paid as a redemption fine due to non-fulfillment of the export obligation – **RR Kabel Ltd Vadodara Commissioner (Appeals)**.
- Transitional credit of spillover transactions in case of builders – VAT paid @ 1% on the sale deed;
- Refund for flat cancellations – Taxes paid under the erstwhile tax regime;
- Taxability of Joint Development agreements in case of spill over transactions;
- Denial of the refund of transitional credit for exporters;
- SCN being issued under GST law for the transitional matters

THANK YOU



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