



ALL ABOUT ANTI - PROFITEERING UNDER GST

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Introduction

1. In general, profit is an excess of value spent on producing or delivering of goods or services, which is nothing but a pecuniary gain. It is the 'margin' earned after considering both the receipts and payments. In *Bharat Insurance Co. Ltd. v. CIT* [1931] 5 ITC 288 (Lahore), it has been held that the profit means the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned. *Explanation* to sub-section (3) of Section 8 of the Representation of the Peoples Act, 1951, defines the term 'Profiteering' as making an exorbitant and unjustifiable profit, taking undue advantage of the short supply of necessary commodities. Under GST Regime, the prices of the most of goods and services are gradually coming down. The Constitution of India listed the 'Price Control' in its 'Concurrent List' as 34th among other '52' subjects which mandate the Central and the State Governments to ensure whether the registered taxpayers pass on the benefit of the rate reduction to the end consumers. Accordingly, due anti-profiteering measures (borrowed from Malaysian Model of GST Laws) have been adopted to protect the consumers from errant businesses. The current article is an attempt to know whether National Anti-Profiteering Agency constituted under the said Laws is effectively monitoring the situation, with adequate measures, the trend of industry's favourable orders and issues connected therewith.

Anti-profiteering measures - In brief

2. Section 171 of the Central GST Act, 2017, says that any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit (ITC) shall be passed on to the recipient by way of commensurate reduction in prices. Further, the Central Government may, on the recommendation of the GST Council, constitute an Authority to examine whether ITC availed by any registered person or the reduction in the tax rate has actually resulted in a reduction in the price of the goods or services or both supplied by him. Rules 122 to 137 under Chapter-XV of the CGST Rules, 2017 deal with the National Anti-Profiteering Authority (*hereinafter 'the Authority'*), its powers, duties and compliance of its Orders. On 16th, November, 2017, the Union Cabinet has approved the establishment of the Authority; currently its nodal office is situated in Connaught Place, New Delhi and State level Screening Committees in 29 States and 3 Union Territories.

Standing & Technical Committee

3. A four-member Standing Committee and a two-member technical committee, comprising of tax officials of the Centre and the States, have been set-up to receive complaints of undue profiteering by entities under the GST. The Standing Committee will act as a complaint processing machinery and will refer any cases it finds fit for an investigation to the Directorate General of Anti-profiteering (*hereinafter 'DGA'*) [earlier, Directorate General of Safeguards ('DGS')].

Tenure of the authority

4. As per Rule 137 of the Central GST Rules, 2017, the Authority would cease to exist after two years of its constitution. However, due to constant changes in the tax rates, it is believed that GST Council may extend its term beyond two years.

Procedure - In brief

5. All applications from interested parties on issues of local nature shall -

1. Be examined by the State level Screening Committee (hereinafter 'SSC') constituted in each State.
2. SSC on being satisfied will forward its recommendations to the Standing Committee (SC) on Anti-profiteering.
3. If the SC is satisfied, it shall refer the matter to the DGA.
4. DGA shall conduct investigation & collect evidence necessary to determine undue profiteering before initiation of the investigation.
5. DGA can seek an opinion of any other agency or statutory authorities in the discharge of his duties if required.
6. DGA shall complete the investigation within a period of 3 months or within such extended period not exceeding a further period of 3 months.
7. The Standing Committee, upon completion of the investigation, shall submit a report along with the relevant records to the Authority.

Powers - In brief

6. The Authority has following powers -

1. To summon any person considered necessary to produce a document of evidence under Section 70 of the CGST Act, 2017,
2. To conduct judicial proceedings as provided under the Indian Penal Code,
3. To direct the entity to pass on the benefits to consumers,
4. To impose a penalty,
5. To cancel the registration under the Act.

Orders of the Authority

7. The Authority, after granting an opportunity of hearing to the interested parties, within a period of 3 months from the date of the receipt of the report from the DGA, determines whether a registered person has passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of ITC to the recipient. The Orders of the Authority are appealable in the High court.

Penalty

8. Interestingly, if profiteering is discovered, maximum penalty that can be imposed is residual penalty of Rs. 25,000 under GST Laws.

Complaints & status quo

9. The Authority will take up cases for scrutiny that have a mass impact and where the undue profit of more than Rs. 1 crore has been earned. According to media reports, the Authority is looking into more than 60 complaints. The Authority is in place with Screening Committees in 29 States and 3 Union Territories, complaints or responses are poor so far. From the table given, it is clear that hardly there any complaints from 16 States and Union Territories post GST rate cuts in last November 2017 or even after latest rate cuts in July 2018.

Sl. No. State-wise complaints registered so far

- 1 No complaints by Madhya Pradesh, Gujarat, Punjab, Bihar, Himachal Pradesh, Odisha, Jammu & Kashmir, and 8 North Eastern States
- 2 One complaint by Karnataka, Tamil Nadu, West Bengal, Kerala, Jharkhand, Uttarakhand, Haryana, Telangana
- 3 More than one complaint by Rajasthan, Maharashtra, Uttar Pradesh, Delhi and Andhra Pradesh

Interestingly, no single complaint has been received from the State of Gujarat which is one of the biggest manufacturing and trading hubs in the country.

Whether 'NAA' is effectively monitoring?

10. The answer may not be in the 'affirmative'. Surprisingly, Authority's all four Orders have gone in favour of businesses. The Authority & some of its Orders - *In brief*

1. *Dinesh Mohan Bhardwaj v. Vrandavaneshwree Automotive (P.) Ltd.* [2018] 92 taxmann.com 360/67 GST 429 (NAA), in the instant case the aggrieved party, *Dinesh Mohan Bhardwaj (supra)* challenged the reduction in the price of Honda car was not commensurate with the reduction in tax rate post the implementation of GST. However, the Authority, due to non-availment of input tax credit by *Vrandavaneshwree Automotive (P.) Ltd. (supra)* and impact from GST was only 2 per cent, ruled in favour of the respondent.
2. *Kumar Gandharv v. KRBL Ltd.* [2018] 93 taxmann.com 149/67 GST 574 (NAA), in the above-stated case the aggrieved party, Sri. Kumar contended that the benefit of reduction in the tax rate on 'India Gate Basmati Rice' had not been passed on to the consumers' Maximum Retail Price had been increased instead of reducing it. However, after careful consideration of Report submitted by DGA, the Authority ruled in favour of the M/s. KRBL Ltd. stating that 'India Gate Basmati Rice' was not liable for tax prior to implementation of GST. The Authority also considered the issue of increase in production cost, availment of the meager amount as Input Tax Credit.
3. *Abel Space Solutions LLP v. Schindler India (P.) Ltd.* [2018] 94 taxmann.com 163 (NAA), whereas the aggrieved party *Abel Space Solutions LLP (supra)* complained of charging of service tax on the payment made to Schindler India before the implementation of GST but payment made in July when the installation took place. However, in the instant case, elevators were delivered to the aggrieved party before 1st July 2017, *i.e.*, 'appointed day for the GST implementation', and, accordingly, the tax had been charged without excluding the pre-GST regime excise duty. In other words, the aggrieved party was charged twice, once on the pre-GST excise duty and subsequently, on the full value of the material used in the lift. It is reported that the aggrieved party itself requested for the withdrawal of complaint citing inadequate understanding of GST provisions. However, the Authority considered the investigative report of the DGA before quashing the petition.
4. *Rishi Gupta v. Flipkart Internet (P.) Ltd.* [2018] 95 taxmann.com 221/68 GST 443 (NAA), the aggrieved party Sri Rishi Gupta alleged that the *Flipkart Internet (P.) Ltd. (supra)* had failed to pass the benefit of 'differential amount' occurred between placing an order and the actual delivery of the item, at 28 and 18 per cent, respectively. The Authority held that the withdrawal of discount did not amount to profiteering as the same was offered from his profit margin by the supplier and did not form part of the base price, therefore, supplier could not be held guilty under Section 171 of the Act. Subsequently, Flipkart issued a refund to the complainant. On the basis of this single complaint, the Authority discovered that respondent alone had around 7,500 similar cases of overcharging GST on account of change in rate between placing an order and delivery. The Authority also directed the respondent to issue the refund for all such cases.

International practice

11. Prior to India, Australia was the very first country to introduce antiprofitteering provisions during 2010, thereafter by Malaysia while replacing its Sales and Service Tax (SST) regime during 2015. Indian Government may take a cue from those countries to make antiprofitteering measures even more effective.

12. Latest developments

1. Sought inputs from food chains, telecom and airline operators.

The DGA during last month issued an investigation report on Domino's failure of reducing prices on all its food products. The Authority has also sought an explanation from telecom operator Bharati Airtel, budget airline Indigo whether the prices on its goods and services have been reduced?

2. Voluntary compliance by two prominent businesses.

In the first week of August, 2018, India's two prominent businesses, such as Hindustan Unilever and Nestle have deposited around Rs. 1.6 billion and Rs. 150 million, respectively, into the Government's 'Consumer Welfare Fund' on provisional basis for not passing on rate reduction benefit to end consumers. The said fund will be utilised to promote and protect welfare of the consumers, to create awareness and is operated by the Ministry of Consumer Affairs.

3. Sought pan-Indian Audit of e-Commerce Industry.

The aftermath of Flipkart's 7,500 cases of overcharging GST, the Authority, during the first week of August, 2018 sought a pan-Indian audit of the e-Commerce Industry. On the basis of a single complaint by a consumer from Chennai, the Authority has learned that Flipkart alone had 7,500 similar cases. Chances of tens of thousands of cases on other eplatforms cannot be ruled out. In a response to the Authority, the CBIC has assured that it will take-up special audit in accordance with GST Laws.

4. Authority at Factory doorsteps..!!

In the wake of poor response or no complaints from 17 States, the Authority is planning to approach manufacturers and wholesale dealers' *'suo motu'* instead of formal complaints from the consumers.

5. Consumer Helpline.

In addition to knocking at the doors of manufacturers and wholesale dealers', the Authority has also started a helpline number 011-21400643 which will guide the consumers to register their profiteering complaints, provide information and resolve queries. Aggrieved consumers may call the helpline number between 9:30 am-1 pm and 1:30 pm - 6 pm on all working days. Since not enough profiteering complaints, latest inactivate may go a long way.

Concluding remarks

13. In 2012 the Hon'ble Delhi Court in *Indraprastha Gas Ltd. v. Petroleum and Natural Gas Regulatory*, (W.P.(C) No. 2034/2012 and CM Nos. 4370/2012 & 5617/2012) rightly held that prices are generally governed or regulated by market forces. It is essentially a clog in the freedom of trade and commerce conferred by the Constitution. However, in such circumstances, restriction on the fundamental right through legislatures only. Further, current anti-profiteering provisions are lacking in providing specific mechanism and guidelines to determine actual profit accruing from the constant rate cuts and thereafter its benefits to the end users. Post all - powerful GST Council's 28th Meeting held on 21st July, 2018, efficiency of the antiprofitteering mechanism is under test where the GST Council has reduced the tax rates on number of goods and services. Clear guidelines are the needs of the hour.