



INTRODUCTION OF ANTI PROFITEERING PROVISIONS IN INDIA AND ROLE OF CMA

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Anti Profiteering

The concept of Anti Profiteering though being discussed off late but in substance was prevailing in India since bygone era. As the name suggests, these rules prevent entities from making excessive profits due to the GST. Since the GST, along with the input tax credit, is eventually expected to bring down prices, a National Anti-profiteering Authority (NAA) is to be set up to ensure that the benefits that accrue to entities due to reduction in costs is passed on to the consumers. Also, entities that hike rates inordinately, citing GST as the reason, will be checked by this body.

The Government has actively started considering a reduction of GST rates for goods and services to keep the economy on the growth path. In this context, its important for all Entrepreneurs to under anti-profiteering regulations under GST. The basis of anti-profiteering provisions in the GST rules is to ensure that any reduction in GST rate and associated input tax credit benefit is passed on to the end consumer by way of reduction in prices. In this article, we look at anti-profiteering provisions under GST in detail.

What is the meaning of anti-profiteering under GST?

Any reduction in GST rate or benefit of input tax credit should be passed on to the end consumer and not retained by the business. This is the basis of anti-profiteering provisions under GST. Under anti-profiteering provisions, its illegal for a business to not pass on benefits of GST rate benefits to the end consumer and thereby indulging in illegal profiteering.

The Anti-Profiteering Rules, 2017 lay down details about the selection of the members of the NAA and the other committees that will assist the NAA in investigating the complaints, the procedure to be followed in investigations and the powers given to the authority.

Once the registered entity, which has profiteered illegally, is identified, it can be asked to - one, reduce prices if it has hiked prices too much and, two, if price reduction due to GST has not been passed on to customers, to return to the customer the sum equivalent to the price reduction along with 18 per cent interest from the date the higher sum was collected. The authority can impose penalty on the profiteer or cancel its registration.

Legal provisions in GST Act relating to Anti profiteering

As per Section 171 of the CGST/SGST Act, any reduction in tax rate on any supply of goods or services, or any benefit of 'input tax credit', must be passed on to the recipient (for example, customer) by the registered person (e.g., trader) through a commensurate reduction in prices.

Thus, if a trader is paying, say, Rs 100 less in the new tax rate on a certain item, he has to compulsorily sell that item for Rs 100 cheaper, so the customer benefits proportionally. Failure to do so would mean the trader is indulging in 'profiteering'.

Sec 171 also states that the central government would set up an five-member authority to check whether input tax credits availed by a "registered person", or reduction in tax rate, have been proportionally passed to the customers of those goods or services. Industry is not sure how this will be implemented in practical terms.

This authority is free to decide the methodology to determine if reduction in rate of tax on the supply of goods or services, or the benefit of input tax credit, has been passed on to the customer through a commensurate reduction in prices. The authority also has the power to impose a penalty, order a reduction in final prices and cancel the registration of any person or entity that indulges in 'profiteering'.

With introduction of Anti Profiteering measures, the Government is expecting companies to cooperate in achieving its objectives. Despite introduction of the new dimension, the government is hopeful that they would don't have to use the weapon. The Government authority has demanded "cooperation" from corporate India on pricing of their goods and services after the implementation of goods and services tax (GST). In other words, the authority is expecting that the pricing of goods and services should be in compliance with the government's expectations. If companies failed to comply, it is warned that the government has a weapon to unleash on them-the "anti profiteering" clause. This new "weapon" in the arsenal of the Union government has been designed and launched as part of the GST Bill. The government can now create a new "Authority" which will decide whether businesses have reduced their prices "enough" when there is a reduction in the GST rate of a particular good or service.

Illustration

Let's understand in this way: Today, a *ghee dosa* at a popular restaurant in New Delhi costs Rs160. The same *dosa* in the same chain in Chennai costs Rs80. GST rates of *ghee* are now fixed at 12%, which is a reduction from the current 12.5% tax for *ghee* in Delhi but an increase from the current 5% in Chennai. But GST rates for services in an air-conditioned restaurant are 18%, down from 22% in both the states. So, as per the government's "expectations of cooperation", this restaurant should now drop its price of *ghee dosa* in its outlets in Delhi and the quantum of this price decrease should be a precise weighted average of the GST rate reductions of half a percentage point for *ghee* and four percentage points for service tax. Ostensibly, an officer from the new "Anti Profiteering Authority of India" will now do this calculation and inspect the restaurant in Delhi to check if the price of *ghee dosa* has indeed been reduced by this amount.

This is the weapon the government has threatened to unleash, if goods and service providers fail to comply. It is a bit unclear if the government also expects the Chennai outlet of the restaurant to match the revised price of *ghee dosa* in the Delhi outlet under the slogan of a "one nation, one *ghee dosa*, one price"

India is on the threshold of capsuling down hundreds of different tax rates of thousands of goods and services across 36 states and Union territories into just five tax rates. This is an extraordinary achievement, in the backdrop of stark economic, political and social disparity of the different states of India.

There is much consternation among policy analysts and economists over multiple GST rates rather than just one rate for all goods and services. Poetic as it may have been, a "one nation, one tax" was never possible in a diverse and complex federal

polity, such as India. Multiple taxes were inevitable to assuage India's 3-3-3 paradox - the three richest states being three times richer than the three poorest states.

Instead, what should enrage economists and commentators is this potential throwback to the 1960s. Phrases such as "anti profit", "authority", "expect cooperation from businesses", "weapon", etc., bandied about in public by one of India's senior most bureaucrats, is unbecoming of a nation that just celebrated its silver jubilee of "economic liberalization". The last time India had an anti-profiteering legislation was the West Bengal Anti-Profiteering Act of 1958.

To be sure, India is not the only country to conjure up an anti-profit legislation. Malaysia tried an anti-profiteering and price control law in 2011, ahead of its GST roll-out. It turned out to be a disastrous move which was counter-productive and finally abandoned. Lest this be misunderstood as some paean for efficiency of free and unfettered markets, I readily admit that India is more prone to price gouging and cartelization than most other developed nations. The fears of Revenue authority and the GST Council of collusion among businesses to not pass on lower prices to consumers may well be justified. There may certainly be a need to supervise, oversee and regulate such unruly behaviour by corporate India. But why create yet another new government body when India already enacted a Competition Act back in 2002 and created the Competition Commission to regulate precisely such behaviour.

The Competition Commission with a mandate to protect the consumer from industry cartelization has been fully functional for eight years now and has earned a good reputation for itself. Rather than create yet another regulator, the GST law could have merely conferred referral powers to the GST Council to refer suspicious cases of price hoarding to the Competition Commission. It is not hard to imagine how officers of this new "Anti Profit Authority" can raise arbitrary objections to what they deem is a "fair" price of a certain good or service after a GST reduction and threaten to levy penalties.



From the expectation of the Government, it could be implored that the Indian industry, experts and commentators to be more forthright in their analysis of policies and not hold back for fear or favour in expressing the ideas and views on anti profiteering. Indian industry has never had the spine to speak up, economic liberalization or otherwise. The very idea of creating a new government body to monitor prices is retrograde. Commentators and policy analysts need to speak out against this vehemently and ensure India is not saddled with yet another regulatory "authority".

CAG Comment on anti - profiteering

CAG also initiated one study report titled as "**Implementation of Value Added Tax in India - Lessons for transition to Goods and Services Tax - A Study Report**" on the transition of Sales Tax to VAT and observed:

"Besides weak monitoring also hampered ensuring that the reduction in rates of taxes showed up in the prices of the commodities and the benefit reached the desired beneficiaries (common man). A Study found that 13 manufacturers did not reduce the maximum retails price of the goods despite sharp decline in the rate of tax. Consequently, the benefit of Rs. 40 crore was illegally retained by these manufacturers and the dealers in VAT chain instead of passing on to consumers.

The CAG report highlighted that tight monitoring is required if the government actually intends to provide benefits to the masses. The following questions must be addressed through research with conclusive evidences:

- a) What are the category of goods and services where rates were brought down.
- b) What were the prices before **transition to GST** on monthly basis for each of the month for the last one year

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1. What are the category of goods and services where rates were brought down.
2. What were the prices before transition to GST on monthly basis for each of the month for the last one year
3. What prices were charged after transition to GST for each of the month
4. What were the authenticated costs of each of the product or services (established through cost audit mechanism) before transition
5. What were the authenticated costs of each of the product or services (established through cost audit mechanism) after transition.

Cost Audit And Anti Profiteering

Fortunately in India, cost audit mechanism has been established by Ministry of Corporate Affairs which can come to the rescue of manufacturers to justify their stance regarding pricing and costing on one hand and on the other

hand it also helps the government to probe with ease as the costing and pricing data is available at SKU levels.

Induction material on Ministry of Corporate Affairs site mentions Cost Audit Branch is mandated to perform following functions as per the provisions of the Companies Act, 2013: Matters falling under Section 148 of the Companies Act, 2013 including: a) Policy framing -

- (i) Framing policy framework for cost accounting records and cost audit in the corporate sector.
- (ii) Identification of class of companies i.e. the industries/sectors for inclusion/exclusion under the provisions of section 148 of the Companies Act, 2013.
- (iii) Prescription of order/rules for maintenance of cost records and cost audit thereof by Companies including review, rationalization and amendment or modification of the existing ones.

With the government's clear intention of providing the benefits to common masses by bringing down the GST rates on most of the items, now it's time for the companies to keep all the costing & pricing data ready with audit trails so as to convince any authority about the increase or decrease in prices post GST transition. The anti-profiteering provisions are there in GST Acts to help the government to ensure that the common masses enjoy the benefits of the reduction in rates by way of reduced prices.

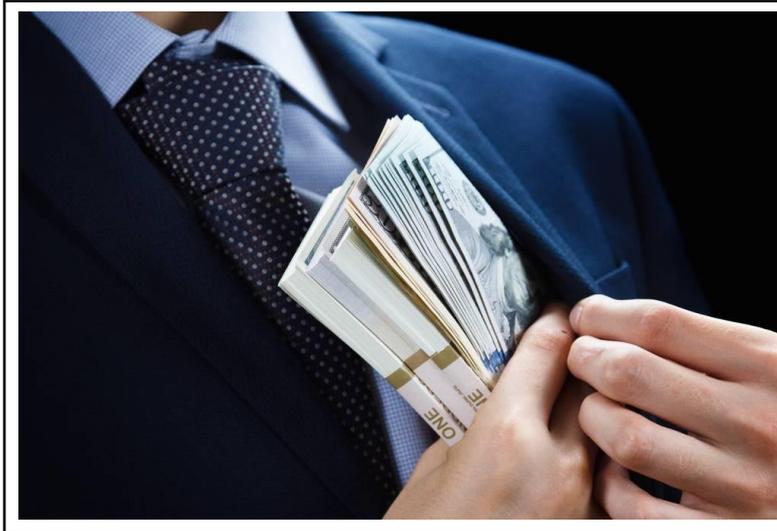
Global scenario

Many countries that have adopted GST such as Singapore and Australia witnessed a spurt in inflation after implementation. Retail inflation in Australia, for instance, spurred from 1.9 per cent in the year before GST to 5.8 per cent in the year when the tax was rolled out. Malaysia was able to avoid a similar surge in inflation by effectively implementing anti-profiteering rules. A formula was laid down wherein the net profit margin in the period preceding GST was compared to the post-GST margins to see if inordinate gains had gone to the bottom-line. Gains were determined after taking in to account the supplier's cost, costs incurred for furthering business, market conditions and other relevant issues.

The Centre is also thinking along similar lines. But it is way behind schedule in forming the rules. The Authority is yet to be formed, the committees have to be selected, they have to formulate the rules to determine profiteering and then listen to complaints. It appears that quite some time will pass before these rules are effectively used in the country.

Malaysia introduced the GST in April 2015. Since then it has diluted the scope of its regulations. The new anti-profiteering regulations in Malaysia, which came into effect from January this year, apply to fewer goods. Food and beverages, and household goods are still under it while the earlier law covered all.

"The rules that Malaysia introduced in 2015 to deal with the danger of profiteering were detailed, wide-ranging and difficult to apply practically. These were reworked and simpler arrangements put in place," said Robert Tsang, GST implementation leader, Deloitte Touche Tohmatsu India.



Malaysia's anti-profiteering rules were drawn up on a formula-based approach to determine instances of "profiteering" or "unreasonably high" profit. The prescribed formula for determination of net profit margin takes into account factors such as taxes, supplier costs, supply and demand conditions, circumstances of the geographical and product market. Hence the Tax experts are of the opinion that India's anti-profiteering provision under the GST law is more a statement of intent that does not specify any consequence of non-compliance.

Section 171 of the Central GST Act does not spell out the grounds to test whether there has been "commensurate reduction" in price after the introduction of the GST. Similarly, it does not provide any guidance on what happens if someone profiteers. In its June 3 meeting, the GST Council decided to set up a committee to receive complaints on this. The committee comprises of revenue officers from the Centre and states.

A key lesson from Malaysia's experience in price control after the introduction of the GST is that over-regulation and micro-management of market forces enhances cost of compliance and stifles growth, said experts. "In Malaysia, the aggressive enforcement of anti-profiteering provisions have been criticised strongly and have proved to be litigious and difficult to implement,"

Australian Experience

Given this scepticism over the anti-profiteering provision included in the GST law, the following question emerges: is there any international experience with a similar provision that could throw some light on the feasibility of implementing anti-profiteering and related measures in the Indian context, with the primary goal of protecting consumers against improper price increases?

Australia leads by example in this respect. Australia introduced GST on 1 July 2000 to replace a number of existing indirect taxes, including the wholesale sales tax (ACCC 2000a). The GST implementation had a three-year transition period from 1 July 1999 to 30 June 2002, during which the national competition regulator and consumer law

champion - namely, the Australian Competition and Consumer Commission (ACCC) - was legally entrusted with the responsibility for overseeing the pricing responses to the GST and taking action against businesses that adjust prices inconsistent with tax rate changes consequent to the GST implementation.

Towards this end, the government has conferred many statutory responsibilities on the ACCC. Important among them are the responsibility to

- (i) formulate guidelines about what constitutes price exploitation;
- (ii) seek information from businesses to effectively monitor the price movements;
- (iii) Issue notice to the businesses in case they indulge in price exploitation;

- (iv) seek penalties before the federal court for breach of price exploitation provision by businesses and individuals;
- (v) accept undertakings from the businesses which are enforceable in a court;
- (vi) investigate complaints and issues of public concern; and
- (vii) provide information to both businesses and public on price exploitation provisions

Initiatives of ACCC

Armed with these statutory responsibilities, the ACCC undertook several measures to ensure that due to the GST reforms consumers

- (i) would fully benefit from the reduction in tax rates and tax cascading;
- (ii) do not experience greater than necessary increases in the prices; and
- (iii) are not subject to price exploitation by the businesses.

The major initiatives taken by the ACCC are as follows.

Commitments from corporates:

To check price exploitation, large corporates with turnovers exceeding \$100 million were invited to offer a Public Compliance Commitment (PCC) to the ACCC on a voluntary basis. The PCC required the chief executive officer of a company to submit a signed commitment/statement indicating to the public that the company is committed to complying with the ACCC's price exploitation guidelines. In doing so, the company is required to provide appropriate information to the ACCC in support of its commitment.

The primary objective of the PCC is to provide an assurance to the consumers that businesses would not engage in price exploitation by taking undue advantage of the GST changes. However, it is to be noted that the offering of a PCC does not prevent a company from enforcement action by the ACCC in case the company provides misleading information to the ACCC.

Retail price surveys:

The ACCC collected prices from retail outlets and supermarkets for a range of goods and services, both before

and after the introduction of GST, by way of specially commissioned monthly and quarterly surveys of retail prices (ACCC 2001a). The main purpose of this exercise was to collect information on price changes and thereby identify areas of potential price exploitation, including the possible increase in prices of goods and services in anticipation of the introduction of GST.

Ban on misleading pricing claims:

To protect the consumers against unethical business practices, under the Trade Practices Act, 1974, businesses were prohibited from influencing consumer demand by making deceptive pricing claims. For instance, there were provisions in the act to take corrective action if a firm attempts to encourage consumers to make buying decisions before the implementation of GST by way of misleading advertisements claiming that the price would increase as a result of GST, though in reality it might come down. Another example of misrepresentation would include the claim by the businesses that the increase in the prices was due to an “anticipation” of the effect of tax rate changes due to GST introduction.

Price and profit margin rules:

The ACCC devised a price rule as per which the prices charged by the businesses in response to the tax changes should not rise by more than 10% in any event due to two reasons (ACCC 2000a, 2000d). First, the net cost of inputs/raw materials used by the businesses was not expected to increase beyond 10%. Second, businesses were entitled to claim an input tax credit for the GST paid.

However, businesses were allowed to adjust their prices to the extent of recouping the compliance costs associated with GST, such as purchase of new accounting software, staff training, and seeking advice specific to GST compliance. Capital expenditures, such as installation of a new accounting system incurred by the businesses to comply with GST, were also permitted to be passed on to prices over several years in line with accounting depreciation rules. As per the profit margin rule, the businesses were barred from making undue profits by altering their profit margin, called the net dollar margin, in the process of implementation of GST

International experience indicates that anti-profiteering provisions succeed only if there is sufficient preparation time to allow the government to monitor and collect data related to prices of various categories of products and services.

A case in point is Australia, one of the first countries to introduce robust anti-profiteering measures during introduction of the GST in July 2000. Anti-profiteering measures were implemented from 1999 and 2002.

“It is important to remember that for 12 months before the commencement of the GST, the Australian Competition and Consumer Commission rigorously devoted its resources to educate the consumers and businesses through publication of price guidelines, communication strategies and hot lines as well as extensive monitoring of prices,”

It is expected that that the anti-profiteering provisions in India are invoked sparingly and limited to cases of monopolistic and oligopolistic market conditions.

Reporting to Anti-Profiteering Authority

Any interested party who has information to believe a taxable person in engaging in illegal profiteering from GST can refer the matter to the local screening committee. The matter will then be examined by a State level Screening Committee constituted by the State Governments consisting of officers of the State Government.

If the screening committee determines that the matter has merit, it would be forwarded with recommendations to the Standing Committee on Anti-Profiteering, which consists of Officers of both the State Government and Central Government.

If the Standing Committee is satisfied that there is evidence to show that the taxable person has engaged in illegal profiteering, then the matter will be referred to the Director General of Safeguards for a detailed investigation.

Investigation by Director General of Safeguards

All matters referred by the Standing Committee will be investigated by the Director General of Safeguards. The Director General of Safeguards will collect evidence, conduct investigation and issue notices to the interested parties. Anti-profiteering notice must contain the following details:

1. The description of the goods or services in respect of which the proceedings have been initiated.
2. Summary of the statement of facts on which the allegations are based.
3. The time limit allowed to the interested parties and other persons who may have information related to the proceedings for furnishing their reply.

Once all the information and hearings are complete, the Director General of Safeguards will provide a report of findings. Report of findings must be submitted by the Director General of Safeguards normally within 3 months or within 6 months if an extension is provided.

Order under Anti-Profiteering Provisions

Once all the proceedings are completed and a report is obtained from the Director General of Safeguards, the Members of Committee will pass an order. An order from the Authority could mandate

1. Reduction in prices.
2. Return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest.
3. Imposition of penalty as specified under the Act.
4. Cancellation of GST registration.

Hope with the introduction of the concept of Anti Profiteering, the consume of the country would be immensely benefitted by way of reduction of prices and at the same time the Government exchequer would be benefited by getting appropriate revenue from all supply and activities.