

# Anti-profiteering under GST Law

## Introduction

- What is Profiteering?
- What is Anti-profiteering?
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## Meaning of the term 'Profiteering' –

- The term “**Profiteering**” has not been defined under GST Laws.
- **Black’s Law Dictionary** – The taking advantage of unusual or exceptional circumstances to make excessive profits.
- **Law Lexicon** – To seek or obtain excessive profits, one who is given to making excessive profits.
- **Shorter Oxford English Dictionary** - Make or seek to make an excessive profit.
- **Mount vs. Welsh** – Any conduct or practice involving the acquisition of excessive profit.
- **Islamic Academy of Education vs. State of Karnataka** – Profiteering would mean taking advantage of unusual or exceptional circumstances to make excessive profit.
- Besides this, the definition of “*profiteered amount*” as given in Explanation to Sub-section (3A) of Sec. 171 also throws light on the meaning of the term “*profiteering*”. The term 'profiteering' would, **therefore, mean pocketing by a supplier of a tax benefit which is meant for the customers and it is this 'profiteering' which the Legislature intends to check.**

- CBIC FAQ on Anti-profiteering provisions "profiteering" means willful action of not passing on the benefit of reduction in rate of tax or the benefit of input tax credit to the recipients in the prescribed manner

### **Sec. 171 of the CGST Act, 2017 - Antiprofiteering measure**

(1) 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.

(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

1 [(3A) Where the Authority referred to in sub-section (2), after holding examination as required under the said sub-section comes to the conclusion that any registered person has profited under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profited:

Provided that no penalty shall be leviable if the profited amount is deposited within thirty days of the date of passing of the order by the Authority.

Explanation .-For the purposes of this section, the expression " profited" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both]

#### **Rules relating to Anti-Profiteering –**

- Rule 122 [Omitted]\*\*\*\*
- Rule 123 Constitution of the Standing Committee and Screening Committees
- Rule 124 [Omitted]\*\*\*\*
- Rule 125 [Omitted]\*\*\*\*
- Rule 126 Power to determine the methodology and procedure
- Rule 127 Functions of the Authority
- Rule 128 Examination of application by the Standing Committee and Screening Committee

- Rule 129 Initiation and conduct of proceedings
- Rule 130 Confidentiality of information
- Rule 131 Cooperation with other agencies or statutory authorities
- Rule 132 Power to summon persons to give evidence and produce documents
- Rule 133 Order of the Authority
- Rule 134 [Omitted]\*\*\*\*
- Rule 135 Compliance by the registered person
- Rule 136 Monitoring of the order
- Rule 137 [Omitted]\*\*\*\*

### **Rules Omitted –**

Rule 122 - Constitution of the Authority

Rule 124 - Appointment, salary, allowances and other terms and conditions of service of the Chairman and Members of the Authority

Rule 125 - Secretary to the Authority

Rule 134 - Decision to be taken by the majority

Rule 137 - Tenure of Authority

Omitted (w.e.f. 01.12.2022) vide [Notification](#) No. 24/2022 - CT dated 23.11.2022

### **Case Laws on Anti-profiteering –**

1. DG of Anti-profiteering v. Nestle India Ltd. (2019) – adopting incorrect methodology to pass on benefit of rate of reduction
2. Dhiraj Shetty v. Bhagwati Infra (2022) – Additional ITC not passed on to the Customers
3. Jijrushi N Bhattacharya v. NP Foods (2018) – Base price increased for non-eligibility of ITC
4. Sukhbur Rohilla v. Pyramid Infratech (P) Ltd. (2018) – Penalty for not passing of benefit of ITC to buyers
5. Director General of Anti-Profiteering v. L'Oreal India (P.) Ltd. (2022) - Provisions of section 171 on anti-profiteering were violated when benefit of reduction in tax rate of hair and skin care products in post-GST period, had not been passed on to end consumers by way of commensurate reduction in price; profiteered amount was to be deposited in consumer welfare funds along with interest

**Competition Commission** will be Authority to regulate Anti-Profiteering w.e.f. 1-12-2022 - The Government has empowered the Competition Commission of India established under Section 7(1) of the Competition Act, 2002 as an authority under

Section 171(2) of the Central Goods and Services Tax Act, 2017 with effect from December 1, 2022, vide Notification No. 23/2022-CT dated 23-11-2022.

Earlier, National Anti-Profiteering Authority was constituted w.e.f. 28-11-2017. Now, that authority has been abolished w.e.f. 1-12-2022.

Standing Committee and Screening Committees will be constituted. State Level Screening Committees will also be constituted - Rule 123 of CGST and SGST Rules, 2017.

The Authority will determine methodology and procedures to determine whether reduction in rate of supply and benefit of ITC has been passed on to the recipient - Rule 126 of CGST and SGST Rules, 2017.

Functions of Authority have been specified in rule 127 of CGST Rules, 2017 as amended on 1-12-2022.

Applications will be scrutinised by Standing Committee within two months. This period can be extended for further one month as may be allowed by Authority for Anti-Profiteering. Applications of local nature will be scrutinized by State Level Screening Committee and then forwarded to Standing Committee for further action within two months. This period can be extended by one month by Authority - Rule 128 of CGST and SGST Rules, 2017 amended w.e.f. 28-6-2019.

The Standing Committee will scrutinize the cases. If prima facie evidence of profiteering is found, the matter shall be referred to Director General of Anti-profiteering. The Director General of Anti-profiteering will issue notice to interested parties who pay have information. He will collect evidence and complete investigation within six months. He will submit his report within three months to the Authority or such further period not exceeding three months, as may be allowed by Authority - Rule 129 of CGST and SGST Rules, 2017 as amended w.e.f. 28-6-2019.

Director General of Anti-profiteering can take assistance of other authorities - rule 131 of CGST Rules

Authority, Director General of Safeguards or officer empowered by him have powers to summon persons to give evidence and produce documents - Rule 132 of CGST and SGST Rules, 2017 amended w.e.f. 28-6-2019.

Provisions of section 11 of RTI Act relating to disclosure of confidential information supplied by third party will apply to information received by Director General of Safeguards - Rule 130 of CGST and SGST Rules, 2017.

On receipt of report of Director General of Safeguards, the Authority will give opportunity of hearing to interested parties.

The Authority shall, within a period of six months from the date of the receipt of the report from the Director General of Anti-profiteering determine 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 input tax credit to the recipient by way of commensurate reduction in prices - Rule 133(1) of CGST and SGST Rules, 2017.

The time limit of six months is directory and not mandatory as no consequence of non-adherence of said period of six months is prescribed either in CGST Act or rules framed thereunder - Nestle India Ltd. v. Union of India [2020] (Delhi HC DB).

Authority can seek clarifications from Director General of Anti Profiteering on report submitted by him under rule 129(6), during investigation under rule 133(1) - rule 133(2A) of CGST Rules inserted w.e.f. 28-6-2019.

After investigation and hearings, the Authority can pass suitable order like (a) reduction in price (b) return amount to recipient (c) deposit 50% amount in Central Consumer Welfare Fund and balance 50% in State/Union Territory Consumer Welfare Fund along with interest @ 18% from date of collection of higher amount to date of deposit of the amount (d) impose penalty (which is maximum Rs. 25,000) (e) cancellation of registration under GST Act - Rule 133(3) of CGST and SGST Rules, 2017 as amended on 13-6-2018 and 28-6-2019.

If the report of the Director General of Anti-profiteering referred to in rule 129(6) recommends that there is contravention or even non-contravention of the provisions of section 171 of CGST Act or Rules, but the Authority is of the opinion that further investigation or inquiry is called for in the matter, it may, for reasons to be recorded in writing, refer the matter to the Director General of Anti-profiteering to cause further investigation or inquiry in accordance with the provisions of the Act and these rules - Rule 133(4) of CGST and SGST Rules, 2017 inserted w.e.f. 23-3-2018.

The Authority can order investigation in respect of other goods or services or both. This will be treated as new investigation under rule 129 - rule 133(5) of CGST Rules inserted w.e.f. 28-6-2019.

If the taxable person does not comply, recovery proceedings can be initiated as per provisions of CGST, SGST and UTGST Act - Rule 135 of CGST and SGST Rules, 2017.

### **Case Laws on Anti-profiteering – CCI regime**

1. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs v. Subway Systems India (P.) Ltd. (2023)
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs v. Lucknow Development Authority

### **Rule 123 - Constitution of the Standing Committee and Screening Committees**

(1) The Council may constitute a Standing Committee on Anti-profiteering which shall consist of such officers of the State Government and Central Government as may be nominated by it.

(2) A State level Screening Committee shall be constituted in each State by the State Governments which shall consist of-

- (a) one officer of the State Government, to be Nominated by the Commissioner, and
- (b) one officer of the Central Government, to be Nominated by the Chief Commissioner.

#### **Rule 126 - Power to determine the methodology and procedure**

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.

#### **Rule 127 - Functions of the Authority**

4[The authority shall discharge the following functions, namely:-]

(i) to determine whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;

(ii) to identify the registered person who has Not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;

(iii) to order,

(a) reduction in prices;

(b) return to the recipient, an amount equivalent to the amount Not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount Not returned, as the case may be, in case the eligible person does Not claim return of the amount or is Not identifiable, and depositing the same in the Fund referred to in section 57;

(c) imposition of penalty as specified in the Act; and

(d) cancellation of registration under the Act.

[(iv) to furnish a performance report to the Council by the tenth 2day] of the close of each quarter.]

*4. Substituted (w.e.f. 01.12.2022) for "It shall be the duty of the Authority,-" vide Notification No. 24/2022-CT dated 23.11.2022.*

#### **Rule 128 - Examination of application by the Standing Committee and Screening Committee**

(1) The Standing Committee shall, within a period of two months from the date of the receipt of a written application 1[or within such extended period Not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority,] in such form and manner as may be specified by it, from an interested party or from a Commissioner or any other person, examine the accuracy and adequacy of the evidence provided in the application to determine whether there is prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has Not been passed on to the recipient by way of commensurate reduction in prices.

(2) All applications from interested parties on issues of local nature 1[or those forwarded by the Standing Committee] shall first be examined by the State level Screening Committee and the Screening Committee shall, 1[within two months from the date of receipt of a written application, or within such extended period Not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority,] upon being satisfied that the supplier has contravened the provisions of section 171, forward the application with its recommendations to the Standing Committee for further action.