

# **Anti-Profiteering – Policy and Practice in India!**

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**Guide on anti-profiteering measure in GST!**

**17 June 2019**

**GST**

## **Anti-Profiteering – Policy and Practice in India**

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## Feedback

- The book would not have been possible without support of team members CA Vaishali Kharde, Sajana Kumawat, Sourabh Kankaria, Amit Gundecha, Sahil Tharani, Lavesh Solanki, Bhargav Amuru, M. Raju, Pooja Bora, Pooja Sharma, Gaurav Suryawanshi and Nitu Mishra.
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## **1. Anti-profiteering – Policy**

### **1.1 Anti-profiteering legislation**

Whilst we await to celebrate completion of two years of GST in India, clarity about 'anti-profiteering' provision has been at the forefront of taxpayers worries.

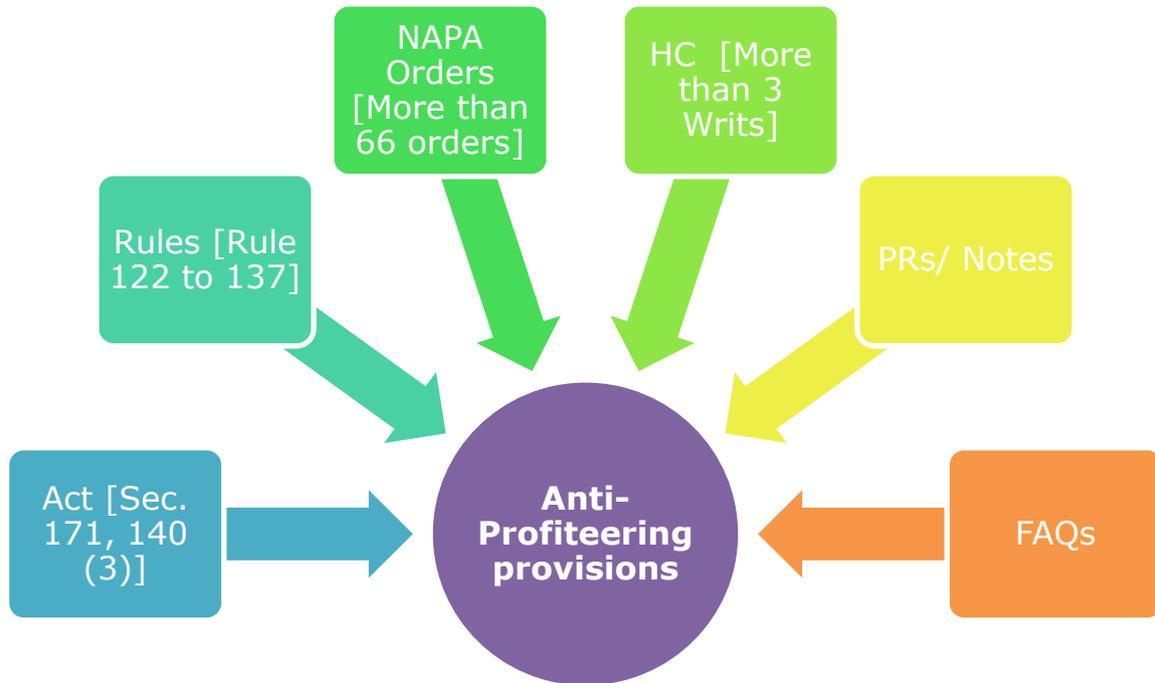
Though, anti-profiteering provision was introduced with the intent that it should benefit the consumer, however, the question is whether the intent is materialised? Lets decode.

Section 171 of CGST Act, 2017 introduced the much celebrated 'Anti-profiteering provisions' to ensure that the benefits arising out of the GST regime are passed on to consumers. In this regard, Rule 122 to 137 of CGST Rules were introduced which deal with anti-profiteering.

National Anti-Profiteering Authority is created to ensure compliance of anti-profiteering provisions.

## 1.2 Anti-Profiteering legislation – Coverage

Anti-profiteering legislation is tabulated below:



## 1.3 What section 171 says?

Section 171 of CGST Act mandates a supplier to pass on the benefits, due to rate reduction and more credits being available in GST regime, to the consumer by way of commensurate reduction in prices. It is pertinent to note that Section 171 is just 10 lines long!

Section 171 of CGST Act reproduced below:

**"SECTION 171. Anti-profiteering 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.”*

## **Analysis**

Clause (1) of Section 171 is most critical clause as it lays down the basis for anti-profiteering. However, this clause just has **34 words** and most of the critical words used there is un-defined such as:

- a. 'Reduction' in 'rate' of 'tax'
- b. 'The benefit' of 'input tax credit'
- c. 'Commensurate' 'reduction' in 'prices'

### **'Reduction' in 'rate' of 'tax'**

Herein the meaning of the term 'reduction in tax' is not very clear.

For example, what if rate of tax is reduced but input tax credit is

denied? Whether in such cases only net benefit, if any to be passed on? Apparently, based on the NAA Orders it appears that the reference here is to net benefit<sup>1</sup>.

Similarly, does the term 'tax' here means GST or even pre-GST taxes (such as Excise, VAT/CST and Service Tax, Entertainment Tax etc? It may be noted that section 9 of CGST Act refer 'tax' as Central GST only.

### **'The benefit' of 'input tax credit'**

While discussing rates, Section 171 mentions 'reduction' but when it comes to ITC, it only mentions '**the benefit**' rather than qualifying it by:

- Increased benefit
- Incremental benefit
- Additional benefit
- New benefit etc

When in preceding line of the section there is mention of '**any reduction**', then conspicuous absence of antonym (such as

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<sup>1</sup> Refer Jubilant Food Work Ltd 2019-TIOL-04-NAA-GST and KRBM Ltd [2018 (13) GSTL 412 (NAPA)]

increased, incremental etc) in the subsequent part of the section 171, could dangerously lead to interpretation that the Legislators wanted that 'the benefit' of ITC (i.e. entire ITC and not incremental ITC) should be passed on to recipient.

However, by referring to few of the NAPA orders one can say that only incremental credit is to be passed on<sup>2</sup>. Also, one can contend that the intention of Anti-profiteering is only to ensure that prices should not be increased in cases where there is additional credit available to the supplier (i.e. based on the intent of the law).

### **'Commensurate' 'reduction' in 'prices'**

Again the terms 'commensurate' 'reduction' and 'price' is un-defined. Thus, question that often debated is whether, instead of reducing the price, the GST payer can increase the quantity of goods? However, the approach of giving more quantity of goods (instead of reducing prices) does not seem to have acceptance of NAA<sup>3</sup>.

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<sup>2</sup> Refer Pyramid Infratech [2019-TIOL-34-NAA-GST], S3 Infra Reality [2019-TIOL-12-NAA-GST]

<sup>3</sup> <https://economictimes.indiatimes.com/>

## 1.4 What is the role of the Authority?

Section 171 of CGST Act also empowers the Government to constitute an authority or entrust an existing authority to ensure compliance of anti-profiteering provisions.

Accordingly, National Anti-Profiteering Authority (NAA) was constituted on 30<sup>th</sup> November 2017<sup>4</sup>. NAA has authority to ask details, order price reduction and even levy penalty or cancel GST registration (refer Rule 133 and Rule 127).

In the last two years, NAA has passed more than **66 Orders**. **These Orders** are quite detailed and thus, certainly are of help to understand the views adopted by NAA as well as industry.

In more than **29 cases** (out of 66 Orders), NAA dismissed the application as allegation of not passing on the benefit were not established in the said cases. At the same time, the Orders of NAA indicate substantial lapses or non-passing of the benefits by the industry in many cases.

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<sup>4</sup> At present, NAA does not have a judicial member as part of its committee.

At present, as per new reports, more than 700 anti-profiteering cases are under investigation<sup>5</sup>. Further, NAA is expected to get extension till 30<sup>th</sup> November 2020<sup>6</sup>.

### 1.5 Anti-Profiteering in news

In the last two years, anti-profiteering provisions have hogged the limelight, though not for compliance but non-compliance by the industry players. Few of the prominent news<sup>7</sup> are reproduced below:

Industry	Anti-profiteering amount	Status
FMCG	INR 383 crore (HUL)	Writ in HC <sup>8</sup>
	INR 250 crore (P&G)	-
	INR 150 crore (Patanjali)	-
	INR 100 crore (Nestle)	-
Restaurant	INR 41 crore (Jubilant)	Writ in HC <sup>9</sup>
	INR 8 crore (Macdonald)	-
Real Estate	INR 8 crore (Pyramid)	Writ in HC <sup>10</sup>

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<sup>5</sup> <https://www.business-standard.com/>

<sup>6</sup> <https://www.business-standard.com/>

<sup>7</sup> <https://economictimes.indiatimes.com/industry/cons-products/fmcg/pg-india-charged-with-rs-250-crore-of-gst-profiteering/articleshow/69017307.cms?from=mdr>

<sup>8</sup> <https://economictimes.indiatimes.com/>

<sup>9</sup> Jubilant Foodworks Ltd [2019-TIOL-1017-HC-DEL-GST]

<sup>10</sup> [Business-standard.com](https://www.business-standard.com/)

## 1.6 Goods or services covered under NAA orders

Till now, the order issued by NAA covers the following goods or services:

Shirt/ Jeans/ Lungi/ Briefs/ Dhoti/ Socks	Tiles	Cartridge	LED	Chimney
Suitcases	Speakers	Creams	Soap	Paint
Cars	Lift	Almirah	Matress	Noodles
Burger/ Pizza	Chocolate	Masala/ Black pepper	Imported equipments	D2H
	Restaurant	Flats/ apartments	Courier	

Parties involved in the anti-profiteering violations are, broadly:

Manufacturer	Trader	Importer	Online platforms
	Distributor	Service provider	

## **1.7 What is the interest and penalty levied?**

Perusal of the NAA orders shows that the interest @ 18% is proposed to be levied. Also, penalty is proposed to be levied under Section 122 (1) (i) read with Rule 133 (3) (d) of CGST Rules.

## **1.8 Is it 'anti-profiteering' or 'anti-pricing'?**

It may be noted that in a free-economy, a supplier has all right to reduce or increase the prices or offer discount or discontinue discounts of the goods/ services. However, at the same time, the anti-profiteering provisions provide for commensurate reduction in prices, if there is any reduction in rate of tax or in view of benefit of input tax credit.

Thus, the underlying question is whether section 171 of CGST Act is trying to regulate the prices? In this regard, if one analyses section 171 then it can be observed that the section does not indicate that is intending to regulate the prices. Rather Section 171 is a specific provision asking supplier to pass on the benefit to the customer (in view of introduction of GST).

Even the NAA in the case of **Jubilant Food Work Ltd**<sup>11</sup> observed that 'Price Control Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations, 2014' promulgated by the **Malaysian Government** and the 'Net Dollar Margin Rule' of the **Australian Government**, regulate prices whereas the section 171 of the CGST Act, 2017 does not provide for such regulations and its only aim is to pass on the benefit.

Even Mr B. N Sharma (Chairman, National Anti-Profiteering Authority National Anti-Profiteering) stated that NAA is not a price regulator<sup>12</sup>.

### **1.9 Any global precedence on anti-profiteering provision?**

Globally, Australia is said to be the first country to introduce anti-profiteering provisions during GST introduction in the year 2000, followed by Malaysia in the year 2015.

Interestingly, the NAA had invited Mr. Allan Fels, Ex-Chairman Australian Competition and Consumer Commission for a Conference on experience of Anti-profiteering in Australia<sup>13</sup>.

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<sup>11</sup> 2019-TIOL-04-NAA-GST

<sup>12</sup> Refer [NAA is not price regulator](#)

<sup>13</sup> [http://www.naa.gov.in/gallery\\_detail.php?eventid=2](http://www.naa.gov.in/gallery_detail.php?eventid=2)

As regards Malaysia, it may not be considered as an acceptable source of reference as it has withdrawn its GST from 1 June 2018 and substituted it with erstwhile Sales and Service Tax<sup>14</sup>.

### **1.10 How to compute impact of Anti-profiteering' provision'?**

Though at present, guidelines to compute the benefits are not made available, still the taxpayer is expected to compute the likely benefit and pass on the same. In this regard, lets understand the practical stumbling blocks for the taxpayers.

Anti-profiteering provision categories the benefits in two baskets, one, additional input tax credits becoming available in GST regime and second, reduction in tax rates, if any. First lets understand which are the benefits expected to arise from input tax credits perspective. Pre-GST regime, Central Sales Tax was a cost in the supply chain and in GST, there isn't CST. This could be construed as a benefit arising due to transition to GST. Similarly, all additional credits, which are

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<sup>14</sup> It may be noted that in Malaysia, the opposition party, won the general election in 2018 only on the point that if voted to power they will scrap Malaysian GST which was introduced in the year 2015. In 2018, after winning the elections, Malaysian GST was scrapped and earlier Sales and Service Tax laws were re-introduced.

However, in India, GST being an economic policy, jointly implemented by Center and States, ideally, if Opposition parties actually have a better solution, for GST challenges, then they should present the same before GST Council than making a rhetoric about the same during Central/State elections.

expected to accrue to a taxpayer, being manufacturer or trader or service provider, need to be computed and passed on to the consumer.

The inherent challenge is how to compute benefits from GST rate reduction, if any i.e. whether the benefit should be computed at product level or organization level<sup>15</sup>. 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). Should only the net benefits be passed on to the consumer or product-wise benefits should be passed (without netting off)? Also, can the benefit be passed on to the consumer by giving free additional quantity of goods (say 110 gm for the price of 100 gm)?<sup>16</sup>

Further, whether the cost incurred due to GST introduction such as additional cost for IT implementation, additional manpower, training, compliance, ASP/ GSP etc should be deducted to compute net

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<sup>15</sup> Refer [Computation at Product level or Entity level](#)

<sup>16</sup> Refer [NAA is not price regulator](#)

benefit? Additionally, what if the supplier was in losses before GST then should it continue the loss post GST as well?<sup>17</sup>

### **1.11 Should the benefits arising to vendor also be passed on?**

Another question that arises is whether the business are expected to pass on the entire benefit which the business eco-system has gained in GST i.e. whether the taxpayer is also required to ensure that the vendors pass on the benefits by way of price reduction to him so that he can pass it on onwards to consumer?

This is another million-dollar question on which anti-profiteering provisions are silent (like other aspects!). Thus, even now, it's a mystery as to whether the taxpayer is required to compute the benefits available at the vendor level and then pass on the gross benefit (i.e. arising at the taxpayer level plus benefits passed on by the vendors) to the customer.

Further, whether the benefit should be computed for Tier-I vendors, Tier-II (i.e. vendors vendor) and Tier-III (i.e. vendors vendor's vendor) as well? If the intention of the anti-profiteering provision is

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<sup>17</sup> As per the NAA Chairman '...past losses cannot be adjusted against the reduced tax rates' (refer [Meeting of NAPA at CII, Mumbai](#))

so then the question is how taxpayer are expected to obtain cost data from vendors? The ability of the taxpayer, to get data from suppliers is limited if not missing, as anti-profiteering provisions do not empower the taxpayers for the same. Further, even if few vendors, share the data, how then the veracity of the details shared by vendor could be verified by the Company? Whether the taxpayer is expected to carry out an audit of their vendors for the same or obtain an certificate from vendors statutory/ internal auditors? The missing clarity on these aspects is another stumbling block.

### **1.12 Whether distributors are liable to comply?**

One of the biggest practical challenge of anti-profiteering provision is how to ensure that the benefit of price reduction actually reaches the consumer. This is particularly true in case of B2C (i.e. business to consumer) segment.

The challenge is, in case there is any price reduction in view of anti-profiteering provisions, how to ensure that the prices of the medicines on the shelf of the distributor are actually sold at a reduced price to

the consumer. In this regard, recently, the NAA has stated that the Distributors are liable to pass on the benefit to the consumer<sup>18</sup>.

### **1.13 No methodology to seek ruling on anti-profiteering**

It can be observed that the anti-profiteering provision has failed short of explaining the methodology to compute the benefit, leaving everything to the imagination of taxpayers/consultants and discretions of Authorities.

Further, GST Act does not provide for mechanism to proactively approach the GST Authorities or NAA or Advance Ruling Authorities on the question of anti-profiteering. This non-existence of mechanism has resulted in GST payer being left to no option but to interpret the provisions, which itself, has lead to disputes.

### **1.14 Challenges for service sector**

For service providers, computation of anti-profiteering benefit is bigger challenge as for service industry difficult to determine service level benefits and pass on the same (as unlike products, prices of services may differ customer-wise)<sup>19</sup>.

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<sup>18</sup> Refer [Distributor to pass on benefit](#)

<sup>19</sup> NAA in the Bharti Telemedia [2019-TIOL-37-NAA-GST] observed that '*It is also apparent*

Even though services comprise of more than 50% of the GDP, as regards complaints with NAA, very few orders (such as D2H, courier, restaurant, real estate and installation) pertain to service sector.

### **1.15 Notes/PR by CBIC – Are they guidelines?**

During transition to GST, for computation of anti-profiteering benefits, it is pertinent to note that no specific guidance was made available by the Government except few Press Releases (PR) issued in May 2017 by Central Board of Indirect Taxes and Customs ('CBIC')<sup>20</sup>.

These PR highlights likely industry/ product-wise benefits (for products like cement, medicaments etc and two services telecom and entertainment).

The challenge with these PR is that whilst they highlight few benefits arising in GST regime, being just a one or two pager, they end up being high level analysis than reliable documents. For the CBIC notes refer [CBIC Notes on select product/ services](#).

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*that the plans and packages post GST had been changed and thus, there were no comparable prices for the old packages with that of the new ones'.*

<sup>20</sup> [CBIC Notes on select product/ services](#)

## 2. Anti-Profiteering – Practice

### 2.1 Anti-profiteering is concession given by Government

It has been consistently held by NAA that the supplier is not being asked to extend this benefit out of his own account and he is only liable to pass on the benefit of ITC to which he has become entitled and benefit is a concession given by the Government from its own tax revenue to reduce the prices being charged from the customers<sup>21</sup>.

Even Mr B. N Sharma (Chairman, National Anti-Profiteering Authority National Anti-Profiteering) stated that ***'By reduction of rates, Government sacrifices revenue but commensurate reduction should be passed on to the end consumers.'***<sup>22</sup>

### 2.2 Anti-profiteering benefit to be passed to each customer

In the case of **Jubilant Food Work Ltd**<sup>23</sup> the NAA observed that the tax reduction benefit **cannot be denied to a customer** on the ground that he, as an entity, has passed on the benefits to the **entire group** of customers and the benefit cannot be denied to a customer

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<sup>21</sup> Pyramid Infratech Pvt. Ltd. 2018 (19) GSTL 65 (NAPA)

<sup>22</sup> Refer [NAA is not price regulator](#)

<sup>23</sup> [2019-TIOL-04-NAA-GST](#)

claiming the same has been passed on to another customer on another product.

In Kunj Lub Marketing Pvt. Ltd<sup>24</sup> it was that the supplier has no liberty to arbitrarily decide in respect of which products he would pass on the benefit and in respect of which products he would not pass such benefit and as per the provisions of Section 171 of the Act the benefit has to be passed on to each recipient and the same cannot be selectively granted or denied.

### **2.3 Computation at product/SKU level and not entity level**

In the case of **Jubilant Food Work Ltd**<sup>25</sup> the NAA observed that the denial of the benefit to the customer on the ground that the respondent had passed it on a particular product in place of another product which he may not buy, would be hit by Article 14 of the Constitution of India. Each and every customer is entitled to receive the tax reduction benefit without any discrimination. Therefore, the provisions of anti-profiteering have to be applied at each and every product and the respondent has no unfettered discretion to allow them selectively or as per his own whims and fancies. The contention

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<sup>24</sup> 2018 (19) GSTL 84 (NAPA)

<sup>25</sup> 2019-TIOL-04-NAA-GST

of the respondent that the profiteered amount should be calculated by considering him as an **entity and not on each product/SKU, was also found to be not acceptable** in view of the provisions of Section 171 of CGST Act, 2017 which requires that the benefit of tax reduction should be passed on each and every recipient on every supply.

## 2.4 Computation to be done based on facts of each case

In the case of **Jubilant Food Work Ltd**<sup>26</sup> the NAA observed that no fixed method can be prescribed as various parameters are required to be taken into account while making such computation and the same varies from industry to industry and from one product to another.

Similarly, NAA in the case of **Hardcastle Restaurants Pvt. Ltd**<sup>27</sup> observed that:

*"It would also be appropriate to mention here that the computation of the profiteered amount under Section 171 has to be done on the basis of the facts of each case and hence no general methodology and procedure can be prescribed for the same. Moreover, the word used*

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<sup>26</sup> 2019-TIOL-04-NAA-GST

<sup>27</sup> 2018 (19) GSTL 511 (NAPA)

*in Rule 126 is to 'determine' and not to 'prescribe' the methodology and procedure. The basic aim is to ensure that both the benefits of reduction in the rate of tax and the ITC are passed on to the consumers by commensurate reduction in the prices."*

In the aforesaid case, NAA also observed "*The law settled in the cases of CIT v. **B.C. Srinivasa Shetty** - (1981) 2 SCC 460 and Commissioner of Central Excise v. Larsen & Toubro Ltd. - (2016) 1 SCC 170 is not applicable **as specific and adequate anti-profiteering machinery has been provided** under the above Act and the Rules to enforce the above provisions. The averment of the Respondent regarding **excessive delegation** to the Authority for framing methodology is also not tenable as the delegation has been done in exercise of the powers conferred under Section 164 of the Act on the recommendation of the GST Council which is a body established under the Constitution. It is humbly submitted that the judgment passed in the case of Indian Aluminium Co. Ltd. and Anr. v. The State of Bihar and Ors. - 1994 (1) PLJR is not being followed as the delegation has been made in accordance with the provisions of the CGST Act, 2017."*

## 2.5 If rate reduced but ITC denied then net-effect

In the case of **Jubilant Food Work Ltd**<sup>28</sup> the NAA observed that it was the duty of the Respondent to ascertain on which of his products the rate of tax had been reduced and after taking into account the impact of denial of ITC to what extent the prices should have been increased

## 2.6 If rate increased with ITC then net benefit be considered

In **KRBM Ltd**<sup>29</sup> it was observed that the *"ITC available to him as a percentage of the total value of taxable supplies was between 2.69% to 3% whereas the GST on the outward supply of his product was 5% which was not sufficient to discharge his tax liability. Moreover in this case the rate of tax has been increased from 0% to 5% instead of reduction in the same. ... It is further revealed from the record that the Respondent had increased the MRP of his product from Rs. 540/- to Rs. 585/- which constituted increase of 8.33% keeping in view the increase in the purchase price. Therefore, due to the imposition of the*

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<sup>28</sup> 2019-TIOL-04-NAA-GST

<sup>29</sup> 2018 (13) GSTL 412 (NAPA). This case was distinguished in Hardcastle Restaurants [2018 (19) GSTL 511] wherein it was observed that *'The order passed in the Case of Kumar Gandharv v. KRBL Ltd. on 4-5-2018 [2018 (13) GSTL 412 (NAPA)] by this Authority pertains to Basmati in the case of which the GST was increased from 0% to 5% and hence there has been no reduction in the rate of tax and therefore, the provisions of Section 171 were not attracted as is the case in respect of the Respondent'*.

*GST on the above product as well as the increase in the purchase price of the paddy there does not appear to be denial of benefit of ITC as has been alleged by the applicant as there has been **no net benefit of ITC** available to the respondent which could be passed on to the consumers”*

## **2.7 If base price not increased then no anti-profiteering**

In case of reduction in GST rates, it has been held by NAA that non increase of the base price (on which GST is levied) could be an indication of compliance with anti-profiteering provisions<sup>30</sup>. Similarly, has been held that if the reduction in the base prices of the product is more than the additional ITC eligible thereon, the allegation of profiteering is said to be not established<sup>31</sup>.

## **2.8 Comparison of ITC ratio**

From perusal of the NAA orders it appears that in most of the cases the pre-GST ITC ratio to Turnover is compared with post-GST ITC ratio to Turnover to arrive at the additional credit (refer Pyramid Infratech<sup>32</sup>, KBRL Ltd<sup>33</sup>, S3 Infra Reality<sup>34</sup> etc).

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<sup>30</sup> Fabindia Overseas Pvt. Ltd. 2018 (19) GSTL 533 (NAPA)

<sup>31</sup> Fabindia Overseas Pvt. Ltd. 2018 (19) GSTL 533 (NAPA)

<sup>32</sup> 2019-TIOL-34-NAA-GST

<sup>33</sup> 2018 (13) GSTL 412 (NAPA)

<sup>34</sup> 2019-TIOL-12-NAA-GST

## 2.9 Benefit to be passed even on imported goods

In JP And Sons<sup>35</sup> the NAA observed that the price offered prior to implementation of GST has to be reduced by the amount of CVD paid in order to neutralise the impact of ITC available to the importer and thus, importer ought to have reduced the base price to the extent of CVD that was no longer required to be paid as well as to the extent of IGST whose credit was now available to him. Similarly, has been held in **Theco India Pvt Ltd**<sup>36</sup>.

## 2.10 Can subsequent credit note help in negating allegations

In the case of Sharma Trading Company<sup>37</sup> the NAA observed that "*As soon as the Respondent had issued the tax invoice on 15-11-2017 after increasing the base price he had violated the provisions of Section 171.*" and thus, issuance of credit note may not help.

## 2.11 Earlier price reduction cannot help

In the case of **Excel Rasayan Pvt Ltd**<sup>38</sup> the NAA observed that plea that base prices were drastically lowered when GST came into effect cannot absolve supplier from not passing on the benefit.

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<sup>35</sup> 2018-TIOL-15-NAA-GST

<sup>36</sup> 2018-TIOL-14-NAA-GST

<sup>37</sup> 2018 (19) GSTL 497 (NAPA)

<sup>38</sup> 2019-TIOL-02-NAA-GST

Similarly, in the case of **TTK Prestige Ltd**<sup>39</sup> the NAA observed that submission of the respondent that the price of the product was not increased at the time of introduction of GST when the rate of tax was increased to 28% (from earlier VAT liability of 14.5% plus CVD @3%) and hence the question of reducing the prices when the rate of tax was decreased from 28% to 18% does not arise, is legally unsustainable since section 171 clearly specifies that the benefit of reduction in tax has to be necessarily passed on to the recipient by commensurately reducing the prices.

## **2.12 Distributor to pass on the benefit**

In the case of **Satya Enterprises**<sup>40</sup> the NAA observed that the best course for the supplier/ distributor would have been to pass on the benefit of reduced rate of GST to his customers and claim compensation from the manufacturer and respondent cannot be absolved of his legal obligation on the plea that he had no control on the fixing of the MRPs.

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<sup>39</sup> 2019-TIOL-29-NAA-GST

<sup>40</sup> 2019-TIOL-03-NAA-GST

In **Cloudtail Pvt Ltd**<sup>41</sup> it was observed that the GST envisages every registered supplier is bound by section 171 of the Act to pass on the benefit of reduction in tax and supplier and passing of the benefit by the distributor or retailer does not rest on the fact that the manufacturer or his supplier should have first passed on the same benefit to him.

### **2.13 Even TRAN-2 credit to be passed on**

In Hindustan Unilever Limited<sup>42</sup> the issue before NAA was whether the amount of transitional credit of 76.06 crores [claimed by the respondent through TRAN-2 on inputs held in stock as on 30-6-2017], would be available as deduction from the amount of profiteering? In this regard, the NAA held that the legal **definition of ITC is inclusive** of TRAN-2 credit as per Section 140(3) of CGST Act, 2017 read with Rules 117(4)(a)(i) and 117(4)(a)(ii) of CGST Rules, 2017 which make it very clear that the transitional credit availed through TRAN-2 statements was nothing but ITC as defined under Section 2(63) read with Section 2(62) of the said Act for all intents and purposes of the above Act.

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<sup>41</sup> 2019-TIOL-16-NAA-GST

<sup>42</sup> 2019 (21) GSTL J74 (NAPA)

## 2.14 Methodology is mathematical calculation

In the case of Sharma Trading Company<sup>43</sup> the NAA held that *"The argument advanced by the Respondent appears to be frivolous as it involves only mathematical calculation of the amount by which the tax had been reduced..."*.

## 2.15 Project completed prior to GST are outside

The NAA in the case of **Bestech India Ltd**<sup>44</sup> observed that since the project has been completed before coming into force of GST w.e.f 01.07.2017, anti-profiteering provisions contained in s.171(1) of the Act are not attracted.

## 2.16 New project (launched after 1<sup>st</sup> July 2017) are outside

The NAA in the case of **Conscient Infrastructure**<sup>45</sup> observed that *"10. ... The DGAP's Report also stated that the Respondent **must have taken into consideration the benefit of ITC** available to him post implementation of GST, while fixing the base price. ...*

*15. From the above payment schedule it is clear that the project was launched only after the implementation of GST. As there was no*

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<sup>43</sup> 2018 (19) GSTL 497 (NAPA)

<sup>44</sup> 2019-TIOL-36-NAA-GST

<sup>45</sup> 2019-TIOL-33-NAA-GST

*comparative pre GST ITC that was accumulated or utilized by the Respondent the question of profiteering does not arise.”*

### **2.17 Reduction in discount is not profiteering**

The NAA in the case of Asian Paints Ltd<sup>46</sup> observed that *“The increase in the base price is on account of the reduction in the discount. It is also revealed that the reduction in discount doesn’t amount to profiteering as the same was offered from his profit margin by the Respondent and **doesn’t not form part of the base price** and therefore, the Respondent cannot be held guilty under Section 171 of the Act”*

### **2.18 APB to be passed on to landowner as well**

The NAA in the case of Sattva Developers Pvt Ltd<sup>47</sup> observed that the Developer has to pass on the benefit of profiteered amount to the land owner who will in turn pass on the benefit to his buyers.

### **2.19 Repay amount of anti-profiteering plus the GST thereon**

In cases where the anti-profiteering by the supplier was established, the NAA has consistently asked the supplier to repay the ‘base

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<sup>46</sup> 2019 (20) GSTL 391 (NAPA)

<sup>47</sup> 2019-TIOL-38-NAA-GST

profiteered' amount plus the 'applicable GST' collected thereon by supplier<sup>48</sup>.

## **2.20 Deposit to CWF (Centre and State)**

In case amount is to be credit to consumer welfare fund then NAA has asked the suppliers to deposit the anti-profiteering amounts alongwith interest within 3 months. This amount is to be deposited in the ratio of 50%:50% to Central and State Consumer Funds.

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<sup>48</sup> Salarpuria Real Estate 2019-TIOL-35-NAA-GST

### 3. Challenges for Developers

#### 3.1 Anti-Profitteering cases against developers

Out of 66 orders passed by NAA till now, more than 8 relate to developers as under:

Developer	Additional ITC (%)	Amount involved
Pyramid Infratech <sup>49</sup>	6.10%	8.22 crore
Gurukripa Developers <sup>50</sup>	3.04%	-
S3 Infra Reality <sup>51</sup>	2.84%	58 lacs
Eldeco Infrastructure <sup>52</sup>	2.84%	42 lacs
Sattva Developers Pvt Ltd <sup>53</sup>	2.66%	99 lacs
Puri Constructions <sup>54</sup>	1.79%	1.01 crore
Salarpuria Real Estate <sup>55</sup>	1.45%	19 lacs
Shrivation Homes <sup>56</sup>	Nil	-

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<sup>49</sup> 2019-TIOL-34-NAA-GST

<sup>50</sup> 2019-TIOL-21-NAA-GST

<sup>51</sup> 2019-TIOL-12-NAA-GST

<sup>52</sup> 2019-TIOL-34-NAA-GST

<sup>53</sup> 2019-TIOL-38-NAA-GST

<sup>54</sup> 2019-TIOL-30-NAA-GST

<sup>55</sup> 2019-TIOL-35-NAA-GST

<sup>56</sup> 2019-TIOL-32-NAA-GST

### 3.2 New rates from 1<sup>st</sup> April 2019 for Developers

From 1<sup>st</sup> April 2019, for Developers, the GST Council has introduced new GST rates (1% and 5%) without credit. It is pertinent to note that the non-availability of ITC will lead to increase in the cost of construction for developers. Typically, the cost of construction ranges from INR 1,500 to INR 3,500 per sq. ft. At present, most inputs and input services attract GST at 18 % (except cement which attracts GST @ 28 %).

In this regard, again the question of anti-profiteering will become important. Say, on an average, the GST on a cost of construction is **INR 3,000** per sq. ft then even if **15 %** is assumed to be GST of cost of construction then it will be **INR 450**. Effectively, this means cost of construction for developers is expected to go up to this extent (as ITC will not be available from 1st April 2019 for new projects on which new rates are applicable).

Now, the question is whether the Developers can increase the basic prices (due to loss of ITC)? In this regard, the Press Release (PR) dated 15<sup>th</sup> June 2017 (F. No.296/07/2017-CX.9) clarified that "*... incidence of Central Excise duty, VAT, Entry Tax, etc. on construction material is also currently borne by the builders, which they pass on*

*to the customers as part of the price charged from them. This is not visible to the customer as it forms a part of the cost of the flat... What the customer does not see is the embedded taxes on account of cascading and sticking of input taxes in the cost of the flat, etc... The input credits should take care of the headline rate of 12%...”*

The aforesaid PR clearly stated two aspects:

- a. In Pre-GST regime, incidence of excise and VAT on inputs was borne by developers and it forms part of cost of flat
- b. ITC should take care of headline rate of 12%

If the aforesaid is taken at its face value, then, following aspects clearly emerge:

- a. After 1 April 2019, denial of ITC will again form part of flats
- b. ITC denial will result in cost to the extent of 12% or higher

Thus, given the increase in cost, Developers may well have the option to increase the basic sale price. However, the GST Authorities will certainly monitor the prices of the real-estate project, pre-rate change and post-rate change. Given this, the Developers should maintain appropriate documents to substantiate the price rise, if any, during transition.

## 4. Relevant provisions - Act, Rules, FAQs etc

### 4.1 GST Bill, 2017<sup>57</sup>

#### 4.1.1 Statement of Objects and Reasons

Presently, the Central Government levies tax on, manufacture of certain goods in the form of Central Excise duty, provision of certain services in the form of service tax, inter-State sale of goods in the form of Central Sales tax. Similarly, the State Governments levy tax on and on retail sales in the form of value added tax, entry of goods in the State in the form of entry tax, luxury tax and purchase tax, etc. Accordingly, there is multiplicity of taxes which are being levied on the same supply chain.

...

5. The Central Goods and Services Tax Bill, 2017, inter alia, provides for the following, namely: —

...

**(j) to provide for an anti-profiteering clause in order to ensure that business passes on the benefit of reduced tax incidence on goods or services or both to the consumers;**

...

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<sup>57</sup> <https://www.aces.gov.in/Documents/CGST-bill-e.pdf>

...

7. The Bill seeks to achieve the above objectives.

NEW DELHI; ARUN JAITLEY.

The 23rd March, 2017

#### **4.1.2 Notes on clauses**

...

Clause 171 provides that it is **mandatory** to pass on the benefit due to reduction in rate of tax or from input tax credit to the consumer by way of commensurate reduction in prices. ...

#### **4.1.3 Financial Memorandum**

...

5. Sub- clause (2) of clause 171 of the Bill provides for establishment of an authority for an anti-profiteering clause in order to ensure that business passes on the benefit of reduced tax incidence on goods or services or both to the consumers.

...

## 4.2 GST Act, 2017

### 4.2.1 Section 2 - Definitions

...

(4) “adjudicating authority” means any authority, appointed or authorised 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<sup>58</sup>;

### 4.2.2 Section 171 - Anti-profiteering 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

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<sup>58</sup> Amended w.e.f. 1.2.2019. Given the amendment, now appeal against the Order of NAPA cannot be filed in the normal course except by way of Writ. Till now, writs have been filed in the anti-profiteering issue in Jubilant Foodworks Ltd [2019-TIOL-1017-HC-DEL-GST], Abbott Healthcare Pvt Ltd [2019-TIOL-1016-HC-DEL-GST] and Pyramid Infratech Pvt Ltd [2018-TIOL-174-HC-DEL-GST].

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.

#### **4.2.3 Section 140 - Transitional arrangements for input tax credit**

...

- (3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely :--

- (i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
- (ii) the said registered person is eligible for input tax credit on such inputs under this Act;
- (iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;
- (iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and
- (v) the supplier of services is not eligible for any abatement under this Act :

**Provided** that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person **shall pass on the benefit** of such credit **by way of reduced prices to the recipient**, be allowed to take credit at such rate and in such manner as may be prescribed.

#### **4.2.4 Section 122 - Penalty for certain offences**

(1) Where a taxable person who —

- (i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;

...

he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

...

### 4.3 GST Rules (Rule 122 to 137)

**RULE 122. Constitution of the Authority.** — The Authority shall consist of, -

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

**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 124. Appointment, salary, allowances and other terms and conditions of service of the Chairman and Members of the Authority. —**

- (1) The Chairman and 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.
- (2) 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 :

**Provided** that where a retired officer is selected as a Chairman, he shall be paid a monthly salary of Rs. 2,25,000 reduced by the amount of pension.

- (3) The Technical Member shall be paid a monthly salary and other allowances and benefits as are admissible to him when holding an equivalent Group 'A' post in the Government of India :

**Provided** that where a retired officer is selected as a Technical Member, he shall be paid a monthly salary equal to his last drawn

salary reduced by the amount of pension in accordance with the recommendations of the Seventh Pay Commission, as accepted by the Central Government.

(4) The Chairman shall hold office for a term of two years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment :

**Provided** that a person shall not be selected as the Chairman, if he has attained the age of sixty-two years :

**Provided** further that the Central Government with the approval of the Chairperson of the Council may terminate the appointment of the Chairman at any time.

(5) The Technical Member of the Authority shall hold office for a term of two years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment:

**Provided** that a person shall not be selected as a Technical Member if he has attained the age of sixty-two years:

**Provided** further that the Central Government with the approval of the Chairperson of the Council may terminate the appointment of the Technical Member at any time.

**RULE 125. Secretary to the Authority.** — An officer not below the rank of Additional Commissioner working in the Directorate General of Anti-profiteering shall be the Secretary to the Authority.

**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. Duties of the Authority.** — It shall be the duty of the Authority,-

- (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 per cent. 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 day of the close of each quarter.

**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, 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 shall first be examined by the State level Screening Committee and the Screening Committee shall, 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.

**RULE 129. Initiation and conduct of proceedings. —**

- (1) Where the Standing Committee is satisfied that there is a *prima facie* evidence to show that the supplier has not passed

on the benefit of 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, it shall refer the matter to the Director General of Anti-profiteering for a detailed investigation.

- (2) The Director General of Anti-profiteering shall conduct investigation and collect evidence necessary to determine whether the benefit of 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.
- (3) The Director General of Anti-profiteering shall, before initiation of the investigation, issue a notice to the interested parties containing, *inter alia*, information on the following, namely :-
  - (a) the description of the goods or services in respect of which the proceedings have been initiated;
  - (b) summary of the statement of facts on which the allegations are based; and
  - (c) the time limit allowed to the interested parties and other persons who may have information related to the proceedings for furnishing their reply.

- (4) The Director General of Anti-profiteering may also issue notices to such other persons as deemed fit for a fair enquiry into the matter.
- (5) The Director General of Anti-profiteering shall make available the evidence presented to it by one interested party to the other interested parties, participating in the proceedings.
- (6) The Director General of Anti-profiteering shall complete the investigation within a period of three months of the receipt of the reference from the Standing Committee or within such extended period not exceeding a further period of three months for reasons to be recorded in writing as may be allowed by the Authority and, upon completion of the investigation, furnish to the Authority, a report of its findings along with the relevant records.

**RULE 130. Confidentiality of information. —**

- (1) Notwithstanding anything contained in sub-rules (3) and (5) of rule 129 and sub-rule (2) of rule 133, the provisions of section 11 of the Right to Information Act, 2005 (22 of 2005), shall apply *mutatis mutandis* to the disclosure of any information which is provided on a confidential basis.

- (2) The Director General of Anti-profiteering may require the parties providing information on confidential basis to furnish non-confidential summary thereof and if, in the opinion of the party providing such information, the said information cannot be summarised, such party may submit to the Director General of Anti-profiteering a statement of reasons as to why summarisation is not possible.

**RULE 131. Cooperation with other agencies or statutory authorities.** — Where the Director General of Anti-profiteering deems fit, he may seek opinion of any other agency or statutory authorities in the discharge of his duties.

**RULE 132. Power to summon persons to give evidence and produce documents.** —

- (1) The Director General of Anti-profiteering, or an officer authorised by him in this behalf, shall be deemed to be the proper officer to exercise the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing under section 70 and shall have power in any inquiry in the same

manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

- (2) Every such inquiry referred to in sub-rule (1) shall be deemed to be a judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860).

#### **4.3.1 Rule 133 - Order of the Authority**

- (1) The Authority shall, within a period of three 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.
- (2) An opportunity of hearing shall be granted to the interested parties by the Authority where any request is received in writing from such interested parties.
- (3) Where the Authority determines that a registered person has not 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, the Authority may 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 per cent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount including interest not returned, as the case may be;
- (c) the deposit of an amount equivalent to fifty per cent. of the amount determined under the above clause in the Fund constituted under section 57 and the remaining fifty per cent. of the amount in the Fund constituted under section 57 of the Goods and Services Tax Act, 2017 of the concerned State, where the eligible person does not claim return of the amount or is not identifiable;
- (d) imposition of penalty as specified under the Act; and
- (e) cancellation of registration under the Act.

**Explanation :** For the purpose of this sub-rule, the expression, “concerned State” means the State in respect of which the Authority passes an order.

- (4) If the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129 recommends that there is contravention or even non-contravention of the provisions of

section 171 or these 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 134. Decision to be taken by the majority. —**

- (1) A minimum of three members of the Authority shall constitute quorum at its meetings.
- (2) If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman shall have the second or casting vote.

**RULE 135. Compliance by the registered person. —** Any order passed by the Authority under these rules shall be immediately complied with by the registered person failing which action shall be initiated to recover the amount in accordance with the provisions of the Integrated Goods and Services Tax Act or the Central Goods and Services Tax Act or the Union Territory Goods and Services Tax Act

or the State Goods and Services Tax Act of the respective States, as the case may be.

**RULE 136. Monitoring of the order.** — The Authority may require any authority of Central tax, State tax or Union territory tax to monitor the implementation of the order passed by it.

**RULE 137. Tenure of Authority.** — The Authority shall cease to exist after the expiry of two years from the date on which the Chairman enters upon his office unless the Council recommends otherwise.

**Explanation.** — For the purposes of this Chapter,

- (a) “Authority” means the National Anti-profiteering Authority constituted under rule 122;
- (b) “Committee” means the Standing Committee on Anti-profiteering constituted by the Council in terms of sub-rule (1) of rule 123 of these rules;
- (c) “interested party” includes-
  - a. suppliers of goods or services under the proceedings; and
  - b. recipients of goods or services under the proceedings;
  - c. any other person alleging, under sub-rule (1) of rule 128, that a registered person has not passed on the benefit of

reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.

- (d) "Screening Committee" means the State level Screening Committee constituted in terms of sub-rule (2) of rule 123 of these rules.

## 4.4 Circulars/ PR

### 4.4.1 No additional burden on Homebuyers - 15<sup>th</sup> June 2017

**F. No.296/07/2017-CX.9**

**Govt. of India**

**Ministry of Finance**

**Department of Revenue**

**(Central Board of Excise and Customs)**

New Delhi, the 15<sup>th</sup> June, 2017

#### **OFFICE MEMORANDUM**

Please find enclosed a press release issued by Central Board of Excise and

Customs w.r.t. "*Reduced Liability of Tax on complex, building, flat etc. under GST*", for taking necessary action at your end.

**Encls:** As above

#### **PRESS RELEASE**

The CBEC and States have received several complaints that in view of the works contract service tax rate under GST at 12% in respect of under construction flats, complex etc, the people who have booked flats and made part payment are being asked

to make entire payment before 1<sup>st</sup> July 2017 or to face higher tax incidence for payment made after 1<sup>st</sup> July 2017. This is against the GST law. The issue is clarified as below:-

1. Construction of flats, complex, buildings will have a lower incidence of GST as compared to a plethora of central and state indirect taxes suffered by them under the existing regime.
2. Central Excise duty is payable on most construction material @12.5%. It is higher in case of cement. In addition, VAT is also payable on construction material @12.5% to 14.5% in most of the States. In addition, construction material also presently suffer Entry Tax levied by the States. Input Tax Credit of the above taxes is not currently allowed for payment of Service Tax. Credit of these taxes is also not available for payment of VAT on construction of flats etc. under composition scheme. Thus, there is cascading of input taxes on constructed flats, etc.
3. As a result, incidence of Central Excise duty, VAT, Entry Tax, etc. on construction material is also currently borne by the builders, which they pass on to the customers as part of the price charged from them. This is not visible to the customer as it forms a part of the cost of the flat.

4. The current headline rate of service tax on construction of flats, residences, offices etc. is 4.5%. Over and above this, VAT @1% under composition scheme is also charged. The buyer only looks at the headline rate of 5.5%. In other cities/states, where VAT is levied under the composition scheme @2% or above, the headline rate visible to the customer is above 6.5%. What the customer does not see is the embedded taxes on account of cascading and sticking of input taxes in the cost of the flat, etc.
5. This will change under GST. 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% and it is for this reason that refund of overflow of input tax credits to the builder has been disallowed.
6. 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. It is, therefore, advised to all builders / construction companies that in the flats under construction, they should not ask customers to pay higher tax rate on instalments to be received after imposition of GST.

7. 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.**

#### **4.4.2 No additional burden on Homebuyers – 15.09.2017**

Issued by C.B.E. & C. and Commercial Taxes Department of

States/Union Territories on 15-9-2017

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

- The CBEC and States have received many complaints that in view of the works contract Service Tax rate under GST at 12% in respect of under construction flats, complex etc., the people who have booked flats and made part payment before 1st July, 2017, are being asked to bear higher tax incidence for payments made after 1st July, 2017. This is against the GST law, as explained below.
- Construction of flats, complex, buildings have a lower incidence of GST as compared to a plethora of Central and State Indirect Taxes suffered by them under the earlier regime.
- Central Excise Duty was earlier payable on most construction material @ 12.5%. It was higher in case of cement. In addition, VAT was also payable on construction material @ 12.5% to 14.5% in most of the States. In addition, construction material also earlier suffered Entry Tax levied by the States. Input Tax Credit of the above taxes was not allowed for payment of

Service Tax. Credit of these taxes was also not available for payment of VAT on construction of flats etc. under composition scheme. Thus, there was cascading of input taxes on constructed flats etc.

- As a result, incidence of Central Excise Duty, VAT, Entry Tax, etc. on construction material was earlier being borne by the builders, which they passed on to the customers as part of the price of flats charged from them. This was not visible to the customer as it formed a part of the cost of the flat.
- The earlier headline rate of Service Tax on construction of flats, residences, offices etc. was 4.5%. Over and above this, VAT @ 1% under composition scheme was also charged. The buyer only looked at the headline rate of 5.5%. In other Cities/States, where VAT was being levied under the composition scheme @ 2% or above, the headline rate visible to the customer was above 6.5%. What the customer did not see is the embedded taxes on account of cascading and sticking of input taxes in the cost of the flat etc.
- The situation has changed under GST. Under GST, full input credit is 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% and it is for this reason that refund of overflow of Input Tax Credits to the builder has been disallowed.

- The builders are expected to pass on the benefit of lower tax burden under the GST regime to the buyers of property by way of reduced prices/installments. It is, therefore, advised to all builders/ construction companies that in the flats under construction, they should not ask customers to pay higher amount of installments inclusive of all taxes 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.

#### **4.4.3 Works Contract awarded by railways - 27<sup>th</sup> Oct. 2017**

##### **Ministry of Railways – Works Contracts awarded before implementation of GST**

###### **MOR (RB) Letter 2017/CE-I/CT/7/GST, dated 27-10-2017**

*Subject : Impact of GST on Existing Works Contracts*

1. Ministry of Railways have received a number of representations from Zonal Railways, railway contractors and contractors' associations with a request that the increased tax liability due to implementation of GST should be borne by railways in works contracts awarded before implementation of GST. The issue was under consideration of Board for some time. It is seen that the impact of GST varies, depending upon the type of work, business model adopted by contractor and also on the state in which these works are being carried out. The impact is much more in labour intensive works like P.Way linking, Earthwork etc.
2. Considering the above, it has been decided to make existing works contracts awarded before implementation of GST, as **GST neutral** after carefully taking into account the input tax credit available to the contractor, on a case to case basis, on production of documentary evidence. This exercise may involve reimbursement to contractors or recovery from contractors depending upon the tax liability of the contractor before GST and

after GST including input tax credit available to the contractor after GST.

3. Zonal Railways/Production Units may therefore work out modalities through a procedure order with the approval of General Manager in consultation with Principal Financial Advisor & legal cell. Following should be kept in view while framing the procedure order :

- 3.1 For dealing with impact of GST in individual contracts, a supplementary agreement is to be entered into with the contractor in consultation with financial advisor in terms of Para 1265 of the Engineering Code.

- 3.2 A clause is to be added in the supplementary agreement to state that in case there is any further change in the GST tax structure till the date of completion of work or any error is noticed in the calculation of amount payable/recoverable till the release of Final Bill amount to contractor, the same shall be paid by the Railways or recovered from the contractor's bills/security deposit or any other dues of contractor with the Govt. of India.

- 3.3 In case while awarding the contracts, the reasonability of rates was justified by Tender committee considering the impact of GST, such compensation would not apply.

- 3.4 For neutralizing GST impact on the works contracts awarded before implementation of GST; along with documentary evidence, the contractor should submit work sheet of tax liability before GST and after GST duly certified by chartered accountant engaged by him. The tax liability of the contractor before implementation of GST should be worked out taking into account all stipulated taxes in force before GST implementation i.e., Excise duty, VAT including VAT on Excise duty, Entry tax, Octroi duty, prevalent Service tax etc., irrespective of whether the same were actually paid by agency or not.
- 3.5 The rate reasonability and quantities of input materials for which ITC shall be available to the contractor, should be ensured by the executive with due care in consultation with associate finance.
- 3.6 Sample post checks of the compensation made to the contractor may be got undertaken by the GST consultant engaged by the Zonal Railways/Production Units.
- 3.7 Recovery, if any, which is required to be done from the contractors, may be regulated as per Section 171(1) of CGST Act, 2017.
4. This is issued with the approval of Board (ME, FC, CRB).

#### **4.4.4 No additional burden on home buyers - 9<sup>th</sup> January**

**2018**

Issued by C.B.E. & C. and Commercial Taxes Department of  
States/Union Territories on 9-1-2018

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

As per GST law, construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier, is a supply of service and liable to GST.

1. Sale of building is an activity or consideration which is neither a supply of goods nor a supply of services (Para 5 of schedule III of the CGST Act, 2017).
2. It flows from the above facts that, sale of ready-to-move-in or completed property does not attract GST. GST is payable only on under construction property as discussed below.

	<b>Under Construction Property</b>
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<p align="center"><b>Property for which completion certificate has been issued</b></p>	<p align="center"><b>Entire consideration has been paid to the builder before 1st July, 2017</b></p>	<p align="center"><b>Part consideration has been paid to the builder before 1st July, 2017</b></p>
<p>No GST is applicable on ready-to-move-in or completed property as per para 5(b) of Schedule II of CGST Act, 2017.</p>	<p>There is no GST payable on such property even if the construction is completed after 1st July, 2017. This transaction will attract Service Tax at the rate of 4.5% because as per the Point of Taxation Rules, 2011 applicable to Service Tax, where the invoice was raised or payment made prior to the appointed date under GST, the</p>	<p>4.5% of Service Tax is applicable on the invoices raised or consideration paid before the 1st July, 2017. However, payment made by the buyer to the builder on or after 1st July, 2017 against invoices issued on or after 1st July, 2017 shall attract GST @ 12%.  However, it must be noted that with effect from 1st July, 2017, the builder is eligible for availing full input tax credit (ITC) on goods and services for paying his output tax @ 12%. Further, under Section 171 of the CGST Act, any reduction in tax rate on supply of goods or services or</p>

	<p>point of taxation arose before the appointed day and thus such transaction attracts Service Tax and not GST.</p>	<p>the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices. Anti-profiteering Authorities have been set up to examine whether input tax credits availed by a registered person have actually resulted in a commensurate reduction in price of the goods or services supplied by him.</p>
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**RATE OF GST**

Effective rate of GST payable on purchase of under construction residence or commercial properties from a builder involving transfer of property in land or undivided share of land to the buyer, is 12% with full Input Tax Credit (ITC). [GST payable @ 18% on 2/3rd of the amount for the property; 1/3rd of the amount having been deemed as value of land or undivided share of land supplied to the buyer.]

#### **4.4.5 25<sup>th</sup> GSTC PR (extracts) – 18<sup>th</sup> January 2018**

##### **Recommendations made by the GST Council in its 25<sup>th</sup> Meeting held on 18<sup>th</sup> January, 2018 at Delhi for the housing sector**

In the meeting held on 18<sup>th</sup> January, 2018, the GST Council has made several important recommendations for the housing sector. The recommendations are expected to promote affordable housing for the masses in the country. The recommendations are discussed below.

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7. 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.

**8. The builders/developers are expected to follow the principles laid down under section 171 of the GST Act scrupulously.**

9. The above changes shall come into force with effect from 25 January 2018.

#### 4.4.6 Effective rates for flats - 8<sup>th</sup> December 2018

##### **Effective tax rate on complex, building, flat etc.**

It is brought to the notice of buyers of constructed property that there is no GST on sale of complex/ building and ready to move-in flats where sale takes place after issue of completion certificate by the competent authority. GST is applicable on sale of under construction property or ready to move-in flats where completion certificate has not been issued at the time of sale.

2. Effective rate of tax and credit available to the builders for payment of tax are summarized in the table for pre-GST and GST regime.

<b>Period</b>	<b>Output Tax Rate</b>	<b>Input Tax Credit details</b>		<b>Effective Rate of Tax</b>
Pre-GST	Service Tax: 4.5% VAT: 1% to 5% (composition scheme)	Central Excise on most of the construction materials: 12.5% VAT: 12.5 to 14.5% Entry Tax: Yes	No input tax credit (ITC) of VAT and Central Excise duty paid on inputs was available to the builder for payment of output	Effective pre-GST tax incidence: 15- 18%

			<p>tax, hence it got embedded in the value of properties.</p> <p>Considering that goods constitute approximately 45% of the value, embedded ITC was approximately 10-12%.</p>	
GST	<p>Affordable housing segment: 8%,</p> <p>Other segment: 12% after 1/3<sup>rd</sup></p>	<p>Major construction materials, capital goods and input services used for construction of flats, houses, etc. attract GST</p>	<p>ITC available and weighted average of ITC incidence is approximately 8 to 10%.</p>	<p>Effective GST incidence, for affordable segment and for other segment has not</p>

	abatement of value of land	of 18% or more.		increased as compared to pre- GST regime.
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3. Housing projects in the affordable segment such as Jawaharlal Nehru National Urban Renewal Mission, Rajiv Awas Yojana, Pradhan Mantri Awas Yojana or any other housing scheme of State Government etc., attract GST of 8%. For such projects, after offsetting input tax credit, the builder or developer in most cases will not be required to pay GST in cash as the builder would have enough ITC in his books of account to pay the output GST.
4. For projects other than affordable segment, it is expected that the cost of the complex/ buildings/ flats would not have gone up due to implementation of GST. Builders are also required to pass on the benefits of lower tax burden to the buyers of property by way of reduced prices/ installments, where effective tax rate has been down.

## 4.5 Ministry of Consumer Affairs

### 4.5.1 FAQ on MRP<sup>59</sup>

#### **FAQs on Relaxation of Legal Metrology (Packaged Commodities)**

#### **Rules, 2011 for facilitation of implementation of the provisions of the GST Act and Rules**

**1) What is MRP?**

MRP is the maximum retail sale price inclusive of all taxes.

**2) Whether GST is included in MRP?**

Yes, The MRP on a pre-packaged commodity is inclusive of all taxes that can be levied from the consumer, including the GST.

**3) Whether any retailer may charge GST over MRP?**

No. GST is included in MRP and is not to be charged over MRP.

**4) Is it allowed to revise the MRP if there is any price change after coming into force of the GST law?**

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<sup>59</sup> <https://consumeraffairs.nic.in/more/gst>

With coming into force of the GST law, in rare cases, where there is a need for revising the retail sale price above the already printed MRP on a pre-packaged commodity, Manufacturers/ Packers/ Importers can declare such revised MRP on their unsold stock through stickers/ online printing/ stamping, with the following conditions:

- i) Difference cannot exceed the net price increase on account of incidence of tax after factoring in and taking into consideration extra availability of input tax credit under GST (including deemed credit available to traders under proviso to subsection (3) of section 140 of the CGST Act,2017);
- ii) Original MRP shall continue to be displayed and the revised MRP shall not overwrite on it;
- iii)Manufactures/ Packers/ Importers have to issue two advertisements in one or more newspapers and intimate the Director Legal Metrology and Controllers of Legal Metrology in the states.

## **5) How new MRP will be calculated for the purposes of labeling?**

New MRP of unsold stock manufacture/ packed/ imported prior to 1<sup>st</sup> July 2017 should not be calculated mechanically but after factoring in and taking into consideration extra availability of input tax credit

under GST (including deemed credit available to traders under provision to subsection (3) of section 140 of the CGST Act,2017).

**6) How upward revision of prices can be displayed?**

After declaration of the price by the manufacturer/ Packer/ Importer by complying with the procedure explained in answers to the questions 4 and 5 above, either the Manufacturer/ Packer/ Importer as the case may be or a Wholesaler/Retailer shall affix a sticker/ print/ stamp indicating the revised prices so fixed, advertised and communicated by the Manufacturer/ Packer/ Importer.

**7) How downward revision of prices can be displayed?**

As per proviso to rule 6(3) of the Legal Metrology (Packaged Commodities) rules, 2011 reduced MRP may be declared by putting a separate revised MRP sticker, and the same shall not cover the MRP declaration made by the Manufacturer/ Packer/ Importer. Further, i) Advertisement and intimation to Legal Metrology authorities will not be mandatory in case of such downward revision, ii) Either the Manufacturer/ Packer/ Importer as the case may be or a Wholesaler/ Retailer shall affix the sticker displaying reduced MRP as per the price fixed and communicated by the Manufacturer/ Packer/ Importer.

**8) Does the order on MRP issued by the department of Consumer Affairs apply to all the goods?**

The order applies only to the goods sold in the pre- packaged form, excluding scheduled formulations and non-scheduled formulation covered under the drugs (price control) order. Commodities sold in loose condition are not covered under the said order.

**9) What is the time limit for display of revision of MRP through stickers/ stamps/ online printing, on unsold stocks?**

The time limit is 30<sup>th</sup> September 2017 or till the stock remains unsold, whichever is earlier.

**10) Is the said order applicable for unused wrappers?**

Yes. Any packaging material or wrapper which could not be exhausted by the manufacturer or packer or importer prior to 1<sup>st</sup> July, 2017 may be used for packing of material upto 30<sup>th</sup> September, 2017 or till such date the packing material or wrapper is exhausted, whichever is earlier.

## 4.5.2 Joint PR<sup>60</sup>

### Press Release

#### Joint Clarification from the Department of Revenue and the Department of Consumer Affairs, Government of India regarding the circular WM-10(31)/2017 Dated 04.07.2017

"It is clarified to all concerned that in the circular WM-10(31)/2017 Dated 04.07.2017, on the subject "Impact of GST on the unsold stock of pre-packaged commodities" the phrase *"the increased amount of tax due to GST, if any"* means *"the effective increase in the tax liability calculated after taking into consideration extra availability of input tax credit under GST (including deemed credit available to the traders under CGST)"*

Thus, the declaration of new MRP on unsold stock manufactured/packed/ imported prior to 1st July 2017 should not be done mechanically but after factoring in and taking into consideration extra availability of input tax credit under GST (including deemed credit available to traders under proviso to subsection (3) of section 140 of the CGST Act,2017).

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<sup>60</sup> <https://consumeraffairs.nic.in/more/gst>

## 4.6 CBIC - Anti-profiteering FAQs

### Anti-profiteering provisions – FAQs - CBIC

#### **Q1. What is profiteering?**

**Ans.** In terms of Section 171 of the CGST Act, 2017, the suppliers of goods and services should pass on the benefit of any reduction in the rate of tax or the benefit of input tax credit to the recipients by way of commensurate reduction in prices. The wilful action of not passing on the above benefits to the recipients in the manner prescribed is known as “profiteering”.

#### **Q2. What is the background to providing statutory provisions on anti-profiteering in GST law?**

**Ans.** The Study Report titled ‘Implementation of Value Added Tax (VAT) in India-Lessons for transition to GST’ released by the Comptroller & Auditor General (C&AG) of India in June, 2010 mentioned about several cases of profiteering by dealers by not passing on the benefit of tax rate reduction to the consumers in the wake of implementation of VAT in the country. 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. As a learning from the VAT

experience, legal teeth was sought to be provided in GST law by incorporating anti-profiteering provisions to check profiteering by businesses when GST was being rolled out in the country.

**Q3. What are the statutory provisions of anti-profiteering in GST law?**

**Ans.** Section 171 of CGST Act, 2017, provides that *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.

Chapter XV of the CGST Rules, 2017 comprising of 16 Rules (Rule 122 to Rule 137), contains the detailed mechanism and procedure.

**Q4. Is there a sunset clause for Anti-Profiteering law?**

**Ans.** Yes. In terms of Rule 137 of the CGST Rules, 2017, the Anti-profiteering Authority shall cease to exist after the expiry of two years from the date on which the Chairman of the Authority enters upon his office unless the GST Council recommends otherwise.

***Q5. What are some of the instances in which the statutory provisions of anti-profiteering will kick in?***

**Ans.** The different situations in which Section 171 of CGST Act, 2017 & the identical provision in State/UT GST Act will get attracted include:

- i. reduction in tax rate;
- ii. benefit of Input Tax Credit (ITC) available to the registered person/ supplier.

***Q6. What is the function of National Anti-Profiteering Authority (NAA)?***

**Ans.** The National Anti-Profiteering Authority (NAA) is required to determine whether the benefit of input tax credit or reduction in the tax rate has actually resulted in a commensurate reduction in the price of the goods or services or both.

The NAA has the power to identify the registered person who has not passed on the benefit of reduction in tax rate or input tax credit by way of commensurate reduction in prices and it may order reduction in prices; return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest; cancellation of registration of the supplier and imposition of

penalty. In case the eligible recipient is not identifiable or does not claim return of the amount, the NAA may order the supplier to deposit the amount in the Consumer Welfare Fund.

**Q7. Should a customer pay extra GST on Maximum Retail Price (MRP) affixed on goods?**

**Ans.** No. MRP is inclusive of GST and is the maximum retail price that can be charged from the consumers.

**Q8. In cases of over-charging in the name of GST, where can a consumer register his complaint for redressal?**

**Ans.** Charging more than MRP attracts the provisions of Legal Metrology Act. In case of over-charging over MRP, a complaint can be lodged on toll-free number 1800-11-4000/14404.

There are multiple ways through which aggrieved consumers or suppliers of goods and services can register their complaints against profiteering:

a. *Online complaint facility :*

Complainant can register an online complaint at <http://www.naa.gov.in/complaint.php>.

Link to see the guidelines to register online complaint :

<http://www.naa.gov.in/page.php?id=guidelines-for-consumers>

b. *Via Mail :*

User can mail the complaint at :

<b>Agencies</b>	<b>Mail-Id</b>	<b>Nature of the complaint</b>
Standing Committee	sc.antiprofitteering@gov.in anti-profitteering@gov.in	Complaints involving issues of all-India nature.
State-Screening Committees	For State-wise E-mail Addresses please refer to : <a href="http://www.naa.gov.in/doc/screening%20committees%202020-08-18.xlsx">http://www.naa.gov.in/doc/screening%20committees% 2020-08-18.xlsx</a>	Complaints involving issues of local nature.

c. *By Post :*

<b>Agencies</b>	<b>Postal Addresses</b>
National Anti-profitteering Authority	National Anti-profitteering Authority Dept. of Revenue, Ministry of Finance 6th Floor, Tower One

	Jeevan Bharati Building Connaught Place New Delhi-110 001.
Directorate General of Anti- Profiteering & Standing Committee	Directorate General of Anti-profiteering, Dept. of Revenue, Ministry of Finance, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi -110 001.

**Q9. In cases of profiteering in the name of GST, what is the complaint redressal mechanism available to the consumer?**

**Ans.** The CGST Act, SGST Acts & the CGST/SGST Rules framed thereunder provide for the following complaint redressal mechanism.

1. The aggrieved persons may file an application, in the prescribed format, before the Standing Committee on Anti-profiteering or before the State Level Screening Committee. (If the issue involved is of local nature).
2. The State Level Screening Committee constituted in every State/UT with legislature examines it & forwards it to the Standing Committee constituted at the national level, if a prima facie case of profiteering is made out against the registered person.

3. Thereafter, the Standing Committee shall refer the matter to the Director General of Anti-Profiteering (erstwhile DG, Safeguards) for a detailed investigation, if prima facie evidence of profiteering exists.
4. The DG, Anti-Profiteering shall conduct the investigation and submit its report to the National Anti-Profiteering Authority (NAA) constituted by the Central Government under section 171(2) of the CGST Act, 2017 for taking appropriate action, as mentioned in the Answer to Q6. above.

**Q10. How can one file complaint against profiteering?**

**Ans.** An online complaint can be filed at <http://www.naa.gov.in/comp-laint.php>. Complaints of the nature of national-level can be filed by e-mail at [sc.antiprofitteering@gov.in](mailto:sc.antiprofitteering@gov.in). Complaints of local nature can be sent by mail to the respective State Screening Committee.

**Q11. Whether one form is sufficient for multiple goods or services?**

**Ans.** No, the prescribed application form APAF-01 is with reference to a single Good/Service. In case of application for multiple

Goods/Services, separate application for each Goods/Service is required to be filed.

***Q12. What is the methodology to identify cases of profiteering?***

**Ans.** Rule 126 of the CGST Rules, 2017 vests the power to determine the methodology & procedure with the National Anti-Profiteering Authority constituted by the Central Government under Section 171(2) of the CGST Act, 2017. The guiding principle mentioned in the said Rule states that the reduction in tax rate on supply of goods or services or benefit of input tax credit has to be passed on to the recipient by way of commensurate reduction in prices. The methodology and procedure adopted to identify cases of profiteering may vary from case to case, depending upon the facts of the case and the nature of goods or services supplied.

***Q13. What are some of the measures taken by the Consumer Affairs Ministry in the Government of India to check cases of profiteering post implementation of GST?***

**Ans.** The Consumer Affairs Ministry in the Government of India, vide its letter no. WM-10(31)/2017, dated 4-7-2017, permitted the manufacturers or packers or importers of pre-packaged commodities

to affix new MRP labels (after incorporating tax changes due to GST) in addition to existing MRP for three months from 1st Jul. to 30th Sept., 2017. Similar action was taken after the GST rate reduction in November, 2017 and July, 2018.

***Q14. What can buyers do if shopping malls and retail stores are still selling goods at pre-GST affixed labels?***

***Ans.*** As per the Government's directive, shopping malls and retail stores are required to affix two MRP labels reflecting both pre-GST & post-GST prices. Despite this, if consumers find that retailers are selling goods at pre-GST affixed labels, they can report to National Consumer Helpline. Also, the administrative machinery of the Controller of Legal Metrology can be effectively used by States/UTs to monitor & resolve such cases.

***Q15. How can buyers of under-construction flats benefit from the anti-profiteering provisions?***

***Ans.*** Section 171 of the CGST Act, 2017 can be invoked when the builder increases the instalment amount to be paid in case of an under construction flat, complex etc., on the pretext of leviability of 12% GST as against the apparently lower tax rates in the earlier indirect tax regime. In pre-GST era, Central Excise duty was payable on most

construction material at 12.5%. In addition, VAT was payable on construction material at 12.5% to 14.5% in most of the States & the construction material also suffered entry tax. The input tax credit of the above taxes was inadmissible for meeting Service Tax liability of the builder, thus leading to cascading of input taxes on constructed flats & a higher effective tax incidence. But GST regime allows full input tax credit for offsetting the headline rate of 12%, thereby reducing the effective tax incidence.

***Q16. Can action be taken under the anti-profiteering provisions in case benefit of transitional credit availed is not passed to the consumers?***

***Ans.*** The benefit of transitional input tax credit allowed under Section 140(3) of the CGST Act, 2017, is required to be passed on to the recipient by way of reduced prices.

***Q17. What is the time-frame for deciding cases of anti-profiteering provisions?***

***Ans.*** The maximum time envisaged for resolution of cases is 9 months excluding the time taken by the State-level screening committee and the Standing Committee (maximum 2 months) for processing the complaints.

**Q18. What should a complainant ensure while submitting complaint to Screening Committee/Standing Committee?**

**Ans.** 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.

**Q19. A company in order to justify the prices being charged by it may have to submit information which could be confidential and may impact its business interest?**

**Ans.** The provisions of section 11 of the Right to Information Act, 2005, shall apply *mutatis mutandis* to the disclosure of any information which is provided on a confidential basis.

The DG, Anti-Profiteering may require the parties providing information on confidential basis to furnish a non-confidential summary thereof. If in the opinion of the party providing such information, the said information cannot be summarised, such party may submit a statement of reasons as to why summarisation is not possible.

**Q20. Where can one access the orders passed by NAA?**

**Ans.** All the orders passed by NAA are available on their website  
*<http://www.naa.gov.in/news.php?cat=2>*.

Source – CBIC-GST.gov.in

## 4.7 NAA Chairman's Message

<sup>61</sup>The National Anti-profiteering Authority (NAA) is the institutional mechanism under GST law to check the unfair profit-making activities by the trading community. The Authority's core function is to ensure that the benefits of the reduction in GST rates on goods and services made by GST Council and proportional change in the Input tax credit passed on to the ultimate consumers and recipient respectively by way of reduction in the prices by the suppliers.

The formation of NAA comes in the background of rate-reduction of large number of items by GST Council in its 22nd meeting at Guwahati. At the meeting, the Council reduced rates of more than 200 items including goods and services. This has made tremendous price reduction effect and the consumers will be benefited only if the traders are making quick reduction of prices of respective items.

The Authority's main function is to ensure that traders are not realizing unfair profit by charging high price from consumers in the name of GST. The responsibility of NAA is to examine and check such profiteering activities and recommend punitive actions including

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<sup>61</sup> Reproduced from <http://www.naa.gov.in/page.php?id=chairman-message>

cancellation of Registration. The chairman, NAA along with 4 Technical members and with help of the Standing Committee, Screening Committee in every state and the Directorate General of Anti-profiteering in the Central Board of Indirect taxes and Customs (CBIC), will work together on the anti-profiteering front.

We hope to bring transparency in our decisions and be more proactive in persuading the industry and traders in passing on benefits to the consumers.

B N Sharma,

Chairman, NAA, Ex-Officio Secretary of GoI

#### **4.7.1 Review Meeting at Mumbai (28<sup>th</sup> December 2018)**

<sup>62</sup>Review Meeting of Anti-Profiteering efforts at Mumbai dated 28<sup>th</sup> December, 2018.

Posted on: January 02, 2019

The Chairman-cum-ex-officio Secretary to the National Anti-Profiteering Authority under GST Shri B.N. Sharma hold a review meeting on Anti-Profiteering efforts at Mumbai on 28<sup>th</sup> December 2018 with the members of Screening Committee and senior officers of CGST-Mumbai and Maharashtra State GST department.

In meeting the Chairman emphasized on the need of pro-active enquiries by GST field formation to ensure that effect of reduction of tax rates or benefit of ITC is being commensurately passed on to the consumers. He further added that any instance of non-compliance with the provisions of anti-profiteering should properly be inquired into and brought to the notice of NAA. He also discussed recent cases inquired and decided by the authority with the GST officials. It was impressed upon by the Chairman that whenever GST-rates are reduced by the government in favour of consumers, the GST field

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<sup>62</sup> Reproduced from [http://www.naa.gov.in/news\\_detail.php?newsid=83](http://www.naa.gov.in/news_detail.php?newsid=83)

formations should make a study on prices pre and post rate change so as to ensure that benefit of such reduction is passed on to the consumers. The GST officials informed Chairman regarding inquiries being made by the department to ensure the compliance of anti-profiteering provisions.

#### **4.7.2 Meeting of NAA at Delhi (5<sup>th</sup> December 2018)**

Presentation hosted by the National Anti-profiteering Authority, on 5th Dec, 2018 at New Delhi, on ITC Benefits to the Construction Sector and Anti-Profiteering Mechanisms.

Posted on: December 05, 2018

**<sup>63</sup>Presentation hosted by the National Anti-profiteering Authority, on 5th Dec, 2018 at New Delhi, on ITC Benefits to the Construction Sector and Anti-Profiteering Mechanisms.**

As part of its outreach activities, the National Anti-profiteering Authority (NAA) hosted a presentation on the topic, "ITC Benefits to the Construction Sector and Anti-Profiteering Mechanisms", on 5th December, 2018, in New Delhi, chaired by Sh. BN Sharma, Chairman (NAA). The keynote speaker was Sh. Vijay Kr. Choudhary, GM (Finance) of National Building Construction Company (NBCC). The esteemed guests in the audience included Sh. Sunil Kr. Sawhney (Director General, DG Anti-Profiteering), Sh. Himanshu Gupta (Pr. Commissioner, Delhi North Commissionerate), Sh. OP Dadhich (Principal Commissioner, Customs), Smt. BK Sokhey (Chief Finance

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<sup>63</sup> [http://www.naa.gov.in/gallery\\_detail.php?eventid=8](http://www.naa.gov.in/gallery_detail.php?eventid=8)

Officer, NBCC), Sh. PK Mohanty, (Advisor to the Government of India on GST-related matters), and representatives from the field-formations of Delhi-NCR. The detailed nuances of the ITC Benefit made available to the construction sector were discussed in light of the Anti-profiteering mechanism under the GST law. The meeting was very insightful and fruitful for all the participants.

### **4.7.3 Meeting of NAA at CII, Mumbai**

#### **<sup>64</sup>National Anti-Profiteering Authority is not a price regulator : Mr B. N Sharma Chairman, National Anti-Profiteering Authority**

Mr B N Sharma, Chairman, National Anti-Profiteering Authority, assured companies that the National Anti-Profiteering Authority is not a price regulator and neither does it have legislative intent. He was addressing an interactive session with industry organized by the Confederation of Indian Industry (CII) at Mumbai today.

Mr Sharma mentioned that authorities are sensitive to natural business outcomes and appreciate that several factors contribute to pricing decisions such as supply and demand, supplier's cost and taxes, etc. Hence, it is not justified to lay down uniform parameters across sectors.

The Chairman said that the three-layer mechanism consisting of screening committee at state level or Standing committee where

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<sup>64</sup> [http://www.naa.gov.in/news\\_detail.php?newsid=42](http://www.naa.gov.in/news_detail.php?newsid=42)

impact is pan-India; Investigatory at Director General Safe Guards and National Anti-Profiteering Authority help identify genuine cases of anti-profiteering where they exist.

The anti-profiteering measures introduced under GST are extremely critical in today's business, as reduction of GST rates is required to be passed on to the customers on immediate basis.

Clear guidelines on how pricing and profits are to be calculated under GST regime to track any unlawful gains and whether anti-profiteering provisions would apply at entity or a product level were taken up at the session. 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.**

Clarifying the **applicability at SKU levels**, he reiterated that **it is product specific, affecting individual customers and cannot be clubbed. He further clarified that past losses cannot be adjusted against the reduced tax rates. Any business-as-usual activity in the form of business promotion by way of offering discounts or increasing unit quantity cannot offset the commensurate benefit to the end consumers.**

Mr Sharma stressed that companies need to set mechanisms to address the requirements of the provisions of anti-profiteering.

**4 October 2018**

**New Delhi**

#### **4.7.4 Meeting with Mr. Allan Fels (Australia)**

<sup>65</sup>Conference on experience of Anti-profiteering in Australia- with Mr. Allan Fels, Ex-Chairman Australian Competition and Consumer Commission

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<sup>65</sup> [http://www.naa.gov.in/gallery\\_detail.php?eventid=2](http://www.naa.gov.in/gallery_detail.php?eventid=2)

## 4.8 CBIC Notes on select product/ services (May' 2017)

### 4.8.1 Note on Cement, medicament etc<sup>66</sup> (22 May 2017)

#### **PRESS RELEASE**

#### **Note on Important Commodities**

Cement: Packaged cement attracts central excise duty of 12.5% + Rs.125 PMT and standard VAT rate of 14.5%. At these rates, the present total tax incidence works out to more than 29%. If we include tax incidence on account of CST, octroi, entry tax, etc., the present total tax incidence would work out to more than 31%. As against this, the proposed GST rate for cement is 28%.

1. Medicaments, including Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic systems: Medicaments, in general, attract 6% central excise duty and 5% VAT. Further, CST, octroi, entry tax, etc. are also applicable in general. At these rates, the present total tax incidence works out to more than 13%. As against this, the proposed GST rate on medicines, including ayurvedic medicines, is 12%.

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<sup>66</sup> <http://www.cbic.gov.in/resources//htdocs-cbec/press-release/cement-press-relse.pdf;jsessionid=7200B9FE682F90FDB316052D4FB8C64E>

2. Smart phones: Smart phone attracts 2% central excise duty [1% excise duty + 1% NCCD]. VAT rates vary from State to State from 5% to 15%. Weighted average VAT rate on smart phones works out to about 12%. Thus, the present total tax incidence on smart phones works out to more than 13.5%. As against this, the proposed GST rate for smart phones is 12%.
  
3. Medical devices including surgical instruments: Medical devices, including surgical instruments, in general attract 6% central excise duty and 5% VAT. Along with CST, octroi, entry tax, etc., the present total tax incidence on them works out to more than 13%. As against this, the proposed rate under GST is 12%.
  
4. Puja samagri including havan samagri: These goods will be under Nil category.  
  
However, exact formulation for the same is yet to be finalised.

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#### **4.8.2 Note on Entertainment services<sup>67</sup> (23 May 2017)**

### **PRESS RELEASE**

#### **Tax Incidence on Entertainment Services under GST**

Taxes on entertainments and amusements (covered by the erstwhile entry 62 of State List of the Constitution) have been subsumed under GST except to the extent of taxes on entertainments and amusements levied by a Panchayat or a Municipality.

2. The rate of GST approved by GST Council on services by way of admission to entertainment events or cinematography films in cinema theatres is 28%. However, the entertainment tax rates in respect of exhibition of cinematography films in theaters/cinema halls, currently levied by States are as high as 100% in some of the States.
3. The rate of entertainment tax on cable TV and Direct-To-Home (DTH) levied by States is in the range of 10%-30% in many States. Apart from this, Service tax is also leviable at the rate of

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<sup>67</sup> <http://www.cbic.gov.in/resources//htdocs-cbec/press-release/press-release-entertainment-services.pdf;jsessionid=B9BBA642E95DDA83E5E1FE3E4E59BCF9>

15%. As against this, the rate of GST approved by GST Council on these services is 18%.

4. The rate of GST approved by GST Council on access to circus, theatre, Indian classical dance including folk dance and drama is 18% *ad valorem*. Further, the GST Council has approved an exemption upto a consideration for admission of Rs 250 per person. These services currently attract entertainment tax levied by the States.
  
5. Thus, entertainment services shall suffer a lower tax incidence under GST. In addition to the benefit of lower headline rates of GST, the service providers shall be eligible for full input tax credits (ITC) of GST paid in respect of inputs and input services. Presently, such service providers are not eligible to avail of input credits in respect of VAT paid on domestically procured capital goods & inputs or of Special Additional Duty (SAD) paid on imported capital goods and inputs. Thus, while GST is a value added tax, entertainment tax, presently levied by the States is like a turnover tax.

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### 4.8.3 Note on Sugar, tea, milk etc<sup>68</sup> (25 May 2017)

#### **PRESS RELEASE**

#### **Comparative analysis of the proposed GST Tax rates to the prevailing taxes on the below mentioned Important Commodities**

**1. Sugar:** Sugar attracts specific central excise duty of Rs.71 per quintal plus Sugar Cess of Rs.124 per quintal, which translates to ad valorem rate of more than 6%. Including incidence on account of account of CST, octroi, entry tax, etc., the present total tax incidence would work out to more than 8%. As against this, the proposed GST rate on sugar is 5%.

**2. Tea and coffee (other than instant coffee):** Tea and coffee attract Nil central excise duty and VAT rate of 5%. Considering embedded taxes in production of tea and coffee and the incidence on account of CST, octroi, entry tax, etc. the present total tax incidence works out to more than 7%. As against this, the

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<sup>68</sup> <http://www.cbic.gov.in/resources//htdocs-cbec/press-release/analysis-gst-rates.pdf>

proposed GST rate for tea and coffee (other than instant coffee) is 5%.

**3. Milk powder:** Milk powder attracts Nil central excise duty and 5% VAT. Considering embedded taxes in production of milk powder and the incidence on account of CST, octroi, entry tax, etc. the present total tax incidence works out to more than 7%. As against this, the proposed GST rate on milk powder is 5%.

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#### **4.8.4 Note on Telecom services<sup>69</sup> (26 May 2017)**

### **PRESS RELEASE**

#### **GST on Telecom Services**

Telecommunication services presently attract service tax of 14% along with Swachh Bharat Cess (SBC) of 0.5% and Krishi Kalyan Cess (KKC) of 0.5%. While service tax is a pure value added tax, the above mentioned cesses are not. This is for the reason that while no ITC (input tax credit) of SBC is available, the ITC of KKC is allowed to be set off only against KKC. Therefore, both the cesses are turnover tax.

2. As against the above, the telecommunication services will attract GST of 18% in the GST regime, which is a pure value added tax because full ITC of inputs and input services used in the course or furtherance of business by the telecommunication service provider would be available.
3. Moreover, presently telecom service providers are neither eligible for credit of VAT paid on goods nor of special additional duty (SAD) paid on imported goods/equipment. However, under GST, telecom

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<sup>69</sup> <http://www.cbic.gov.in/resources//htdocs-cbec/press-release/GST-telecom-services.pdf;jsessionid=A412C7500F44F68DE022E77947DFD70E>

service providers would avail credit of IGST paid on domestically procured goods as also imported goods. As per some estimates, this additional input tax credit would be as much as 2% of the turnover of the telecom industry. Further, ITC of service tax paid on assignment of spectrum by the Government in 2016 is presently allowed to be availed of by the telcos over a period of 3 years. In the GST regime, the entire credit can be taken in the same year. Resultantly, the balance two-thirds credit of the previous year would be admissible in the current financial year itself. All of these would reduce the telcos liability to pay GST through cash to about 87% of what they paid in the last fiscal.

4. Thus, the telcos are required to re-work their costing and credits availability and re-jig their prices and ensure that the increased availability of credits is passed on to the customers by lowering their costs.

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*Yesterday I was clever, so I wanted to change the world.*

*Today I am wise, so I am changing myself.*

*Rumi*