

## **Nitya's insight on anti-profiteering measures under the GST law**

### **1. INTRODUCTION OF GST**

Till June 30, 2017, India was marred by multiple indirect taxes that were levied at distinct points in a supply chain. This not only restricted the free flow of credit but also led to cascading effect of taxes. Goods and Services Tax ('GST'), introduced in India from July 1, 2017, is a value added tax levied at each stage of supply chain with no tax becoming cost.

In the initial months of implementation of GST, the government has made significant changes in rate of tax on various products (July 1, 2017 and November 15, 2017 being the key dates). This has resulted in significant reduction of overall incidence of indirect taxes on products.

### **2. PRICING AS A BUSINESS FUNCTION**

Indirect taxes (like GST) levied on goods or services are always borne by the ultimate consumer. Thus, any increase or decrease in their incidence is to be borne or enjoyed by the end consumer only.

Pricing has always been a business function, however, due to various economic factors, the government has chosen to bring few products in the pricing regulations like DPCO for Drugs, FCO for fertilizers etc. Apart from such products, a business entity is always free to decide product pricing. Even the Sale of Goods Act, 1930 permit buyer and seller to agree to do business based on mutually agreeable terms.

It is pertinent to note that changes in indirect tax structure is not something new in India and the country witnessed introduction of Value Added Tax ('VAT'), regular changes in rates of excise duty, customs duty service tax, VAT etc. Till now, the Indian government never intervened in the way in which the business entities determine price of their products.

### **3. ANTI-PROFITEERING MEASURES IN INDIA**

#### *Statutory provisions*

For the first time, the government has incorporated anti-profiteering measures under Section 171 of the Central Goods and Services Tax Act, 2017. Under Section 171, the following benefits need to be passed to the customers by way of reduction in prices:

- a) Reduction in rate of tax on supply of goods and services
- b) Benefit of Input Tax Credit ('ITC')

For this purpose, Anti-Profiteering Rules are enacted under Chapter XV (Rule 122 to Rule 137) of the Central Goods and Services Tax Rules, 2017.

On the face of it, the measure is well-intentioned to ensure that tax efficiencies and tax reductions emerging in GST regime, are passed on to the ultimate customers and is not pocketed by the business

entities. However, Indian laws do not provide for any guidelines for measuring profiteering which poses a significant challenge to business entities in its implementation.

### *International experience*

India is not a unique country to implement anti-profiteering measure. Australia, Malaysia, New Zealand and Canada introduced this measure while adopting GST / VAT. However, there is a significant departure in the manner of implementation of anti-profiteering measures in India vis-à-vis global practice. Across the world, anti-profiteering authority was independent of tax administration whereas GST authorities have only been entrusted to implement this measure in India.

### *Manner of implementation*

The Government has notified three-tier structure, comprising of the following for the implementation of anti-profiteering measures:

- State Screening Committee *[On satisfaction of prime facie evidence of profiteering, this Committee will refer the matter to the Standing Committee]*
- Central Standing Committee *[On satisfaction of prime facie evidence of profiteering in pan India cases or based on recommendations of State Screening Committee, this Committee will refer the matter to the Director General of Safeguards ('DGS')]*
- National Anti-Profiteering Authority ('NAA') *[Based on the recommendations of DGS, this authority will conclude whether the taxpayer contravened anti-profiteering regulations]*

### *Repercussions of non-compliance*

If a business entity is found guilty of violation of anti-profiteering regulations for not passing of commensurate benefit, NAA may order the following:

- a) Reduction in prices
- b) Return the benefit to consumers or consumer welfare fund (with 18 percent interest)
- c) Imposition of penalty
- d) Cancellation of registration of supplier

### *Recent news*

The government's aggressive stand on anti-profiteering can be gathered from the following:

- The government is actively publicizing reduction in rate of GST on various products at different fora, news media etc. The Finance Secretary has repeatedly emphasized that business entities are responsible to ensure that their entire supply chain adheres to these measures so that price to end consumer is reduced

- The senior government officials told that guidelines to ascertain profiteering, would be introduced by first week of December 2017 though no such guidelines have been issued so far. These officials also said that India may adopt a product-specific approach for implementing anti-profiteering measures
- The government has manufacturers, importers, dealers etc. to affix revised MRP sticker on retail packages. The Union Minister for Consumer Affairs, Food & Public & Distribution, Shri Ram Vilas Paswan stated that revised MRP sticker needs to be affixed in all cases where MRP is required to be reduced due to reduction in rate of GST or ITC benefit
- The Union Cabinet has given nod for setting up of NAA and appointed its first chairman
- CBEC has written to all major FMCG Companies asking them to immediately revise MRP of all the products on which GST rates have been reduced
- Top tier PSUs have started demanding undertakings from their vendors for adherence to anti-profiteering measures
- The government has issued anti-profiteering application Form (APAF-1) for filing of the complaints by the consumers
- The government has issued first set of anti-profiteering notices to two business entities (a car dealer and a real estate company)

#### **4. NITYA'S TAKE ON ANTI-PROFITEERING MEASURES**

Being a consumer welfare measure, anti-profiteering regulations will always be interpreted in favors of consumer. Considering its sensitivity, possibility of foul play by competitors or heightened role of consumer NGOs cannot be ruled out. The seriousness of the issue is evident from the emerging business practices like the customers reaching out to vendors for giving anti-profiteering workings as well as anti-profiteering compliance declarations as terms of doing business, conducting third party audits from anti-profiteering perspective etc.

Despite major focus of the government on implementing anti-profiteering measures, it is still ambiguous as to what should or should not be considered while measuring profiteering under the GST law. The absence of clear guidelines makes it difficult for the tax payers to fully understand the precise business and legal implications including their rights and obligations in this context.

##### *Key issues*

The following is an illustrative list of issues that are likely to pose challenges in determining as to whether there has been a profiteering by a business entity:

- Prior to introduction of GST, a business entity may have different indirect tax costs for reasons like:
  - o Different rate of taxes applicable on same product in different States;
  - o Different rate of taxes across various product segments in the same State;

- Specific unit based tax exemptions / incentives available to a business entity etc.
- A business entity may have different pricing pattern amongst:
  - Same product sold to different customers;
  - Same products in different SKUs;
  - Different products etc.
- Treatment of following costs or incomes while computing profiteering amount:
  - Costs (because of factors such as IT changes, professional services, increase in working capital requirements, changes in raw material costs since last price revision, additional headcount required for GST compliances etc.);
  - Incomes (because of factors such as operational efficiency, consolidation of supply chain leading to reduced logistics / compliance costs, budgetary support for excise duty exempted area based units etc.);
  - Possible gains accruing indirectly because of introduction of GST (such as consolidation of supply chain leading to reduced logistics / compliance costs) etc.
- Requirement to reduce MRP on product packages or sale price consequent to reduction in effective tax incidence considering GST laws as well as the Legal Metrology regulations
- Manner of passing of the benefit in monetary terms or otherwise, say by increasing the quantity of the product without any change in price
- The newly introduced Form APAF-1 is comprehensive and likely to pose challenges as it seeks details like GSTIN of the supplier, HSN of goods, details of pre-GST and post GST MRP etc.

### *Way forward*

In the absence of any robust guidelines in Indian laws for determining profiteering and considering the importance of the issue, it becomes imperative for business entities to take informed decisions and make due adherence to anti-profiteering mandate. This can involve undertaking following activities:

- Conducting / reviewing impact assessment in terms of applicable GST rates (including changes in rates of GST) vis-à-vis rates under the erstwhile Indirect Tax laws, cost-benefit analysis including availability or restriction of input tax credit due to implementation of GST as compared to the erstwhile Indirect Tax laws at applicable business division / product family / customer / unit level
- Review of overall cost, revenue and profitability trend for analyzing change in margin calculation for the relevant products in pre-GST and post GST period
- Taking positions on various costs and benefits that should be factored while determining profiteering i.e. GST implementation as well as other non-GST factors

- Review of changes in pricing and MRP of the products in pre-GST and post-GST period including review of existing price revision policies, past profitability of the company etc.
- Review of adherence to requirements of Legal Metrology regulations regarding MRP
- Taking decisions on requirement of advertisements in media for educating the consumers about price reduction including seeking certification from distributors, retailers etc.
- Undertaking similar exercise at the end of the vendors to ensure that they pass on the benefit of reduction in taxes to the business entity
- Keeping adequate records for future verification / inspection (if any)