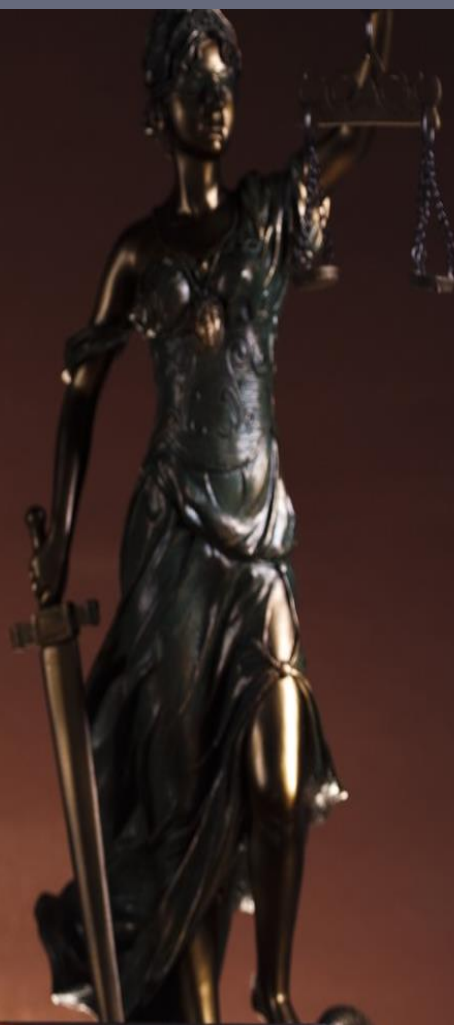




NITYA'S INSIGHT:

Legal Precedents' Series

**Issue 3 (Anti-Profiteering Orders) /
February 25, 2019**

Period: July 1, 2017 to January 31, 2019

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INTRODUCTION

The Goods and Services Tax ('GST') has been one of the major legal reforms in India in recent times which sought to simplify the indirect tax landscape in the country. As a concept, the purpose of GST is to reduce tax burden and ensure seamless credit for the taxpayers. While introducing GST, one of major fears of the government was that the business entities may not pass on the benefit of reduction in taxes or higher credits, to end consumers and this may lead to inflationary pressures. To attain this objective, the legislature enacted Anti-Profiteering measures in the GST law.

The Anti-Profiteering provisions provide that any reduction in rate of tax or the benefit of input tax credit should be passed on to the recipient by way of commensurate reduction in prices. Unfortunately, there is a single Section in GST law containing such an important measure which is both cryptic and inadequate. The taxpayers have been awaiting for long for clear guidelines prescribing methodology basis which the factum of profiteering or Anti-Profiteering can be ascertained.

The National Anti-Profiteering Authority ('NAA' or 'Authority') was established in 2018. NAA is the final authority which determines whether the profiteering exists in a particular case or not. The Authority comes with a sunset clause of two years from the date of its constitution.

Till January 2019, the Authority has issued 32 orders in diverse cases. Some of these orders have far reaching implications for the taxpayers' in general. Importantly, till now, even NAA has not laid down concrete tests to adjudge profiteering.

This Insight is an attempt to familiarize the reader with the key propositions emerging out of the orders passed by NAA till January 2019.

We hope you find this an interesting read!

Regards,
Team NITYA

Disclaimer:

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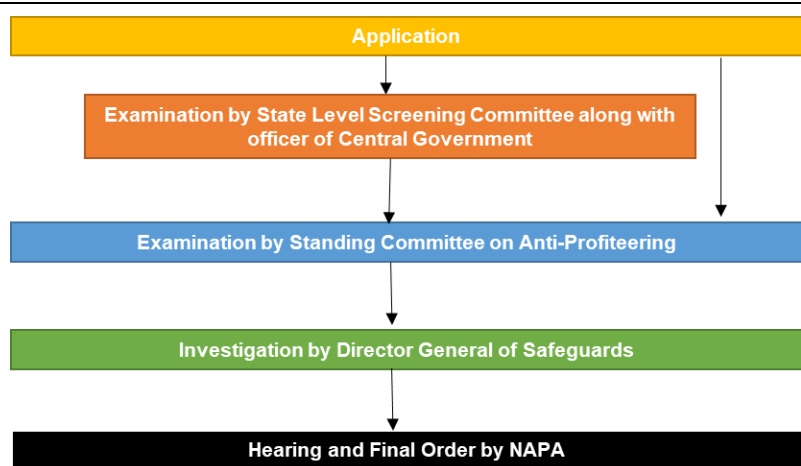
PART A: ANTI-PROFITEERING UNDER GST

Legal provisions for Anti-Profiteering Measures

Section 171 of the Central Goods and Services Tax Act, 2017 ('CGST Act') read with Rules 122 to 137 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') contain statutory provisions dealing with Anti-Profiteering. These provisions are summarized below:

Applicability	The taxpayer is required to pass on the benefit in the following scenarios: - Reduction in rate of tax on supply of goods / services - Benefit of Input Tax Credit ('ITC') The benefit of such reduction / ITC shall be passed on to the recipient of supply by way of <i>commensurate reduction in prices</i>.
Authority to examine profiteering	To examine whether there is profiteering in a case, NAA has been constituted.
Orders that NAA can pass	- Reduction in prices - Return of amount, not passed to the recipient, along with interest at the rate of eighteen per cent. In case the eligible person is not identifiable, depositing the same in the Consumer Welfare Fund - Imposition of penalty upto ₹25,000 - Cancellation of registration
Term of NAA	NAA shall cease to exist after two years from the date on which the Chairman enters its office unless the GST Council recommends otherwise. <i>(As on date, NAA shall cease to exist on March 23, 2020)</i>
Power to determine the methodology and procedure	NAA can determine the methodology and procedure for determination of profiteering on its own. For this purpose, NAA has issued National Anti-Profiteering Authority under the Goods & Services Tax Methodology and Procedure, 2018. <i>(It is pertinent to note that even under National Anti-Profiteering Authority under the Goods & Services Tax Methodology and Procedure, 2018, no methodology to determine profiteering has been prescribed)</i>

Process of dealing with Anti-Profiteering complaints



PART B: ORDERS PASSED BY NAA

1. Important principles

Reference	Facts	NAA's Order
Base price of goods should remain same		
Asian Granito India Limited, 2018-VIL-19-NAA Ahuja Radios, 2018-VIL-25-NAA	Nature of business: Tiles and speakers Complaint: There was a reduction in rate of tax in November 2017. The taxpayer did not reduce the price of the goods nor passed on the benefit of rate reduction to the consumer.	Profiteering: No Reasoning: - The taxpayer did not resort to profiteering as it did not increase base price.
Zeba Distributors, 2018-VIL-16-NAA	Nature of business: Spices Complaint: With the advent of GST, the taxpayer did not pass on the benefit of reduction in rate of tax.	Profiteering: No Reasoning: - The rate of tax remained same in pre-GST and post-GST period. Moreover, the base price and selling price remained same in both the periods.
Discounts not to be considered for computing profiteering		
Asian Paints Limited, 2018-VIL-26-NAA	Nature of business: Paints Complaint: After GST came into force, rate of tax reduced. However, the taxpayer increased the price of its product and did not pass on the benefit of rate reduction to the consumer.	Profiteering: No Reasoning: - The increase in base price (net of discount) was on account of reduction in discount. The reduction in discount does not amount to profiteering as the taxpayer offers the same from its profit margin.
Flipkart Internet Private Limited, 2018-VIL-04-NAA	Nature of business: E-commerce Operator Complaint: There was a reduction in rate of GST between period of booking and delivery of goods. By not reducing the price of the goods to the extent of reduction in effective	Profiteering: No Reasoning: - There was no increase in base price (before discount) of the goods. - The withdrawal of discount does not amount to profiteering as the

Reference	Facts	NAA's Order
	tax incidence, the taxpayer resorted to profiteering.	supplier offers the same from his profit margin and the same does not form part of the base price. - An e-commerce operator (who is not supplier of goods), cannot be held liable for profiteering (if any).
NITYA Comments: <i>Discount offered on base price is part and parcel of the price of the goods. Hence, price should be seen net of discount. In our view, NAA has incorrectly ignored discount component in these cases.</i>		
Anti-Profiteering not applicable in case of increase in effective rate of tax		
Maruti Suzuki India Limited, 2019-VIL-01-NAA Peps Industries Private Limited, 2018-VIL-21-NAA Janson, 2018-VIL-24-NAA Panasonic India Private Limited, 2018-VIL-18-NAA Lorenzo Vitrified Tiles Private Limited, 2018-VIL-23-NAA Impact Clothing Company, 2018-VIL-20-NAA	Nature of business: Automobiles, mattress, clothes, electronic items, tiles etc. Complaint: With the advent of GST, there was reduction in tax incidence which was not passed on to the consumer.	Profiteering: No Reasoning: - The effective tax incidence increased post introduction of GST.
KRBL Limited, 2018-VIL-02-NAA	Nature of business: Rice manufacturer Complaint: The benefit of reduction in rate of tax was not passed onto the consumer and MRP was increased.	Profiteering: No Reasoning: - Taxpayer's products were not taxable in pre-GST period. However, these goods became liable to 5 percent GST. The ITC claimed by the taxpayer was less

Reference	Facts	NAA's Order
		than the incremental tax and it paid balance amount in cash.
FabIndia Overseas Private Limited, 2018-VIL-10-NAA	Nature of business: Retailer Complaint: The taxpayer did not reduce the price of its products even though the rate of tax reduced. Thus, benefit of rate reduction was not passed onto the consumer.	Profiteering: No Reasoning: - The rate of tax actually increased from pre-GST regime. Further, the taxpayer reduced its base price as well as profit margin and kept MRP intact.
Reduction in GST rate – dealers to reduce price (even if procurement price increases)		
Harish Bakers and Confectioners Private Limited, 2018-VIL-14-NAA Sharma Trading Company, 2018-VIL-05-NAA Lifestyle International Private Limited, 2018-VIL-07-NAA Raj and Company, 2018-VIL-22-NAA J.P. and Sons, 2018-VIL-13-NAA	Nature of business: Retailer Complaint: There was a reduction in rate of tax in November 2017. The taxpayer increased the base price of the products equal to the reduction on account of tax rate.	Profiteering: Yes Reasoning: - The taxpayers contended that their suppliers increased base price of the impugned products and they did not increase their profit margin. NAA held that the taxpayers are bound to reduce the price to end customer in case of reduction in price. - NAA observed that technical constraints (like billing software being controlled by manufacturer) is not a valid ground for not passing such benefit to customer.
NITYA Comments: <i>The Rulings are incorrect to the extent they held that base price should have remained the same even where the purchase price increased. The relevant criteria for determining profiteering is whether the dealer has earned any additional profit. For determining whether there was additional profit, it needs to be seen holistically after duly considering the increase in purchase price.</i>		
Decrease in rate of tax to be seen net of ITC denied		
NP Foods (Franchisee Subway India), 2018-VIL-08-NAA	Nature of business: Restaurant Services Complaint: The rate of GST on restaurant services was reduced	Profiteering: No Reasoning:

Reference	Facts	NAA's Order
	from 18 percent to 5 percent (with denial of ITC) in November 2017. The taxpayer increased the basic price of its products.	- The taxpayer had increased the base price of its products to neutralize the denial of ITC post reduction of rate of GST. The increase in price was commensurate with the amount of ITC denied.
Hardcastle Restaurants Private Limited, 2018-VIL-11-NAA	Nature of business: Restaurant Services Complaint: The rate of GST on restaurant services was reduced from 18 percent to 5 percent (with denial of ITC) in November 2017. The taxpayer increased the basic price of its products and maintaining same price (inclusive GST) as was being charged before rate reduction.	Profiteering: Yes Reasoning: - The base prices were deliberately enhanced exactly equal to the amount of reduction in tax incidence. The denial of ITC was less than increase in price.
Availability of additional ITC to be considered		
Pyramid Infratech Private Limited, 2018-VIL-06-NAA (Taxpayer has challenged the order in Delhi High Court)	Nature of business: Real Estate Complaint: The benefit of ITC additionally becoming available to the taxpayer post introduction of GST, was not passed on to the consumer.	Profiteering: Yes Reasoning: - The taxpayer became eligible to claim ITC after introduction of GST. Hence, it was liable to pass on the benefit to the consumer. - NAA rejected the argument of the taxpayer that it could not pass on the benefit as there was an increase in the rate of tax. It held that availability of ITC was higher than increase in tax.

2. Specific Rulings

2.1 Hindustan Unilever Limited, 2018-VIL-17-NAA (HUL's ruling) (This ruling has been challenged by the taxpayer in Delhi High Court)

Brief Facts:

The rate of GST on the products was reduced in November 2017. The taxpayer did not immediately reduce the price of the products and increased base prices exactly equal to the amount of reduced tax.

Issue	HUL's submissions	NAA's Ruling	NITYA Comments
Methodology	No methodology prescribed in law	Not accepted NAA held that no general methodology can be prescribed, and methodology should be determined based on facts of each case.	The taxpayers have been waiting for specific procedure to determine profiteering for long. The issue as to whether the absence of procedure is fatal to enforcement of Anti-Profiteering regulations, is expected to be tested before court of law.
Grammage	Grant of additional grammage of a product should be accepted as a mode of passing benefit to the consumer. The reduction in price is not possible in each case (specifically for products sold at sensitive price points).	Not allowed NAA held that the benefit can only be passed on by reducing prices. Increasing quantity is not a permissible method to pass on the benefit. Considering the intent of legislature and trade practice to pass on the benefit through increased grammage, NAA allowed deduction as a one-time exception.	NAA has taken a narrow view and it did not acknowledge that increase in grammage effectively results in decrease in per unit price of goods. In our view, this methodology should be permitted.
Budgetary Support	Refund on account of budgetary support reduced in absolute terms due to reduction in GST rate.	Disallowed The amount of tax paid in cash was received back as refund. Therefore, there was no loss in absolute terms.	NAA failed to appreciate the point that the budgetary support computation in GST regime is very different from old regime. The amount of refund directly depends on amount of tax paid in cash. Hence, deduction of reduction in refund should have been considered.
Packing expenses	Additional expenses	Disallowed	NAA cannot dictate the manner in which business should be

	incurred for change in packing due to change in MRP.	Expenses incurred on packing was entirely a business decision. The Legal Metrology law did not mandate change in packing and allowed change in MRP by stickering as well.	done. The change of packaging or affixing of sticker should be call of a business entity. The disallowance of expense for the reason that option of stickering was available, is unjust.
Timing of reduction	The prices cannot be reduced immediately, and time should be allowed to reduce prices.	Disallowed NAA held that there should be an immediate reduction in prices from the date of change of rate of GST.	The expectation of NAA that the prices should be immediately reduced is unjust.

2.2 Kunj Lub Marketing Private Limited, 2018-VIL-09-NAA

Brief Facts:

The rate of GST on Maggie noodles was reduced from 18 percent to 12 percent in November 2017. However, the taxpayer did not reduce the price of 1 Stock Keeping Unit (SKU) but reduced price of other SKU considering the sensitive price points of both the products.

Taxpayer's submissions	NAA's Ruling	NITYA Comments
The benefit on account of one SKU (35 grams) was passed on as reduction in price in another SKU (70 grams)	Disallowed The benefit of rate reduction needs to be seen vis-à-vis the same SKU of a product and not against a different SKU since the customers are different for each product. Anti-Profiteering needs to be satisfied customer wise.	The order of NAA fails to satisfy the intent test. The intent of Anti-Profiteering provisions is that the supplier does not unduly benefit from rate reduction. NAA has ignored all practical issues that a taxpayer faces and has suggested compliances which are practically impossible.
In the light of Legal Metrology law, MRP needs to be rounded off. The price of SKU in question (35 grams) could not be reduced since rounding off the reduced-price results in original price only.	Disallowed The provisions of Legal Metrology law cannot result in profiteering by the taxpayer.	By NAA's logic, there is no option to reduce price in case of low denomination goods (say priced at Re.1). In case of rate reduction for such products, the taxpayer will have to deposit amount in Consumer Welfare Fund.

2.3 Excel Rasayan Private Limited, 2019-VIL-02-NAA

Brief Facts:

There was a reduction in rate of GST of detergents in November 2017. The taxpayer did not reduce the price of its products.

Taxpayer's submissions	NAA's Ruling	NITYA Comments
Due to introduction of GST, the rate of tax for taxpayer increased from 12.5% to 28%. The taxpayer did not increase the base price and absorbed the burden of higher rate of tax. The subsequent reduction of tax off-sets the earlier losses being made by the taxpayer. Thus, the taxpayer should not be expected to reduce price.	Disallowed MRP of products was not reduced after reduction in rate of GST. The absorption of loss on account of rate increase was taxpayer's decision. The benefit arising due to subsequent reduction in rate of tax needs to be passed on to the consumer.	NAA took a myopic view and limited its order to reduction in rate of tax. NAA should have considered the fact that the taxpayer suffered loss because of its inability to change price earlier. Thus, any benefit accruing to the taxpayer due to reduction in rate of tax, should not be demanded from it.

2.4 Jubilant Food Work Limited, 2019-VIL-04-NAA

Brief Facts:

The rate of GST on restaurant services was reduced in November 2017. However, the taxpayer increased the basic price of its products and maintained same price (inclusive of GST) as was being charged before.

Issue	Taxpayer's submissions	NAA's Ruling	NITYA Comments
Consideration of other factors influencing the price	There are various factors that influence the prices such as pricing of competitors, strategies for market penetration, profit margins for sustaining in market, life cycle of product, increase in prices of raw material and increase in cost due to non-availability of ITC.	Not allowed NAA held that the taxpayer did not substantiate increase in prices of raw material or increase in price at regular intervals. On the other hand, total variable cost reduced rather than increased. Overall profitability of the taxpayer (in percentage terms) also increased. NAA also observed that inflation was prevalent between April to October 2017 as well. Increasing the prices from	In various decisions, NAA has not been accepting the computations submitted by the taxpayer. In case of difference of opinion, NAA should consider seeking independent certification from the taxpayer or appoint an independent expert for vetting the calculations. Further, increase in base price corresponding with change in rate of tax is seen negatively by NAA.

	Further, the Company has a history of raising prices 2-3 times in a year. The instant price rise was not intended to profiteer on account of reduction in rate of GST.	midnight of November 14 th / 15 th shows that the intention of taxpayer was <i>mala fide</i> with intent to profit from rate change.	
All stores should be treated as separate entities as per GST law	All stores are separately registered State wise and should be treated separate persons as per the GST law.	Not relevant NAA held that even if such stores are assessed separately, the conclusion would be the same as prices charged were same in all outlets and were centrally fixed.	
Price relevant for comparison (menu price vs. net sales realization)	The menu prices, which are uniform across the country, should be considered instead of net sales realization. DGAP did not add operational and promotional discounts to net realization value while calculating the amount of profiteering.	Not accepted As per Section 15 of the CGST Act, the value of the supply can be calculated only on the basis of actual price paid and not the menu price. This is because generally the products are not sold on the menu prices. NAA held that the profiteering amount shall be computed based on net sales realization of the taxpayer.	Relying on Section 15 of the CGST Act, NAA is correct in holding that profiteering shall be computed on post-discount price of the product. This ruling of NAA is a significant departure from its earlier rulings where it held that a taxpayer offers discount from its own pocket and increase in prices due to reduction in discount cannot be considered as profiteering.
Product comparison pre and post rate change must be same	Product compared before and after change in rate were different. Therefore, the proceedings initiated by Screening Committee and subsequently referred to DGAP, were not tenable.	Not accepted The taxpayer itself accepted that base prices of both the products were increased. Therefore, irrespective of the fact that products were different, it cannot be denied that the profiteering existed.	NAA should have restricted the investigations of Screening Committee as well as its ruling only to the product for which complaint was filed. NAA erred in extending the scope of inquiry to all the products dealt in by the taxpayer.

Profiteering should be computed for products for which allegation was filed and all 393 SKUs should not be considered.	In the rulings of Vrandavanesh-wree Automotive Private Limited (supra) and Flipkart Internet Private Limited (supra), the rulings were confined only to products for which complaint was made and other products supplied by taxpayers were not taken into account.	Disallowed NAA held that DGAP had not gone beyond its jurisdiction for the following reasons: – Applicant had <i>inter alia</i>, in its compliant, requested to investigate pricing of large organization where prices were inflated after reduction in rate of GST – DGAP was legally bound to take cognizance of violation of Section 171 as it found substantial material during investigation	Rule 128 allows authorities to initiate proceeding based on the accuracy and adequacy of the evidence provided by the Applicant. The action of the authorities to investigate all SKUs (placing reliance on applicant's general comment without evidence), is unreasonable and arbitrary. Also, State Screening Committee or DGAP do not have power to <i>suo-moto</i> initiate any proceedings. The proceedings can only be initiated basis complaint filed as per the CGST Rules.
	'Netting off' of positive and negative profiteering across all SKUs should be applied to determine net profiteering.	Disallowed There is no justification for 'netting off' the increase and decrease in prices of various products as benefit of reduction in rate of GST should be passed on for each supply to every customer.	The rejection of taxpayer's claim of netting off positive and negative profiteering across all SKUs is perverse. In many cases, it may not be practically feasible to reduce price equal to profiteering for the products considering the price point at which such products are sold. In such cases, the benefit should be allowed to be passed on to other customers. The NAA should consider the overall objective that a taxpayer should not profit out of reduction in rate of GST on overall basis.

Overall NITYA Comments:

While NAA was established to ensure there is no undue profiteering by business houses. However, the lack of specific methodology to determine profiteering, expectation of passing on the benefit of rate reduction immediately to consumers has made it an uphill task for the companies to have smooth and hassle-free compliance of Anti-Profiteering regulations.

The companies facing investigations, may face not only financial losses but also loss of reputation. With the authorities tightening their grip by each passing day, it is important for taxpayers to have proper records to substantiate compliance with Anti-Profiteering provisions. Companies may also explore providing SOP and trainings to channel partners for maintaining proper documentation to prepare them for any possible investigations in future.

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