

Anti-profiteering provisions under GST: Analysing the emerging paradigm

Objective	To ensure that all consumers enjoy the benefit of lower prices of goods and services under Goods and Service Tax (“GST”) regime.											
What is “Profiteering”?	Section 171 of the Central Goods and Services Tax Act, 2017 (“CGST Act”) mandates that any reduction in rate of tax on any supply of goods or services or benefit of input tax credit is required to be passed on to the recipient by way of commensurate reduction in prices. In terms of the FAQs issued by the National Anti-Profiteering Authority (“NAA”), the willful action of not passing of the said benefits to the recipient amounts to “profiteering”.											
Applicability	These provisions are sector-agnostic and have come to be widely used in the past year, with complaints filed against restaurants, coffee-shops, car dealerships, FMCG companies, fashion retail outlets, etc.											
Constitution of Authorities	<table><thead><tr><th>Authority</th><th>Composition</th></tr></thead><tbody><tr><td>State Level Screening Committee</td><td>1 officer of the State and Central governments, nominated by the Commissioner Chief Commissioner respectively</td></tr><tr><td>Standing Committee</td><td>Officers of the State & Central Government, as nominated by the GST Council</td></tr><tr><td>Directorate General of Anti-profiteering</td><td>Investigative arm of the NAA</td></tr><tr><td>National Anti-Profiteering Authority (NAA)</td><td>Constituted under Rule 122 of Central Goods and Services Tax Rules, 2017 (“CGST Rules, 2017”); consists of a Chairman and 4 Technical Members</td></tr></tbody></table>		Authority	Composition	State Level Screening Committee	1 officer of the State and Central governments, nominated by the Commissioner Chief Commissioner respectively	Standing Committee	Officers of the State & Central Government, as nominated by the GST Council	Directorate General of Anti-profiteering	Investigative arm of the NAA	National Anti-Profiteering Authority (NAA)	Constituted under Rule 122 of Central Goods and Services Tax Rules, 2017 (“CGST Rules, 2017”); consists of a Chairman and 4 Technical Members
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Anti-Profiteering proceedings: Initiation & conduct specifications; Consequences	<div><div><div>Application by Consumer</div><div>↓</div><div><div>State Level Screening Committee</div><div>Confirm prima facie evidence of profiteering</div></div><div>↓</div><div><div>Standing Committee</div><div>Confirm prima facie evidence of profiteering</div></div><div>↓</div><div><div>Directorate General of Anti-profiteering</div><div>For investigating profiteering</div></div><div>↓</div><div><div>National Anti-profiteering Authority (NAA)</div><div>For determining profiteering and passing appropriate order to ensure consumers benefit from reduced prices</div></div></div><div><p>If <i>prima facie</i> evidence proves that supplier has not passed on the benefits, matter is referred to DGA for detailed investigation</p><p>Time period - 2 months from date of receipt of application</p></div><div><p>The Directorate General of Anti- profiteering can:</p><ul style="list-style-type: none">– Initiate investigation by sending notice to interested parties– Conduct investigation and collect evidence to determine profiteering– On completion of investigation, DGA report along with relevant records forwarded to National Anti-Profiteering Authority<p>Time period: 3 months, extendable by further 3 months</p></div><div><p>If the NAA concludes that there is profiteering, it may order:</p><ul style="list-style-type: none">– Reduction in prices– Refund of money along with interest at the rate of 18% p.a– Deposit of refund amount in the Consumer Welfare Fund (if buyer not– Impose penalty as specified in Act– Cancel GST registration<p>Time period: 3 months from date of receipt of report from the DGA’s office</p></div></div>											

<p>Methodology to determine profiteering</p>	<p>As per Rule 126 of the CGST Rules, 2017, the NAA may determine the methodology and procedure for determination as to whether commensurate reduction in prices has been passed to the recipient. However, no parameters have been prescribed as yet.</p> <p>One may note the rulings of the NAA till date to discern the parameters which have been considered while arriving at its conclusions. Till date, four orders¹ have been passed by the NAA, <u>all being in favour of the assessee</u>.</p> <ul style="list-style-type: none"> – In Dinesh Mohan Bhardwaj vs Vrandavanshwree Automotive Pvt. Ltd, concerning a Honda car dealer (order dated 27.03.2018), the NAA undertook a comparative analysis of the costs pre and post GST regime, keeping the profit margin constant in absolute terms, computed the benefit which ought to be passed to the customer, and since the reduction in sale price post-GST was higher than such benefit from GST, concluded that there was no profiteering. – In Kumar Gandharv vs KRBL Limited, concerning a seller of India Gate Basmati Rice (order dated 04.05.2018), the NAA ascribed relevance to the fact that the input tax credit utilised was less than the output tax paid and that the price of a major raw material had increased by more than 30% in the year 2017 compared to 2016. – In Rishi Gupta vs. Flipkart Internet Pvt. Ltd. (order dated 18.07.2018), the supplier, selling through the electronic platform (“e-platform”) had granted a discount at the time when the buyer had placed the order, but after a rate cut on 15.11.2017, had withdrawn the discount and charged the reduced GST rate on the base (undiscounted) price. The NAA held that since the supplier had (through the platform) refunded the excess GST collected, neither the Supplier nor the e-platform had indulged in profiteering. It had also noted that a withdrawal of discount by the supplier, post the rate change, did not amount to profiteering as the same was offered from his profit margin. The NAA has (vide letter dated 24.05.2018) also directed the Director General of Audit, Central Board of Indirect Taxes and Customs to audit the major e-platforms as regards cases where e-platforms had collected excess GST from the buyers and not refunded the same after the rate cut on 15.11.2017 and submit its findings to the NAA.
<p>Modalities to pass the benefits to consumers: the ‘Volume vs Value’ debate</p>	<p>In the absence of methodology and/or procedure to determine commensurate reduction in prices, different practices appear to be in vogue for passing-on the benefit to the recipient:</p> <ul style="list-style-type: none"> – Equivalent reduction in price to that of the benefit accrued – Increase in grammage/weight of the product – Commensurate reduction in price on macro parameters of different products coming from a single factory
<p>Suggested best practices</p>	<p>Given the present lack of certainty on the exact methodology for determining ‘commensurate reduction in prices’, preparedness is required across the supply chain/service network as a single complaint can trigger extensive investigation by the authorities. Certain suggested practices can help mitigate potential risk:</p> <ul style="list-style-type: none"> – Reduction in rate of tax or benefit of input tax credit should be closely monitored and computed, to ensure commensurate reduction in prices – Benefit of commensurate reduction in price is required to be passed on to the next receiver in the supply chain/service network – Benefits accruing from GST, which is passed on to the customer, may be depicted as such on the invoice issued – The next receiver in chain should be adequately updated of the passing-on of this benefit down the supply chain/ service network to the end customer/ end service receiver – Computations in relation to anti-profteering should be maintained on record, which may be shown as and when an assessment or audit proceeding is initiated

¹ In the case of Abel Space Solutions LLP vs Schindler India Private Limited, concerning a seller of lifts (order dated 31.05.2018), the application filed by the complainant was withdrawn and the order did not dwell into the profiteering parameters in detail.

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