

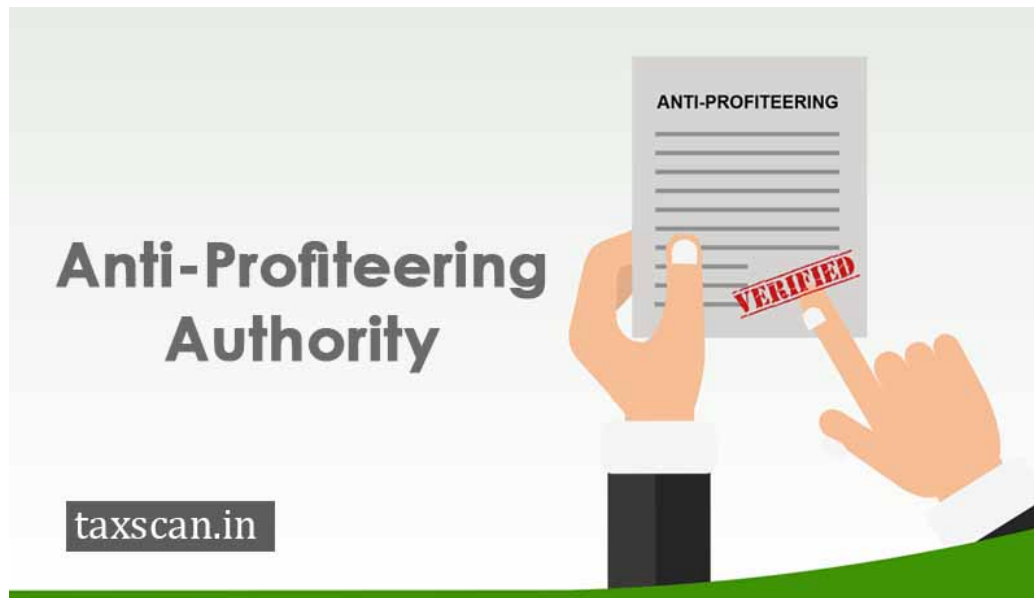
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## The Anti-Profiteering Conundrum

July 20, 2018 4:07 pm | By : Vivek Sharma



The [GST](#) laws set-up the National Anti-Profiteering Authority ('NAA') basically as a deterrent to ensure that any benefit of reduction in rate of tax or benefit of [input tax Credit](#) is passed-on down the chain to the end customer/ service recipient. The intention behind the legislation is no doubt noble. It also entitles the receiver of goods/ services (such as end customer) to get redressal in some form. A complaint by such person to the prescribed Screening Committee or Standing Committee, as the case maybe, may trigger wide level of investigation and scrutiny by the NAA on an errant assessee/ supplier. However, even after close to a year of [GST](#) implementation, there still appear several open issues with respect to these provisions:

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



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The trigger for invoking anti-profitteering measure arises when any reduction in rate of tax or the benefit of **input tax credit** on any supply of goods/services is not passed on to the recipient by way of commensurate reduction in prices [section 171 (1) Central Goods and Services Tax Act, 2017 ('CGST Act')]. Simply put, one view is that reduction in rate of tax or benefit of **input tax credit** is required to be followed by reduction in the price of the specific commodity supplied or service provided. Basically, the receiver of goods/services, should not be over charged and in real time actually get the benefit of reduction in rate of tax or benefit of **input tax credit** (i.e. there has to be commensurate reduction in the purchase price of the commodity/ service).

There could be several other instances where one could argue that there has been commensurate reduction in prices brought about due to reduction in rate of tax or benefit of **input tax credit**. For instance, free increase in the grammage/quantity of the product and selling it at the same price (pre and post reduction in rate of tax), commensurate reduction in price passed-on based on macro parameters of different products coming from a single factory, etc.






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However, **GST** law is silent on the meaning of the term or words 'commensurate reduction in prices'. The power to determine the methodology and procedure as to whether reduction in rate of tax or benefit of **input tax credit** has been passed on by a registered person to the recipient by way of commensurate reduction in prices vests with the NAA by Rule 126 of the Central Goods and Services Tax Rules, 2017. As on date, the NAA has not brought about any such methodology or procedure for the purpose of such determination. This Rule uses the words *The Authority may determine the methodology and procedure...*. Given this, the NAA could well be of the view that there is no requirement of prescribing any such methodology or procedure as the prerogative whether the same is required or not vests with it. If that be the case, the NAA may have to deal with various instances and interpretations that will come before it during its investigation on the meaning of the term or words 'commensurate reduction in prices'. Since the law is silent on the exact determination of 'commensurate reduction in prices', one could well argue that there are two views possible on the issue at hand. It is settled

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law in certain situations that when two views are possible, the benefit of doubt is to be given to the assessee. Consequently, this jurisprudence may be tested with reference to this provision in the days to come.



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There are also instances where the Courts have taken a position that the word 'may' is required to be understood as 'shall' in certain instances. Basis this, the proposition that the NAA was duty bound to bring about the necessary methodology and procedure, since the Act, in any case, was silent on the exact determination may come to test.

Importantly, the Act itself should have brought about certainty with reference to section 171 of CGST Act and prescribed the substantial mechanism / do's and don'ts with reference to 'commensurate reduction in prices'. This would have provided better certainty and clarity to suppliers of goods/ services when dealing with any reduction in rate of tax or benefit of [input tax credit](#).

### Order of NAA

The scheme of the provisions is crystalized in a manner that the complaint is filed to the Screening Committee or Standing Committee, as the case may be. On prima facie evidence of their being a case, Directorate General of Safeguards (re-christened Directorate General of Anti-Profitteering) initiates the investigation and submits it's report to the NAA or whether benefit of reduction in rate of tax or benefit of [input tax credit](#) has been passed to the recipient by way of commensurate reduction in prices. The NAA then is ordinarily required to pass an Order within a period of three months from the date of receipt of report, after giving an opportunity of personal hearing to the Interested parties. Pursuant thereto, an Order is passed by the NAA which may, amongst other things, impose penalties as specified under the Act or go the extent of cancelling the [GST](#) registration.

This essentially results in an Order being passed without actually putting an assessee to notice, amongst other things, which particular penalty under the law is likely to be imposed on the assessee or whether the NAA is looking at cancellation of [GST](#) registration itself. No doubt, an opportunity of hearing is granted to an assessee being investigated. However, the law does not appear



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to have put-in-place any formal mechanism of forewarning an assessee by way of a notice from the NAA on the likely contours of the penal provisions the NAA is looking at invoking.

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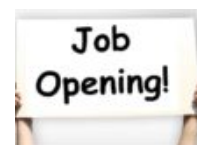
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Chapter XIX of the CGST Act which is the relevant Chapter for 'Offences and Penalties' has 17 sections (sections 122 to 138). Sections 122 to 127 are simplicitor penal provisions. Section 122 (1) of CGST Act itself covers twenty-one instances/ sub-sections for imposition of penalty. Given the legislation, an assessee is expected to come prepared before the NAA and defend itself against all the penal provisions during the course of the hearing, as the NAA has the power to pass an Order of imposition of penalty as specified under the CGST Act. This snapshot certainly envisages rigorous preparedness at the end of the assessee.

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### ***No express appellate redressal mechanism***

There is no express appellate/redressal mechanism prescribed under the GST laws against an Order passed by the NAA. The Appellant Authority may not be the proper forum as it appears that the NAA itself may be equal or higher in rank than the Appellant Authority. The law does not appear to provide a statutory mandate to challenge such Orders before the Tribunal, High Court or the Supreme Court. If this be the position, an assessee will have no other alternative remedy but to approach the High Court and seek redressal through writ petitions.

Even if it is considered that the NAA is envisaged to helm affairs for a period of two years then also it would have been apt for a statutory appellant forum to be prescribed under the GST laws itself. It is only proper that any order passed in law is open to scrutiny by multiple forums. This assists in a balanced working of the law.

These instances bring out certain ambiguities in the framework of Anti-profiteering provisions enshrined in GST laws. As of 13 July 2018, it appears that the NAA has passed three Orders. However, there are multiple complaints still pending before it. Given this, some of these issues may unfold in the days to come.



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*The views expressed herein are the personal views of the author and do not express the view of the Firm.*

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