



In GST, National Anti-profiteering Authority (**NAA**) has an innocuous mandate – to ensure that businesses pass on the benefit of reduction in rate of tax or input tax credit to consumers. Over three years down the GST lane, NAA, however, perhaps has single handedly managed to contribute to high number of litigations. Huge demands have been raised against business in almost every sector be it consumer goods, pharma, real estate, restaurants or media and entertainment.

At the center of all controversy surrounding NAA's actions, is its inconsistency in the methodology adopted for computation of benefits. The key terms "rate of tax", "benefit" and "commensurate reduction in prices", which are the soul of the anti-profiteering mandate, are regrettably not defined in GST. Neither are there any prescribed methodology / guidelines to decide the quantum of benefits, which should be followed by NAA. In fact, NAA has been given wide powers to determine the methodology and procedure. In the guise of such powers, NAA, instead of notifying a standard computational methodology, has been arbitrarily deciding the computational methodology on a case-to-case basis.

In relation to the FMCG sector, cases investigated by NAA such as Reckitt Benckiser, Johnson & Johnson, Hindustan Unilever, McNROE, Jubilant FoodWorks, Procter & Gamble etc., the NAA seems to have adopted a unique parameter of "base price comparison" before reduction of tax rate *vis-à-vis* post reduction, to determine profiteering. If the base price has increased while the GST rate has been reduced, the supplier is held liable for profiteering. In case of multiple stores /depots, through which products are sold and sometimes at different prices, NAA in many instances has considered an average price as the base price for the entire business. It then computes profiteering by comparing this average price with the actual price charged. While adopting such methodology, NAA seems to have conveniently ignored sales below the average price. In effect, transactions where the difference is in negative (i.e. where the supplier has passed on the benefit to customers in excess of the required amount) are not considered. This means that NAA has not given the benefit of 'netting off' viz. pricing below the determined median of profiteering. This ultimately leads to an inflated and arbitrary figure of overall profiteering.

In most cases, NAA has been considering one average base price across India which is completely flawed inasmuch as the base price for different markets may vary according to their respective economic dynamics including factors such as transportation, warehousing cost, competition pricing, credit period offered to vendors, price elasticity of demand etc. The methodology also fails to consider the impact of discount or promotional schemes offered by the business or the increased quantity / grammage offered at the same price.

In contrast, it is seen that, the methodology adopted by NAA for real estate players such as Pyramid Infratech, Emaar MGF, Suncity Projects, Aster Infrahome, Fusion Buildtech etc., hinges on the ratio of creditable taxes to turnover in the pre-GST regime *vis-à-vis* post GST regime. Hence, for the real estate sector, NAA has been computing benefit by applying the incremental ratio of 'creditable taxes' to turnover. The approach is entirely in conflict with the intention of law, which requires the business to pass on the benefit of 'non-creditable taxes' which were a cost prior to GST and became creditable post implementation of GST. In real estate, unlike any manufacturing business or typically one-time service contract, the life - cycle of a project generally spreads over a period of 3-4 years during which the developer continues to incur construction cost and avail corresponding credit. The turnover on the other hand, is recorded on the basis of invoices raised, which are time bound contractually and are not construction linked. Thus, the ratio of credit to sales for any period will invariably differ from period to period, unless considered for the complete project lifecycle of approximately 3-4 years.

In addition to the above sector specific fallacies, a fundamental aspect of increase in prices on account of increase in cost of raw materials or change in pricing strategy industry-wide, has been completely discarded by NAA. This is problematic as the anti-profiteering provisions fail to define the period for which profiteering should be calculated. It cannot be anybody's case that the business ought not consider the rising cost of materials, pricing strategy, etc., in the fear of facing the wrath of NAA. In fact, NAA

has been counting GST on the base profiteering amount, as part of benefit to be passed on to consumers, when the reality is that such GST already has been deposited with the Government.

The lacunae in the methodology adopted by NAA has been raised by almost every company while challenging the NAA orders before the High Courts. For instance, Reckitt Benckiser (2019) has argued that NAA has not considered the benefit passed to consumers by means of discount and cashback schemes or the increased grammage keeping the price same for 'Dettol liquid soap'. Similarly, in Hindustan Unilever (2019), NAA denied giving benefit of 'netting off' while computing profiteering, which is now being challenged by HUL before the High Court. Jubilant FoodWorks, which owns Dominos (2019), has challenged that NAA methodology *inter alia* on grounds of failure to consider the impact of increasing costs, coupled with non-availability of input tax credit to their sector. Similar contentions on NAA methodology have been raised by real estate players such as Pyramid Infratech (2018).

Interestingly, India is not the first country to witness anti-profiteering mandate. Similar provision was prevalent in GST of countries like Australia and Malaysia, where it was implemented in a more structured manner with prescription of a definite formula-based methodology for computing profiteering. In fact, most of the Indian tax legislations, such as erstwhile Excise and Service Tax, including GST, describes mechanisms to arrive at valuation or cost. The anti-profiteering provisions should be no exception.

While the extended mandate of NAA ended on March, 2021, undeniably, the inconsistencies in computation adopted by NAA have led to confusion and litigation. Currently, the Delhi High Court is seized of the constitutionality challenge to NAA, on writ petitions by various aggrieved parties wherein one of the key grounds of challenge remains absence/ inconsistency of methodology. We await the final outcome.

**Authors:** Kumar Visalaksh, Partner and Surbhi Jain, Associate Manager, Economic Laws Practice (ELP), Delhi.

**Disclaimer:** The views expressed are personal. ELP is representing various companies in consumer goods and real estate sectors before the Delhi High Court against the orders passed by NAA in anti-profiteering matters.



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[Email: Insights@elp-in.com](mailto:Insights@elp-in.com)

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