

Complying with Anti-Profiteering Clause under GST Law



Anti-profiteering measures have been incorporated in the tax laws for the first time. The intention behind this introduction was to curtail the inflation pursuant to the implementation of GST. The law mandates passing on the benefits on account of reduction in the rate of tax, by reducing in prices, the non-compliance of which has its consequences. There are certain areas where the business may get benefit of input tax credit that were not available under the erstwhile regime. The assessee must, therefore, undertake the detailed analysis of change in tax rates and input tax credits availed to justify reduction in prices or to withhold price reductions, based on certain factors discussed infra. The author in this article endeavours to identify the areas that may be explored to ensure compliance of the anti-profiteering provision under the GST law. The article, divided into two sections, highlights the goods or services where there has been a reduction in the rate of tax and increase in the input tax credits. The author analyses the recent judgments pronounced by the National Anti-Profiteering Authority to determine if the supplier has complied with the anti-profiteering provision, and concludes by identifying certain grey areas that have not been addressed yet and highlighting the professional opportunities for Chartered Accountants. Read on...



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Anti-profiteering clause is a unique provision inserted under the GST law to ensure that the assesseees pass on the benefits on account of the implementation of GST to the ultimate consumers. Section 171(1) of the Central Goods and Services Act, 2017 (*CGST Act, for brevity*) contemplates passing on any reduction in rate of tax on any supply

of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices. The GST law envisages a reduction in the prices to comply with the provision, which can be determined under the following broad categories:

- Difference in rate of tax pre and post GST to illustrate the reduction in prices, particularly in case of goods sold on the basis of Maximum Retail Price (*MRP*), and
- Difference in the quantum of input tax credit pre and post GST and the resultant reduction in cost of goods and services.

Part A: Reduction in the Rate of Tax

At the time of introduction of GST, the rate of tax on supply of goods under GST regime was determined based on the weighted average rate of all taxes that existed under the *erstwhile* regime. The Fitment Committee of the GST Council fixed tax rate on supply of goods under the schedule that was closest to the weighted average tax rates under the *erstwhile* regime. Therefore, some goods have undergone either increase or reduction in the tax rate pursuant to implementation of GST. The specific requirement under the law is to pass on the benefits on account of reduction in the rate of tax under GST, by reducing in prices, the non-compliance of which has its consequences.

As regards the rate of tax on supply of services, majority of the services have undergone increase in the tax rate on account of implementation of GST, while there has been a reduction in the tax rate on a few categories of services. The service sector is, therefore, being looked upon to pass on the benefits only on account of input tax credits that were not available under the *erstwhile* regime.

After implementation of GST in India, the economy has experienced significant tax buoyance, in response to which, the Government has reduced rate of tax on supply of goods and services, based on the recommendations of the GST Council. The rate of tax on inter-State supply of goods is provided under the principal Notification No. 1/2017-Integrated Tax (Rate), dated 28-06-2017, which has undergone various amendments from time to time, as under:

- Notification No. 16/2017-Integrated Tax (Rate) dated 30-06-2017;
- Notification No. 19/2017-Integrated Tax

(Rate) dated 18-08-2017;

- Notification No. 27/2017-Integrated Tax (Rate) dated 22-09-2017;
- Notification No. 35/2017-Integrated Tax (Rate) dated 13-10-2017;
- Notification No. 43/2017-Integrated Tax (Rate) dated 14-11-2017;
- Notification No. 7/2018-Integrated Tax (Rate) dated 25-01-2018; and
- Notification No. 19/2018-Integrated Tax (Rate) dated 26-07-2018.

Similarly, the rate of tax on inter-State supply of services is provided under the principal Notification No. 8/2017-Integrated Tax (Rate), dated 28-06-2017, which has undergone various amendments from time to time, as under:

- Notification No. 20/2017-Integrated Tax (Rate) dated 22-08-2017;
- Notification No. 24/2017-Integrated Tax (Rate) dated 21-09-2017;
- Notification No. 39/2017-Integrated Tax (Rate) dated 13-10-2017;
- Notification No. 48/2017-Integrated Tax (Rate) dated 14-11-2017;
- Notification No. 1/2018-Integrated Tax (Rate) dated 25-01-2018; and
- Notification No. 14/2018-Integrated Tax (Rate) dated 26-07-2018.

Under GST regime, the tax is payable on transaction value of the supply and hence compliance relating to passing on the benefit on account of reduction in the rate of tax can be taken care of merely by giving effect to the relevant amendment in the ERP of the supplier. It however, becomes an elaborate exercise when it comes to *MRP* based goods, wherein the supplier must ensure that *MRP* of the product is also reduced by affixing labels in compliance with the Legal Metrology (Packaged Commodities) Rules, 2011, for the stock of goods held by him and the entire supply chain. The authorities are, therefore, accentuating on the Fast-Moving Consumer Goods (*FMCG*) sector to ensure that benefit on account of reduction in the rate of tax is passed on to the consumers.

The Director of Legal Metrology has issued advisory from time to time regarding labeling

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of MRP on pre-packaged commodities after implementation of GST and reduction in the rate of tax. The industry is thus allowed to declare the changed MRP on the unsold stock by way of stamping, stickering or online printing till such time that the packing material or wrapper is exhausted or the date notified, whichever is earlier, to enable old stocks to be cleared based on revised MRP. It is, therefore, apparent that the law expects manufacturers to declare the changed MRP so that the ultimate consumers get the benefit of reduction in GST rates.

Part B: Increase in Input Tax Credit

The term 'input tax credit' is defined under section 2(63) of the CGST Act, to mean the credit of input tax, which *inter alia* includes Central Tax, State Tax, Integrated Tax or Union Territory Tax charged on any supply of goods or services or both made to him. It can, therefore, be inferred that the requirement under section 171(1) of the CGST Act is limited to passing on the benefit that gets accrued to a supplier under GST law. Another school of thought contemplates the supplier to pass on the benefit on account of input tax credit which were either not available or not eligible for utilization under the *erstwhile* tax regime.

Though the above issue is a subject matter of interpretation, let us proceed on an assumption that the intention behind introduction of anti-profiteering clause was to curtail inflation pursuant to implementation of GST. Therefore, the credit of taxes that were available due to enactment of GST must also be passed on, to ensure compliance under the anti-profiteering provision. Some major areas where the business may get benefit of input tax credit, that were not available under the *erstwhile* regime are listed hereunder:

- Non-reversal of Value Added Tax (VAT) input tax credit on account of stock transfer of goods;
- Admissibility of VAT input tax credit on inputs used by service providers;
- Admissibility of Countervailing Duty on inputs used by service providers;
- Admissibility of Cenvat credit on input services used by VAT dealers;
- Admissibility of full Cenvat credit on capital goods in the first year of purchase;
- Non-reversal of Cenvat credit under Rule

6(3) of Cenvat Credit Rules, 2004 (CCR);

- Availability of credit for unregistered dealers on opening stock of goods;
- Seamless flow of credit for supplies received from small businesses due to reduction in threshold for registration;
- Availability of credit of Central Excise duty or Service Tax on goods and services, that were not available under the CCR; and
- Refund of accumulated credit because of inverted tax structure.

In addition to the above, some factors that have resulted in reduction of procurement cost of goods and services, which is also required to be passed on to the recipient by way of commensurate reduction in prices, enlisted in the table below.

| Factors | Justification for reducing the price |
|---|---|
| Price reduction on inputs supplied by vendors | Reduction in the price on inward supply of goods and services due to price negotiation with the vendors brings down the procurement costs. |
| Central Sales Tax | Inter-State purchase of goods under GST regime does not require payment of non-creditable tax, thereby reducing the landed cost of inputs as well as capital goods. |
| Octroi, Entry Tax or Local Body Tax | These taxes were charged on movement of goods into a particular State or areas in a State, thereby adding to the procurement cost. Abolishing of these taxes has reduced cost of inward supplies. |
| Entertainment Tax & Luxury Tax | These taxes have been subsumed under GST and hence the same is not adding to the cost of procurement. |
| Cess | The levy of various Cesses have been abolished, resulting in seamless flow of credit and reduce the effective cost of procurement. |

While the above factors justify reduction in the price of goods and services, the supplier must also take into account the following aspects before reducing the sale prices.



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| Factors | Justification for withholding price reduction |
|--|---|
| Payment of tax for the past period without eligibility of input tax credit | Any tax paid for the period prior to the introduction of GST is to be borne by the supplier and the same can neither be passed on nor availed as credit. |
| Pre-GST tax credits foregone | CCR did not prescribe any time limit for taking credit of duty paid on capital goods or re-availment of the credit reversed. Such credits cannot be availed under GST and must be factored in the cost of goods or services supplied. |
| Increase in tax rates | There has been an adverse impact due to increase in tax rate on services, where the input tax credit cannot be availed. |
| Increased financial burden | The concept of matching of input tax credit under GST regime has a negative impact on working capital requirement, if the recipient does not intend to take the risk of availing input tax credit on provisional basis. |
| Pruning of upfront exemptions | The list of goods and services that were exempted from payment of tax has been pruned under the GST regime to large extent. |
| GST implementation cost | Implementation of GST has resulted in migration of registrations and complete overhaul in the returns filing process. The cost of carrying out changes in the IT infrastructure has also been substantial |
| Increased operational costs | Businesses have employed tax professionals to adhere to the legal requirements. The increased costs have impacted small businesses to understand the law and avail services of experts to be GST compliant. |
| Lower fiscal incentives | There has been a reduction in fiscal incentive due to withdrawal of area based exemption and reduction in the quantum of refund. |
| Adjustment of losses | The businesses incurring loss due to reduction in demand for their products may be justified in adjusting such loss with the benefit of increase in input tax credit to maintain their bottom-line. |
| Inflationary impact | Most of the companies have a policy of reviewing their product prices annually to factor the impact of inflation. Inflation being a cost that hits the profit margin, must be taken into consideration for factoring the pricing. |

Recent orders of the NAPA

A complaint relating to anti-profiteering is generally filed before the Standing Committee or State Level Screening Committee, which confirms *prima facie* evidence to support the claim of the applicant of profiteering by the business. The matter is, thereafter, referred for detailed investigation by the Director General of Anti-

Profiteering, which reports its findings to the NAPA. Thereafter, NAPA determines profiteering by the business and passes appropriate order to ensure consumers benefit from reduced prices. Some judgments pronounced by the NAPA to determine if the supplier has complied with the anti-profiteering provision are summarized in the table below:

| Party | Product | Inference of NAPA |
|---|-----------|---|
| Dinesh Mohan Bhardwaj v. Vrandavaneshwree Automotive Pvt. Ltd. [2018-TIOL-01-NAPA-GST] | Motor Car | <ul style="list-style-type: none"> The benefit of price reduction in a product has to be considered based on the rate of tax, including benefit of input tax credit accrued. |

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| Kumar Gandharv v. KRBL Ltd. [2018-TIOL-02-NAPA-GST] | Basmati Rice | <ul style="list-style-type: none"> • Increase in price of product due to market factors can be factored as cost. • ITC paid in cash can be considered as one of the ground that benefit ITC was not available. |
| Abel Space Solutions LLP v. Schindler India Pvt. Ltd. [2018-TIOL-03-NAPA-GST] | Lift | <ul style="list-style-type: none"> • Advance for purchase of the lift paid prior to GST was leviable to Service Tax under the Finance Act, 1994. • Invoices raised for installation of the lift completed after enactment of the CGST Act, was liable for payment of GST. |
| Rishi Gupta v. Flipkart Internet Pvt. Ltd. [2018-TIOL-04-NAPA-GST] | Almirah | <ul style="list-style-type: none"> • Withdrawal of discount does not amount to profiteering, if offered from profit margin. • The supplier cannot be held guilty if he is an agent and, therefore, cannot be held responsible for collection or refund of GST. |
| Pawan Sharma v. Sharma Trading Company [2018-TIOL-05-NAPA-GST] | Vaseline | <ul style="list-style-type: none"> • The concessions are given by the Government from its own revenue and the suppliers cannot appropriate them. • The Authority is not mandated to be a price regulator. • The Respondent is not required to perform an impossible act and hence doctrine of "<i>Lex non cogit ad impossibilia</i>" does not apply. |

Certain Contentious Issues

Rule 126 of the Central Goods and Services Tax Rules, 2017, as amended from time to time, empowers the NAPA to determine the methodology and procedure by which a registered person must pass on the benefits to the recipient by way of commensurate reduction in prices. However, the no such methodology or procedure has been prescribed as yet. This has left the businesses in dark regarding the manner of determining commensurate reduction and passing on the rate reduction or input tax credit benefits to the recipient. The Board (CBIC) is also expected to come out with clarification to address some of the queries relating to anti-profiteering provisions, such as:

- Whether the benefit accruing to a registered person needs to be determined at Transaction level, Product category level, GSTIN level or Entity level?
- Whether a transaction with a recipient resulting in profiteering be adjusted against loss incurred in another transaction, for compliance under the anti-profiteering provision?
- Whether the benefits in case of tax-inclusive contracts, firm price contracts and Government tender/bid needs to be passed on to the recipient?
- Whether the benefits can be passed on by way of provision of additional quantity of goods at same price or commensurate reduction in price is mandatory?
- Whether gradual increase in profit margins in the recent past as a trend be considered while determining compliance under the anti-profiteering provision?
- How to establish one to one correlation between the input tax credit and the tax payable on outward supplies at product level?
- Whether the benefit needs to be passed on to the customers when the registered supplier is incurring a loss?
- Whether reduction in the basic sale price by vendors is required to be passed, as there in neither reduction in the rate of tax not additional input tax credit?
- Whether reduced fiscal incentive by the Government be treated as loss for adjusting the price of products?
- Whether the manufacturer can be held guilty, if his agent/distributor does not pass the price benefit to the end customer?



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Various apprehensions have been expressed by trade and industry regarding operational issues and implementation challenges for determination of quantum of the “commensurate reduction” in prices to be passed on. The manner of passing on the benefit due to reduction in rate or additional of input tax credit has also been a subject matter of debate.

Parting Remarks

Various apprehensions have been expressed by trade and industry regarding operational issues and implementation challenges for determination of quantum of the “commensurate reduction” in prices to be passed on. The manner of passing on the benefit due to reduction in rate or additional of input tax credit has also been a subject matter of debate. In all fairness, NAPA should come out to clear the grey areas quickly and demonstrate to the trade and industry that they sincerely intend to have a Good and Simple Tax. Also, the time is right for the industry to assess the impact of anti-profiteering provision on their business and pass on the benefit of reduction in rate or the benefit of input tax credit, if any, to the recipient. The Industry is therefore advised

to gear up their IT infrastructure and train their tax team to meet the requirement of anti-profiteering provision under GST.

Role of Professionals

The concept of anti-profiteering is relatively new to India. Members specialising in the field of indirect taxes may explore opportunities of undertaking a compliance review for their clients, especially with regard to the verification of cost data and transitional credits. The advantage of conducting such review is not only to help the clients in identifying the additional profits to be passed on in a timely manner, but also help them mitigate penal provisions on account of non-compliance.

The concept of anti-profiteering is relatively new to India. Members specialising in the field of indirect taxes may explore opportunities of undertaking a compliance review for their clients, especially with regard to the verification of cost data and transitional credits.

Chartered Accountants may also explore the opportunity of providing attestation services for certifying the correctness of costing data furnished by the business. ■



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