

CAN EXORBITANT PROFITS BE REALLY
PREVENTED??

ANTI- PROFITEERING

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ANTI-PROFITEERING

17th July 2000 was the day when the seeds were sown for the newly established indirect taxation reform i.e. GST (Goods and Services Tax) and finally after 17 years the dream of unifying indirect taxes across the country has become the reality.

Many businesses found the first draft of Model GST Law as the golden opportunity to restructure their business as in the said proposed legislation no mechanism for price control was introduced and it was assumed that corporate houses would be benefited by the reduced prices of inputs as their overall production cost would be slashing down and the differential amount will add up to their profits. But this soon turned out to be a myth when the revised draft was released and a new entry got inserted in the law named as "***Anti-Profiteering Measures***".

It had been observed internationally that there was a rise in inflation in countries when the GST was introduced there. For example, in Australia inflation rose to 6% from 3% when the GST was introduced in the year 2000. Although it was for a year, but it forced the government to give various concessions to businesses and reduce personal income tax so that the impact of GST can be mitigated. Similarly, Singapore's GDP rate fell to 3% in 1994 when GST was introduced there from 5.5% in 1993, which was a huge decline.

To control such situations it is necessary to have relevant price control mechanism in operation so that economy is not affected negatively and thus Anti-Profiteering measures play a well-defined role.

Now, as the Anti-Profiteering Measure has been successfully adopted in the GST Act, the question to ponder upon is that will the Corporates adhere to this law and what are the possible measures to be adopted by the Authorities to ensure compliance?

Initially, the answer to the above question would have been "**Yes**" or "**No**" depending upon the company's wish but after the insertion of Anti-Profiteering measure in Central Goods and Services Tax Act, 2017 ("**hereinafter referred to as CGST Act 2017**"), it is clear that it will be a mandate for all registered persons to pass on the specified benefits arising consequent to introduction of GST. Benefits can arise in certain cases like tax incidence on inputs might reduce or the input tax which was earlier becoming cost in the pre-GST regime might be available as credit in the form of GST in the post-GST regime. This benefit is required to flow through the complete supply chain to ensure that the ultimate customer is not at the losing end and if any intermediary tries to obtain exorbitant profits from such benefit then it will be a non-compliance in accordance with section 171 (**Anti-profiteering Measure**) of CGST Act 2017.

The same provision has been adopted under Integrated Goods and Services Tax Act, 2017 ("hereinafter referred to as IGST Act, 2017") by the virtue of Section 20(xxv) of IGST Act, 2017, wherein it says that miscellaneous provisions (i.e. chapter XXI of CGST Act, 2017) shall, mutatis mutandis, apply in relation to integrated tax as they apply in relation central tax. Similarly, the provision has been adopted under Union Territory Goods and Services Tax Act, 2017 by virtue of Section 21(xxvii).

The concept of Anti-profiteering seems to be a new initiative but actually, this concept is not new to India, rather the first move towards curbing the inflation was initiated in India about 58 years back in 1959 in the form of "**West Bengal Anti-Profiteering Act, 1958**".

Reference over this topic can also be drawn to Malaysian law where GST has recently been implemented in 2015. In Malaysia, the concept of Anti-profiteering does not come under the purview of GST Act rather a separate law "**The Price Control and Anti Profiteering Act, 2011**" has been enacted. In 2014, amendments were also introduced which sought to penalize businesses which make **unreasonably high profits** arising from the implementation of the tax.

Recently, in 2017 Price Control and Anti-profiteering (Mechanism to Determine Unreasonably High Profit for Goods) Regulations 2016 (New Regulations) were introduced which replaced the 'old' regulations. New regulations came into force on 1 January 2017 and use the formula-based approach to determine unreasonably high profits.

ANTI-PROFITEERING MEASURE – SEC 171 OF CGST ACT, 2017

Section 171 of CGST Act, 2017 reads as:

(1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.

(2) The Central Government may, on recommendations of the Council, by notification constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

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If we strictly go by the wording, then an authority will be appointed to examine the following:

- Whether the benefit of Input Tax Credit availed in Post – GST regime which was cost in Pre – GST regime is being passed in the form of reduced selling price or not.

To illustrate, Suppose in Pre – GST Regime goods of Rs 100 were purchased in course of inter-state trade on which Rs 2 was paid as CST (Central Sales Tax), the credit of which was not available. In GST regime there will be no such credit blockage and ultimately the cost which was Rs 102 earlier will now be Rs 100 only.

So this section ensures that in GST regime, the dealer should pass on the benefit of cost savings (Rs 2 in this case) to the ultimate consumer.

- Whether the prices of goods or services have been reduced or not in the case where the tax rates had decreased as compared to Pre – GST regime.

To illustrate, Suppose in Pre – GST regime Assessable value of goods was (Cost before all taxes) Rs 100, on which Excise duty of 12.5% and a VAT of 12.5 % was levied which resulted in effective tax rate of 26.56%. In GST regime suppose GST rate of 18% is leviable on such item.

So this section ensures that in GST regime, the good should be available for Rs 118 as compared to Rs 126.56 in Pre – GST regime.

NATIONAL ANTI-PROFITEERING AUTHORITY

As per the ANTI-PROFITEERING Rules, National Anti-Profiteering Authority shall be constituted under Rule 122. The duty of the authority shall be as follows:

- To determine whether any benefit of reduction in the rate of tax on any supply or benefit of input tax credit has been passed on to the recipient of the supply by way of commensurate reduction in prices.
- To identify the registered persons who have not passed the benefits mentioned above.
- To order the reduction in prices.
- To order the supplier to return the recipient any amount, which has not been passed by way of commensurate reduction in price, along with interest rate of 18%. Interest shall be chargeable from the date since when such higher amount was collected till the date when the said amount has been refunded.
- To order imposition of penalty.
- To order cancellation of registration under GST.
- To furnish performance report to the Council by a tenth of the close of each quarter.

Ministry of Finance notified through the press release on 25th July 2017 that GST council has formed the selection committee to identify and recommend eligible persons for appointment as the Chairman and Members of the National Anti-profiteering Authority under GST.

Proceeding with regard to any application made towards non-compliance with Anti-Profiteering measure shall be undertaken as follows:

- Any application regarding non-compliance with Anti-Profiteering rule shall be written to the Standing Committee constituted by the council. Committee will examine the application to find out the accuracy of such application within a period of 2 months.
- On issues of local nature, the application shall be first examined by the State level Screening Committee and further upon satisfaction of the committee that contravention has been made, such application will be forwarded to Standing Committee.
- If standing Committee is satisfied that there is *prima-facie* evidence to show that supplier has not passed on the said benefit in the said manner then it shall refer the matter to Director General of Safeguards for a detailed investigation.
- Director General of Safeguards shall complete the investigation within 3 months and furnish the report to the National anti-Profiteering Authority.

IMPACT IF BENEFIT IS NOT PASSED

- The other aspect to examine here would be the case in which such benefits are not passed. Although the authority would be there to examine the compliance, still to understand the viability of this measure and consequences if the authority fails to identify non-complying businesses, we need to look at the impact on final output sold to consumers in case of non-adherence with Anti Profiteering Measures.
- So let's first look at the scenario where normal trading was done in Pre - GST regime.
- In the following illustration, ABC Suppliers is a manufacturing concern whereas XYZ Co. is a trading concern.

CURRENT SCENE OF PURCHASING GOODS

Sell amount	100
Excise Duty	12.5
VAT	14.0625
Total	126.5625



ABC suppliers



Cost	112.5
Profit	30
Sell Amount	142.5
VAT	17.8125
Total	160.3125



XYZ Co.



Cost	142.5
Profit	10
Total	152.5
VAT	19.0625
Total	171.5625



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In this case, ABC Suppliers sells goods to XYZ Co. for Rs 126.5625 and further for XYZ Co. Excise duty paid to ABC becomes cost as XYZ does not charge it separately in its invoice issued to dealers (Assuming it is not a First Stage Dealer (FSD) or Second Stage Dealer (SSD)). So, effective cost for XYZ Co. comes out be Rs 112.5 (Sell amount + Excise Duty). Further, XYZ sells it for Rs 160.3125 after adding its profit margin and charging output VAT. In the same manner, Dealer sells the same goods to the customer for Rs 171.5625 after adding its profit margin and charging output VAT on the total of effective cost i.e. Rs 142.5 + profit margin.

Now, when the same trading is done in GST regime the scenario would be something like this:

GST SCENE OF PURCHASING GOODS (when credit passed)

Sell Amount	100
GST	18
Total	118



ABC suppliers

Supplies Goods

Cost	100
Profit	30
Sell Amount	130
GST	23.4
Total	153.4



XYZ Co.

Sell to Dealers

Cost	130
Profit	10
Total	140
GST	25.2
Total	165.2

Sell to Consumers

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In this case, ABC Suppliers will sell goods to XYZ Co. and charge GST* (assuming GST rate on goods to be 18%) on it, so total price coming out to be Rs 118. Now the further effective cost to XYZ Co. will be Rs 100 only as the full credit of GST paid will be available. Similarly, the cost to Dealer will be the Sell amount as again full credit will be available to him as well. Dealers sell the goods to the consumers for Rs 165.2 after charging GST on Rs 140.

From the above two illustrations, we can clearly figure out that the goods which are available to the customer in Pre - GST regime for Rs 171, will be available in Post - GST regime for Rs 165 only. So there is a clear-cut benefit of Rs 6 (others factors considered to be constant) to the customer in GST regime as compared to Pre - GST era. But this is possible only when the benefit which accrues to the intermediaries is passed on to the next level of supply chain i.e. Anti-Profiteering measures are complied with.

Now let's figure out what will happen when the benefit is not passed on. For example, let's analyze the case where XYZ Co. does not pass on the benefit in the supply chain:

GST SCENE OF PURCHASING GOODS (when credit not passed)

Sell Amount	100
GST	18
Total	118



ABC suppliers

If XYZ Co. continues on selling for 142.5 i.e. benefit of tax reduction is not passed on further.

Cost	100
Profit	42.5
Sell Amount	142.5
GST	25.65
Total	168.15



XYZ Co.



If the benefit of reduction in cost was properly passed, then the GST chargeable by Dealer would have been 25.2

Cost	142.5
Profit	10
Total	152.5
GST	27.45
Total	179.95

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In this case, if XYZ Co. does not pass on the benefit and continues to sell on Rs 142.5 instead of Rs 130, the price to ultimate consumer turns out to be Rs 179.95, which is even more than the price in Pre - GST regime. So where the customer should have reaped the benefit of reduction in cost by Rs 6, he has to pay the price which is increased by Rs 9. This is the effect which would occur if the businesses do not comply with Anti - Profiteering Measure.

CHALLENGES IN EXAMINING THE COMPLIANCE

It seems to be easy that the government will appoint the authority and that authority will examine for non-compliance by businesses, but is it that easy?

There are many industries where it would be difficult to identify whether the benefits have actually been passed or not. The main segment of industry, which comes under the ambit of this category, is the one which decides the price of its output on the basis of Demand and Supply. Prices of some commodities like sugar and steel is market driven and is determined by Demand and supply concept. These industries sometimes have to sale at the price which is even less than their cost (this usually occurs when the breakeven point of production has not been achieved and the fixed cost cannot be recovered) and have to bear losses.

Now challenge here would be to identify whether these industries have reduced their prices to pass on the benefit or not, because currently if they are experiencing losses the benefit of reduced input cost will help them in reducing their loss.

In these cases if the price of output has not been changed and remain same as before then how can one determine that they are not passing on the benefit of reduced input cost because they can keep the price stable to reduce their losses and in that case it would be difficult to say that they are non-compliant in accordance with Sec 163.



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