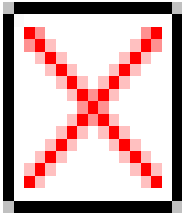


Anti-Profitteering under GST - An analysis of the nature and structure of NAA

SEPTEMBER 18, 2020

By Vinayak Mathur, Advocate, PDS Legal, Delhi



THE advent of the GST regime with effect from 01.07.2017 brought a paradigm shift in the indirect taxation system in India. Instead of multiple points in the lifecycle of goods and services attracting different taxes at Central or State level, there is now only one tax i.e. GST which is imposed on the supply of goods and services. The introduction of GST led to rationalization of indirect taxes thereby resulting in lower and more competitive prices of goods and services. Further, to remove the cascading effect of tax, input tax credit ("*ITC*") was granted at each step of the supply chain so that GST is only paid on the value addition.

Section 171 was inserted in the Central Goods and Services Tax [Act, 2017](#) ("*CGST Act*")

) to ensure that the benefit of any reduction of rate of tax or benefit of ITC on supply of any goods and services passed on to the recipient by way of commensurate reduction in price. Most significantly, Sub-section (2) of Section 171 provided for the creation of an Authority by the Central Government to examine whether such benefit as envisaged in Sub-section (1) was passed on to the recipient. In exercise of such powers, the Central Government created the National Anti-Profitteering Authority ("*NAA*")

). Further, the powers and functions of the NAA are prescribed in Chapter XV of the Central Goods and Services Tax [Rules, 2017](#) ("*CGST Rules*").

The objective of the present article is to throw light on the nature and structure of the NAA and analyse whether the NAA qualifies as a "*tribunal*" and ought to be presided and consist of judicial members.

Overview of the NAA

Rule 122 of the CGST Rules provides that the NAA shall consist of a Chairperson who holds or held a post in rank equivalent to a Secretary to the Government of India and four technical members. Rule 124 provides that persons to the abovementioned posts shall be appointed by the Central Government on the recommendations of a Selection Committee constituted for this purpose by the GST Council. Rule 123 provides for the creation of a Standing Committee and State level Screening Committee for the *prima facie* examination of any complaints. Further, the NAA also exercises superintendence, direction and control over the Directorate General of Anti-Profitteering ("*DGAP*").

The functioning of the NAA and the DGAP may be summarised as below:

- a. On the receipt of a complaint filed by a recipient of goods or services, the Standing Committee shall refer a complaint filed by a recipient to the DGAP for investigation if it is satisfied that there is *prima facie* evidence of violation of Section 171;
- b. The DGAP shall undertake investigation and collect evidence to determine any violation of Section 171. Rule 132 also grants the DGAP power to summon any person to give evidence or produce documents and shall have power in any inquiry in the same manner as provided to a civil court under the Code of Civil Procedure, 1908;
- c. The DGAP shall submit its report to the NAA. Rule 133 provides that the NAA shall determine whether there has been a violation of Section 171.

d. During the proceedings, an opportunity of being heard would be granted to the interested parties, including the supplier of goods or services. In case the NAA concludes that the supplier did not pass on benefit by commensurate reduction of prices, the NAA may order any of the following:

- i. Reduction in prices;
- ii. Refund to the recipient of any additional amount charged from him along with interest;
- iii. Imposition of penalty;
- iv. Cancellation of registration

e. Any decision by the NAA shall be taken by a minimum quorum of three members with the Chairperson having a casting vote in the case of a tie;

f. Rule 135 directs that any order passed by the NAA shall be immediately complied with and Rule 136 provides that the NAA may require any authority of central, state or union territory tax to monitor the implementation of the order passed by it;

A perusal of the above clearly shows that the NAA is a body created by the Ministry of Finance with the sole objective of adjudicating disputes when it is alleged that commensurate reduction in prices were not offered by suppliers when there is any reduction in rate of tax or grant of ITC. Prior to adjudication of the dispute, the DGAP undertakes investigation and submits a report to the NAA. In the case of any contravention, the NAA is empowered to pass orders to remedy such a situation and impose penalties or cancel registration. Thus, the NAA, while being an executive body, exercises adjudicatory functions and passed order which entail civil consequences. Here, the question arises if the NAA qualifies as tribunal.

Whether the NAA qualifies as a tribunal

In **Durga Shankar Mehta v. Thakur Raghuraj Singh** ¹, the Hon'ble Supreme Court held that the expression "**Tribunal**" as used in Article 136 does not mean the same thing as "**Court**"

but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions. The Hon'ble Supreme Court in **ACC v. P.N. Sharma** ²

held that a tribunal is a body, other than an ordinary court which has the "**trappings of a court**"

. The basic test to qualify as a tribunal having the "**trappings of a court**" are as below:

- a. The power of adjudication has been conferred on the authority in question by statute;
- b. Such adjudicating power is a part of the State's inherent power exercised in discharging its judicial function ³;
- c. Power to compel attendance of witness and to examine them on oath;
- d. Provisions for imposing sanctions by way of imprisonment, fine, damages or mandatory or prohibitory orders;
- e. If there is a **lis** and the decision of the authority is binding and final ⁴

It is submitted that each of the abovementioned tests required to qualify as a tribunal are fulfilled by the NAA:

- a. The power to adjudicate has been granted to the NAA under Rule 133 read with Section 171 of the CGST Act.
- b. The power to determine whether commensurate reduction in price was passed on to the recipient was vested with the Civil Courts in terms of Section 9 of the CPC.

- c. Rule 132 empowers the NAA to summon any person to give evidence and produce documents the way a Civil Court is empowered to;
- d. The NAA is empowered to order imposition of penalty and cancel registration of any supplier under Rule 133(3);
- e. The decision of the NAA is final and it can ensure compliance of its order under Rule 135 and monitor the same under Rule 136

Accordingly, it is the author's view that while the NAA is created by statute, it is an adjudicating body invested with judicial power and qualifies as a tribunal. Before we analyse whether the structure of the NAA is compliant with the judicially mandated structure of a tribunal, it is relevant to understand the legal history regarding adjudication by executive bodies and whether the NAA can be distinguished from the same.

Adjudication by the executive

The doctrine of separation of powers provides that each organ of the State i.e. the executive, legislature and the judiciary have clearly earmarked functions so that one organ of the State does not usurp the function of the other. This doctrine has been recognised as a part of the basic structure of the Constitution. ⁵

However, unlike the USA, this doctrine is not rigidly followed in India and a law would not be in violation of this doctrine if it results in some overlap of functions unless it takes over an essential function of the other branch leading to a lapse of constitutional accountability. ⁶

In **Clariant International Ltd v. SEBI** ⁷

, the Hon'ble Supreme Court held that administrative adjudication has become a necessary concomitant of a welfare state and that the executive also performs quasi-judicial and quasi-legislative functions. In **Satya Pal Anand v. State of Madhya Pradesh** ⁸, the Hon'ble Supreme Court upheld the exercise of quasi-judicial functions by the Registrar of Co-operative Societies on the ground that while the Registrar exercises certain adjudicatory functions, it predominantly exercises administrative functions. Thus, such a joint function exercised by the Registrar was a valid exercise of administrative adjudication. Even the Election Commission of India has been granted quasi-judicial power to determine whether to register a political party or not and such a power was upheld by the Hon'ble Supreme Court in **Indian National Congress v. Institute of Social Welfare** ⁹

. Similarly, various assessment officers and first appellate authorities exercise administrative as well as adjudicatory functions. In all such cases, the contention that adjudication must be made by a judicially trained person or bench was not accepted. However, in each of the abovementioned cases, it was an undisputed fact that the executive body, while exercising quasi-judicial functions, primarily exercised administrative functions of various kinds.

In comparison to the abovementioned bodies, the NAA exercises a singular function of adjudicating disputes wherein any person has alleged that the reduction in rate of tax or grant of ITC did not result in commensurate reduction in price for the recipient. The NAA neither exercises any administrative functions nor does it have the *suo motu* power to adjudicate any dispute. ¹⁰

In this background, it is submitted that when the grant of such adjudicatory functions is not co-incidental to any other administrative functions carried out by it, the NAA qualifies as a 'tribunal' and ought to be distinguished from any other executive body exercising quasi-judicial control along with administrative functions.

Comparison of the NAA with the CCI

An interesting comparison of the structure of the NAA can be made with the Competition Commission of India ("**CCI**"). Under Section 26(1) of the Competition Act, 2002, on the receipt of a reference from the Central or a State Government, or statutory authority, or its own knowledge or on receipt of a complaint under Section 19 regarding contravention of Section 3 or 4, the CCI shall direct the Director General to investigate into the matter. If subsequent to such investigation, the CCI finds that there has been a contravention of Section 3 or 4, then it shall pass orders under Section 27 to the concerned enterprise or association of person to discontinue the arrangement causing such contravention or impose penalty or modify any arrangement. Section 36 grants the power to CCI to regulate its own procedure and Section 61 provides that such power of adjudication is to the exclusion of any civil court. The CCI Regulations, 2009 permit the CCI to take evidence (Reg. 37), inspect certified copies of documents (Reg. 41) and examine witnesses and documents (Reg. 45). Thus, the procedure followed by the CCI is comparable to that of the NAA. ¹¹

In **Mahindra Electric Mobility Ltd v. CCI** ¹²

, the Petitioners had challenged the structure of the CCI and contended that the CCI amounts to a tribunal exercising judicial functions.

Accordingly, it was contended that the procedure under the CCI must confirm to a judicial approach. However, this challenge was repelled by the Delhi High Court. The High Court relied on **CCI v. SAIL** ¹³

wherein it was held that the CCI is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. The High Court held that the power to direct investigation under Section 26(1) is administrative and it is only the investigation or report by the DG which may trigger subsequent inquiry and adjudication. Considering the multiple functions exercised by CCI, the High Court concluded that the CCI is not a tribunal exercising exclusive judicial powers and is rather a body exercising part-administrative, expert and quasi-judicial powers. Further, the High Court held that the structure of the CCI does not violate the doctrine of separation of powers since various regulatory bodies such as the SEBI, AERA, PNGRB and Electricity Commissions are examples of executive bodies which perform multifarious tasks and clothing them with administrative, quasi-legislative and quasi-judicial powers would not make the same a judicial body.

However, the NAA cannot be bracketed along with regulatory bodies like the CCI etc since the NAA is not mandated to undertake all the functions which are representative of a regulatory body such as advisory, advocacy, investigation and adjudication. The Hon'ble Supreme Court ¹⁴ held that to regulate is to control by Rule or to subject to governing principles. It also includes the power to issue directions. ¹⁵

As noted above, the NAA remains a dormant body until it is seized of any complaint and can exercise *suo motu* powers only in continuation of an ongoing investigation. Further, it has no powers to issue any directions or take any proactive measures surrounding the issue of anti-profiteering. Thus, the NAA is completely different from a regulatory body like the CCI and even though the Delhi High Court held that exercise of adjudicatory powers by CCI does not make it a tribunal, it is submitted that the same reasoning shall be inapplicable in the present case.

It may also be noted that direction to the DGAP to conduct investigation, while being an administrative act, will not dilute the nature of the NAA. It is submitted that even though the judicial system in India is broadly adversarial, to undertake an inquisitorial function i.e. to direct investigation is not a unique feature attributable to the NAA. Under Order 26 Rule 9, a Civil Court is empowered to issue a commission to any person to undertake a local investigation for any matter in dispute. Further, a public interest litigation pursued before the Supreme Court or any High Court is considered inquisitorial in nature ¹⁶

. Thus, the power granted under Rule 128 to direct investigation will not alter the nature of the NAA and the same ought to be considered an adjudicatory body with the *"trappings of a court"*.

Accordingly, it is submitted that the vesting of such adjudicatory powers with the NAA amounts to an infringement of the doctrine of separation of powers since it takes over a crucial function of Civil Courts to adjudicate on anti-profiteering related disputes and does not get covered under any of the exclusions to the doctrine.

Structure of the NAA vis-À-vis a tribunal

The structure of a tribunal has been the subject matter of various Supreme Court decisions. In **Union of India v. R. Gandhi** ¹⁷, it was observed that if tribunals are established in substitution of Courts, they must also possess independence, security and capacity. Further, with transfer of jurisdiction to a tribunal, it was held that *inter alia*, the following conditions must be met:

- i. Tribunals should have as members, persons of a rank or a rank, capacity as nearly as possible as the rank, capacity and status of the court which was dealing with such matters and the members should have independence and security of tenure;
- ii. There is no presumption that there should be technical members. Only where the exercise of jurisdiction involves inquiry and decisions into technical aspects shall technical members be useful;
- iii. The term of office shall be for a period of seven or five years subject to eligibility for one more term instead of being for three years or up to the age of 65 since term of three years with the retirement age of 65 years is perceived as having been tailor-made for persons who have retired or shortly to retire and encourages these Tribunals to be treated as post-retirement havens;
- iv. Two member benches in a tribunal shall always have a Judicial member. When any larger/special bench is constituted, then the number of technical members cannot exceed the judicial members

The abovementioned conditions were reiterated in **Madras Bar Association v. Union of India** ¹⁸

. Insofar as the NAA is concerned, none of the conditions are being fulfilled:

- i. The NAA currently consists only of a chairman and four technical members;

ii. There is no provision to appoint a judicial member;

iii. The period of office of a chairperson and technical member is for two years or age of 65, whichever is earlier;

Lastly, it is submitted that Rule 134 which provides that the Chairperson shall have a casting vote is anathema to adjudicatory functions wherein each member exercises the same jurisdiction and powers. Reliance here is placed on

Shobhana Shankar Patil v. Ramachandra Shirodkar ¹⁹

wherein it was held that the casting vote granted to a chief judge in the event of a conflict between two judges was illogical and arbitrary. Thus, as the present structure of the NAA exists, it is not in compliance with the judicially mandated structure of a tribunal.

Conclusion

The Hon'ble Supreme Court insisted on appointment of judicially trained members in tribunals so that the jurisdiction usurped from traditional courts is vested in persons who appreciate judicial procedure and the principles of natural justice and to ensure that tribunals do not resemble bureaucratic boards ²⁰

. Through the NAA, we have seen the creation of a unique body which is although clothed as an executive body to ensure compliance of Section 171, is in fact a tribunal which only springs into action when a complaint is forwarded to it. The experience of representations before the NAA has not been rewarding for suppliers and multiple writ petitions are currently pending before High Courts across India challenging the authority of the NAA to pass orders and on merits with a common complaint that the NAA has been unable to approach and dispose of matters as a judicially trained body ought to. What emerges from the abovementioned analysis is that the structure of the NAA requires a serious re-look and a major overhaul to be in consonance with the requirements of a tribunal vested with the **"trappings of a court"**.

[The views expressed are strictly personal.]

¹ (1955) SCR 267

² AIR 1965 SC 1595

³ Engineering Mazdoor Sabha v. Hind Cycles AIR 1963 SC 874

⁴ Jaswant Sugar Mills v. Lakshmidhand AIR 1963 SC 677

⁵ Kesavananda Bharati v. Union of India (1973) 4 SCC 225

⁶ Bhim Singh v. Union of India (2010) 5 SCC 538

⁷ (2004) 8 SCC 524

⁸ (2014) 7 SCC 244

⁹ (2002) 5 SCC 685

¹⁰ The NAA has been recently granted limited ***suo motu***

powers under Rule 133(5) to direct investigation and adjudicate disputes wherein on receipt of any DGAP investigation report, it directs the DGAP to investigate any contravention of Section 171 in respect of supplies of goods and services other than those covered in the DGAP report.

¹¹ It is relevant to note that the Draft Amendment Bill to the Competition Act, 2002 was published for comments on 12.02.2020. It has been proposed that the CCI be split between the CCI and a Governing Body with the Governing Body under proposed Section 18A being responsible for undertaking all regulatory and advisory functions of the CCI. Further, the role of the CCI will be limited to adjudication under Section 26.

¹² 2019 SCC Online Del 8032

¹³ (2010) 10 SCC 744

¹⁴ U.P. Cane Cooperative Cane Farmers Union v. West U.P. Sugar Mills Association (2004) 5 SCC 430

¹⁵ Star India Pvt Ltd v. DIPP (2019) 2 SCC 104

¹⁶ Manohar Joshi v. State of Maharashtra (2012) 3 SCC 619

¹⁷ (2010) 11 SCC 1 - [2010-TIOL-39-SC-MISC](#)

¹⁸ (2014) 10 SCC 1 - [2014-TIOL-82-SC-MISC-CB](#)

¹⁹ AIR 1996 Bom 217

²⁰ R. Gandhi, Supra, Para 64

*(DISCLAIMER : The views expressed are strictly of the author and Taxindiaonline.com doesn't necessarily subscribe to the same.
Taxindiaonline.com Pvt. Ltd. is not responsible or liable for any loss or damage caused to anyone due to any interpretation, error, omission in
the articles being hosted on the site)*