Anti-Profiteering - Urgent need for Appellate forum

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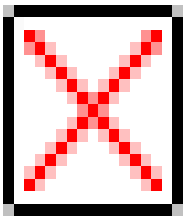

ARE the orders passed by the National Anti-profiteering Authority quasi-judicial orders?

1.1. Sub-section (1) of Section 171 of the CGST **Act, 2017** and the corresponding provisions of the SGST Acts provide that 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. Sub-section (2) of Sec 171 authorises the Central Government to constitute an Authority for implementation of the provisions of Sub-section (1). In terms of Sub-section (3), the Authority constituted by the Central Government under sub-section (2) of this Section shall exercise such powers and discharge such functions as may be prescribed. Rule 122 of the CGST **Rules, 2017** (Chapter XV) constitutes the National Anti-profiteering Authority (NAA) for enforcement of the provisions of sub-section (1) of Section 171. The NAA consists of a Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India and four Technical members who are or have been Commissioners of Central Tax or State Tax or an equivalent post.

1.2. Under Rule 126, the NAA has been authorized to determine the procedure and methodology (including computational methodology) for determining whether a registered person has contravened the provisions of Sec 171(1) of the Act. Rule 127 of the CGST Rules, 2017 specifies the duties of the Authority as under -

> ***"âDuties of the Authority. - It shall be the duty of the Authority,-***
>
> ***(i) to determine whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;***
>
> ***(ii) to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;***
>
> ***(iii) to order,***
>
> > ***(a) reduction in prices;***
> >
> > ***(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent from the date of collection of the higher amount till the date of the return of such amount***
>
> ***or recovery of the amount not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in section 57;***
>
> ***(c) imposition of penalty as specified in the Act; and***

(d) cancellation of registration under the Act."

1.3. In terms of sub-rule (1) and sub-rule (2) of Rule 133, the Authority, before deciding whether a registered person has contravened the provisions of Section 171 and if so, passing an order against him in terms of Rule 127(iii), shall grant an opportunity of hearing to the ***"interested parties"***. The term ***"interested parties"***
, in terms of the Explanation (c) to Chapter XV includes the supplier of the goods or services under the proceedings, the recipient of the goods or services under the proceedings or any other person under Rule 128(1) making allegation of profiteering against the registered person being proceeded against under Rule 133.

1.4. The NAA, thus, functions as a quasi-judicial authority and the orders passed by it under Rule 133 of the CGST Rules, 2017 are quasi-judicial orders. It is, in fact, the authority for adjudication of the disputes relating to anti profiteering matters.

2. There is no provision in the GST Laws for appeal against NAA's orders.

2.1. Though NAA is the adjudicating authority in respect of anti-profiteering matters, the definition of 'Adjudicating Authority', as given in Section 2(4) of the CGST Act, 2017 specifically excludes ***"the authority referred to in sub-section (2) of Section 171"***
. Since appeal under Sec 107(1) of the CGST Act before the "Appellate Authority", as defined under Sec 2(8), is against a ***"decision or order passed under CGST Act, 2017 or State Goods and Services Act or the UTGST Act by an adjudicating authority"***
and the definition of ***"adjudicating authority"***
excludes NAA, no appeal can be filed under Sec 107 against the NAA's orders. Since the Appellate Tribunal constituted under Sec 109 of the CGST Act hears appeals only against orders of the
"appellate authority" which, in turn, hears appeals against the orders of the adjudicating authority as defined under Sec 2(4)", the Appellate Tribunal also cannot entertain appeals against the orders of NAA.
Sec 117(1) of the CGST Act provides for appeal to High Court against the orders of the State Bench or Area Bench of the Appellate Tribunal. Since the appeals against NAA's orders are excluded from the jurisdiction of the Appellate Tribunal, no appeal can be filed to High Court under Sec 117 against NAA's order. Thus, in the GST laws, there is no provision for appeals against the orders of the NAA. In other words, there is no statutory appeal against the orders of NAA either before the Appellate Tribunal or before the High Court.

3. **Anti-profiteering provisions are no longer of purely temporary nature and are no longer used sparingly**.

3.1. The possible reason for not making any provision for statutory appeal against the orders of NAA may be that when the GST was introduced w.e.f. 01.07.2017, the anti-profiteering provisions were supposed to be of temporary nature and were expected to be used sparingly. The temporary nature of the anti-profiteering provisions of Section 171 is evident from the provision in Rule 137 of the CGST Rules, 2017 giving powers to the Central Government to fix, on the recommendations of the GST Council, the tenure of the Authority after which it will cease to exist. Initially, the tenure fixed was two years from the date on which the Chairman of the Authority enters upon his office.

3.2. But the anti-profiteering provisions have neither remained a short term temporary measure nor are sparingly used, as-

(a) the tenure of NAA has been increased to four years by amending the Rule 137 by Notification No. **33/2019** dated 18.07.2019 and looking to the number of cases under investigation and the manner in which new cases are being taken up for investigation, it will not be surprising if the tenure of the Authority is further extended; and

(b) as discussed in detail in an earlier articles titled ***Implementation of Anti-Profiteering Provisions - critical issues*** published on January 03, 2020 and ***Do Anti-profiteering provisions in GST law suffer from vice of excessive delegation?*** published on August 27,2020, the anti-profiteering provisions are no longer being used sparingly.

3.3. Very often, the amounts determined by the Authority as profiteered amount are highly inflated because of the following practices of questionable legal validity adopted by the Authority for identifying the cases of profiteering and the calculation of profiteered amount.

(a) The core issue in the anti-profiteering proceedings is the computational methodology for identifying the cases of contravention of the provisions of Sec 171(1) of the CGST Act, and having identified a case of profiteering, how the profiteered amount will be calculated and for what period. But the CGST Rules framed by the Central Government do not prescribe any computational methodology and instead, the Rule 126 delegates the power in this regard to the NAA. The NAA, instead of notifying a standard computational methodology has interpreted Rule 126 as giving it power to decide the computational

methodology on case to case basis i.e. deciding every case by best judgement method. There are cases of franchisees of the same franchisor with same pricing policy and supplying the same products where because of different computational methodology adopted widely different percentage of profiteering has been alleged.

(b) In cases where reduction in rate of tax is accompanied by withdrawal of ITC benefit, the loss of ITC benefit for post rate reduction period is not calculated on realistic basis. Besides this, increase in the cost of inputs during post rate reduction period is also ignored for profiteering calculations as a result of which, genuine business expenses also get included in the profiteered amount. In fact, in profiteering calculations, neither the investigating agency- DGAP, nor the adjudicating authority- NAA goes into the question of increase in the cost of inputs/business expenses during post rate reduction period.

(c) Once an assessee is held to have contravened the provisions of Sec 171(1) of the CGST Act, the profiteered amount is calculated from the date of reduction in rate of tax/ change in law resulting in availability of higher quantum of ITC benefit to last day of the month in which the reference was received by the investigating agency- DGAP from the Screening Committee, which is arbitrary.

(d) Because of the above two practices adopted by NAA, even a genuine increase in the base price during post rate reduction period which was necessary on account of increase in the cost of inputs, is also counted as profiteering, which amounts to regulating the price and thereby violation of the right to carry on any trade or business guaranteed under Art 19(1) (g) of the Constitution.

(e) When an assessee as per his marketing policy sells his product to different category of buyers at different prices, clear picture of profiteering would emerge only when separate calculations are made for each category of sale by comparing pre and post rate reduction base price of the product. But instead of doing this, profiteering is calculated by comparing the average base price for all categories of sales for pre rate reduction period with the post rate reduction base price, which results in the profiteering calculations getting distorted.

(f) In case of promotional sales at discount as per the sales policy of an assessee, the discounts are to be ignored for profiteering calculations, as the same are given by the assessee from his own profit margin. This is what has been held by NAA in its order in case of **Rishi Gupta Vs Flipkart Internet Pvt Ltd reported as 2018-TIOL-04-NAA-GST.** But this order is not being followed now invoking Sec 15(3) (a) of the CGST Act, 2017, which is applicable for levy of GST and has no application for determining whether a person has contravened the provisions of Sec 171(1). Because of taking discounted price for profiteering calculations, the profiteering calculations get distorted. The profiteered amount would get inflated if because of higher proportion of discounted sales during pre-rate reduction period, the average base price during that period had become lower than the price as per pricelist for that period.

(g) When an assessee is held to have profiteered, in addition to the profiteered amount as calculated along with 18% interest, he is also asked to pay GST on this amount ignoring the fact that earlier GST had been paid by him to the Government on the same amount. Thus. On the part of the sale price held to be "profiteered amount", GST is levied twice.

3.4. In many cases pertaining to the period prior to 1 st January, 2020, the newly introduced penal provisions of Sub-section (3A) of Sec 171 which were brought into force w.e.f. 1st January, 2020 have been invoked, which is outright wrong.

3.5. Thus, very often, the orders passed by NAA by which huge amounts have been demanded from the assessees proceeded against as profiteered amount along with interest and penalty, are either of doubtful legal validity or are outright contrary to the provisions of law. What is worse, in terms of Rule 135 of the CGST Rules, any order passed by the NAA against registered person is required to be complied by him immediately failing which the profiteered amount along with interest and penalty can be recovered from him under Sec 79 of the CGST Act and the corresponding provisions of SGST Acts.

4**. Options, at present, available to an assessee aggrieved by an order passed by NAA.**

4.1. Faced with the recovery proceedings in pursuance of an adverse order of NAA against which there is no provision for statutory appeal, the only option available to the assessee is to go to the jurisdictional High Court. But since, as discussed above, there is no provision in the CGST Act or SGST Acts for filing of appeal to High Court against NAA's orders, the only remedy available to an assessee aggrieved by an order passed by NAA is to file a writ petition against the order before the jurisdictional High Court under article 226 of the Constitution for quashing of the order on the ground of patent illegality or the order being in violation of the fundamental rights - the
"right to practice any profession, or to carry on any occupation, trade or business" guaranteed under Art 19(1)(g) of the Constitution or ***"right to equality before law"*** guaranteed under Art 14.

5. **Problems with writ remedy.**

5.1. There are several problems in pursuing writ remedy. First of all, it is a much costlier remedy as compared to appeal before an appellate tribunal, especially for the assessees in MSME sector who may find it difficult to afford its cost. Second problem in pursuing writ remedy is that unlike the writ petitions in other matters, where the dispute is only over the points of law, in anti-profiteering cases, the dispute is largely over the points of fact, i.e. the computational methodology adopted by the Authority and the calculations based on the same. For examining the petitioner's plea regarding violation of right to carry on any trade or business guaranteed under Art 19(1) (g) or the right to equality before law guaranteed under Art 14, the Court will have to delve into the question of correctness of the computational methodology adopted and the correctness of the calculations based on the same. It is unfair to expect the High Courts, already burdened with huge pendency, to be able to do full justice to this job by going through the complicated calculations presented by both the sides and give a finding on facts. If there had been provision for appeal to some Appellate Tribunal against NAA's orders, the issues relating to computational methodology and computations would have been examined and sorted out before the matter coming to High Court and the High Court would have to deal only with the substantial questions of law, if any involved.

5.2. The third problem is the pre-deposit. Since at the stage of admission of writ petitions against orders passed by NAA, it is difficult to take a prima facie view about the petitioner's case after going into the complex calculations presented by both the sides, in most of the cases, the High Courts have ordered pre-deposit, very often ranging from 50% to 100% of the profiteered amount as determined by the NAA, as a condition for admission of the writ petitions, which is causing hardship to the petitioners, especially those in MSME sector. In contrast, under Sec 112(8) of the CGST Act, 2017 the required pre-deposit for filing appeal to the GST Appellate Tribunal is 30% of the tax amount in dispute, irrespective of the gravity of the offence and under Sec 129E of the Customs Act, 1962, the required pre-deposit for filing appeal to CESTAT against the Commissioner's order is 7.5% of the tax amount in dispute irrespective of the gravity of the allegation of tax evasion.

6**. Need for a provision for statutory appeal and an Appellate Authority.**

6.1. Up till now, NAA has passed 177 orders, more than 90% of which are against the assessees. The number of assessees facing anti-profiteering proceedings is increasing and most of these proceedings will culminate in adverse orders. A large number of assessees facing anti-profiteering proceedings are from restaurant and construction sectors, both of which have been hit hard by the Covid-19 pandemic. In case of a fast food restaurant chain with more than 600 franchisees, a large number of which are in MSME sector, the investigations are being taken up franchisee-wise and, thus, anti-profiteering proceedings against this restaurant chain itself may culminate in about 600 adverse orders. In fact, further extension of the tenure of NAA beyond November, 2021 may be required just to complete the franchisee-wise investigation and adjudication against these 600 franchisees, as investigating some franchisees and leaving others would result in violation of Art 14 of the Constitution. There may be more such cases.

6.2. As discussed above, writ remedy is not a substitute for statutory appeal and it is out of reach for small assessees because of the expenses involved. At present, the alternatives before an assessee faced with an adverse order of NAA are either paying up the entire amount as per the Authority's order along with interest and penalty within the time period allowed by the Authority, failing which the coercive measures for recovery under Sec 79 of the CGST Act and corresponding provisions of SGST Acts can be invoked, or pursuing the costly writ remedy for which also, he may have to pay a part of the alleged profiteered amount as pre-deposit. It is cruel to expect the assessees hit hard by the Covid-19 pandemic, especially those in MSME sector, to engage in the costly litigation before High Courts. It is, therefore, now absolutely necessary to have a provision in the GST laws for statutory appeal against NAA's orders and this should be done as soon as possible.

6.3. Ideally, a provision could be made for hearing of appeals against NAA's orders by the National Bench of the GST Appellate Tribunal (GSTAT) constituted under Sec 109(3) of the CGST Act. But the GSTAT has not been constituted so far and its constitution would get further delayed, as Sec 109(3) and Sec 109(4) of the CGST Act regarding constitution of the National Bench/ Regional Benches and Sec 109(9) regarding constitution of the State Benches and Area Benches have been struck down by Hon'ble Madras High Court by its judgement in case of **Revenue Bar Association Vs Union of India reported as 2019-TIOL-2188-HC-MAD-GST**
on the ground that since GSTAT is replacing the **CESTAT and the Sales Tax/ VAT Tribunals**
, composition of the GSTAT must be on the same lines and in this regard, Art 50 of the Constitution must be interpreted in such a way that the dominance of Technical members does not outweigh the Judicial members. Since constitution of GSTAT is going to take time, for providing

immediate relief to the assessees facing adverse orders of NAA, a good alternative would be to empower an existing Tribunal - CESTAT to hear appeals against the orders of NAA. The provisions in this regard can be made on the same lines as those under Sec 9C of the Customs Tariff Act, 1975 for appeals against the orders of the 'Designated authority' in anti-dumping duty, countervailing duty and safeguard duty matters to be decided by a bench consisting of President, one Judicial member and one Technical member. This would be a great relief to the trade and industry.

[The views expressed are strictly personal.]

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