Is It Time to Bid Adieu to Anti-Profiteering?

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As we witness an unprecedented black swan event, the Government along with India Inc. has an arduous task to pull out the economy from the clutches of this demonic situation with least scars. While it's too early, but if one visualises the post pandemic situation, all that comes to mind is a cloud of uncertainty. The Government can be lauded for all its efforts taken to ensure the safety of citizens; but one will just have to wait and watch the post pandemic reforms that may be announced in order to safeguard the economy. Though the Government has not disappointed the industry by extending all the regulatory timelines and waiving off penalties and interests wherever possible, it is to be seen that what tangible steps are taken to bring the economy back on its feet. There are copious measures that the Government is deliberating upon to handhold the industries from coping up from the massive losses; however, one such measure which could go a long way in providing aid to the bleeding industry is withdrawal of the Anti-profiteering clause from the Central Goods and Services Tax, 2017 (CGST Act).

Anti-profiteering

Section 171 of the CGST Act is the enabling provision which provides that the suppliers of goods and services should pass on the benefit of the following by way of commensurate reduction in prices:

1. Any reduction the rate of tax;
2. Seamless flow of input tax credit

Also, Rule 126 of the Central Goods and Services Tax Rules, 2017, mandates that the anti-profiteering body must evolve a methodology to deal with anti-profiteering issues.

Anti-profiteering is not a new concept and has been prevalent in other countries like Australia, Canada and Malaysia. Globally, the phenomenon of inflation was noticed post introduction of GST. These countries battled with inflation with the help of Anti-profiteering provisions. Therefore, when India introduced Anti-profiteering clause, it was considered as a noble move which intended to pass the benefit of GST to the ultimate consumers who bear the brunt of indirect taxes. However, soon the noble intent was replaced by the nightmare of litigations, notices and writs across the country transpiring due to the obscure methodologies framed in this regard.

National Anti-profiteering Authority (NAA) was formed to determine the method and procedure for computing whether the reduction in rate or the benefit of input tax credit has been passed on by the seller to the buyer by reducing the prices. In June 2019, the tenure of NAA was extended for two more years owing to the pendency of cases.

Lacunae of Anti-profiteering

While an authority and its powers were notified to oversee the Anti-profiteering provisions, the fundamental step to put in place a mechanism to compute the profiteering has not been clarified as yet. The provision reeks of obscurity and vagueness. The following gaps that need addressing are:

1. No methodology has been notified to determine the profiteering. This is a major issue since not only the Authority does not have a standard mechanism to follow, but they follow different methods in different cases. It has also been noted that the methodologies across cases have been contradictory. This does

not set any precedent and hence is vague. This also results in confusion when the matters reach the courts, as the courts do not have any specific guidance in this regard.

2. The term 'commensurate reduction' from Section 171 of the CGST Act is equivocal. There is no guidance as to whether this reduction should be in absolute terms or relative terms. Further, one question which is relevant to all industries is whether reduction should be computed on gross level or entity wise or item wise. Further, it is unclear as to whether the reduction in price has to be done on pre-discount price or post discount price and the time period to test profiteering and periodicity to pass benefits is also under dispute.
3. There is no separate appellate authority prescribed to challenge the orders of NAA. For any appeals, one has to file a writ in the writ courts and not the Goods and Services Tax Appellate Tribunal. Having no specific appellate tribunal for these orders makes filing an appeal gruelling and time consuming. Further, the expertise of the technical domain may not be available with the courts where writs are filed.
4. Further, a penalty of 10% on non-payment of dues within 30 days is highly onerous on the assesse and also a rare instance..

The above lacunae have been proved time and again during the judicial pronouncements announced around the issue. Most of the judicial pronouncements indicate that disputes have arisen due to lack of standard methodology for computation of profiteering amount.

In the recent case of ***Director General of Anti-Profiteering Vs Patanjali Ayurveda Ltd. [TS-185-NAA-2020-NT]***, it was held by the NAA that the Company should have increased their prices if their costs increased post introduction of GST. The benefit of reduced rate of GST has to be mandatorily passed on to the consumers. The same cannot be netted off against each other.

In another case of ***Director General of Anti-Profiteering Vs Reckitt Benckiser India Private Limited. [TS-226-NAA-2020-NT] ,*** the NAA imposed a penalty on the assesse alleging that the assesse did not reduce the price for their product 'Dettol' even though the GST rate reduced from 28% to 18%. On the contrary, the price was increased due to elevating demand of Dettol in the current times. The assesse defended their case by saying that Section 171 of the CGST Act does not state that the benefit of reduced rates should be passed on to the end consumers by 'commensurate reduction' (via cash only) and that it was following other methods like increasing the quantity of the commodity or including them under buy one get one offers, etc. NAA has concluded this case by ruling that the GST benefit shall be passed on to the end consumer only by the way of reduction in Goods and Service Tax rates and not by way of discounts and other schemes.

From the aforementioned case, it can be said that during the times of Covid-19, the prices are being decided basis a number of factors such as supply-demand, availability of products, timely and safe transportation of products etc. There are external factors which are influencing the pricing of a product. In such times, if the Anti-profiteering provisions kick in, they would add to more uncertainty and ambiguity in determining product prices adding to the woes of suffering businesses.

Further, most of the orders of the NAA where profiteering has been alleged, are being challenged in various High Courts where the courts have stayed such orders and the litigation is on-going. With most NAA orders being diputed, the main objective of the NAA, which is to ensure that the GST benefit is passed on to the consumer, is somehow lost in transit.

Why the Anti-profiteering needs to go

In this backdrop, it is amply clear that sometimes even the best intentions could also fall short of delivering the desired benefit if they are not implemented meticulously. With the worsening economic conditions, a suspension or at least a deferment of the Anti-profiteering provisions can prove to be breather for trade and industry in such tough times as Anti-profiteering the last thing for the businesses to worry about. The GST council has been more than rational in extending the deadlines for various compliances, but the question here is whether they will be sensitive enough to put the Anti-profiteering provisions on the back seat for the larger benefit of the economy.