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Anti-profiteering Provisions under Indian GST: Despite Judicial Blessing, the Government must reconsider its stance

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Introduction

The anti-profiteering law[1] under the Goods and Services Tax law ('GST') in India has been a subject matter of debate since the time GST was introduced. More than a hundred petitioners challenged the constitutional validity of the anti-profiteering provision by virtue of a petition before the Hon'ble Delhi High Court ('DHC'). At the conclusion of several months-long proceedings, the decision was finally pronounced by the Court on January 29, 2023, by upholding the constitutional validity of the Anti-Profiteering provisions and approving a wide discretionary power to determine the methodology of calculating the profiteered amount.[2]

The anti-profiteering law in India

Before discussing the Courts's decision it is important to acclimatize ourselves with the thought behind the introduction of the anti-profiteering law in India. The implementation of the GST law in India in 2017 brought about a substantial change in the nation's tax system including unifying the taxation system of the nation, eliminating the levy of multiple taxes and setting aside the cascading effect of taxes.[3] These reforms and efficiencies led to a reduction in the overall tax burden post-introduction of GST on most goods and commodities. During a similar past reform, wherein the Value Added Tax (VAT) was introduced in the year 2005, the government observed numerous instances of businesses profiteering by failing to pass on the benefit of tax rate reduction to the customer.[4] However, in the absence of any legislative mandate at the time of implementation of VAT, the Government could not force such businesses to reduce the prices to the extent of reduction in taxes.

Taking a cue from past experience and to avoid similar practices of profiteering post the rollout of GST, legal provisions relating to Anti-Profiteering were included in the GST statute. The anti-profiteering clause was implemented as part of the Government's efforts to streamline taxation. Its purpose was to safeguard consumers' interests and guarantee that businesses would transfer the benefits of lower tax rates and input tax credits to the final consumers. Another peculiar characteristic of the provision is that even though it is essentially a welfare legislation, it has been enacted as a taxing statute.

Challenge to the Provision

Though the objective behind the provision was to ensure consumer welfare, certain peculiar aspects of the functioning of the provision put several companies and industry players in an unfair position. The National Anti-Profiteering Authority (NAA) was designated as the regulatory authority entrusted with the task of enforcing the provision.[5] Surprisingly, the provisions did not specify the procedure for determining the *'profiteered amount'*, but instead gave discretionary powers to the NAA to determine whether the tax benefit is being passed on to the consumers.[6] The principal criticism expressed by the corporate organisations was that the provisions failed to establish any tangible technique for measuring the amount of profiteering. FMCG giants like Reckitt Benckiser, Hindustan Unilever, Nestle, P&G, and Patanjali, along with various other businesses in diverse sectors, challenged the provision for being unconstitutional as the enacting of the provision was beyond the law-making powers of the Parliament. The petitioners argued that the legislation suffered from excessive delegation as NAA was entrusted with the responsibility to determine profiteering in the absence of clear legislative guidelines, proffering unbridled powers in the hands of the regulatory authority. The lack of a specified method to determine the amount profiteered and the gap in defining the extent of the term *'commensurate'* posed obstacles to its successful implementation. The industry condemned the NAA's methodology, in many cases, for failing to acknowledge the impact of independent variables on product prices, particularly demand and supply, product variety, fixed and variable costs, etc., arguably functioning as a price-fixing mechanism. In the absence of any guiding principles, numerous organisations extended tax benefits to customers in the shape of coupons, gift cards, loyalty points, freebies, and so on. Nevertheless, the NAA elucidated that the benefit to be transferred pertaining to a specific product cannot be deducted from the enhanced benefit transmitted for another product.[7] Furthermore, it was mandated that the benefits must be conveyed to consumers exclusively in the form of price reductions and by no other means.[8] Based on the above reasoning, the NAA held several businesses to be guilty of profiteering merely because the means adopted by them to pass on benefits to consumers did not coincide with those envisioned by the authorities. Consequently, the arbitrary methodology employed by NAA resulted in businesses being held guilty of massive profiteering and eventual penalties.

Decision of the Delhi High Court

Due to such reasons, the Court's ruling upholding the validity of the anti-profiteering provisions had far-reaching implications and came as a blow to several industry players. It was held that the legislation fell within the law-making powers of the legislature and was not an excessive delegation as it was enacted in the form of a clear legislative policy. Keeping in mind the volatile nature of a free economy, the court opined that '*no one size fits all'* method could be prescribed. Consequently, the regulatory authority had to be given the discretion to determine the appropriate methodology on a case-to-case basis. While affirming the constitutionality of the provisions, the Court did recognise the potential for capricious use of authority by exceeding jurisdiction or disregarding legitimate external factors (such as cost increases or imbalanced credit situations), however, it also noted that statutory provisions could not be struck down merely due to possibility of abuse. Nevertheless, in such instances of application of wrongful methodology, it held that the appropriate approach would be to invalidate such orders based on the facts of the case, rather than repealing the provision itself.

Global Practices Relating to Anti-Profiteering

It may be relevant to note that similar Anti-profiteering related legislations were implemented in certain other countries as well. Countries such as Singapore, Australia and Malaysia also

introduced the anti-profiteering law while adopting the GST regime. However, an important distinction is that most countries introduced the provision under anti-trust or consumer-welfare laws, namely the 'Price Control and Anti-profiteering Act, 2011' of Malaysia and the "Australia Competition and Consumer Act, 2010'. Unlike India, Australia stuck to the three-year transitional period prescribed and passed the appropriate consumer welfare statute.[9] Similarly, Malaysia diluted the scope of its regulations over time as over-regulation and micro-management resulted in stifled growth.[10] Thus, the approach adopted by other countries is more pragmatic, wherein the provisions are implemented with the help of Anti-Trust or Consumer Protection related legislations. Whereas on the Contrary, India has adopted a policy to implement the Anti-Profiteering provisions through the provisions under the parent taxation legislation itself.

What's Next?

India introduced the Anti-Profiteering provision under the GST law as a transitional provision to ensure a smooth transition into the GST regime. The provision is essentially a consumer welfare mechanism imposing huge tax penalties on businesses and creating fetters on the businesses to decide the final selling price of the products. Clearly, the ball seems to be now in the court of various petitioners if they will litigate further before the Apex court, which seems like a possibility. Having said that, in our view, the ball is equally in the court of policymakers to firstly design a flexible computational mechanism for penalties, secondly to indicate a sunset date by which the anti-profiteering provisions shall cease to apply, given that globally, it is a temporary measure and more importantly, and thirdly, devise a mechanism for out of court settlement of dispute for the period when the computation mechanism did not exist. Hence, policymakers need to reflect on the law, keeping in mind its nature, which is now posing as a hindrance to commercial entities in an otherwise effective GST reform.

[1] Section 171, Central Goods and Service Tax, 2017

[2] Reckitt Benckiser India Private Limited Vs. Union of India through its Secretary & Ors, W.P. (c) 7743/2019

[3] Brief History of GST, Goods and Services Tax Council, https://gstcouncil.gov.in/brief-history-gst

[4] Comptroller and Auditor General Report available at – https://cag.gov.in/uploads/StudyReports/SR-StudyReports-05de75c18e2e379-28804851.pdf

[5] Central Board of Excise and Customs, Government of India, press release, Cabinet Approves the Establishment of the National Anti-Profiteering Authority under the GST (16 November 2017), https://pib.gov.in/newsite/PrintRelease .aspx?relid=17356

[6] Rule 126, Central Goods and Service Tax Rules, 2017.

[7] Ankur Jain v. Kunj Lub Marketing (P.) Ltd. [(2020) 119 taxmann.com 370]

[8] Director General of Anti-Profiteering Vs. L'Oreal India (P.) Ltd. [2022] 141 taxmann.com 145 (NAA)[23-06-2022]

[9] Repeal consumer protection disguised as tax provision. (2024, February 8). law.asia. Retrieved February 13, 2024, from https://law.asia/repeal-consumer-protection-tax-provision/

[10] Kir, A. (2023). Profiteering Under GST: Lessons from India, Australia and Malaysia. Australia and Malaysia (July 20, 2023), 295-316.

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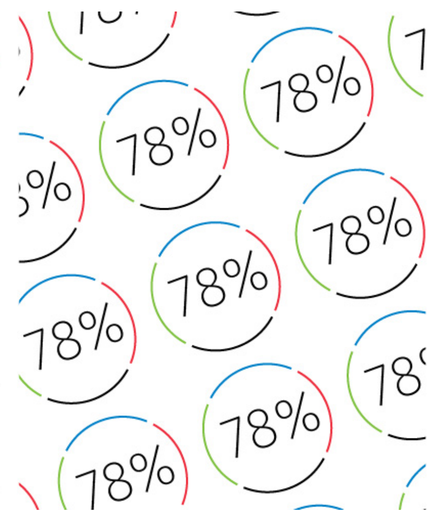

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