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TREADING THE GST PATH – XLIV

UNDERSTANDING ANTI-PROFITEERING



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GST law in India has provisions for preventing profiteering activities by the tax payers. Being a destination based consumption tax, seamless credit is ensured under the GST law and it is hoped that the benefit of the same reaches the ultimate consumer. With this objective in mind Section 171 has been enacted in CGST Act, 2017 (with corresponding provisions under the SGST Acts) and the said section is reproduced below.

171. Anti-profiteering measure. – (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

In exercise of the powers granted under sub section (3) of Section 171, Chapter XV containing Rules 122 to 137 have been enacted under CGST Rules, 2017.

It may be observed from Section 171 that the anti-profiteering measures would be attracted in two situations, viz.,

- 1.Reduction in rate of tax on supply of any goods or services.
- 2.Benefit of input tax credit.

In the above two situations, any benefit accruing to the supplier shall be passed on to the recipient by way of commensurate reduction in prices.

It may also be noted that these anti-profiteering provisions are temporary in nature, so that the benefits accruing on account of subsuming various indirect taxes into single GST would reach the consumers. The Government has indicated that these provisions would be enforced for a period of two years from the introduction of GST. It should be understood that section 171 is not a permanent price control mechanism.

Let us try to understand as to how these provisions would operate.

Benefit by way of reduction in tax rate has to be passed on to consumer.

Let us take two commodities, “A” which was being sold at an MRP of RS.1,000 prior to GST and another commodity “B” which was sold at Rs.1000 Basic Price plus 12 % Excise duty and 14 % VAT, prior to GST. Let us assume that commodity A was also attracting 12% Excise duty (on MRP minus 35 % abatement) and 14 % VAT.

The break up of price for commodity A, prior to GST would be

ED @ 12 % on 65 % of Rs.1,000	= Rs.78
VAT @ 14 % on Rs.1,000 on cum duty basis i.e. $(1000/114)*14$	= Rs.123
Total tax incidence, pre GST	= Rs.201
Price before taxes (Rs.1,000-Rs.201)	= Rs.799

Let us assume that the total GST rate for commodity A is 18 %. If the said commodity A is sold at the same MRP of Rs.1,000 post GST, then the tax incidence would be

$$(1000/118)*18 = \text{Rs.153.}$$

It may be noted that the tax incidence would come down by Rs.48 (Rs.201-153) under GST, if the same MRP is maintained. This is due to the fact that the erstwhile rate of taxes was 12 % Excise duty (on 65 % of MRP) and 14 % VAT, whereas the total tax rate under GST is only 18 %. Section 171 envisages that the benefit of this reduction in tax has to be passed on to the customer. So the MRP of commodity A has to be refixed as below.

Pre GST price before taxes	= Rs.799
GST @ 18 %	= Rs.144
Revised MRP	= Rs.943

In case of commodity “B” which is sold at a basic price of Rs.1000 plus applicable taxes, the pre GST selling price would be,

Basic Price	=	RS.1000
Excise duty @ 12 %	=	RS. 120
VAT @ 14 % on RS.1120	=	RS. 157
Total Selling price	=	RS.1277.
Post GST, the selling price would be Basic Price	=	RS.1000
GST @ 18 %	=	RS. 180
Total Selling price	=	RS.1180.

It may be observed from the above that in case of pricing exclusive of taxes, the reduction in taxes payable would automatically lead to a reduced price and only in case of all inclusive pricing, the price need to be reduced, if the tax rates under GST are lesser than the tax rates under the erstwhile tax regime.

Benefit by way of input credit has to be passed on to consumer.

Input credits were available under erstwhile Excise, Service Tax and VAT laws, with certain restrictions. Some of those restrictions have been removed under the GST regime.

It may be noted that as per the relevant Accounting Standards, the taxes which are entitled for input tax credit shall not form part of the cost and hence the price fixed for the final product / output service, would be based on cost of such product / service (exclusive of taxes on inputs and input services which are entitled for input tax credit) plus profit margin.

If the GST law has extended input tax credit, over and above such entitlement under pre GST regime, the cost would further come down, post GST and hence the benefit of such input credit has to be passed on to the consumers by way of reduction in prices.

The following examples can be cited, where additional input tax credit entitlement is gained under GST regime.

- Under the erstwhile laws, the CST paid on inter-state purchases was not available as input tax credit and hence it was considered as part of the cost, whereas, under GST, the IGST paid on inter-state purchases is fully entitled for input tax credit.
- Under the erstwhile laws, a pure VAT dealer was not entitled to avail credit for the excise duties and service tax suffered by him, whereas under GST law, a dealer is entitled for input tax credit for all GST suffered by him on his inputs and input services, thereby reducing his cost.
- Under the erstwhile laws, if the final product was exempted from Excise duty / VAT or the service is exempted from service tax, then no input tax credit would be admissible, thereby increasing the cost. If such goods / services are now made taxable under GST, the suppliers of such goods / services are entitled for input tax credit of GST paid on all inputs and input services, thereby reducing the cost in their hands.
- Under erstwhile laws, a service provider was not entitled to avail input tax credit for the VAT suffered on his inputs, whereas under GST, such supplier of service is entitled for input tax credit in respect of the GST paid on inputs as well as his input services.

Anti-profiteering provisions require that the benefits in the above cases, which goes to reduce the cost, must be passed on the consumers by way of commensurate reduction in prices. Under the above situations, the price fixed before GST would have considered various taxes, which are not entitled for input tax credit, as part of the cost. Post GST, where the incidence of such taxes which are not entitled for input tax credit is absent, obviously, the cost would come down.

It may again be noted that anti-profiteering provisions are not general price control provisions, but are only in the nature of transitional provisions, to ensure that the benefits arising out of GST are passed on to the consumers. Pre GST prices are compared with post GST prices and if any of the above two benefits (reduced rate of GST on supplies and / or benefit of input tax credit) are present in a case, then the provisions of Section 171 gets attracted.

So, the applicability of anti-profiteering provisions have to be seen in the context of enhanced eligibility for ITC under GST as compared to pre GST regime and consequent reduction in cost.

Let us see an example.

S.No	Details	Pre GST	Post GST
1	Cost in the hands of the supplier, excluding all taxes	RS.70,000	
2	Incidence of Excise duty, Service Tax and CST which is not entitled for input tax credit and hence to be considered as part of cost	Rs.10,000	
3	Incidence of VAT which was being availed as input tax credit	Rs.15,000	
4	Cost in the hands of supplier (1)+(2)	Rs.80,000	
5	Add Profit @ 20 %	Rs.16,000	
6	Selling Price (4)+(5)	Rs.96,000	
7	Cost of raw materials for the supplier, excluding all taxes		Rs.70,000
8	Incidence of GST on input and input services, which is eligible for input tax credit		Rs.20,000
9	Incidence of taxes, which is not entitled for input tax credit		NIL
10	Cost in the hands of the supplier		Rs.70,000
11	Add Profit @ 20 %		Rs.14,000
12	Revised Selling price		Rs.84,000

In the above example if the price is reduced from Rs.96,000 to Rs.84,000 the same is in compliance with the anti-profiteering provisions. The buyer cannot insist for reduction of the Pre GST price by Rs.20,000 i.e. the total credit available under GST regime. The price reduction of Rs.12,000 (from Rs.96,000 to Rs.84,000) is due to the fact that the cost has come down by Rs.10,000 (there are no duties which are not entitled for input tax credit under GST) and profit margin on such cost, i.e. 20 % of Rs.10,000, i.e. Rs.2,000.

Viewed in this context, if we refer to the decision of the National Anti-Profiteering Authority in the case of Shri Kumar Gandharv Vs KRBL Ltd - 2018-TIOL-02-NAPA GST, with due respect, the author is of the opinion that the principles of anti profiteering has not been applied properly.

It has been held in the case that as against the GST payable on the goods supplied, @ 5 %, the benefit of input tax credit earned by the supplier is only to the tune of around 2.69% to 3 % and the balance GST has to be paid necessarily in cash and hence the provisions of anti-profiteering are not attracted. The NAPA has proceeded to compare the quantum of ITC available and the quantum of GST payable on the supply, which appears to be totally irrelevant for application of the anti-profiteering provisions.

Almost in all cases, except in case of inverted duty structure and sale below cost, the quantum of tax payable on outward supply would always be more than the input tax credit entitlement, considering the value addition and profit margin. So if it is held that the provisions of anti-profiteering would be attracted only if the quantum of eligible ITC is more than the GST payable on outward supply, that would whittle down the scope of anti-profiteering provisions. In case of inverted duty structure, refund of accumulated credit has been provided for and to this extent such additional input tax credit also would not form part of the cost and would not influence the price.

Further it may be noted that input tax credit is not something which is given free of cost to a supplier. In order to claim input tax credit, he has to make payment in cash to his supplier of inputs and input services. Then he can charge and collect GST on the outward supply made him, from the recipient of the supply. While paying GST on his outward supply, he would reduce the input tax credit available and pay only the balance in cash. This is the situation under pre GST laws also. By itself, the above would not give raise to any anti-profiteering. Collecting the output taxes from the buyer and paying the same to the Government partly by way of utilisation of input tax credit and partly by cash is an usual phenomenon which is permitted under law.

A buyer cannot insist that the total input tax credit available to the supplier should be passed on to him by way of reduction in price. The only requirement is that during price negotiations, the quantum of input tax credit eligible is not considered as part of the cost, for price fixation. To continue with the above example in respect of commodity A, the supplier is bound to pass on only the additional input tax credit entitlement under GST and the buyer cannot insist that the price has to be reduced by the total amount of input tax credit availed by the supplier, against the subject supply.

Unfortunately, this finer aspect has been missed by the NAPA in the above decision. Instead of finding out whether any additional input tax credit is entitled to the supplier, on account of introduction of GST, leading to reduction in input cost, which required to be passed on to the consumer, the NAPA has compared the quantum of GST payable on the outward supply and the quantum of input tax credit entitled and come to the conclusion that there is no anti-profiteering in this case. The author is not suggesting that anti-profiteering would be applicable in this case. But, the proper approach would be to identify whether any additional benefit by way of input tax credit is earned by the supplier under GST regime, when compared to pre GST regime and if so, whether such benefit has been passed on to the consumers by way of commensurate reduction in price or not. This exercise has unfortunately, not at all been attempted by the NAPA.

To conclude, the following issues have to be considered by the suppliers, to ensure that they comply with anti-profiteering provisions.

- Whether the total taxes payable on the outward supply is less than the total taxes payable under the erstwhile regime?
- If so, whether the reduction in tax has been passed on by way of reducing the price to the extent of reduction in taxes on outward supply?
- If there is a reduction in tax rate on outward supply, then the all inclusive price of the supply should be reduced from its pre GST price to the extent of reduction in GST liability.
- Whether any of the erstwhile taxes are not entitled for input tax credit under the erstwhile law and thereby considered as part of the cost?
- Whether the introduction of GST has erased the incidence of such taxes, which are not entitled for input tax credit under the erstwhile regime?
- If so, to what extent the cost will come down, when compared to the pre GST cost?
- Whether such reduction in cost, due to enhanced input tax credit entitlement has been passed on to the consumer by way of reduction of price?