



Tax Flash News

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Anti-profiteering provisions under GST are constitutionally valid

Section 171 of the CGST Act (dealing with anti-profiteering measures) requires every supplier of goods/services to pass on to his customer any benefit on account of reduction in the rate of tax on such supply or the input tax credit. Such benefit is required to be passed on by way of a 'commensurate reduction' in prices. This section and the related rules were challenged on the grounds of constitutionality. The notices and orders issued were also challenged before the court on merits. The Delhi High Court¹ disposed of a batch of over 100 cases in this order upholding constitutionality of the anti-profiteering provisions in the CGST Act. A Special Leave Petition against this decision has been filed before the Supreme Court².

Facts of the case

- Petitioners are companies running diverse businesses ranging from hospitality, FMCG to real estate.
- The National Anti-Profiteering Authority (NAA) passed orders directing the Petitioners to pass on the commensurate benefit of a reduction in the rate of tax or the input tax credit to its consumers/recipients along with interest.
- The Petitioners challenged the constitutional validity of the anti-profiteering provisions as well as the legality of notices proposing imposition or orders imposing penalty by the NAA.
- The learned counsel for the parties prayed to the Delhi High Court to first decide the constitutional validity and then examine the matter on merits.

¹ Pyramid Infratech Private Limited v. Union of India & Ors. [2024-VIL-84-DEL]

² Excel Rasayan Private Limited v. Union of India & Ors. [Special Leave to Appeal (C) No(s). 3112/2024]

Petitioners' contentions before Delhi High Court

- It is a settled law that the delegatee cannot further delegate unless expressly or implied authorised. Further delegation of powers by the Central Government to the NAA is in contravention of the provision on anti-profiteering under section 171.
- The term 'commensurate' referred to in section 171 is not defined in the CGST Act. The expression 'profiteering' in section 171 is dependent upon the scope and meaning of the phrase 'commensurate reduction in the price'. Since the expression 'profiteering' does not provide any mechanism to determine the amount of anti-profiteering or commensurate reduction in price, it is a violation of Article 14 (viz., equality) and Article 19(1)(g) (viz., right to carry on trade or business).
- Section 171 does not provide any clarity on adjustments allowed on account of a rise either in input costs or in customs duty on the import of inputs and other factors which impact pricing.
- Section 171 does not prescribe a timeframe during which the reduced prices of the goods and services had to be maintained. This indefinite obligation hinders the Petitioners' right to trade and commerce.
- Mandating price reduction as the only way to pass the commensurate benefit to the recipient is arbitrary and unreasonable since there could be other ways to pass on the commensurate benefit by way of an increase in the volume or weight of the product being sold for the same price.

- Lack of a provision to appeal against the findings of NAA is unconstitutional.
- The benefit of the input tax credit referred to in section 171(1) is the input tax credit under the CGST Act and not the input tax credits under the earlier subsumed statutes.

Revenue's contentions before Delhi High Court

- No essential legislative function has been delegated to NAA. Section 171 is clear when it states that any reduction in the rate of tax or the benefit of input tax credit must be passed on to the recipient by way of a commensurate reduction in prices.
- The word 'commensurate' though not defined in the CGST Act has a clear and definite meaning in general parlance.
- Language of the impugned provisions on anti-profiteering does not provide flexibility to adopt any other mode for transferring the benefit of reduction in tax rate and benefit of input tax credit.
- Benefit has to be calculated for every product and has to be passed on to every buyer. The quantum of benefit would depend upon the pre-reduction base price of the product which is required to be maintained during the post-rate reduction period.
- Commercial factors might necessitate an increase in price despite a reduction in the rate of tax or availability of the benefit of input tax credit. However, if the supplier, when increasing the base prices of the goods or services does not account for the commensurate reduction of prices as a result of the reduction of the tax rates or benefit of the input tax credits, the supplier would be said to be profiteering.
- There is no legal principle on the basis of which the Petitioners can contend that the mere absence of a timeframe up to which reduced prices are required to be maintained, would render the anti-profiteering provisions unconstitutional.
- In the absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of a party.

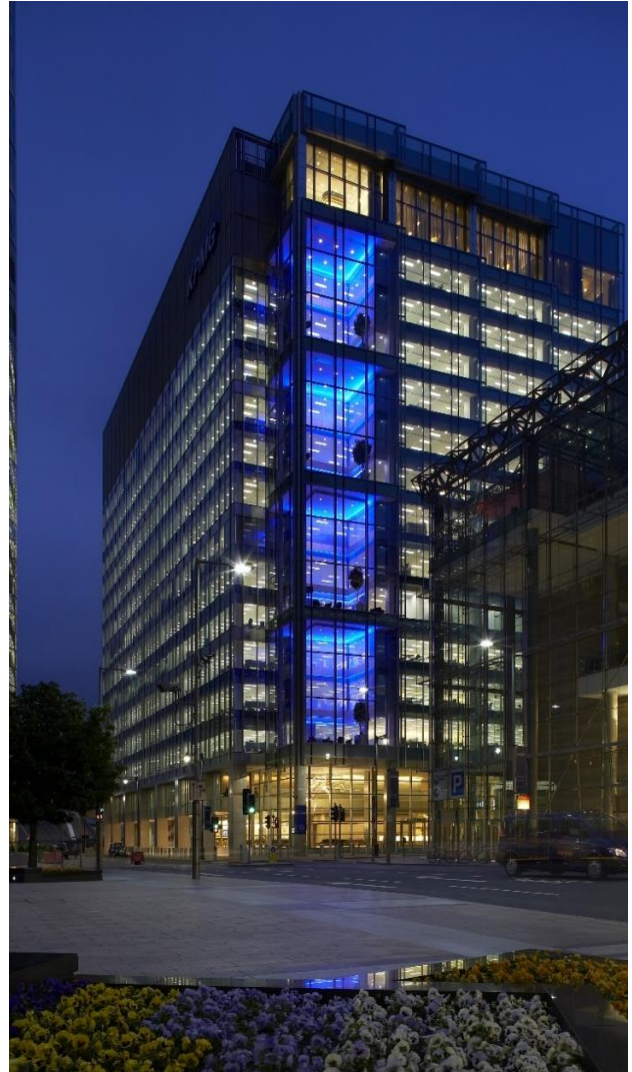
Delhi High Court's decision

The Delhi High Court upheld the constitutional validity of the provisions on anti-profiteering based on the contentions of the Revenue. It has also upheld that there may be cases of arbitrary exercise of power under the anti-profiteering mechanism. The remedy for the same is to set aside such orders on merits for erroneous application of power. It therefore listed the matters on merit before the Division Bench for appropriate directions. Other highlights of the judgement are as follows:

- Section 171 neither delegates any essential legislative function nor violates Article 14 of the Constitution of India. Powers conferred on the NAA by the Central Government were intended by the Legislature to be exercised by the NAA itself.
- Section 171 is not to be looked at as a price control measure but is to be seen to be directly connected with the objectives of the GST. Tax foregone by the Government should be reflected in terms of reduction in price to the consumer.
- The benefit of tax reduction has to be passed on to the level of each supply of SKU and to each buyer.
- The contention of industry that it is legally impossible to pass on the benefits by reducing the price of goods in cases of low-priced products is not correct.
- It is not possible to prescribe a specific period till when the reduction should be passed on. It should continue till there is no justified change in the costs or other factors offsetting such reduction.
- Statutory provision cannot be struck down merely on the basis of possibility of misuse
- There is no fixed/uniform method or mathematical formula for determining profiteering as the facts of each case and each industry may be different. Consequently, NAA has to determine the appropriate methodology on a case-to-case basis keeping in view the peculiar facts and circumstances of each case.
- There is no vested right of appeal, and an appeal is a creature of the statute. However, decisions are subject to judicial review under Article 226 of the Constitution before the High Courts
- There is no requirement for a judicial member in the NAA.

Our comments

The decision of the Delhi High Court addresses multiple issues and objections and provides judicial interpretation of the anti-profiteering provisions. This order is challenged in the Supreme Court by one of the petitioners and the Supreme Court on 12 February 2024 has issued notice to the Government of India. The Delhi High Court too will take up the petitions on merit on 25 February 2024. Since the Delhi High Court has upheld that there is no vested right of appeal, the parties affected by the order of NAA have a remedy of only a writ. In this background, it would be interesting to watch how the courts would look at the issue going forward.



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