CONSUMER IS THE KING:
A CRITICAL ANALYSIS OF NATIONAL ANTI- PROFITEERING AUTHORITY

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ABSTRACT

Goods and Services Tax has unified the law pertaining to indirect taxes in India and has improved its position in the Ease of Doing Business Index, hence signifying the importance of this legislation. GST saw a controversial transition period wherein new challenges and queries in the provisions knocked the door of authorities every single day. One must not forget that there are still questions which need to be answered with respect to the scheme and implementation of GST. At this juncture, the provision of anti-profiteering comes into the picture. Anti-profiteering measure provided under Section 171 of Central Goods and Service Tax Act, 2017 is the epitome of the expression- 'Consumer is the King', as also referred during the discussion on The Goods and Services Tax Bill, 2014 in the Lower House. The provision codifies the doctrine of 'unjust enrichment' by compelling the traders and suppliers to pass on the benefit accrued from the reduction in rate of GST or from the Input Tax Credit availed. However, the measure has its own blemishes and there are still some challenges in successful implementation of anti-profiteering measures under GST. The article firstly examines the need for the insertion of an anti-profiteering measure under the CGST Act along with highlighting the Australian and the Malaysian jurisprudence. It further discusses the establishment of the National Anti-profiteering Authority with special reference to Chapter XV of the Central Goods and Services Tax Rules, 2017 (hereinafter 'CGST Rules'). The article then emphasizes on the challenges faced by traders, suppliers and companies by critically analysing the orders passed by the NAA. In conclusion, light has been thrown on the overall impact of the anti-profiteering measure and provide certain recommendations for efficient working of NAA.

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I. INTRODUCTION

In the era of a global economy, customer satisfaction is the focal point of every business. This comes up with various business strategies to provide stimulating benefits to the customer, in order to endure the stiff competition in the market. One such benefit provided to the customer is mandated by the Government under Section 171 of the Central Goods and Service Tax Act, 2017 (hereinafter 'CGST Act'), known as the anti-profiteering measure which reads as follows: "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".[1]

However, this statutory obligation casted on the suppliers overrides with the zeal of the companies in accomplishing their business motive. It hampers the flexibility of the company to conduct their business affairs due to a superfluous burden on them to implement the mandate of Section 171.[2] In such circumstances, it becomes imperative to understand the objective sought to be achieved by anti-profiteering clause and the jurisprudential aspect relating to it.

A. Objectives of the Anti-profiteering Measure

The anti-profiteering measure is intended to protect the consumers against the excessive price charged by the suppliers and thus it is rightly

[1] Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, 2017, § 171.
[2] Pavithra R., *Undue Profit Taken Care of: Anti-Profiteering in GST,* 5 GNLU L. REV. 201, 201 (2018).

called as a "consumer protection measure".[3] In addition, it ensures that price of the goods or services are under control and do not lead to inflation.[4]

An illustration of the practices adopted by the suppliers after reduction in the Goods and Services Tax (hereinafter 'GST') rate is presented herein for a better understanding of the new anti-profiteering provision-

Goods supplied @ 28% GST **[1]**	Goods supplied @ 15% GST (without increasing the Base Price) **[2]**	Goods supplied @ 15% GST (increasing the Base Price) **[3]**
Base Price = Rs. 10,000 **[A]**	Base Price = Rs. 10,000 **[A]**	Base Price = Rs. 11,131 **[A]**
GST @ 28% = Rs. 2,800 **[B]**	GST @ 15% = Rs. 1500 **[B]**	GST @ 15% = Rs. 1,669.65 **[B]**
Selling Price = Rs. 12,800 **[C=A+B]**	Selling Price = Rs. 11,500 **[C=A+B]**	Selling Price = Rs. 12,800 (round off) **[C=A+B]**

Column 1 represents the supply made before the rate of reduction in GST, that is, 28%. The consumer while purchasing the goods has to pay Rs. 12, 800/- (inclusive of 28%GST). Whereas Column 2 represents the situation wherein the Government has reduced the GST rate from 28% to

[3] M.A. Maniyar, *Anti-Profiteering Measure under the GST Laws*, *in* GOODS AND SERVICES TAX MANUAL113 (Sathpal Puliani ed., 2017).
[4] *Id.*

15%, and selling price of the goods has been reduced by an amount of Rs.1, 300/- as compared to the selling price in Column 1. Next, Column 3 depicts that the supplier has increased the base price of the commodity in such a way that the selling price of the goods remains the same despite there being a decrease in the GST rate.

The above illustration explains how the suppliers exploit the consumers by not passing on the benefits of reduced tax rate and thereby inflating the price of the goods or services. The concept of profiteering is not new in India as it became a rampant practice amongst the suppliers even during the implementation of the Value Added Tax (hereinafter VAT).[5] The same was also experienced by many countries where an increase in the value of goods and services was witnessed post the enactment of GST, in spite of tax credit mechanism available to the suppliers.[6]

B. Jurisprudential Aspects of Anti-profiteering Measure

The word "profiteering" has a negative connotation in the sense that it means an act involving exceptional circumstances to reap the undue profits incurred.[7] One must understand that the legislature has made the act of profiteering illegal, under Section 171 of the CGST Act, by making an extraordinary concession from Government's tax revenue to provide the consumers with the benefit of price reduction.[8] Having said this, anti-

[5] *FAQs on Anti-Profiteering*, CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS, https://www.cbic.gov.in/resources//htdocs-cbec/gst/Final-GST-FAQ-31218.pdf;jsessionid=58E074E382392B297D58CC543CD8DEF4.
[6] SUMIT MAJUMDER, KNOW YOUR GST- GST UNRAVELED 1010 (1st ed. 2017).
[7] Islamic Academy of Education v. State of Karnataka, AIR 2003 SC 3724.
[8] Sukhbir Rohilla v. Pyramid Infratech Pvt. Ltd., NAA Case No. 7/2018.

profiteering clause has a reflection of essential contract law principle- the doctrine of 'unjust enrichment'.[9] It is based on the premise that undue enhancement of one party (supplier) must not happen at the cost of another party (consumer).[10]

The concept of anti-profiteering can also be related to the ideology of "Socialism" as imbibed under the Preamble of the Constitution of India.[11] Thereby, the provision promotes the objective of a welfare state and reduces economic inequalities as envisaged by the founding fathers of our Constitution

C. History of Anti-profiteering Clause

The notion of anti-profiteering in India dates back to the year 1958 when the West Bengal Government enacted the West Bengal Anti-profiteering Act, 1958.[12] The purpose of the enactment was to prevent profiteering in certain goods and services of daily use and for the same reason the legislation defined the term "profiteering" as "sale by a dealer at a higher price."[13]

The concept of anti-profiteering is also well recognized in the international community. Australia and Malaysia are amongst the few

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[9] Pavithra, *supra* note 2, at 204.
[10] POLLOCK & MULLA, THE INDIAN CONTRACT& SPECIFIC RELIEF ACTS 1052 (16th ed. 2019).
[11] Pavithra, *supra* note 2, at 206.
[12] *Id.*, at 205.
[13] West Bengal Anti-Profiteering Act, 1958, No. 24, Acts of Legislature of West Bengal, 1958.

countries to implement the law relating to anti-profiteering in the wake of a shift in the indirect tax regime.[14]

In Australia, the concerns regarding profiteering and levying exorbitant prices on the goods and services rest with the Australian Competition and Consumer Commission (hereinafter 'ACCC').[15] In the light of GST law being implemented in Australia, the ACCC was entrusted to look after the possible inflation and price rise of the goods and services.[16]Similarly, Malaysia enacted a special law to curb the practice of profiteering,[17]which was later backed by a set of regulations applicable only on fast-moving consumer goods.[18]

II. CHALLENGES

The Supreme Court in *R.K. Garg v. Union of India*,[19] has rightly pointed out that: "Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses." The anti-profiteering measure has posed some challenges to the businessmen due to its ambiguous nature pertaining to its implementation in the normal parlance.[20] This part of the article discusses some of the challenges raised by the suppliers and for this

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[14] Bela Mao & Parul Anand, *Anti-Profiteering and India's GST: A Double Edged Sword,* 29 INT'L TAX REV. 16, 16 (2018).
[15] Competition and Consumer Protection Act, 2010, part VIIA (Austl.).
[16] Gautam Khattar& Nikhil Mediratta, *The Enactment of Anti-Profiteering Clauses sees Compliance gone Ashtray*, 64 GST-MAG. 56, 58 (2017).
[17] Price Control and Anti-Profiteering Act, No. 723 of 2011 (Malaysia).
[18] Khattar & Mediratta, *supra* note 16.
[19] R.K. Garg v. Union of India, AIR 1981 SC 2138, ¶ 10.
[20] Mao & Anand, *supra* note 14, at 16.

purpose, an attempt to critically analyse the orders passed by the National Anti-profiteering Authority (hereinafter 'NAA') has been made.

A. Constitutional Challenges

1. Violation of Article 19(1)(g)

The issue regarding the constitutional validity of Section 171 of the CGST Act has been a matter of debate as the suppliers have contended that it is violative of Article 19(1)(g). This can be highlighted through catena of case laws,[21] wherein the suppliers have argued that anti-profiteering measure impairs the right of freedom of trade and business as enshrined under the Indian Constitution.

The proponents have argued that anti-profiteering provision seems to bring back the system of "Inspector Raj"[22] and therefore, the NAA controls the price of the goods and services.[23] The suppliers in many case laws have argued that the NAA has been empowered with the power of "price fixation" or "price regulation" in their hands which has not been envisaged by any constitutional provision or the CGST Act.[24] One can also substantiate this argument by looking into the principle of economics that the prices of a product are fixed or regulated by market forces and any

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[21] Ravi Charaya v. Hardcastle Restaurants, NAA Case No. 14/2018; Kiran Chimirala v. Jubilant Food Work Ltd., NAA Case No. 04/19; Neeru Varshney v. Lifestyle Int'l Pvt. Ltd., NAA Case No. 8/2018; Director General of Anti-Profiteering v. Johnson & Johnson Pvt. Ltd., NAA Case No. 77/2019.

[22] MAJUMDER, *supra* note 6, at 1014.

[23] Adithya Reddy, *The anti-profiteering concept is flawed,* BUSINESSLINE (Feb. 26, 2018), https://www.thehindubusinessline.com/opinion/the-anti-profitering-concept-is-flawed/article22858653.ece.

[24] Neeru Varshney v. Lifestyle Int'l Pvt. Ltd., NAA Case No. 8/2018; Ravi Charaya v. Hardcastle Restaurants, NAA Case No. 14/2018.

attempt to regulate the mechanism of price fixing is violative of freedom of trade and commerce.[25]

This in turn restricts the supplier to fix a price on a product and thereby blights the right of the supplier to earn a reasonable profit.[26] The commercial sense of the supplier to price a good or service as per his business needs gets sacrificed and hence the principle of "commercial expediency"[27] as recognized by the Supreme Court has been undermined by the anti-profiteering provision.

The above proposition can be explained through a hypothetical example. A businessman is carrying on a business of sweets. He has fixed Rs. 1000/- on a sweet box and the same has remained unchanged for the past four months (June-September). As the festive season is approaching in the month of October, he anticipates that the demand of the product will rise and he decides to increase his base price to Rs. 1200/- and make a reasonable profit out of it. In the middle of this, the Government decides to reduce the rate of tax with effect from 27th September. Now, Section 171 of the CGST Act mandates the businessman to reduce the price of the product in pursuance of reduction in rate of tax and for that purpose businessman has no alternative but to forgo the reasonable profit which he intended to make.[28] Hence, the provisions under the attire of protecting

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[25] Indraprastha Gas Ltd. v. Petroleum & Natural Gas Corp., (2012) ELR (DELHI) 1013.
[26] Reddy, *supra* note 23.
[27] S.A. Builders v. Comm'r of Income Tax (Appeals), (2007) 1 SCC 781.
[28] Pranjul Chopra, *Anti-Profiteering: A Tool to Ensure GST's Success as a Reform or an Interference in Free Economy,* CENTRE FOR LITIGATION STUDIES BLOG (Sept. 28, 2017), https://clisnlujblog.wordpress.com/2017/09/28/anti-profiteering-a-tool-to-ensure-gsts-success-as-a-reform-or-an-interference-in-free-economy/.

public interest cannot hamper the business of an individual by inflicting excessive burden on him.[29]

Another problem which arises is that the mandate of Section 171 is not restricted to certain class of goods and services but brings in all kinds of goods and services under its umbrella.[30] In such a set-up, the argument pertaining to reasonable restrictions under Article 19(6) falls devoid of the fact that price fixation as a reasonable restriction is applicable only in cases of essential goods and services and not non-essential goods and services.[31] This proposition also draws inspiration from the law prevailing in Malaysia, wherein the applicability of anti-profiteering clause is limited to the fast moving consumer goods.[32]

However, it cannot be said that anti-profiteering measure is violative of Article 19(1)(g) since such an argument remains untenable in law. The NAA in various cases[33] has rejected the argument against the constitutional validity of Section 171. The NAA has time and again negated the argument that it plays the role of a "price regulator", by relying on the literal interpretation of Section 171 of CGST Act. It has also been made clear by the rationale purported by the NAA that it is only concerned with two primary things, first, the benefits of reduction in rate of tax, and second, passing on the input tax credit to the end consumers, and hence it is not involved in the process of price fixation.[34]

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[29] Thamal Surana v. Union of India, AIR 1959 Raj 206.
[30] Mao & Anand, *supra* note 14, at 16.
[31] Saurav Agarwal, *Anti-Profiteering Provision: A Toothless Provision or a Dangerous Weapon,* 5(1) NLUJ L. REV. 76, 82 (2018).
[32] Khattar & Mediratta, *supra* note 16, at 58.
[33] *Supra* note 21.
[34] *Id.*

One must understand that the anti-profiteering measure is hit by the principle of *ex proprio vigor* which means to "operate by its own force".[35] Applying this principle to Section 171 of the CGST Act, one may observe that the section only gets triggered on happening of certain condition, and in the absence of such condition, the NAA cannot interfere in the working of the business. For example, if the Government has decided to reduce the rate of tax with effect from July, the supplier has full autonomy to fix the price of the goods any time prior to July and thereby earn a reasonable profit. The mandate of the anti-profiteering provision will be enforced from the date when the rate of tax is reduced and the NAA will be endowed with the task of ensuring that the benefit is passed on to the consumers.[36] Hence, the NAA will not interfere with the right of the supplier to fix the price of the goods at any time prior to July.

Another favourable argument for the anti-profiteering provision is that it comes within the ambit of reasonable restrictions imposed by the State in the interest of the general public.[37] There is dearth of jurisprudence existing on the conflict between Article 19(1)(g) and Article 19(6). Here, it is significant to highlight the observation of the Supreme Court in the case of *Laxmi Khandsari v. State of Uttar Pradesh*,[38] wherein the Court held that:-

> Reasonable restriction depends upon the character of the statute, the object which it seeks to serve, the existing circumstances, the evil it sought to remedy as also the nature of restriction placed on the rights of the citizens. Further, the restriction must be in public interest and are imposed by

[35] Khattar & Mediratta, *supra* note 16, at 58.
[36] Central Goods and Services Tax Rules, 2017, Gazette of India, Ext., Pt. II, r. 127.
[37] INDIA CONST. art. 19, cl. 6.
[38] Laxmi Khandsari v. State of Uttar Pradesh, AIR 1981 SC 873.

> striking a just balance between deprivation of right and danger or evil sought to be avoided. Restriction must have close nexus to the object which it intends to serve.[39]

Taking a step further, an analogy may be drawn from the Minimum Wages Act, 1948 wherein certain provisions of the Act compels the employer to pay the minimum wages as prescribed by the authorities. The contention against the minimum wages requirement was raised in the case of *Bijay Cotton Mills Ltd v. State of Ajmer*,[40] wherein it was argued that due to some financial constraints the employers were not in a position to pay the minimum wages as prescribed. The Court ruled in favour of the constitutionality of the said provisions and observed that:-

> It is in the interest of the general public that the labourers should secure adequate living wages, the intention of the employer whether good or bad is irrelevant. Individual employers might find it difficult to carry on the business on the basis of the minimum wages fixed but this must be due to entirely to the economic conditions of these particular employers.[41]

Thus, it is pertinent to understand that the anti-profiteering provision has been inserted to protect the interest of the consumers from the unscrupulous price levied on the goods and services and thus comes within the ambit of reasonable restrictions as provided under Article 19(6). The interest of the suppliers must be taken into consideration, but it stands at a lower pedestal when compared with interest of the consumers.[42]

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[39] *Id.*
[40] Bijay Cotton Mils v. State of Ajmer, AIR 1955 SC 33.
[41] *Id.*
[42] Commercial & Ahmedabad Mill v. Union of India, AIR 1993 Guj 30.

2. The Mischief of Excessive Delegation

Section 171 of CGST Act read with Rules 126 and 127 of CGST Rules, 2017 opens up the door of 'excessive delegation' while conveniently shutting behind the corridor leading to 'essential legislative function'. Section 171(2) empowers the Central Government to constitute an Authority to scrutinize the undue profits, if any, made by the sellers. Section 171(3) provides such authority with a huge canvas to paint their own powers and functions. Here comes Rule 126 in the picture which allows the Authority to determine its own methodology and procedure to check if the profit has been passed to the consumers by way of commensurate reductions in the price. It is pertinent to note that there are absolutely no guidelines or any kind of restrictions on this power. This unencumbered discretionary power given to NAA makes the process ambiguous, arbitrary and non-transparent.

One cannot ignore the importance of 'delegation' in the legislative process, but through such delegation, executive cannot build its own skeleton and fill it wherever and whenever necessary. Separation of powers is a basic feature of the Constitution wherein Legislature makes the law, Executive implements it and Judiciary interprets it.[43] However, Section 171 provides a vague idea with respect to the substantive law. One of the key factors to verify if any provision lies within the scope of excessive delegation is to apply the test of essential legislative function.[44]

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[43] Rai Sahib Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549.
[44] Lipika Vinjamuri, *Does the National Anti-Profiteering Authority Suffer from the Vice of Excessive Delegation?,* KLUWER INT'L TAX BLOG (Jan. 23, 2020), http://kluwertaxblog.com/2020/01/23/does-the-national-anti-profiteering-authority-suffer-from-the-vice-of-excessive-delegation/.

This simply includes all the functions which cannot be delegated to the executive.[45] In the present situation, lack of a minimal standard or basic guidelines to execute the law falls under the realm of excessive delegation by the Legislature.

The questions such as what is the mechanism to discover whether a business has indulged in profiteering, what is the method to be used for calculations, what about the profits incurred by the seller due to other factors, and even the meaning and ambit of the term 'commensurate', are unanswered.[46] In an attempt to answer these questions, NAA has taken the justification of determining the methodology and procedure depending on case-to-case basis.[47] The approach taken by NAA may be said to be bad in law since this is certainly not the first legislation where court's course of action varies from one case to another. The legislative process and the judicial system in India is such where cases are decided on their facts and merits. This should not carve out an escape route for the legislature for making a law. The law must be elaborated with vital explanations, necessary exceptions and a room for procedural flexibility depending on the circumstances. At this juncture, the observation of the Supreme Court of India in the case of *Harishankar Bagla v. State of M.P*,[48] may be valuable:

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[45] Jyoti Pershad v. Administrator, Union Territory of Delhi, AIR 1961 SC 1602; Sita Ram Dayal v. State of U.P., 1972 SCR (2) 141; Avinder Singh v. State of Punjab, 1979 SCR (1) 845; Registrar of Coop. Societies v. K. Kunjabmu, AIR 1980 SC 350.

[46] Ravi Charaya v. Hardcastle Restaurants, NAA Case No. 14/18; Kiran Chimirala v. Jubilant Food Work Ltd., NAA Case No. 04/19; Sandeep Puri v. Glenmark Pharmaceuticals Pvt. Ltd., NAA Case No. 50/19; Mohd. Azid Ramzani v. Adarsh Marbles, NAA Case No. 42/19.

[47] Kiran Chimirala v. Jubilant Food Work Ltd., NAA Case No. 04/19.

[48] Harishankar Bagla v. State of M.P., 1955 SCR 313.

> The legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct.

Further, Rule 127(iii) (d) is another example that the anti-profiteering measure suffers from the vice of excessive delegation. The Rule empowers the NAA to order cancellation of registration under the CGST Act. The substantive law as contained in Section 171(3A) only prescribes for a penalty. In such a scenario, one may question the source of power to cancel the registration under the Act in case of profiteering. The matters of substantive law such as adequate penal provisions, methodology, guidelines for calculations, should have been envisaged in the parent legislation only (Section 171) thereby leaving no scope for arbitrariness and going against the rule of law.

Therefore, one cannot deny that there are insufficient rules or methodology to determine what amounts to 'profiteering'. Even the Delhi High Court has stayed the NAA Order[49] in the *Jubilant Fireworks* case on the basis of "prima facie" deficiency of methodology to ascertain profiteering. Hence the essential legislative function is not only delegated to NAA but the same has not been provided anywhere, leaving NAA unguided.[50]

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[49] Kiran Chimirala v. Jubilant Food Work Ltd., NAA Case No. 04/19.
[50] Vinjamuri, *supra* note 44.

B. Other Factors Influencing the Price of a Product

The price of a product is dependent on various factors such as cost of raw material, demand and supply, fixed cost, variable cost, profit margin, etc. In such a situation, it has been argued that anti-profiteering measure does not take into consideration the rise in price due to other factors.[51]

It is pertinent to highlight the case of *Ravi Charaya v. Hardcastle Restaurant Pvt. Ltd.*,[52] wherein the Respondent had argued that the Director General of Anti-Profiteering (hereinafter "DGAP") has failed to consider the increase in the cost of inputs such as electricity, fuel, variable rent and royalty. The NAA did not accept the contention of the Respondent on the ground that the duty of the DGAP was limited to determine whether the benefit mandated under Section 171 has been passed on and the argument that he should take note of such other costs, was held unsustainable.

Contrary to the above, the NAA in the case of *Kumar Gandharv v. KRBL Ltd.*,[53],evaluated the evidences in hand and observed that there arises no case of profiteering since the price of rice is governed by market forces which resulted into the increase in price. This is an instance where the other factors' influencing the price of the product were taken into consideration.

The question that arises in the present context is whether Section 171 of the CGST Act contemplates the notion of other factors as a

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[51] Dinesh Kanabar & Niraj Bagri, *Indirect Tax: India,* 69 TAX EXEC. 49, 52 (2017).
[52] Ravi Charaya v. Hardcastle Restaurant, NAA Case No. 14/2018.
[53] Kumar Gandharv v. KRBL Ltd., NAA Case No. 3/2018.

decisive factor to test the case of profiteering. A view may be taken that if there exists a correlation between increase in the price of a product and the increase in input cost, then the supplier must be given a leeway and accordingly he must be able fix the price. If such other considerations are not taken into account, it would be an infringement of Article 19(1)(g), as the supplier in order to meet the mandate of Section 171 has to reduce his profit margin.

For instance, the base price of the product is Rs. 1000 and the cost of product is Rs. 700 and hence, the supplier earns a profit of Rs. 300. Due to an unforeseen situation, the cost of the product is increased to Rs. 825 and the supplier now decides to sell the product at Rs. 1125, maintaining the profit margin of Rs. 300. Meanwhile, the Government has decided to reduce the rate of tax and compels the supplier to follow the mandate of Section 171. Thus, the supplier in such a situation is required to reduce the price of product, but the NAA may question the supplier for profiteering since, he has increased the base price from Rs. 1000 to Rs. 1125. This would require the supplier to forgo the profit margin and earn Rs. 125 (Rs. 1000- Rs. 825) which is impermissible and violates Article 19(1) (g).

C. The Issue of Discounting

A businessman may come up with various ways to attract the consumers for purchasing his product. One such traditional way of drawing the attention of consumers is offering 'discounts'. This section contemplates a situation where in the supplier may inflate the price of the

product and thereby offers a discount which might make the price equivalent to the price calculated after tax reduction.[54]

For instance, a supplier sells a product at Rs. 118/- (inclusive of 18% GST). The Government reduces the tax rate from 18% to 5% on the said product which in turn reduces the price of the product to Rs. 105/- (inclusive of 5% GST). Now, the supplier wants to attract the attention of the consumers and for that purpose, he increases the selling price of the product to Rs. 118/- and offers a discount on the selling price of that product as a result of which the product is sold at Rs. 105/- (inclusive of 5% GST).

This issue was discussed in the case of *Director General of Anti Profiteering v. M/s Raj & Co.*,[55] wherein the supplier was selling the product at Rs. 31.25/- (inclusive of 28% GST). After the reduction in tax rate to 18%, the price of the product remained unchanged, that is, Rs. 31.25 (inclusive of 18% GST). The allegation of profiteering was levelled against the supplier as he was violating Section 171 of the CGST Act. The supplier in the present case contended that it had passed on the benefit to the consumer by way of giving 12.5% discount. The NAA did not accept this contention since there was a prime facie case of profiteering and even after taking into consideration the scheme of discount, the base price was increased by Rs. 2.07/-. The question to be answered here is whether this is permissible under the law.

One may argue that the 'commercial expediency' of the seller permits him to price the product in his own way and it would not

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[54] Thomas Lambert, *Evaluating Bundled Discounts,* 89 MINN. L. REV. 1688, 1753 (2005).
[55] Director Gen. of Anti-Profiteering v. Raj & Co., NAA Case No. 25/2018.

contravene Section 171 of CGST Act. Also, going by the rule of literal interpretation, despite the pricing strategy adopted, the supplier has passed on the benefits of reduction of rate of tax and input tax credit, thereby fulfilling the mandate of anti-profiteering clause.[56]

The argument that the supplier should be given a choice in adopting a pricing model which serves his interests and at the same time, indirectly, leads to compliance of anti-profiteering clause is inherently flawed. Such a practice must be restricted since discount means "a deduction from an original price or debt".[57] By no stretch of imagination, the inflated price can be considered as an original price of the product. Also, one of the objectives of introducing anti-profiteering measure was to control the inflation caused due to the paradigm shift in the indirect tax regime.[58] By adopting such pricing scheme, the purpose of the insertion of anti-profiteering clause is diluted as there exists a notion in the mind of the consumers that the definite value of the product is what has been claimed by the seller (i.e. inflated price) and the discount is offered from the supplier's profit margin. This will result into a situation where the inflated value of the goods will be considered as the actual or real value which is not acceptable.

D. Lack of Reasonable Time Frame

India had many examples before it to understand the challenges and learn from the mistakes of others in a situation where the tax regime was being revised. Undoubtedly, the implementation of GST could have

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[56] Mathuram Agrawal v. State of Madhya Pradesh, AIR 2000 SC 109.
[57] *Discount,* MITRA'S LEGAL & COMMERCIAL DICTIONARY (6th ed. 2006).
[58] Maniyar, *supra* note 3.

been much better and more efficient for both sellers and consumers. Australia had brought out certain norms and rules such as dual ticketing norms, price and profit margin rules, retail price surveys, etc. to implement anti-profiteering post the rolling out of GST.[59] Amongst various challenges with regards to poor implementation, another one is the scarce time frame provided to reduce the price and therefore implement anti-profiteering. The concerns have been raised in various cases before NAA where sellers have contended that there was no time given to reduce the prices thereby making it impossible to comply with the provision.[60] The maxim "*Lex Non Cogit ad impossibilia*" which means "law does not require a man to do which he cannot possibly perform" has been resorted to. However, DGAP and NAA have rejected this contention by showcasing the malice of the sellers where there was an increase in the base price of the product overnight.[61]

A reasonable time period is of great significance and therefore should have been granted to comprehend the implementation process as per the business requirements and to grasp the consequences. The measures adopted in Australia may be of significant regard here.[62] The traders were asked to change the prices as soon as reductions came into effect but at the same time ACCC paved out a flexible approach. For instance, the shelf prices were supposed to be updated within 10 days of GST implementation. In addition, if there were any practical complications to meet the 10 days criteria, vendors were asked to put out a

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[59] Sthanu Nair, *Price Monitoring and Control under GST,* 52 ECON. & POL. WEEKLY 1, 4-5 (2017).
[60] Sandeep Puri v. Glenmark Pharmaceuticals Pvt. Ltd., NAA Case No. 50/19
[61] Ravi Charaya v. Hardcastle Restaurant, NAA Case No. 14/2018.
[62] Nair, *supra* note 59, at 6.

notice which would communicate to the customers that GST inclusive concrete prices would be paid at the instance of billing.[63]

III. CONCLUSION

The concept of *Parens Patriae* harks back at the power and the duty of the State to enact social-welfare legislation for its citizen and the anti-profiteering provision is a perfect illustration of the duty of the State to protect the interest of its citizens. The concept of anti-profiteering draws a distinction between profit and excessive profit, wherein the latter is considered to be illegal.[64] This distinction is essential and the provision of anti- profiteering was enacted with a just intent. However, the implementation of the law, lack of detailed provisions and the inability of the Legislature to foresee the consequences are the factors which take away the icing from the cake. Due regard should be given to the orders of NAA and their contribution in dealing with the issues of customers/sellers and thereby providing some clarity to the working of anti-profiteering measure. However, it is difficult to understand the assumed authority and arbitrary approach adopted by NAA. The NAA seems to apply its mind as per its convenience. For instance, NAA took it upon itself to decide the question of its own constitutionality.

In conclusion, it may be said that anti-profiteering is not a bad law but there are some loopholes which can be corrected by way of amendments and necessary notifications/circular.

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[63] *Id.*
[64] MAJUMDER, *supra* note 6.