



Email: editorijless@gmail.com

Volume: 8, Issue 2, 2021 (April-June)

**INTERNATIONAL JOURNAL OF LAW, EDUCATION,
SOCIAL AND SPORTS STUDIES
(IJLESS)**

A Peer Reviewed and Refereed Journal

DOI: 10.33329/ijless

<http://ijless.kypublications.com/>

ISSN: 2455-0418 (Print), 2394-9724 (online)

2021©KY PUBLICATIONS, INDIA

www.kypublications.com

Editor-in-Chief

Dr M BOSU BABU

(Education-Sports-Social Studies)

Editor-in-Chief

DONIPATI BABJI

(Law)

©KY PUBLICATIONS





A CRITICAL ANALYSIS OF ISSUES IN THE IMPLEMENTATION OF ANTI-PROFITEERING MEASURES IN INDIA

Santhosh V

First-year LL.M.-Taxation Law student, The Tamilnadu Dr.Ambedkar Law University,
Chennai

Email:santhoshveeramani1997@gmail.com

DOI: [10.33329/ijless.8.2.1](https://doi.org/10.33329/ijless.8.2.1)



ABSTRACT

The suppliers under the Goods and Service Tax law are bound to pass on the commensurate benefit of any tax rate reduction on supplies or the availed input tax credits to the recipient by way of commensurate price reduction. Failing to do the same will amount to profiteering. To ensure that such activities are not taking place after the tax rate-reductions by the GST Council or availing of input tax credits, the National Anti-Profiteering Authority was established under the Indian indirect tax law. The implementation of anti-profiteering measures in India seems inadequate despite having three-tier structures in the form of Committees, Director General of Anti-Profiteering, and the National Anti-profiteering Authority. The level of discretion granted to the anti-profiteering authorities is very high and such discretion raises doubts about the justice and fairness in the procedures adopted by them. Countries like Australia and Malaysia also implemented anti-profiteering laws but the procedures adopted by them were backed by formulas and guidelines. Calculation of the profited amount in India is not backed by formulas or fixed methodology. This paper will analyse the issues in the implementation of the Indian Anti-profiteering laws and their impact on suppliers of goods and services in the absence of clear-cut procedures.

Keywords: Anti-profiteering, cost, price, discretion, procedure, and implementation.

I. Introduction

No law can satisfy everyone and the taxation laws are the perfect example of it. Despite major tax reforms in India to make the indirect tax system simpler, the complexity still looms one way or the other. One such controversial tax reform is the anti-profiteering law. Though such a law intends to ensure the benefit of tax rate reduction or availing of input tax credit reaches the ultimate taxpayer, it is likely to affect even the innocent suppliers in some cases if not implemented properly. When the middlemen between the actual taxpayer and the Government, misuse the tax reforms by not passing on benefits made out of the tax reforms to the ultimate taxpayer, profiteering happens. Paying tax on profit is common but making profit out of tax is not. If such activities are left unchecked, it would defeat the purpose of introducing tax reforms. Tax laws cannot be static and are subject to constant changes. The changes can happen in many forms including but not limited to the abolition of certain taxes, widening or narrowing the coverage, leniency or stringency in payments or penalties, and also an alteration in rates. Whenever there is a reduction in tax rates on goods or services or availing of an input tax credit, the common man would expect the prices of goods or services to come down. This expectation sometimes goes unfulfilled due to the mischievous activities of the suppliers who increase

the prices of their goods or services intending to disallow the consumer from enjoying the benefits of tax rate reduction. Differentiating between the increase in price done to disallow the public from enjoying the benefits of tax rate reduction or input tax credit, and the genuine increase in price due to other factors is easier said than done. Identifying such profiteering activities needs separate attention and if it is left unregulated or regulated dubiously, then it would affect both suppliers and the general public at large. When a country gives separate and special attention to these activities by constituting an authority in this regard, the suppliers, who genuinely increased the prices due to other factors, may also be put to trouble if the anti-profiteering law enacted by the country is ambiguous. India is one of the countries having such laws so it is essential to check the proper implementation of the same.

II. Indian Anti-Profiteering Laws

The Comptroller and Auditor General (CAG) Report in June 2010 relating to the then Value Added Tax (VAT) pointed out the profiteering done by dealers not passing on the benefit of tax rate reduction to the consumers in the wake of VAT implementation. This warning served as one of the many reasons for having anti-profiteering provisions in GST.¹ The Institute of Chartered Accountants of India (ICAI) published a study on unjust enrichment in which the applicability of unjust enrichment on the indirect tax laws was analysed. In the said paper, it was discussed that when the tax or duty is passed on to the customer, the manufacturer is also bound to pass on the benefits or refunds. If the manufacturer fails to pass on such benefits, then it would result in undeserved profit.² On 10th November 2017, the GST Council recommended the reduction in the tax rates of various goods and services from 28% to 18%, 18% to 12%, 12% to 5% and 5% to nil which would be effective from 15th November 2017.³ This move was likely to trigger profiteering activity all over the country. However, the laws to regulate this seemed more like an attacking weapon in disguise than damage control. The teeth of Indian anti-profiteering laws is Section 171(1) of CGST Act, 2017 which mandates that any reduction in the rate of tax on any supply of goods or services or the benefit of the input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.⁴ To examine if the commensurate reduction takes place, the Central Government has constituted the National Anti Profiteering Authority (NAA) by powers granted under the CGST Act, 2017.⁵ The NAA has been granted the power to determine the procedure and methodology adopted in determining if the profiteering takes place or not.⁶ The State Level Screening Committee will receive applications of local nature and forward the same to Standing Committee (national level) after examining the same. The applications of local nature if made to Standing Committee will usually be forwarded back to State Level Screening Committee first for initial examination.⁷ Once that is over, the Standing Committee will examine the application forwarded by the State Level Screening Committee or the applications (national level) directly received by it and refer the matter to the Director-General of Anti-Profiteering (DGAP) if *prima-facie* evidence is present.⁸ The performance of both the committees is reviewed by NAA every month based on the details furnished by DGAP regarding the cases received and disposed of by

¹FAQ on Anti-profiteering provisions, India, available at: <https://www.cbic.gov.in/resources//htdocs-cbec/gst/Anti-prof-FAQs-FINAL-FAQs.pdf> (last visited on March 29, 2021).

²The Institute of Chartered Accountants of India, "Study Paper on Unjust Enrichment" (February, 2017).

³Central Board of Indirect Taxes, Press release -10th November, 2017, available at: <https://cbic-gst.gov.in/pdf/press-release/Press-Release-10-11-2017.pdf> (last visited on March 29, 2021).

⁴The Central Goods and Services Tax Act, 2017(Act 12 of 2017), s. 171.

⁵The Central Goods and Services Tax Rules, 2017, Rule 122, available at: <http://gstcouncil.gov.in/cgst-rule> (last updated on July 1, 2020).

⁶*Id.*, Rule 126.

⁷*Supra* note 5, Rule 128.

⁸*Supra* note 5, Rule 129.

the Committees.⁹ There is no clear-cut procedure to process applications received by them. There is no liability for the Standing Committee if it refers a matter to DGAP without *prima-facie* evidence. The fact that even the complaints of local nature are ultimately going to be investigated by DGAP and concluded by NAA, makes the necessity of having two separate committees questionable.

The discretion given to DGAP under the CGST rules is intriguing. The CGST Rules, 2017 (hereafter referred to as “the Rules”) empowers the DGAP to investigate and collect evidence for determining the profiteering activities. Apart from the notice requirements and the time limit for investigation (6 months which can also be extended to 3 more months with NAA permission), there are no other strict protocols that are required to be followed by DGAP as per the CGST Rules.¹⁰ Though there is a hope of protection for confidential information, the same is an eye-wash as the law also requires the holder of confidential information to furnish a statement of reasons if the confidential information cannot be summarized in a non-confidential manner.¹¹ This defeats the very object of protecting the same in the first place. To counter these lacunae, the NAA issued certain guidelines for the DGAP which allows the DGAP to submit the report in 2 parts, one with confidential information and one without. However, the guidelines give the discretion to DGAP in deciding if submitting the report in 2 parts is necessary or not.¹² Not just NAA, even the DGAP has the powers of a Civil Court.¹³ The DGAP has to submit the report within 6 months of the reference made to it. This period can be further extended to 3 more months.¹⁴ As far as the investigation done by DGAP is concerned, there is no protocol given concerning the methodology adopted by DGAP in determining the profiteered amount. There is no liability for DGAP if the DGAP report has wrongly calculated the profiteered amount. Such absolute discretion given to DGAP might result in abuse of power.

After the receipt of the report submitted by DGAP, the NAA finally determines if there was any profiteering activity. The order of NAA is not bound by the report of DGAP as the report is considered merely as a recommendation. The NAA can also direct the DGAP to further investigate the same matter if it deems fit.¹⁵ The NAA within 6 months of the receipt of the DGAP report can order for a reduction in prices, returning the profiteered amount to the recipient along with 18% interest, deposit the same in the Consumer Welfare Fund (CWF) if no claim is made by the recipient or if the recipient is unidentifiable, imposition of penalty or even cancellation of registration.¹⁶ The power of NAA to cancel the registration of the supplier as a punishment for anti-profiteering is seldom exercised and it might violate the doctrine of proportionality if used lavishly. Under a notification in 2019, the NAA also has the powers to direct the DGAP to direct the investigation of profiteering concerning goods or services which are not covered in the DGAP Report.¹⁷ The decisions of NAA are based on the majority where the quorum is a minimum of three members. In the event of an equality of votes, the Chairman has the second vote.¹⁸ Neither the CGST Act, 2017 nor the CGST Rules, 2017 provide remedies against

⁹ Bringing Directorate General of Anti-Profiteering under superintendence, direction and control of National Anti-Profiteering Authority - Notification of detailed guidelines by NAA - 04.10.2019, *available at*: [https://www.naa.gov.in/docs/Scan_20191004%20\(2\).pdf](https://www.naa.gov.in/docs/Scan_20191004%20(2).pdf) (last visited on March 30, 2021)

¹⁰ *Supra* note 5, Rule 129.

¹¹ *Supra* note 5, Rule 130.

¹² *Supra* note 9.

¹³ *Supra* note 5, Rule 132 (1).

¹⁴ *Supra* note 5, Rule 129 (6).

¹⁵ *Supra* note 5, Rule 133(4).

¹⁶ *Supra* note 5, Rule 133 (3).

¹⁷Government of India, Notification No.31/2019-Central Tax dated 28.06.2019, *available at*: <http://gstcouncil.gov.in/312019-central-tax-dt-28-06-2019> (last visited on March 30, 2021).

¹⁸ *Supra* note 5, Rule 134.

the frivolous orders of NAA. Though the aggrieved party may file a writ petition challenging the NAA orders, it may lend a hand only when there is a clear violation of fundamental rights.¹⁹

As far as the tenure of NAA is concerned, it was fixed as two years in the beginning but later, it was further extended by the Central Board of Indirect Tax and Customs.²⁰ The tenure of NAA will now expire in November 2021.²¹ While the tenure of NAA is likely to be extended further, the Federation of Indian Chambers of Commerce and Industry (FICCI) recommended discontinuing the anti-profiteering laws prospectively and allowing the market forces to determine the prices. The FICCI substantiated its recommendation by pointing out the lack of guidelines in the implementation process.²² There is no other guideline concerning the procedure or methodology adopted by NAA than the National Anti-Profiteering Authority under the Goods & Services Tax Methodology and Procedure, 2018 published on the NAA website.²³ The NAA through this document has granted itself certain extra (excessive in some cases) powers that were not explicitly given under the CGST Rules or the CGST Act, 2017. Some of the powers discussed in the said document are as follows:-

- The NAA may direct the DGAP to inquire about contravention of Section 171 of CGST Act, 2017 even in cases where there was no application was made. (Clause 9)
- The NAA may allow the interested parties to examine the original documents placed on the report. (Clause 18) [The clause does not specify if the word 'report' includes the report with confidential information also.]
- The NAA orders that were dismissed or disposed of ex-parte can be reinstated on an application within 15 days and the said time limit can be extended by NAA if it is satisfied that there was sufficient cause for delay. (Clause 21)
- The NAA may correct the arithmetical or factual mistakes in its previous orders apparent from the record within 3 months (Clause 30)
- Any investigation or prosecution instituted against the chairman and the technical members of NAA will require Central Government approval. (Clause 38)²⁴

III. Issues in Implementation

There are plenty of issues in the implementation of anti-profiteering laws starting from identifying the violator to signing the final order. In *DGAP v. M/s Satya Enterprises*,²⁵ though the manufacturer was in control of fixing the MRP (Maximum Retail Price), the dealer was punished for not passing on the commensurate benefits of tax rate reduction by way of commensurate reduction in

¹⁹ *Smt. Ujjam Bai v. State Of Uttar Pradesh*, 1963(1) SCR 778.

²⁰ Government of India, Notification No.33/2019 -Central Tax dated 18.07.2019, available at: <https://www.cbic.gov.in/resources//htdocs-cbec/gst/notfctn-33-central-tax-english-2019.pdf?jsessionid=2446CEA726650C2211AC98D19A848090> (last visited on March 30, 2021).

²¹ Bela Sheth Mao, "Anti-profiteering in GST: Caught in litigation, extension in tenure may not be enough", *The Economic Times*, July 11, 2019, available at: <https://economictimes.indiatimes.com/small-biz/gst/anti-profiteering-in-gst-caught-in-litigation-extension-in-tenure-may-not-be-enough/articleshow/70168665.cms?from=mdr#:~:text=Anti%2Dprofiteering%20provisions%20have%20been,m ore%20years%2C%20till%20November%202021> (last visited on March 31, 2021).

²² FICCI wants abolition of anti-profiteering provisions, available at: <http://www.ficci.in/ficci-in-news-page.asp?nid=27855#> (last visited on March 31, 2021).

²³ The National Anti Profiteering Authority under the Goods & Services Tax Methodology and Procedure, 2018, available at: https://www.naa.gov.in/docs/procedure%20_methodology_18.pdf (last visited on March 31, 2021).

²⁴ *Ibid.*

²⁵ NAA Order No. 03/2019, available at: https://www.naa.gov.in/news_detail.php?newsid=89 (last visited on March 27, 2021)

prices. The dealer argued that MRPs are fixed by the manufacturer (M/s Patanjali Ayurveda Ltd.) and the dealer was not supposed to reduce the price on its own. There was no change in the percentage of commission charged by the dealer in pre-GST and post-GST periods (i.e. 5%). However, the base price was increased, and based on this increase, the dealer was directed by NAA to deposit Rs.6,06,752.72/- along with 18% interest in the Consumer Welfare Fund.

At times, the Anti-profiteering Rules are even used as unnecessary harassment against well-known companies. In *KSC v. M/s Maruti Suzuki India Ltd.*,²⁶ the Kerala State Screening Committee on Anti-Profiteering in May 2018 falsely alleged that M/s Maruti Suzuki India Ltd. had profited on supply of four models of motor car merely based on invoices. When the matter was referred to the Standing Committee on Anti-Profiteering, it referred the matter to DGAP without properly checking the tax rate for those 4 models before and after GST. Finally, the DGAP in its report dated 28.09.2018 found that there was an increase in the rate of tax from 15.63% in pre GST period to 29% in the post-GST period. The pre-GST tax rate included Central Excise Duty-12.5%, Central Sales Tax-1%, National Calamity Contingent Duty-1%, Auto Cess-0.125%, and Infra cess-1% whereas the post-GST tax rate included central GST at 14%, State GST at 14%, and Compensation Cess at 1%. The DGAP report dated 28.09.2018 also stated that the company had reduced the net base price for two car models despite the tax increase. The increase in the net base price of the other two models was very negligible (i.e. Rs. 190/- and Rs.210/-) and even that slight increase was due to the reduction in discount as the base prices excluding discounts remained the same. The NAA dismissed this meritless application on 02.01.2019. The Maruti Suzuki had to go through this process for almost 8 months.

The law permits the NAA to investigate the matter further but it does not permit the NAA to reinvestigate the same matter again and that too due to the blunders committed by DGAP. However, NAA has allowed the DGAP to reinvestigate the same matter again. In *DGAP v. M/s Patanjali Ayurveda Ltd.*,²⁷ the NAA while examining the report filed by DGAP against M/s Patanjali Ayurveda Ltd. found that the DGAP has incorrectly worked out on taking rate reduction from 28% to 18% instead of 18% to 12%. The DGAP report computed the profiteering of certain SKUs (Stock Keeping Unit) twice or thrice. The NAA also found that there was no confirmation from DGAP concerning the investigation of all the SKUs impacted by tax rate deductions. Therefore, NAA directed the DGAP to prepare the report again by conducting the investigation properly. Later, the DGAP compared the average base price of products sold in 14 days with the actual base prices of products for the following 1 year and 4 months. Even though the company pointed out that this methodology is arbitrary, the NAA defended the same calling it an “approved” one which cannot be claimed to be incorrect. The NAA directed the company to deposit a whopping amount of Rs.75,08,64,019/- in the Consumer Welfare Fund.

In the absence of procedure and methodology, the NAA has considered the increase in the number of goods instead of a reduction in prices as a factor in some cases.²⁸ On the other hand, it has also refused to rely on the Certificates issued by Chartered Accountants. In the *Rahul Sharma v. M/s Reckitt Benckiser India Pvt. Ltd.*,²⁹ the DGAP computed the profited amount by comparing the average base price during the period from 01.11.2017 to 14.11.2017 (14 days) with actual invoice-wise base prices of the product “Dettol HW Liquid Original 900ml” sold during 15.11.2017 to 31.03.2019 (almost 1.4 years) by including the excess GST collected on increased base price. It was argued that the

²⁶ NAA Order No. 01/2019, available at: https://www.naa.gov.in/news_detail.php?newsid=85 (last visited on March 27, 2021)

²⁷ NAA Order No.16/2020, available at: https://www.naa.gov.in/news_detail.php?newsid=330 (last visited on March 28, 2021).

²⁸ *Ankit Kumar Bajoria v. M/s Hindustan Unilever Ltd.* 2019 (21) GSTL J74 (N.A.P.A).

²⁹ NAA Order No. 20/2020, available at:

<http://nidan.co.in/files/naa/Reckitt%20Benckiser%20India%20Pvt%20Ltd.%2019.03.2020%20Scanned.pdf> (last visited on March 28, 2021).

commensurate reduction in price need not be in cash only and the reduction was commensurately made by supplying more number goods but the said contention was refuted by NAA as sufficient details regarding the same were not produced. The NAA refused to rely on a certificate issued by Chartered Accountant that the company has passed on the benefits by increasing the quantity (by an additional volume of 200ml). The NAA directed the respondents to deposit Rs.63,14,901/- (for manufacturer) and Rs.2,33,456/- (for dealer) in Consumer Welfare Fund. For the question of procedure and methodology to be adopted in computing the anti-profiteering amount, the NAA held that no fixed procedure or methodology can be adopted and the DGAP has to deal with it on case to case basis subject to NAA orders and NAA notification dated 28.03.2018 regarding the same.

As already discussed the discretion of DGAP is wide enough and it can even cover all goods and services in its sight. DGAP can either choose to investigate all products though not referred to it or just stick to the product referred to it. The business entities are now at the mercy of DGAP as the investigation process is DGAP's convenience rather than a prescribed condition. In *Rahul Sharma v. M/s Samsonite India*,³⁰ the reference to DGAP by the Standing Committee was based on a complaint concerning "American Tourister Sky Tracer (Hard Trolley)" which was priced at Rs.9100/- before and after reduction in the tax rate. However, during the investigation, the DGAP also investigated other products supplied by Samsonite. This was challenged by the respondent. The NAA nevertheless defended the DGAP report saying that the DGAP is bound to investigate all products impacted by rate reduction even if they are not mentioned in the notice issued to him. The NAA directed the supplier to deposit Rs.25,73,82,482/- along with 18% interest in CWF.

The NAA orders were challenged before Hon'ble High Courts multiple times. In one matter, the hearing was done only by three members but the final order was signed by four members. The Hon'ble Bombay High Court set aside this NAA order as it violated the principles of natural justice. There was no opportunity to present the case before the fourth signatory.³¹ The Hon'ble Delhi High Court has stayed the NAA orders which permitted the DGAP to investigate products that were not originally referred to it³² and even the NAA orders which did not consider the pricing of all products cumulatively instead of individually considering it.³³

The business entities are asked to pass on benefits due to tax rate reduction and they are punished if they don't. If the supplier decreases the price when the tax rate increases, then there is no reward for not passing on the burden to the consumer.³⁴ The price increase is punished but the price decrease is not rewarded even if it is done at the times when the tax rate increases. The increase or decrease in prices is based on many factors and not just tax. Despite this, the Indian anti-profiteering laws are not considering the factors like supply and demand conditions, GST compliance costs, increase in cost, competition and pricing strategies, etc. Failing to take account of relevant considerations while exercising the discretion would amount to an abuse of discretion. A decision must be arrived at after

³⁰ NAA Order No. 22/2020, available at: https://www.naa.gov.in/news_detail.php?newsid=345 (last visited on March 28, 2021)

³¹ *Hardcastle Restaurants Pvt. Ltd. v. Union of India*, TS-899-HC-2019 (Bom).

³² Deepshika Sikarwar, "Abbott anti-profiteering case stayed, hope for other firms", *The Economic Times*, May 8, 2019, available at: <https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/abbott-anti-profiteering-case-stayed-hope-for-other-firms/articleshow/69241483.cms?from=mdr> (last visited on March 28, 2021).

³³ Sumit Jha, "Anti-profiteering mechanism: Slew of stay orders by high courts expose NAA lacunae", *Financial Express*, May 17, 2019, available at: <https://www.financialexpress.com/industry/anti-profiteering-mechanism-slew-of-stay-orders-by-high-courts-expose-naa-lacunae/1580706/> (last visited on March 28, 2021).

³⁴ YouTube, *ANTI-PROFITEERING UNDER GST BY CA ABHISHEK AGARWAL,2020*, available at: <https://youtu.be/d4ko4I8NTbA>

taking into account all relevant considerations.³⁵ Cost is a relevant factor in the determination of price. If the said factor is not considered by DGAP in determining the profiteered amount, then it would result in abuse of discretion. No discretion is unreviewable and there is nothing like unfettered discretion immune from judicial review.³⁶ Price control is essentially a clog on the freedom of trade and commerce conferred the status of a fundamental right under Article 301. However wherever the circumstances so justify, the same has been treated as a reasonable restriction.³⁷ Price control in the name of anti-profiteering for four long years may not fall under the scope of a reasonable restriction though done in the public interest. The impact of tax rate reduction on prices will diminish after a point of time because of which the tenure of NAA was fixed only to two years. However, extending it further was uncalled for. The procedures adopted by DGAP also cannot be challenged as there is no standard based on which one argues that the DGAP has violated this or that protocol. All these issues, if left unchecked, might impact certain business entities selectively at the discretion of anti-profiteering authorities.

IV. Australian and Malaysian Models

In Australia, the Australian Competition and Consumer Commission (ACCC) was given the responsibility of checking the price changes happening after the introduction of GST which replaced many taxes. The ACCC's Price Exploitation Guidelines were not thrust upon the public undemocratically. The preliminary draft was issued in May 1999 and the modified guidelines were issued in July 1999 after considering the matters put forth in the consultation period.³⁸ As per the guidelines, if the new tax changes cause tax and costs to fall by 1 \$, then prices should fall by 1 \$. The guidelines also give due consideration to the cost of business, supply and demand conditions and it provides that if there is a rise in the cost of business by 1 \$, then the business entities are free to raise the prices by 1\$. However, the price increase cannot exceed 10%.³⁹ The ACCC conducted monthly and quarterly surveys to collect price details before and post the introduction of GST from retail outlets and supermarkets. This helped them in identifying areas where price exploitation is likely to happen. GST Compliance costs such as purchase price of new accounting software, staff training were allowed to be adjusted in the price of the product. These anti-profiteering measures were implemented from 1999 to 2002 but the ACCC monitored the prices 12 months before the implementation. It also made people aware of the anti-profiteering measures by way of publications and hotline numbers.⁴⁰ Price details collected in 8 capital cities and 100 towns were collected by monthly and quarterly surveys. Surveys were conducted eight times during the transition period. Information obtained from these surveys and also from other sources was used in studying price changes. This information was disseminated to consumers and businesses and they were made aware of expected price movements for 185 common

³⁵ *Sachidanand Pandey v. State of West Bengal*, (1987) 2 SCC 295.

³⁶ *Khudiram Das v. State of West Bengal*, (1975) 2 SCC 81.

³⁷ *Indraprastha Gas Ltd. v. Petroleum And Natural Gas Regulatory Board* 2012 SCC Online Del 3215.

³⁸ John Martin, *Dealing with Pricing in the Transition to the New Tax System*, Presentation to Australian Business Limited Council Luncheon, Held on June 30, 2020 at Wollongong, available at: <https://www.accc.gov.au/system/files/Presentation%20to%20Australian%20Business%20Limited%20Council%20Luncheon.pdf> (last visited on March 31, 2021).

³⁹ ACCC pricing guidelines 'Firm And Fair', Media Release (March 9, 2000), available at: <https://www.accc.gov.au/media-release/accc-pricing-guidelines-firm-and-fair> (last visited on March 31, 2021).

⁴⁰ Mrityunjay Acharjee, "Introduction Of Anti Profiteering Provisions In India And Role Of CMA" 5 *Tax Bulletin of The Institute of Cost Accountants of India*, 4-5 (December 2017)

consumer goods and services over the six months from the date of introduction of GST. This made the consumers vigilant and suppliers cautious well in advance. ⁴¹

As far as Malaysia is concerned, the Price Control and Anti-Profiteering Act, 2018 (PCAPR) came into effect on 6 June 2018 which punishes increase in the net profit margin of goods and services beyond a certain level computed based on the net profit margin of the products and goods calculated over the past 3 years with a prescribed formula. The formula takes into account various factors such as taxes, supplier costs, supply and demand conditions, circumstances of the geographical and product market.⁴² The 2018 Regulation replaced the old regulations which applied to foods and beverages, and non-durable household and personal care products only. The new regulation applied to all goods and services. There is no expiry date to the New Regulations. As per the new regulation, the normal profit margin was ascertained for each product on a base date and any profit beyond that is unreasonably high. Profit is unreasonably high if the mark-up percentage (MU) or margin percentage (MG) for goods or services supplied on any date in a particular financial year (FY) or calendar year (CY) exceeds the MU or MG in respect of those goods or services, as at the 'baseline' first day of that particular FY or CY. The MU and MG for baseline first day of FY or CY is computed by considering the MU and MG of preceding 3 FYs or CYs.⁴³ Unlike India, Malaysia has a formula for anti-profiteering, and the formula though looks rigid, it is flexible with a lot of exceptions. Unlike India, factors like costs, supply & demand conditions are also given due consideration⁴⁴. From the formula, it can be also be inferred that the data for three preceding years are given due consideration.

V. Conclusion and Suggestions

The Indian anti-profiteering laws passed with the good intention of passing on the benefits of tax rate reductions or benefits of input tax credits by the suppliers to the public is, unfortunately, harassing the suppliers in some cases due to poor implementation process. There are issues in each stage of the implementation process like identifying the person who fixes the price, deciding the products to be investigated, determining the methodology to be adopted in calculating the profiteered amount, deciding the relevant or irrelevant considerations, submitting the Report without discrepancies, signing the order after following principles of natural justice, remedies against unjust orders, etc. In the absence of proper guidelines, the discretion given to anti-profiteering authorities is abused or exercised excessively. Even though India cannot completely copy the Australian and Malaysian models but can surely learn from their experiences as well as borrow the ideas that worked well. The following suggestions are made to improve the anti-profiteering mechanism in India:-

1. In case anti-profiteering authority (like the NAA) are introduced again in the future, then the procedures adopted by ACCC like spreading awareness, retail surveys, price estimates, and other procedures can be followed six months before the implementation of such laws. Based on price surveys, India should come up with its formula for calculating the profiteered amount. An increase in cost should also be a relevant consideration in determining the profiteered amount.

⁴¹ Sthanu R Nair & Leena Maryeapen, "Price Monitoring and Control under GST", *Economic and Political Weekly*, June 28, 2017, available at: <https://www.epw.in/journal/2017/25-26/web-exclusives/price-monitoring-and-control-under-gst.html> (last visited on March 31, 2021).

⁴² Price Control and Anti-Profiteering, available at: <https://www.pwc.com/my/en/services/tax/indirect-tax/pcapa.html> (last visited on March 31, 2021).

⁴³ Indirect Tax Alert New Anti-profiteering regulations for ALL businesses, available at: <https://www2.deloitte.com/content/dam/Deloitte/my/Documents/tax/my-tax-indirect-tax-alert-new-anti-profiteering-regulations-for-all-businesses.pdf> (last visited on March 31, 2021).

⁴⁴ *Ibid.*

2. The State Level Screening Committee should be abolished and its functions can be carried out by the Standing Committee with more branches and members. The Committee(s) and DGAP should be made liable for all the errors made by them in the reference notice or the Report as the case may be. The DGAP's powers to investigate should be limited to the products mentioned in the reference made to it. If any discrepancies are found in the DGAP report, the person responsible for it should be fined. The amount collected from DGAP by way of a fine should also be deposited in the Consumer Welfare Fund.
 3. The NAA orders once disposed-off should not be reinstated. Appeal against NAA orders should lie to High Courts. The NAA's power to order for cancellation of registration should be taken away. The tenure of NAA should not be extended further. However, the pending matters before it may be dealt till a period as may be required. The tenure of NAA should expire once the pending matters are disposed of and no new matters should be entertained after November 2021. The words "or by an increase in the number of goods" should be included at the end of Section 171(1) of CGST Act, 2017.
-