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NAA confirms profiteering by DTH service provider for not passing on ITC benefit

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Summary

The National Anti-Profiteering Authority (NAA) confirmed profiteering in relation to direct-to-home (DTH) services provided by the respondent for failing to pass the appropriate input tax credit (ITC) benefit, which was previously unavailable to service providers in pre-Goods and Services Tax (GST) regime but is now available post-GST. The Directorate General of Anti-Profiteering (DGAP) examined the input tax credits (ITC) available under the pre-GST and post-GST regimes and computed additional ITC that the respondent was obligated to pass on to the eligible recipients. The NAA emphasised that neither this authority nor the DGAP had acted as price controllers or regulators as they did not have such a mandate. The NAA further stated that any notice or report issued under the rules is legally valid and constitutional, and by no stretch of the imagination can it be held to be *ultra vires*. The NAA further explained that the term 'profiteering' has been clearly defined under the provisions, as inserted vide the Finance Act, 2019 w.e.f. 1 January 2020. The NAA concurred with the DGAP's claim and found no reason to disagree with the methodology used or the detailed estimate of profiteered amount in the report. The NAA then instructed the respondent to deposit the profiteered money along with 18% interest in the consumer welfare fund (CWF).

Facts of the case

- Applicant no.1[1] had alleged profiteering concerning the DTH service supplied by the respondent[2]. It had submitted that the respondent had not passed the commensurate benefit of ITC available to the respondent at the time of GST implementation[3]. The DGAP (applicant no.2) has filed the report basis the application received from applicant no. 1 for alleged profiteering[4].
- The state screening committee (SSC) received the application for review. The SSC forwarded it further to the standing committee (SC) and stated that it appears *prima facie* that the benefit of higher ITC has to be passed on by the service provider in the form of reduced subscription charges. The SC investigated it further, and the DGAP then obtained the minutes, basis which the DGAP gave the respondent a notice.
- In respect to the DGAP's notice, the respondent submitted the reply, which was preferred for investigation of non-passing of ITC benefit of VAT[5]/ SAD[6]/ entry tax/ CST[7]/ purchase tax, etc. It was observed that the benefit of credit accrued consequent to GST introduction should have been passed on to the customers. The respondent was not eligible to avail of CENVAT credit of VAT/ CST/ purchase tax/ entry tax, etc.

[1] Sweety Agarwal
[2] M/s TATA Play Limited (formerly known as Tata Sky Limited)
[3] Section 171 of the CGST Act, 2017
[4] From 1 July 2017 to 31 January 2019
[5] Value Added tax
[6] Special Additional Duty
[7] Central Sales Tax

paid on the inputs or capital goods purchased indigenously and the credit of SAD paid on imported goods in as much as the respondent was not engaged in the sale of goods. Further, post-GST, the respondent could avail the ITC of GST paid on all the inputs and capital goods, including the VAT/SAD/CST/purchase tax, etc. which got subsumed in GST.

- The DGAP observed that post GST, the eligible applicants can claim the benefit of additional ITC[8] accrued to the respondent. Hence, it appeared that the respondent had contravened the provision. Thus, the DGAP proposed to deposit the profiteered amount in the CWF[9].
- After considering the DGAP report, the NAA issued a notice to the respondent and directed them to file written submissions[10], which were then sent to the DGAP for the supplementary report.
- The respondent submitted that applicant no. 1 is not the affected party and had not even submitted the evidence of profiteering. Hence, the NAA's notice is *void-ab-initio.* Further, per the provisions, the recipient can only file a written complaint against an assessee. However, since applicant no. 1 was not the subscriber, she did not have *locus standi* to file the present complaint. In this respect, the DGAP submitted that since the SC forwarded the application to the DGAP, it was under obligation to complete the investigation.
- The respondent further submitted that applicant no. 1 had not submitted the supporting evidence. In this respect, the DGAP clarified that upon examination of the requisite documents, it observed that the respondent was not eligible to avail of CENVAT credit; however, the respondent could avail ITC of all taxes which got subsumed in GST.
- The respondent said that it had adopted competitive prices that were not based on cost or tax computation. Hence, there was no impact of taxes on his pricing to the subscribers and, thereby, no relevance of input of VAT/CST/Entry Tax/SAD on subscribers' prices. In this respect, the DGAP made it clear that it was agreed that the pricing was dependent on market conditions, and the respondent was free to decide on pricing. Accordingly, to comply with the provisions, the respondent had to pass the benefit of additional ITC.
- The respondent submitted that the computation in the DGAP's report is on an ad-hoc basis. It had charged service tax on MRP value; however, under GST, the tax is paid on the transaction value. Thus, the comparison base is incorrect.

[8] to the tune of 4.19%
[9] Rule 133(3)(e) of the CGST Rules, 2017
[10] On 12 June 2022 and 11 July 2022

However, the DGAP clarified that there was a correlation between the turnover and the CENVAT credit of service tax/ ITC. Further, the contention of the respondent to pay service tax on MRP was not tenable.

- Regarding the DGAP's supplementary report, the respondent further argued that the DGAP had ignored the malafide intention of applicant no.1. Further, the clarification by the DGAP[11] that any other person could be considered as an interested party and file a complaint against an assessee, was erroneous. Besides, the exercise of jurisdiction at the level of SSC and SC was erroneous and against the rule[12]. Further, the investigation was extended beyond the particular service availed by applicant no.1. Hence, the proceedings were unsustainable and bad in law as they had transgressed the ambit of the complaint.

NAA's observations and ruling[13]

- **Compliant of applicant no. 1 is maintainable:** The NAA said that the information provided by applicant no.1 was adequate to demonstrate that she was the person using the connection. However, the subscription was not in her name. Further, the respondent had not refused to accept the consideration from her, and even allowed her to modify the contact details. Thus, her complaint is maintainable. The NAA held that applicant no. 1 has *locus standi,* the SSC and SC have rightly taken cognisance of the matter, and the DGAP has correctly investigated the case and submitted its report.
- **The additional benefit of ITC in the post-GST period:** The NAA observed that there was an additional benefit of ITC in the post-GST period compared to the pre-GST period. Further, the profiteered amount due to the seamless credit facility made available under the post-GST regime was calculated by contrasting the ITC to turnover ratio during the pre-GST and post-GST periods.
- **Notice or report issued is not *ultra vires:*** The NAA claimed that the Parliament, as well as all the state and UT legislatures, had passed the provisions, and that the central government had been given the responsibility of prescribing the authority's powers and functions based on which the regulations had been created. Therefore, any notice or report made in accordance with the rules is legally binding, and constitutional, and cannot in any way be considered to be outside of its authority.

[11] post introduction of N/N 14/2018-CT dated 23 March 2018

[12] Rule 128 of the CGST Rules, 2017

[13] Case No. 63/2022, Order dated 29 August 2022

- **Benefit of additional ITC to be passed on:** The NAA noted that although pricing was determined by market conditions and the respondent had complete control over subscription package rates, under the terms of the provision, the respondent had to pass on the benefit of the additional ITC accrued post GST by way of reduction in prices. Therefore, the allegation of the respondent is not correct.
- **Method of computation adopted by the DGAP:** The NAA found the correlation between the turnover and CENVAT credit of service Tax/ ITC as the respondent was discharging its output liability out of the credit available based on turnover. Accordingly, the pre and post-GST turnover had been taken from the data submitted by the respondent and compared with the ITC data.
- **NAA and DGAP have not acted as price controllers:** Neither the NAA nor the DGAP has ever controlled or regulated prices. The NAA further noted that the restrictions do not hinder the respondent's freedom to operate his own business or profession or to set his own price and margin. The role of the provision is to protect the welfare of the consumer, who is ultimately bearing the burden of indirect tax. Further, the NAA needs to ensure that both the benefits of tax reduction and ITC are passed on to the general public[14].
- **The benefit to be passed on at the level of each supply:** The NAA found that the procedure and methodology to pass on the benefit of reduction in the rate of tax or benefit of ITC is enshrined in the provisions. A reduction in the rate of tax on goods or services does not necessarily mean that the reduction in the tax rate is to be taken up at an entity, group, or company level for all of the supplies made by it. As a result, the advantage of the reduced tax must be distributed to each buyer of each unit at the level of supply.
- **No fixed mathematical methodology to determine the benefit:** The word 'commensurate'[15] describes the amount of benefit to be passed on by way of reduction in the prices which must be computed in respect of each product based on tax reduction or availability of additional ITC as well in addition to the existing base price of the product. The computation of reduction in prices is purely a mathematical exercise that varies from product to product. Hence, a fixed methodology cannot be prescribed

[14] as per provisions of Section 171 of CGST Act 2017 read with Rule 127 and Rule 133 of CGST Rules 2017

[15] mentioned in Section 171 (1) of CGST Act 2017

to determine the amount of benefit or the profiteered amount.

- **Acceptance of the DGAP's report and deposit of profiteered amount in CWF:** The NAA agreed with the view of the DGAP. Therefore, it directed the respondent to deposit the profiteered amount of that applicant along with all other eligible subscribers for a particular period[16] in the CWF[17] within three months from the date of receipt of the order.
- **Imposition of penalty:** The respondent is liable for a penalty, however, since these provisions came into effect w.e.f. 1 January 2020, therefore, the penalty cannot be imposed retrospectively.

[16] from the date the said amounts were profiteered till the date of deposit in CWF

[17] In 50:50 ratio (Central and state government CWF)

Our comment

The anti-profiteering measures are included in the GST law to prevent businesses from taking unfair advantage of the decreased GST rates or increased ITC. According to the provisions, any benefit from a lower tax rate or a higher ITC must be passed on to the customers by lowering the cost of the relevant goods and services. The NAA must decide if an appropriate price decrease in the products and/or services has resulted from the benefit of greater ITC or a lower tax rate. However, it is to be noted that the methodology and process used to spot instances of profiteering may change based on the specifics of each case and the type of goods or services provided. In the present ruling also, the NAA held that while choosing a 'methodology' and 'procedure', one formula cannot be used to match all situations.

Additionally, effective 1 January 2020, the GST law added the penal measures for the imposition of penalties in case of infringement of the anti-profiteering requirements. The NAA has correctly ruled that the penalty provision cannot be applied retroactively in reliance on the same. Therefore, the NAA has withdrawn the penalty since the penalty provisions were not in existence during the period of the dispute.

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