Legislative changes to strengthen the GST regime First report on specific research issues

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About the Authors

Rav P Singh is a Senior Resident Fellow and the Team Lead of the Tax Law Vertical at the Vidhi Centre for Legal Policy, New Delhi.

Vidushi Gupta is a Research Fellow in the Tax Law Vertical at the Vidhi Centre for Legal Policy, New Delhi.

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A. Introduction

In July 2017, India moved to a unified Goods and Services Tax ('GST') regime from the existing scheme where multiple taxes were imposed by the States and Union Government.. Billed as the biggest tax reform since independence, the GST law subsumed numerous Central and State levies into a single tax applicable to goods and services across the nation. Given that the GST caused a paradigm shift in the indirect tax framework, its implementation was expected to be disruptive. At the same time, the introduction of this mammoth reform came with expectations of a simpler, transparent and user-friendly tax regime.

While there were countless roadblocks and speed bumps, the law was largely embraced by most sections of the society, and the Government's pro-activeness in addressing user complaints and clarifying contentious issues, was appreciated. For a law this vast, implemented in a country as diverse as India, the GST fared fairly well.

However now, after nearly two years of its introduction, the dust surrounding the GST's initial implementation has settled. The margin of error previously allowed to the reform owing to its scale, is rapidly decreasing and expectations of businesses and consumers for its smooth functioning are increasing. The policy has now fully taken shape and the last two years have provided us with practical examples, to help evaluate whether the GST is indeed a 'good and simple tax'.

Whether a tax policy is friendly towards its subjects has often been characterised as a principle to judge its effectiveness. Adam Smith for instance emphasised on the importance of tax being certain, non-arbitrary, clear, and convenient.[1] More recently, the OECD published a Policy Framework for Investment User's toolkit that also highlighted the importance of a simple and stable tax system.[2] The UK Government, in its attempt to adopt a considered approach to tax policy laid emphasis on the implementation of a simple, stable, constant, fair and reasonable tax structure.[3]

Given that the GST has affected everyone from big businesses to common persons, it is imperative to analyse how it has fared on the scale of taxpayer friendliness, and if there is scope to improve the regime to better achieve such standards. In this series of reports, we at Vidhi Centre for Legal Policy seek to do just that. We test the GST law against the touchstone of its friendliness towards taxpayers through an analysis of the legal framework, and a review of orders passed by various institutions incorporated under the GST law. Through this analysis, we seek to determine if the tax structure has been simplified, and if taxpayers are granted certainty and stability under the new regime. We further recommend legislative changes to strengthen the system to attain the aforementioned goal of making it more taxpayer friendly.

In this first report, we study the dispute resolution mechanism, and the anti-profiteering measures adopted under the GST law. Through an analysis of the legal framework, and the orders passed by dispute resolution and anti-profiteering institutions, we first identify issues of concern to taxpayers. These include issues that complicate the regime, cause uncertainties, or place an unnecessary burned on taxpayers. Subsequently, we recommend legislative changes to rectify these concerns.

[1] Smith, Adam, *The Wealth of Nations*, (Annotated edition, RHUS, 2003).
[2] OECD, '*Policy Framework for Investment User's Toolkit*', Report presented as part of the conference documentation for the relevant session in the programme at the Global Forum on International Investment (2013) available at http://www.oecd.org/investment/toolkit/policyareas/41890309.pdf accessed 23 October 2018.
[3] House of Commons Treasury Committee, '*Principles of tax policy*', Volume I: Report, together with formal minutes, oral and written evidence (9 March 2011) available at <https://publications.parliament.uk/pa/cm201011/cmselect/cmtreasy/753/753.pdf> accessed 23 October 2018.

B. Dispute resolution

1. Background

The integrity and efficiency of any tax administration hinges upon the credibility of its dispute resolution mechanism in the eyes of taxpayers. In most Union Budget speeches, Union Finance Ministers, reiterate their commitment towards reducing litigation and strengthening the dispute resolution mechanism under tax statutes. However, it is no secret that Indian courts and tribunals have been perennially over-burdened with tax litigation.

This problem is anticipated to continue under the GST regime as well. Endeavours have therefore been made to prevent taxpayers from filing frivolous cases and delay the assessment process.[4] While these changes seem to be well intended, on the face of it, it appears that the legislation has some failings that are likely to be counterproductive to the efforts undertaken thus far.

Given that the GST law is still in its formative stage, a robust dispute settlement mechanism will play a pivotal role in fostering public acceptance of the regime and giving it the stability that taxpayers expect, and deserve.

Under this section of the report, we analyse the dispute resolution mechanism under the GST regime to evaluate the safeguards implemented to minimise litigation. We also recommend other measures to reduce the likelihood of litigation and strengthen the process of dispute resolution under the GST.

We have divided the dispute resolution mechanism into the following three sections and weighed the provisions under each stage:

1. Advance Rulings
2. Initiation of legal proceedings and
3. Appeals provisions

2. Advance ruling

The advance ruling mechanism has been a common feature of most tax systems, including the United States, the United Kingdom, the Netherlands, Germany, Australia, and South Africa.[5]

Having regard to the complexities of Indian tax laws, the advance ruling scheme was first mooted in India in the Central Budget 1992-93 with an aim to avoid needless litigation and promote better taxpayer relations.[6] In June 1993, the scheme was implemented and made applicable to non-resident income taxpayers under the scope of the Income Tax Act, 1961.

Twenty years later, the advance ruling mechanism still acts as a crucial tool used by the Government to bring certainty and transparency to the tax structure. The scheme was also retained under the GST regime, with the following[7] being two of its broad objectives:

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[4] 'GST plea deterrent', (The Telegraph, 8 August, 2018) available at https://www.telegraphindia.com/business/gst-plea-deterrent/cid/1216522 accessed 15 March 2018.

[5] IMF, '*Introducing an Advance Tax Ruling Regime*' Technical note by the IMF Legal Department (February 2016) available at <https://www.imf.org/external/pubs/ft/tltn/2016/tltn1602.pdf> accessed 23 October 2018.

[6] Speech of the Prime Minister and Minister of Finance Introducing the Budget for 1992-1993, Part B (29 February 1992) available at <https://dea.gov.in/sites/default/files/Union%20Budget%201992-93.pdf> accessed 23 October 2018.

[7] Directorate General of Taxpayer Services Central Board of Excise and Customs, '*Advance Ruling Mechanism in GST*' prepared by the National Academy of Customs, Indirect Taxes & Narcotics, available at <http://www.cbic.gov.in/resources//htdocs-cbec/gst/advnc-rulin-mechanism-gst-20Jul.pdf;jsessionid=716421D03E0ACAE8AC147F6E775AE1FC> accessed 24 February 2018.

1. Reduce litigation;
2. Provide certainty in tax liability in advance in relation to an activity proposed to be undertaken by the applicant.

Under this section of the report, we analyse the legal provisions pertaining to advance rulings under the GST regime and critically examine certain orders passed between July 2017 to October 2018 by Advance ruling authorities, with an aim to determine if the aforementioned objectives of the scheme are being met.

2.1. Legal framework

Chapter XVII of the Central Goods and Services Tax Act ('CGST Act' or the 'Act') and Chapter VII of the State Goods and Services Tax ('SGST')/Union Territories Goods and Services Tax Act ('UTGST Act') (collectively referred to as the 'SGST Acts') pertain to Advance Rulings.

The State GST Acts mandate the Central Government to set up the State/UT's Authority for Advance Ruling ('AAR').[8] The CGST Act also recognises the body constituted under the provisions of each SGST Acts as the AAR.[9] The SGST Acts allow the GST Council to designate any AAR, located in a different State/UT to act as the AAR for a different State/UT.[10]

AARs have been given certain powers of a Civil Court and have the power to regulate their own procedure; however, these powers are subject to the express provisions of Chapter XVII of the CGST Act.[11]

2.1.1. Obtaining rulings

An "advance ruling" has been defined under the CGST Act as a decision provided by the AAR or the Appellate Authority[12] in relation to supply of goods or services or both being undertaken, or proposed to be undertaken by the applicant.[13] Any person registered or desirous of registering under the CGST Act or the SGST/UTGST Act can approach the Authority with an application.[14]

The CGST Act contains an exhaustive list of questions on which rulings can be sought:[15]

1. Classification of goods and/or services
2. Applicability of a notification under the CGST Act
3. Determination of time and value of supply of goods and/or services
4. Determination of the liability to pay tax on any goods and/or services
5. Whether applicant is required to be registered
6. Whether any particular thing done by the applicant with respect to goods and/or services amounts to or results in the supply

A Form GST ARA-01 has been prescribed for filing of an application seeking a ruling, which needs to be submitted manually or electronically along with a fee.[16] Upon receipt of such application, the AAR is mandated to cause a copy of the same to the concerned officer and if required, call upon him for necessary records.[17] The AAR is then required to grant the applicant an opportunity to be heard and decide to either admit or reject the application.[18] The CGST Act also specifically states that if the application has been rejected, reasons for such rejection need to be specified in the order.[19] Further, the Authority is not permitted to admit an application where the question

[8] Union Territory Goods and Services Tax Act 2017, Section 15(1).
[9] Central Goods and Services Tax Act 2017, Section 96.
[10] Union Territory Goods and Services Tax Act 2017, Section 15(1).
[11] Central Goods and Services Tax Act 2017, Section 106.
[12] Provisions that relate to the Appellate Authority are explained in para 1.2.
[13] Central Goods and Services Tax Act 2017, Section 95.
[14] Central Goods and Services Tax Act 2017, Section 95(c); Union Territory Goods and Services Tax Act 2017, Section 14(c).
[15] Central Goods and Services Tax Act 2017, Section 97(2).
[16] Central Goods and Services Tax Rules 2017, Rule 104.
[17] Central Goods and Services Tax Act 2017, Section 98(1).
[18] Central Goods and Services Tax Act 2017, Section 98.
[19] *Ibid.*

raised is pending or has been decided in any proceedings in the case of an applicant under any of the provisions of the CGST Act.[20]

The AAR is required to pronounce their ruling in writing within 90 days from the date of receipt of application.

2.1.2. Appeals before the Appellate authority

The SGST Acts mandate the Central Government to set up the State Appellate Authority for Advance Ruling ('AAAR' or 'Appellate authority').[21] The CGST Act also recognises the body as set up by each State/UT as the AAAR.[22] The State Acts allow the GST Council to designate any AAAR, located in a different State/UT to act as the AAAR for a different State/UT[23].

A matter may reach the Appellate authority under the following circumstances:

1. The members of the AAR differ on a matter;[24]
2. The concerned officer is aggrieved by the advanced ruling passed by the AAR;[25]
3. The jurisdictional officer is aggrieved by the advanced ruling passed by the AAR;[26]
4. The applicant is aggrieved by the advanced ruling passed by the AAR[27]

In the last three cases mentioned above, an appeal is to be filed within a period of 30 days from the date on which the ruling appealed against is communicated to the concerned officer, jurisdictional officer and the applicant.[28] However, the AAAR has the discretion to extend this deadline by 30 additional days.[29]Appeals to the AAAR, are also to be made by applicants manually or electronically under Form GST ARA - 02.[30] While the concerned officers or jurisdictional officers are to appeal electronically under Form GST ARA - 03 without payment of any fee. After giving the parties an opportunity to be heard, the AAR must pass an order either confirming or modifying the order passed by the Authority within a period of 90days from filing of appeal/date of referral.[31]

If the members of the AAAR differ on any point(s) it is deemed that no advance ruling can be issued on the question under the appeal or reference.[32] The AAAR has been given certain powers of a Civil Court and has the power to regulate its own procedure, however these powers are subject to the express provisions of Chapter XVII of the CGST Act.[33]

2.1.3. Composition of the AAR and the AAAR

As per the State Acts, AARs consist of two members - one from among the officers of Central tax Department and one from State tax Department. These members are to be appointed by the Central Government.[34] While these Central/State tax officers were previously[35] required to be of the rank of a Joint Commissioner only, however their qualification requirements were amended to allow officers of the Joint Commissioner rank or above.[36]

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[20] *Ibid.*
[21] Union Territory Goods and Services Tax Act 2017, Section 16(1).
[22] Central Goods and Services Tax Act 2017, Section 99.
[23] Union Territory Goods and Services Tax Act 2017, Section 16(2).
[24] Central Goods and Services Tax Act 2017, Section 98(5).
[25] Central Goods and Services Tax Act 2017, Section 100(1).
[26] *Ibid.*
[27] *Ibid.*
[28] Central Goods and Services Tax Act 2017, Section 100(2).
[29] See 'n 25'.
[30] Central Goods and Services Tax Rules 2017, Rule 106.
[31] Central Goods and Services Tax Act 2017, Section 101.
[32] Central Goods and Services Tax Act 2017, Section 101(3).
[33] See 'n 30'.
[34] Union Territory Goods and Services Tax Act 2017, Section 15(2).
[35] Central Goods and Services Tax (Amendment) Rules 2017.
[36] Central Goods and Services Tax Rules 2017, Rule 103.

As per the SGST Acts, AAARs consist of two members - one Chief Commissioner of Central tax as designated by the Board, and one Chief Commissioner of State tax having jurisdiction over the applicant. These members are to be appointed by the Central Government.[37]

2.1.4. Applicability of advance rulings

Advance rulings passed by the AAR or the AAAR are binding only on:

1. The applicant who sought such ruling and
2. The concerned officer and jurisdictional officer in respect of such applicant

so long as the law, and facts and circumstances surrounding the matter do not change.

Both the AAR and the Appellant authority have the powers to amend their orders so as to rectify any error made on the face of the record as long as:

1. The AAR or Appellant Authority as the case may be, notice it them
2. The Concerned officer brings it to their attention
3. The Jurisdictional officer brings it to their attention
4. The applicant or appellant brings it to their attention

within a period of 6 months from the date of order.[38]

Rulings of the AAR or the Appellate authority may be declared *void ab initio* in case the applicant or appellant obtained the same by fraud, misrepresentation or suppression of material facts. The applicant or appellant however must be given an opportunity to be heard before such an order is passed.[39]

2.2. Identification of issues in the advance ruling mechanism

The facility of Advance rulings on the interpretation of tax laws was introduced with an intention to provide taxpayers with certainty regarding the tax implications of their transactions.[40] In this section, we identify issues in the AAR structure under the GST regime, that act counter to the aforementioned intention. To further demonstrate the result of the problems identified, we rely on certain orders passed by AARs during the period from July 2017 to October 2018 ('Review period').

2.2.1. The subject matter jurisdiction of the AAR mechanism is limited

As noted above, AARs are authorised to rule on matters that are included in the following exhaustive list of questions mentioned under the CGST Act:[41]

1. Classification of goods and/or services
2. Applicability of a notification under the CGST Act
3. Determination of time and value of supply of goods and/or services
4. Determination of the liability to pay tax on any goods and/or services
5. Whether applicant is required to be registered
6. Whether any particular thing done by the applicant with respect to goods and/or services amounts to or results in the supply

Determination of the place of supply of goods and services is one of the most contentious under the GST law and the same does not find mention in this list. It is relevant to note that GST revenue is attributable to the State that qualifies as the 'place of supply'. Therefore, given that AARs are bodies established under the respective SGST

[37] See 'n 34'.
[38] Central Goods and Services Tax Act 2017, Section 102.
[39] Central Goods and Services Tax Act 2017, Section 104.
[40] Authority for Advance Rulings Income Tax '*Handbook on Advance Rulings*' (May 2008) available at <https://aarrulings.in/book.pdf> accessed 24 February 2018.
[41] Central Goods and Services Tax Act 2017, Section 97(2).

Acts, empowering them to determine such matters, would enable them to try and maximise short term tax collection at the expense of tax payer uncertainty. Therefore, under the current structure of AARs, it is reasonable to limit their jurisdiction to interpreting provisions of the respective state act and restrict it from delving into the provisions of the IGST Act.

That being said, it is relevant to note that on account of this limitation there are numerous *bona fide* taxpayers who are operating under uncertainty. For instance, a number of these rejected rulings pertained to determination of place of supply of the goods/service in question, or its characterisation as interstate or intrastate supplies.[42] In the *Fichtner Consulting Engineers* case[43] for instance, the applicant's Chennai office received an Engineering services contract from another Chennai based company. However, the applicant was required to draw and design for a Coal Handling Plant in Hazaribagh district of Jharkhand State. The applicant approached the AAR to determine whether the supply in question would qualify as an interstate or intrastate supply. However, the authority held that the Acts limit the AAR to decide on the issues earmarked under Section 97(2). The application was therefore rejected without going into the merits of the case.

Similarly, in the *Kandla Port Trust* ruling[44] the applicant approached the AAR seeking clarity regarding the nature of tax leviable to port related services provided by them, to out-of-state registered dealers. The application was rejected holding that the jurisdiction of the authority does not extend to the questions on determination of 'place of supply'.

Besides determination of place of supply, there are various other issues that AARs are not authorised to adjudicate upon, owing to the limited number of inclusions in the aforementioned list. For instances, in the case of *Kandla Port Trust, In re*[45]the applicant approached the AAR to enquire whether the provision pertaining to tax deduction of source would be applicable to them. However, it was held that since the issue does not find mention under Section 97(2), the AAR did not have jurisdiction to decide on the matter. Similarly, in the case of *Kandla Port Trust, In re*[46] the applicant was paying GST on disputed claims and approached the AAR to inquire whether a refund of GST so paid would be available if the dispute is resolved in their favour. The AAR held that the issue of refund is not covered by Section 97(2) of the Act, and that it is helpless to answer the question raised in the application, as it lacked jurisdiction.

2.2.2. Lack of clarity regarding matters already pending in proceedings

As noted above, the second proviso to Section 98 bars AARs from admitting applications, where the question raised therein is pending, or has already been answered in any proceedings in the case of an applicant. However, the term 'proceedings' is vague and there is no clarity about the stage at which a particular matter is deemed to be one that is 'pending in proceedings'.

This problem was clearly visible in some AAR orders we analysed. For instance, in the case of *Veeram Natural Products, In re.*[47] the matter concerning classification of aluminium foil disposable container was rejected by the AAR as a Show Cause Notice ('SCN') had already been issued to the applicant.

A similar line of reasoning was adopted in the case of *Sasan Power Ltd*., In re.[48] In this specific case, the department had already undertaken audit of the accounts of the applicant and raised some objections on the point in question.

In the case of *Crux Bio Tech India (P.) Ltd., In re.*[49] an application was made, regarding the correct classification of grain based extra neutral alcohol. In this case though the application for advance ruling was filed before the SCN

[42] *Utility Powertech Ltd., In re.* [2018] 95 taxmann.com 88 (AAR-CHHATTISGARH); *Fichtner Consulting Engineers (India) (P.) Ltd., In re.* [2018] 97 taxmann.com 153 (AAR - TAMIL NADU); *Take Off Academy, In re.* [2018] 98 taxmann.com 134 (AAR-GUJARAT); *Kandla Port Trust, In re* [2018] 98 taxmann.com 141 (AAR-GUJARAT); *Toshniwal Brothers (SR) (P.) Ltd., In re* [2018] 98 taxmann.com 175 (AAR-KARNATAKA); Lambda Therapeutic Research Ltd., In re. [2018] 98 taxmann.com 138 (AAR-GUJARAT).
[43] *Fichtner Consulting Engineers (India) (P.) Ltd., In re.* [2018] 97 taxmann.com 153 (AAR - TAMIL NADU).
[44] *Kandla Port Trust, In re*, [2018] 98 taxmann.com 141 (AAR-GUJARAT).
[45] *Kandla Port Trust, In re.* [2018] 98 taxmann.com 139 (AAR-GUJARAT).
[46] *Kandla Port Trust, In re.* [2018] 98 taxmann.com 140 (AAR-GUJARAT).
[47] *Veeram Natural Products, In re.* [2018] 97 taxmann.com 159 (AAR - TAMIL NADU).
[48] *Sasan Power Ltd., In re.* [2018] 96 taxmann.com 551 (AAR-MADHYA PRADESH).
[49] *Crux Bio Tech India (P.) Ltd., In re.* [2018] 94 taxmann.com 126 (AAR- ANDHRA PRADESH).

was issued, the AAR held that the proceedings were initiated well before the filing of advance ruling application. Further, the applicant also admitted that they had filed a writ petition before the Delhi High Court on the same issue.

Similarly, in the case of *Sterlite Technologies Ltd., In re*[50] the applicant approached the AAR seeking clarity on the applicability of GST on excess length of Optical Fibre. While no SCN was issued/charge sheet filed as a culmination of inquiry and investigations. Thus, the initiation of such investigations was held to be initiation of proceedings for the purpose of Section 98.

2.2.3. Conflict between the definition of 'applicant' and 'advance ruling'

On close perusal, there appears to be a contradiction between the definition of the term "advance ruling"[51] and "applicant"[52] under the CGST Act. While an 'applicant' is defined as any person who is/desires to be registered under the CGST Act, the phrase 'advance ruling' is defined as a decision provided by the AAR or the AAAR on questions specified under the Act in relation to supply of goods or services or both being undertaken, or proposed to be undertaken by the applicant. Since the definition of 'advance ruling' restricts its ambit to matters in relation to 'supplies', despite the wide definition of 'applicant', it seems like applicants sought by recipients of supplies regarding their liability to pay tax under the reverse charge may not be covered by the AAR mechanism.

This issue came to light in the case of *Dr. Dathu Rao Memorial Charitable Trust In re*.[53] The AAR interpreted the latter part of the definition of 'advance ruling' i.e. *"in relation to supply of goods or services or both being undertaken, or proposed to be undertaken by the applicant"* so as to essentially limit the scope of applicants to those who undertake, or propose to undertake supply of goods or services. In this specific case, the applicant was a recipient of services, who approached the AAR to ascertain whether they would be liable to pay tax under reverse charge. It was held that advance rulings can only be sought with regard to supply of goods or services or both undertaken or proposed to be undertaken by the applicant. On the basis of this definition of advance ruling, it was held that since the applicant was the proposed recipient of the service, it did not fall within the definition of advance ruling. The application was accordingly rejected.

Given that, the definition of "applicant" under the CSGT Act does not contain any such restriction and *"any person, registered or desirous of obtaining registration"* qualifies under the definition. There is a contradiction between the two provisions which requires immediate attention.

2.2.4. Conflicting rulings

Another serious concern with the AAR mechanism under the GST is the delivery of contradictory rulings by different state AARs. There is a sense of disconnect and lack of coordination between the rulings passed across various state AARs. This has caused confusion among taxpayers and to some extent, defeated the purpose of setting up the AAR mechanism.

During the review period, though similar questions were raised before the authorities in multiple states, and in some cases with even the applicant approaching the AAR being the same entity, the findings arrived at, by the AARs varied.

For instance, the ruling in the case of *CMI FPE Ltd., In re*[54] and that of *Sasan Power Ltd., In re*[55] falls under the former category where though the applicants were different entities, the question raised by the, was the same. In both the cases, the question raised before the AAR pertained to the availability of input tax credit against unutilised CENVAT credit such as Education cess, Secondary & Higher secondary Education cess & Krishi Kalyan cess lying in the applicants' books of accounts. While in the *CMI FPE Ltd.* ruling, the Maharashtra AAR analysed the relevant

[50] *Sterlite Technologies Ltd., In re.* [2018] 97 taxmann.com 315 (AAR - MAHARASHTRA).
[51] Central Goods and Services Tax Act 2017, Section 95(a).
[52] Central Goods and Services Tax Act 2017, Section 95(c).
[53] *Dr. Dathu Rao Memorial Charitable Trust, In re.* [2018] 97 taxmann.com 158 (AAR - TAMIL NADU).
[54] *CMI FPE Ltd., In re.* [2018] 97 taxmann.com 22 (AAR - MAHARASHTRA).
[55] *Sasan* (n 48), 2-17.

legal provisions and held that such credit is not available to the applicant, in the *Sasan* ruling, the MP AAR held that it lacked the jurisdiction to decide on the matter in question. It stated that "*Section 97(2) clearly implies that the any question relating to CENVAT credit, which falls under transitional provisions, shall be out of purview of Advance Ruling. Admissibility of input tax credit, as given in Section 97(2), relates to 'input tax credit' as defined in Section 2(63) of CGST Act, 2017 read with Section 2(62) and not the CENVAT carried forward in TRAN-1, which categorically pertains to pre-GST regime. Thus, we find that the question placed before us does not fall within the four corners of issues defined for seeking Advance Ruling under Section 97(2). Hence the application does not hold ground to be admitted on this count*."

In a similar situation occurred in the case of *Pon Pure Chemical India (P.) Ltd., In re*.[56] and the case of *BASF India Ltd., In re.*[57] In both these rulings, the Maharashtra and the Gujarat AARs were faced with a similar question regarding the applicability of GST on high sea sales. Under the former ruling, the Maharashtra AAR analysed the facts of the case, ruled the transaction in question as a high sea sale and held that no IGST would be leviable on the same. On the other hand, in the *Pon Pure* case, the Gujarat AAR, was also called upon to determine a similar question regarding whether a transaction qualified as a high sea sale. It rejected the application holding that import as well as high sea sales are determined on the basis of 'place of supply'. It was further held that ruling on matters concerning place of supply is outside the AAR's jurisdiction, thus the matter was rejected. The Gujarat AAR also stated that the issue of high sea sales falls in the domain of Customs and not under the GST and rejected the applications on these two grounds.

The two sets of rulings cited above, were though filed by two different applicants, the primary question of law raised before the AARs were essentially the same. While deciding these questions of law, the AARs in the aforementioned cases passed conflicting and inconsistent orders.

In another situation, an applicant *Giriraj Renewables (P.) Ltd.* filed application for advance rulings before AARs in two states on the exact same fact pattern. The question raised in both the applicants concerned the rate of tax applicable to EPC contract for construction of solar power plants. The decision hinged on whether the contract would qualify as a mixed supply, or a composite supply, or a works contract. The applicant argued that they were engaged in the supply of both goods and services related to the installation of the solar power generating system. They further argued that the entire contract is bundled and linked, with the primary intent being the supply of a solar power generating system. Since the solar power generating system itself falls within the 5% rate bracket, the applicants sought for said concessional rate to be levied on the EPC contract. In the case filed before the Karnataka authority[58] the applicant's plea was rejected. It was held that the major component of the contract i.e. PV Module, which constitutes 70 per cent of the project, was supplied by the applicant to the consumer upon high sea sales. Other supplies made by subcontractors too, were viewed as separate/individual supplies. It was thus held that the appropriate rate of GST has to be applied, depending on the specific nature of each such supply, and accordingly no concessional rate of GST was allowed to be levied by the Karnataka AAR. This matter was further affirmed by the Appellate Authority.[59] The Maharashtra AAR on the other hand, held that the end-product of the contract i.e. the solar power plant required an element of permanency, for which it had to be attached to the ground. It was thus held to qualify as immovable property, thus the EPC contract executed by the applicant was a works contract leviable to tax at the rate of 18%. This decision was also further affirmed by the Appellate Authority.[60]

2.2.5. Poor application of legal principles

During the Review period, it was noticed that the reasoning applied by the AAR and certain AAAR to arrive at a conclusion in certain rulings contradicted some basic principles of legal interpretation. The AAR/AAARs' blatant disregard for established legal principles, and their failure to adjudicate the issues before them, without the application of legal mind, has defeated the purpose behind establishing the mechanism. As noted above, AARs were established to promote taxpayer friendliness. It was established with an aim to provide taxpayers with certainty, and to reduce litigation before courts. Given that the GST is still in its formative years, there are

[56] *Pon Pure Chemical India (P.) Ltd., In re.* [2018] 94 taxmann.com 155 (AAR - GUJARAT).
[57] *BASF India Ltd., In re.* [2018] 95 taxmann.com 1 (AAR - MAHARASHTRA).
[58] *Giriraj Renewables (P.) Ltd., In re.* [2018] 94 taxmann.com 286 (AAR-KARNATAKA).
[59] *Giriraj Renewables (P.) Ltd., In re.* [2018] 97 taxmann.com 510 (AAAR-KARNATAKA).
[60] *Ibid.*

numerous issues regarding its interpretation that require adjudication. However, having passed such legally unsound and questionable orders, the AAR mechanism in its current form has proven to be counterproductive to these goals. Such rulings have discouraged taxpayers from approaching the authority. We illustrate this point by elaborating upon some orders passed by the AAR during the Review period.

The Delhi AAR, in the case of *Rod Retail (P.) Ltd., In re*.[61] was called upon to determine if GST should be levied on the supply of goods made to international outbound passengers holding international boarding pass from the retail outlet of the applicant which was located in the Security Hold Area of the IGI International Airport, Terminal-3, and which is claimed to be beyond Customs Frontiers of India. Contradicting globally recognised principles, the Authority ruled that the supply was indeed taxable. The AAR based its ruling on the definition of "export of goods" under Section 2(5) of the IGST Act which requires goods to be taken out of India, to a place outside India. Further, India is defined under the CGST Act to mean the territory of India as referred to in Article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters. Interpreting the terms 'air space' and 'territorial waters', it was held that export will be completed only when goods cross airspace limits of its territory or territorial waters of India. Given that there was no such physical movement of the goods in question, it was held that GST would be applicable, and the supply would not qualify as export.

This ruling was in stark contrast with existing global principles and demonstrates a clear case of the AAR failing to interpret the provisions of the law, in conjunction with such global principles.

In the same vein, the Maharashtra AAR also allowed the levy of GST on liquidated damages. In the case of *Maharashtra State Power Generation Company Ltd., In re*[62] the AAR upon perusal of the agreement in question, held that liquidated damages would qualify as a supply under Schedule II of the Act and GST would be charged at the rate of 19%. It was held that the recovery of liquidated damages amounts to toleration of the act of non-compliance. This ruling was further affirmed by the Appellate authority.[63] Given that the uncertainty around levy of tax on liquidated damages was an issue that was continuing from the service tax regime, the order faced some resistance. The fact that the inclusion of a liquidated damages clause is a common practice followed in various industries, such as real estate, the industry has been craving for this issue to be clarified and the Advance Ruling doesn't seem to have served the purpose.

Another ruling that caught our attention was the order passed in the case of *Switching Avo Electro Power Ltd., In re*[64] wherein it was held that the supply of UPS and Battery for a single price, is to be considered as Mixed Supply. The AAR reached its ruling primarily on the basis of the fact that a standalone UPS and a battery can be separately supplied in retail set up. Further, the fact that a buyer could purchase a standalone UPS and a battery from different vendors was also noted by the AAR in arriving at the decision that separate commercial values as goods and should be taxed under the respective tariff heads when supplied separately. This decision too has been upheld by the Appellate Authority.[65]

In another ruling that created a stir in the industry, the Kerala AAR in the case of *Caltech Polymers (P.) Ltd., In re*[66] held that the recovery of food expenses from employees for the canteen services provided by company, would come under the definition of 'outward supply' and would classify as a taxable supply.

In the case of *JSW Energy Ltd., In re*.[67] too, the Maharashtra AAR passed an interesting ruling. In this case, the applicant was engaged by a related party to generate and supply electricity. To this end, the related party supplied coal and any other input required in this generation of electricity. While the applicant termed this arrangement as a 'job work' the AAR ruled it to be manufacture. The AAR arrived at this ruling on the grounds that the activity resulted into the manufacture of a distinct commodity, i.e. electricity. Thus, it did not pertain to a 'treatment or

[61] *Rod Retail (P.) Ltd., In re.* [2018] 92 taxmann.com 317 (AAR – NEW DELHI).
[62] *Maharashtra State Power Generation Company Ltd. In re.* [2018] 93 taxmann.com 266 (AAR - MAHARASHTRA).
[63] *Maharashtra State Power Generation Company Ltd.In re.* [2018] 97 taxmann.com 408 (AAAR-MAHARASHTRA).
[64] *Switching Avo Electro Power Ltd., In re.* [2018] 92 taxmann.com 223 (AAR-WEST BENGAL).
[65] Switching Avo Electro Power Ltd., In re 2018] 96 taxmann.com 106 (AAAR-WEST BENGAL).
[66] *Caltech Polymers (P.) Ltd., In re.* [2018] 92 taxmann.com 142 (AAR-KERALA).
[67] *JSW Energy Ltd., In re.* [2018] 93 taxmann.com 91 (AAR - MAHARASHTRA).

process' as required under the definition of 'job work' under the GST law. Given that the parties in question were related and the transaction did not amount to a job work, GST was held to be levied on the supply of power by the applicant. However, the AAR did not comment on whether the supply of coal and other inputs by the related party to the applicant would also qualify as supply or not.

In the case of *United Breweries Ltd., In re.*[68] the Applicant had entered into manufacturing arrangement with contract brewing/ bottling units (CBUs). On the applicant's direction and under their supervision, the CBUs procures raw materials, packaging materials, incurred overheads and other manufacturing costs, etc., on their own account, and sells beer directly to Government corporations/wholesales. The CBUs also affix the applicant's brand name on the beer. Upon sale of beer, the statutory levies and taxes are also paid by the CBUs. The CBUs further account for the manufacturing cost and distribution overheads in their books of account. They retain a certain amount of the profit earned and after accounting for all these revenues, the CBUs transfer the balance amount of the profit to the applicant. The question posed before the AAR, was whether the CBUs are providing the applicant a service, or was a service being provided by the applicant to the CBUs. Since the applicant was not supplying any material to the CBUs, it was held that the activity performed by them is not a service and no GST was applicable on the same. However, it was held that the applicant is providing a service to the CBUs and would be leviable to pay GST on the same.

Columbia Asia Hospitals (P.) Ltd., In re[69] is also worth discussing in this regard. The applicant had its Corporate Office in Karnataka and some of the activities for all other units in India, such as accounting, administration and maintenance of IT system were carried out by the employees from this Corporate Office. Further, GST paid on certain expenses such as rent on immovable property and other equipments, travel expenses, consultancy services, communication expenses etc., which are incurred towards services used by the Corporate office, were availed by the registered person in the state of Karnataka and subsequently, registered person in Karnataka is discharging IGST on the expenses proportionately attributable to the other units located outside the State of Karnataka treating the same as taxable supplies in this regard. The AAR held the Corporate Office and other units of the company as related persons. This decision was reached since the Corporate Office was covered under one GST registration and the other units under a different registration. Further, since the other units were controlled by the Corporate Office, they were considered to be receiving services from said office. Accordingly, it was held that any supply of goods and services from the Corporate Office to the separately registered units would amount to supply of goods and services, even if made without consideration.

The case of *CMS Info Systems Ltd., In re*[70] the Appellate Authority of Maharashtra was called upon to decide on the availability of credit on a van used for carrying cash, by the applicant engaged in transportation of cash from currency chest to bank branches. The members of the Maharashtra AAR had a difference in opinion on the matter.[71] While typically input tax credit is not available on motor vehicles, there is an exception in cases where the same are used for transportation of goods. However, the Appellate authority held that input tax credit would not be available in the instant case as 'money' transported by the vans in question does not qualify as 'goods' under the CGST Act.

3. Initiation of proceedings

The quality of implementation and enforcement of regimes play a significant role in determining the effectiveness and efficiency of tax instruments. Especially a system based on self-assessment must be backed by fair, efficient, and effective tax administration. Its success depends heavily on taxpayers' confidence in the fairness of the laws, and also in their uniform, unbiased and vigorous enforcement.

[68] *United Breweries Ltd., In re.* [2018] 95 taxmann.com 87 (AAR-KARNATAKA).
[69] *Columbia Asia Hospitals (P.) Ltd., In re.* [2018] 96 taxmann.com 245 (AAR-KARNATAKA).
[70] *CMS Info Systems Ltd., In re.* [2018] 96 taxmann.com 292 (AAAR-MAHARASHTRA).
[71] *CMS Info Systems Ltd., In re.* [2018] 93 taxmann.com 95 (AAR - MAHARASHTRA).

3.1. Legal framework

3.1.1. Division of taxpayer base

In accordance with the guidelines decided by the GST Council, administrative control over 90% of the taxpayers with a turnover of less than 1.5 crore is vested with the States and 10% with the Centre. Further, administrative control over the rest of the taxpayers is equally divided between the Centre and States.[72]

In October this year, the Central Board of Indirect Taxes clarified that officers of both Central Tax and State tax are authorised to initiate intelligence-based enforcement action on the entire taxpayer base, irrespective of the administrative assignment of the taxpayer to any authority. It was further clarified that the authority that initiates proceedings, is also empowered to complete the entire process of investigation, issuance of SCN, adjudication, recovery, filing of appeal et al. arising out of such actions.[73]

3.1.2. Officers under the GST regime

The CGST Act mandates the Government to appoint classes of officers for the purpose of the CGST Act by way of notification.[74] Pursuant to this provision, notifications[75] were issued and some of the classes of officers that have been appointed are as under:

1. Principal Chief Commissioners of Central Tax and Principal Directors General of Central Tax
2. Chief Commissioners of Central Tax and Directors General of Central Tax
3. Principal Commissioners of Central Tax and Principal Additional Directors General of Central Tax
4. Commissioners of Central Tax and Additional Directors General of Central Tax
5. Additional Commissioners of Central Tax and Additional Directors of Central Tax
6. Joint Commissioners of Central Tax and Joint Directors of Central Tax
7. Deputy Commissioners of Central Tax and Deputy Directors of Central Tax
8. Assistant Commissioners of Central Tax and Assistant Directors of Central Tax
9. Director General, Audit
10. Additional Director General, Goods and Services Tax Intelligence or
11. Additional Director General, Goods and Services Tax or Additional Director General, Audit
12. Joint Director, Goods and Services Tax Intelligence or Joint Director, Goods and Services Tax or Joint Director, Audit

Further, besides the Government, the CGST Act also allows the Board[76] to appoint other officers under the CGST Act.[77]

Moreover, the Act also contains a provision[78] that allows the Board to authorise officers of the level of Principal Chief Commissioner to Assistant Commissioner to appoint officers of the rank below Assistant Commissioner by passing necessary orders.

Under the SGST Acts too, the State Government has been authorised to appoint officers for the purpose of the act.[79] Pursuant to this provision, some of the classes notified[80] by the Delhi Government for instance, are as under:

1. Commissioner of State Tax
2. Special Commissioners of State tax
3. Additional Commissioners of State Tax

[72] Circular 1/2017 Dated 20 September 2017 F.No. 166/Cross empowerment/GSTC/2017.
[73] D.O.F. No. CBEC/20/43/01/2017-GST (Pt.) Dated 5 October, 2019.
[74] Central Goods and Services Tax Act 2017, Section 3.
[75] Notification No. 2/2017-Central Tax, dated 19 June, 2017 and Notification No. 17/2017-Central Tax, dated 1 July, 2017.
[76] Central Goods and Services Tax Act 2017, Section 2(16).
[77] Central Goods and Services Tax Act 2017, Section 4(1).
[78] Central Goods and Services Tax Act 2017, Section 4(2).
[79] Delhi Goods and Services Tax Act 2017, Section 3.
[80] Notification No. F.3(67)/FIN.(REV.-I)/2017-18/DS-VI/140, dated 14 March, 2018 and Notification No. F.3(16)/FIN(REV-I)/2017-18/DS-VI/359], dated 9 June, 2017.

4. Joint Commissioners of State Tax
5. Deputy Commissioners of State Tax
6. Assistant Commissioners of State Tax
7. Goods and Services Tax Officer
8. Goods and Services Tax Inspector

Under this section, we analyse the provisions pertaining the issuance of SCNs and passage of initial orders to identify areas that require reforms to achieve the overarching aim of limiting the number of litigation and fostering public faith in the mechanism.

3.1.3. Powers of officers

Various provisions of the CGST Act authorise a 'proper officer' to undertake activities such as investigation, issuance of SCNs and passage of orders. The phrase 'proper officer' is defined under the CGST Act in relation to any function to be performed under the Act, as the Commissioner, or the officer of the Central Tax who is assigned that function by the Commissioner of the Board. The Commissioner in-turn has been defined to include the Principal Commissioner as appointed by the Government under the CGST Act and the Commissioner of Integrated Tax, as appointed under the IGST Act.[81] A Commissioner in the Board has been defined as a Commissioner or Joint Secretary posted in the Board and is required to exercise their specific functions upon approval from the Board.[82]

The Act also contains a provision that allows officers to discharge their duties under the CGST Act upon any other officer.[83] Pursuant to this provision, circulars[84] have been issued by the Board, designating various functions to various GST officers in the capacity of 'proper officers'. Some provisions dealing with initiation of proceedings and subsequent passage of orders have been designated in the following manner:[85]

Table: I

Details of allocation of powers for initialization of proceedings

Sections	Designation of officer	Central tax monetary limit, (in INR)	Integrated tax monetary limit, (in INR)	Central and Integrated tax monetary limit, (in INR)
73 and 74 CGST Act	Superintendent of Central Tax	Not exceeding 10 Lakh	Not exceeding 20 Lakh	Not exceeding 20 Lakh
73 and 74 CGST Act as applicable to IGST Act	Deputy or Assistant Commissioner of Central Tax	Above 10 lakh, but not exceeding 1 crore	Above 20 lakh, but not exceeding 2 crore	Above 20 lakh, but not exceeding 2 crore
73 and 74 CGST Act as applicable to IGST Act	Additional or Joint Commissioner of Central Tax	Above 1 crore	Above 2 crore	Above 2 crore

[81] Central Goods and Services Tax Act 2017, Section 2(24).
[82] Central Goods and Services Tax Act 2017, Section 168(2).
[83] Central Goods and Services Tax Act 2017, Section 5(2).
[84] Circular No. 1/1/2017 dated 26 June 2017; Circular No. 3/3/2017 dated 5 July 2017 and Circular No. 31/5/2018 dated 9 February 2018.
[85] Circular No. 3/3/2017 dated 5 July 2017 and Circular No. 31/5/2018 dated 9 February 2018.

In addition to the power to issue SCNs and pass orders where the amount of integrated tax is less than INR 20 lakh, the Superintendent has also been designated the proper officer to scrutinise the taxpayer's returns, seek explanation and in case the explanation is not found to be satisfactory, or where the taxpayer fails to take corrective action after accepting the discrepancy, the Superintendent is also authorised to initiate audit proceedings or issue SCNs.[86]

The CGST Act also contains provisions that allow the authorisation of officers of State/UT tax to be proper officers under the CGST Act.[87] This power has been exercised and various notifications[88] have been issued under this provision as well.

3.2. Identification of issues in the initiation of proceedings

3.2.1. Complicated administrative and enforcement structure

As far as allocation of administrative and enforcement power under the GST is concerned, cross empowerment has been a thorny area. While certain members of the GST Council were keen on the idea of a single administration interface under the GST, some insisted on dual empowerment of both the Centre and States. This issue has been extensively discussed at the meeting of the GST Council.

The modalities of a single interface and distribution of GST jurisdiction between Centre and State were discussed at the 1st GST Council meeting itself. It was discussed that administrative jurisdiction of the Centre and the States would be divided based on the nature of activity conducted by taxpayers, along with their turnover. It was further discussed that the Central Government or State Government would be authorised to exercise information-based enforcement powers in all cases, irrespective of the division. However, no conclusion was arrived at, with regard to any of these issues.[89]

In the 2nd GST Council meeting, members raised concerns regarding the distribution of administrative and enforcement powers between the Centre and States. Some of the issues raised included the contradiction created by grant of administrative powers to one of the Centre or the State, while granting enforcement powers to both the Centre and States. Moreover, concerns regarding the exercise of information-based enforcement powers by the Centre and States in parallel resulting in confusion and possible harassment of taxpayers was also addressed. Therefore, a Committee of Officers was established to look into the modalities for exercising information-based enforcement action.[90]

Subsequently, in the 3rd GST Council Meeting[91], the Committee of Officers made a presentation which suggested that to achieve single interface, States should conduct audit or enforcement action for interstate supplies but subsequent legal action like issue of SCN /adjudication/appeal, etc. should remain with the officers of the Centre. It was stated that this arrangement would avoid any potential conflict of interest between two States. On the subject of information-based enforcement action, it was proposed that officers of the Centre and States should act independently on the basis of intelligence. The Committee of Officers also advised that the initiation of action by one authority should be intimated to the other authority and the other authority would not normally initiate any enforcement action for a given period of time, except in cases where concrete information was available and action was authorized by an officer at a higher level. In this meeting too, the final decision was not taken and the

[86] Central Goods and Services Tax Act 2017, Section 61.
[87] Central Goods and Services Tax Act 2017, Section 6(1).
[88] Notification 10/18 Central tax Dated 23 January 2018 and Notification 27/18 Central tax Dated 13 June 2018.
[89] Minutes of the 1st GST Council Meeting (22 and 23 September 2016) available at <http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%201st%20GST%20Council%20Meeting.pdf> accessed 23 November 2018.
[90] Minutes of the 2nd GST Council Meeting (30 September 2016) available at <http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%202nd%20GST%20Council%20Meeting.pdf> accessed 23 November 2018.
[91] Minutes of the 3rd GST Council Meeting (18 and 19 October 2016) available at <http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%203rd%20GST%20Council%20Meeting.pdf> accessed on 10 November 2018.

issue of cross-empowerment for single interface was decided to be taken up for further discussion in subsequent meetings. A decision on the issue was deferred even at the 4th[92] 5th[93] 6th[94] and 8th[95] GST Council Meeting as well.

Subsequently, in the 9th meeting of the GST Council held on 16 January 2017, it was decided that taxpayers will be divided between the Central and the State tax administrations for all administrative purposes. 90% of the taxpayers earning a turnover of less than INR 1.5 crore will be subjected to administrative control by the State tax administration, while the balance 10% will be under Central tax administration. Moreover, in respect of the total number of taxpayers having turnover above INR 1.5 crore, all administrative control will be divided equally in the ratio of 50% each for the Central and the State tax administration.[96] The GST Council further decided that such division would be done by computer at the State level based on stratified random sampling and could also take into account the geographical location and type of the taxpayers, as may be mutually agreed. As far as intelligence-based enforcement action is concerned, it was decided that both the Central and the State tax administrations will have the power in respect of the entire value chain.[97]

It is relevant to note that these decisions were taken by the GST Council prior to the implementation of the GST regime. Further, none of the concerned expressed in numerous GST Council meetings regarding the exercise of information-based enforcement powers paralally by the Centre and States resulting in confusion and harassment of taxpayers were addressed while making this decision.

The issue of cross empowerment was subsequently discussed in other GST Council meetings[98] too, however the issue of intelligence-based enforcement has not been specifically brought up since the 9th meeting. Therefore, based on the decision taken during the 9th GST Council meeting, a Clarification[99] was issued by the Government of India authorising both the Central and State tax authorities to initiate intelligence-based enforcement action on the entire taxpayer's base irrespective of the administrative assignment of the taxpayer to any authority. The clarification further states that the authority which initiates such action is empowered to complete the entire process of investigation, issuance of SCN, adjudication, recovery, filing of appeal etc. arising out of such action.[100]

As noted above, this clarification comes without any guidelines regarding the exercise of such dual jurisdiction by the Centre and States. Initial discussions at the GST Council meetings suggested that the initiation of action by one authority should be intimated to the other authority. In such cases, the other authority would not normally initiate any enforcement action for a given period, except in cases where concrete information was available and action was authorized by an officer at a higher level. However, this was merely a suggestion, which was not adopted, moreover, there was no indication as to what would constitute as 'a given period of time' or 'concrete information'. The grant of enforcement powers to both the Centre and the State without any directions on exercise of such powers complicates the structure of the administration under the GST regime. Further, by granting multiple authorities the power to act, it is likely to lead to harassment of taxpayers.

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[92] Minutes of the 3rd GST Council Meeting (18 and 19 October 2016) available at <http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%204th%20GST%20Council%20Meeting.pdf> accessed on 10 November 2018.

[93] Minutes of the 5th GST Council Meeting (2 and 3 December 2016) available at http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%205th%20GST%20Council%20Meeting.pdf accessed on 10 November 2018.

[94] Minutes of the 6th GST Council Meeting (11 December 2016) available at <http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%206th%20GST%20Council%20Meeting.pdf> accessed on 10 November 2018.

[95] Minutes of the 8th GST Council Meeting (3 and 4 January 2017) available at http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%208th%20GST%20Council%20Meeting.pdf accessed on 10 November 2018.

[96] Minutes of the 9th GST Council Meeting (16 January 2017) available at http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%209th%20GST%20Council%20Meeting.pdf accessed on 10 November 2018.

[97] *Ibid.*

[98] Minutes of the 22nd GST Council Meeting (6 October 2017) available at http://gstcouncil.gov.in/sites/default/files/Minutes/Signed%20Minutes%20-%2022nd%20GST%20Council%20Meeting.pdf accessed on 10 November 2018.

[99] D.O. F.No. CBEC/20/43/01/2017-GST (Pt.) Dated: 5 October, 2018 available at <https://taxguru.in/goods-and-service-tax/cbic-clarifies-initiation-intelligence-enforcement-action.html> accessed on 10 November 2018.

[100] *Ibid.*

3.2.2. Confirmation bias in the proceedings

Certain provisions[101] under the CGST Act empower the same officer to investigate, adjudicate and pass order in matters. Section 61 of the Act for instance, empowers a proper officer to scrutinise taxpayers' returns, inform them of discrepancies noticed and seek explanations from them. In the event that the explanation offered by the taxpayer is found to be satisfactory, the proper officer can drop the issue. However, if he is not satisfied with the explanation offered by the taxpayer, he can issue a SCN and subsequently adjudicate the matter to pass an order. In accordance with the circular[102] issued under this provision, the Superintendent has been assigned the role of a proper officer.

Effectively, this provision and the assignment of the role of a proper officer thereunder, has resulted in the taxpayer offering an explanation in the same matter before the same authority twice. In our view, this is an ineffective way of conducting the proceedings and fails to inspire public faith in the investigation/adjudication system.

Further, it is pertinent to note that the authority passing the order, is the same authority that conducted the investigation. We believe that this would create a confirmation bias. In the case of *Plus Max Duty Free (Private) Limited*[103] confirmation bias was said to occur when a person believes in or searches for evidence to support his or her favoured theory while ignoring or excusing dis-confirmatory evidence and is disinclined to change his or her belief once he or she arrives at a conclusion.

We believe that in the current situation too, the officer would be inclined to believe the findings from his investigation which renders the whole process futile. The current structure strongly suggests predetermination, prejudice, and bias against the taxpayer.

4. Appeal provisions

The right to appeal holds utmost importance in the eyes of tax litigants seeking justice. It is therefore an important aspect of dispute settlement mechanism. However, it is also settled position that the right to appeal is a statutory right, created by legislations. While granting this right, the legislature is at liberty to impose conditions for its exercise and it is permissible for the legislature to make the right a conditional one.[104] However, it has also been held in a plethora of cases, that due to the importance of this right, it is necessary that the restrictions so imposed are reasonable in nature.[105] Moreover, the right to a fair and unbiased trial is a well-recognised principle of natural justice.

Given the above, in this section we analyse whether the appeal provisions under the GST law are taxpayer friendly. We analyse certain nuances of the two levels of appeals provided for under the GST law. Our analysis and recommendations are prepared keeping in view the goal of fostering public acceptance and faith in the dispute settlement mechanism under the GST.

4.1. Legal framework

4.1.1. First appeal

Any person aggrieved by an order passed by an adjudicating authority under the CGST Act, or the State/UT GST Act can file an appeal.[106] An adjudicating authority has been further defined as any authority appointed or authorised to pass any order or decision under the CGST Act. However, this definition specifically excludes the

[101] Central Goods and Services Tax Act 2017, Section 61.
[102] Circular No. 3/3/2017 - GST F.No. 349/75/2017-GST Dated 5 July 2017.
[103] *Plus Max Duty Free (Private) Limited vs. The Union of India and Ors.* (21.12.2018 - KERHC).
[104] *Anant Mills Company Ltd. vs. State of Gujarat* (1975) 2 SCC 175.
[105] *Mardia Chemicals Ltd. and Ors. vs. Union of India* AIR 2004 SC 2371.
[106] Central Goods and Services Tax Act 2017, Section 107(1).

CBEC, the revisional authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority and the Appellate Tribunal.[107]

Appeals against orders passed by the Additional or Joint Commissioner are to be appealed before the Commissioner (Appeals) and orders passed by the Deputy or Assistant Commissioner or Superintendent are to be appealed before the Additional Commissioner (Appeals).[108]

To file an appeal against the orders passed by the aforementioned adjudicating authority, the CGST Act requires the appellant to deposit ten percent of the amount of tax in dispute. Further, an upper cap of INR 25 crore has been imposed on this requirement of paying pre-deposit[109]

4.1.2. Second appeal

In addition to the above, any orders passed by the Appellate authorities under the aforementioned provisions can also be appealed before the GST Appellate Tribunal ('GSTAT').[110]

In accordance with the provisions of the CGST Act, the powers of the GSTAT are to be exercised through:

1. The National Bench situated at New Delhi: This bench is presided over by a President and has two Technical members, one from the Centre and one from the State;[111]
2. The Regional benches of the National Bench: This bench consist of a Judicial Member and two Technical members, one from the Centre and one from the State.[112]
3. State Benches: These benches are set up to exercise powers of the Appellate Tribunal within the State.[113] Such benches consist of a Judicial member and two Technical members, one from the Centre and one from the State;[114]
4. The Area Benches: These benches are constituted on request of the State Governments and also consist of a Judicial member and two Technical members, one from the Centre and one from the State;[115]

The National and Regional benches hear appeals against orders passed by the Appellate authorities where one of the issues related to place of supply.[116] While State and Area benches hear appeals against orders passed by the Appellate authority in cases where the issues do not relate to place of supply.[117]

In order to file an appeal before the GSTAT, the appellant is required to pay a sum of twenty percent of the disputed tax amount. A maximum cap of INR 50 crores was introduced under this provision.[118] This amount is to be calculated in excess of the ten percent already paid on first appeal.[119] Thus, in effect the appellant is required to deposit thirty percent of the disputed amount of tax.

Further, appeals against orders passed by the State or Area Benches of the GSTAT is filed before the High Court, while those against orders passed by the National Benches, or the Regional Benches is filed before the Supreme Court of India.[120]

[107] Central Goods and Services Tax Act 2017, Section 2(4).
[108] Central Goods and Services Tax Rules 2017, Rule 109.
[109] Central Goods and Services Tax Act 2017, Section 107(6).
[110] Central Goods and Services Tax Act 2017, Section 112.
[111] Central Goods and Services Tax Act 2017, Section 109(3).
[112] Central Goods and Services Tax Act 2017, Section 109(4).
[113] Central Goods and Services Tax Act 2017, Section 109(6).
[114] Central Goods and Services Tax Act 2017, Section 109(9).
[115] *Ibid.*
[116] Central Goods and Services Tax Act 2017, Section 109(5).
[117] Central Goods and Services Tax Act 2017, Section 109(7).
[118] Central Goods and Services Tax Act 2017, Section 112(7)(ii).
[119] *Ibid.*
[120] Central Goods and Services Tax Act 2017, Section 117 and 118.

4.2. *Identification of issues in the appeal mechanism*

From a critical analysis of the above-mentioned provisions, we have identified the following issues that merit a re-evaluation of the legal provisions.

4.2.1. Skewed proportion of technical and judicial members in the GSTAT

It is settled position that the legislature has the power to create Tribunals, however it has been held in numerous cases, that such creation of Tribunals must be done in accordance with the principles of separation of the power and while maintaining independence of the Judiciary.[121]

Some pointers have been laid down by the Apex Court to ensure that the doctrine is adhered to and the independence of the Judiciary is maintained which is a part of the basic structure of the Constitution. For instance, in the case of *Union of India v. R Gandhi*[122], the Apex Court held that when a Tribunal takes over the functions of a court, it should be ensured that persons who are as nearly equal in rank, experience or competence to those of the Court should appointed as members of the Tribunal. Further, the number of Technical Members shall not exceed the Judicial Members.

Under the current matrix of facts, appeals against orders of the National and Regional Benches is heard before the Supreme Court, therefore these Tribunals are essentially taking over the High Courts' jurisdiction. Similarly, appeals against orders of State and Area Benches are heard by the High Court, therefore, these Tribunals are taking over the District Courts' jurisdiction. However, all of these bodies have two technical members and only one member acting in judicial capacity. Further, in certain cases under the CGST Act, the GSTAT has been permitted to hear matters through a single member bench, or a bench of two members.[123] In such cases if there is no judicial member present at the bench, technical members would be adjudicating on questions of law, which would violate the doctrine of separation of powers, and compromise the independence of the judiciary.

From the perspective of the taxpayers too, GSTAT are substitutes for courts. There is a reasonable expectation that the matters are heard, and adjudicated upon after application of legal mind. However, such expectation is violated if the judicial members on the bench are in minority and the system would fail to inspire taxpayers' trust.

4.2.2. Restrictions on appeals by the taxpayer

The right to appeal enables taxpayers to seek redressal against their grievances. This right is especially important during the formative years of a new law as it helps shape its interpretation and attain stability.

While it is correct that the imposition of reasonable restrictions to the statutory right to appeal is legal, it is also imperative to analyse its impact from a policy standpoint. The current pre-deposit requirement is substantially higher than the one imposed under the previous regime. The central excise laws (as applicable to service tax as well) for instance, required a pre-deposit of 7.5%[124] on first appeal and an additional 2.5%[125] on second appeal.

It is also relevant to note that there are no corresponding requirements on appeals filed by the Department against orders that are favourable to the taxpayer. A step in this direction was taken vide a recent circular.[126] This circular increased the threshold limit of Department appeals in Central Excise and Service tax matters. In cases that do not involve a substantial question of law, the revised monetary threshold for Department appeals before the CESTAT is now INR 20,00,000; High Court is INR 50,00,000 and Supreme Court is INR 1,00,00,000.

The current provisions under the GST do not even grant the adjudicating authority in question any discretion to account for exceptions where the taxpayer may suffer from financial hardship.

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[121] *Union of India vs. R. Gandhi and Ors* [2010] 6 SCR 857.
[122] *Ibid.*
[123] Central Goods and Services Tax Act 2017, Section 109(10).
[124] Central Excise Act, 1944, Section 35F(i).
[125] Central Excise Act, 1944, Section 35F(iii).
[126] Circular F.No. 390/Misc./116/2017-JC dated 11 July 2018.

Moreover, while the decision to introduce an upper limit to the pre-deposit requirements is welcome, the amount which the pre-deposit was capped i.e. INR 25 Crore on first appeal and INR 50 Crore on second appeal is very high and renders this upper limit redundant. To draw a comparison, the limit under the Central excise laws (as applicable to service tax as well) was INR 10 Crore in both appeals.[127]

By adopting a one-sided approach to curb the menace of frivolous GST litigation, it is not in the taxpayers' interest to solely impose restrictions on their right to appeal.

4.2.3. Ambiguous pre-deposit provisions

It is relevant to note that the GST provisions require the appellant to calculate pre-deposit as a percentage of the 'tax in dispute'. While the word 'tax' has not been defined, the preceding sub-clause distinguishes between tax, interest, fine, penalty and fee. Therefore, the use of the term 'tax' alone in the sub-section concerning pre-deposit leads to the conclusion that no pre-deposit is to be paid if the demand raised for instance is a penalty, fee or fine.

This view is further endorsed by a reference to the appeal provisions of the Central Excise Act where the amount of pre-deposit is to be calculated as a percentage of the 'duty demanded or penalty'.[128] Further, the phrase 'duty demanded' is also separately defined in the Explanation to the section, such that it includes CENVAT Credit erroneously taken.[129]

In view of the above, the provisions of the GST laws with regard to filing of appeals seem to be inconsistent. While on one hand, a substantial burden is imposed on taxpayers as pre-deposit calculated as a percentage of tax, there is no pre-deposit on cases where the demand seeks to levy penalty/fee/fine.

5. Key takeaways and way forward

In view of the above, we believe that to achieve the overarching aim of facilitating stability in the new regime, taxpayers certainty, and reducing the number of litigations, legislative changes must be implemented.

5.1. The Advance Ruling Mechanism

Due to the AAR mechanism's narrow scope, many applications have been rejected and *bona fide* applicants have been turned away. While there is a reasonable justification for carving matters pertaining to place of supply outside the ambit AARs jurisdiction in its current form, it is vital that changes are made to the structure so that such issues can also be addressed in a fair and un-biased manner going forward. Further, even under the AARs' current form, there is no rationale supporting the exclusion of cases relating to TDS and refunds.

In light of the broader aim of the AAR mechanism, active steps should be taken to further expand its scope. The GST is still at a formative stage and taxpayers are bound to encounter issues that relate to provisions currently beyond the scope of advance rulings. It is imperative that lessons are drawn from the orders passed thus far, and the scope of the AAR scheme is re-evaluated keeping in mind these orders.

Second, numerous ambiguities have been noticed in the AAR provisions, be it the interpretation of a 'pending proceeding' or the conflict between the definition of 'applicant' and 'advance ruling'. It is suggested that these loop-holes are cleared through legislative amendments. Given the overall aim of reducing the number of litigations and providing taxpayers with a forum to pre-emptively clarify tax implications of transactions, defining the scope of 'pending proceedings' may be worth considering. The Tamil Nadu Value Added Tax Act, 2006 for instance, disallows AAR applications on questions pending before any appellate or revising authority of the department or Appellate Tribunal or any Court as in the.[130] Further, as far as the conflict between the definition of the term 'applicant' and 'advance ruling' is concerned, in order to ensure that the AAR facility extends to all taxpayers, the

[127] Central Excise Act, 1944, Section 35F.
[128] *Ibid.*
[129] Central Excise Act, 1944, Section 35F Explanation (ii).
[130] Tamil Nadu Value Added Tax Act, 2006, Section 48A(2)(i).

provisions should be amended to unequivocally clarify that service recipients who may be liable to pay tax under the reverse charge are covered within its ambit.

Third, there were noticed to be numerous contradictory AARs and some orders that were based on blatantly incorrect application of legal principles. In many cases, AAR applicants have appealed the High Court against orders passed either by the AAR, or by the Appellate authority. Therefore, instead of minimising litigation, it has expedited the process in certain cases. Given that the authority is involved in adjudicating matters that involve interpretation of both law and facts, it is imperative that its composition is re-thought. We believe that placing judicial members who have adjudicatory experience on the AAR and AAARs will serve a two-fold purpose. It would firstly ensure the maintenance of a certain standard to the ruling passed by state authorities across the country. The passage of consistently legally sound rulings would also catalyse their acceptance by taxpayer which would consequently aid in stabilising the GST regime. Petitions[131] seeking a review of the composition of AAR and AAARs have been filed before the Punjab and Haryana High Court and the Gujarat High Court as well. Moreover, the creation of a Centralised AAAR to deal with contradicting rulings has already been approved in principle.[132] It is imperative that the scope of powers of this body, and its composition is given the utmost importance.

5.2. The initiation of proceedings

We believe that another effective way of garnering taxpayers' faith in the dispute resolution system and minimising avenues for harassment would be by strengthening the initial enforcement and adjudication process.

As detailed above, by allowing multiple authorities to exercise enforcement jurisdiction over the same taxpayer and failing to provide any guidelines in this regard, the law leaves scope for harassment.

Moreover, in various other cases, the allocation of powers within the tax administration mechanism creates a confirmation bias. Re-evaluating these provisions to ensure fair, transparent and consistent enforcement and adjudication is thus necessary.

5.3. Appeals under the GST regime

Finally, we also identified certain fallacies in the appeal mechanism under the GST. The composition of the GSTAT is not in consonance with the guideline laid down by the Supreme Court of India. The GSTAT has two technical members and only one judicial member. Therefore, it is recommended that in order to ensure that the independence of the judiciary is maintained, and orders correctly apply legal principles, the number of judicial members on the authority must be more than the technical members.

Further, provisions pertaining to pre-deposits under the GST law are substantially different from those under other erstwhile laws as far as the amount of pre-deposit required, is concerned. While this measure was implemented to discourage frivolous litigation, it imposes restrictions only on the taxpayer. We believe that the adoption of a balanced approach that restricts frivolous litigation both from the Revenue's side as well, would help tackle these concerns in a more efficient manner. Moreover, the pre-deposit provisions also give rise to ambiguity regarding whether they apply to cases where penalty and/or interest is charged. We are of the view that clarifying such ambiguities would clear another loophole, making dispute settlement provisions under the GST regime more certain.

[131] *Umang Goyal vs. Union of India and Ors.* CWP No. 28650 pf 2018.
[132] Press Release dated 22 December 2018 available at <http://gstcouncil.gov.in/sites/default/files/press-release/22181222_Press%20Release_31st%20GST%20Council%20Policy_In%20Principle.pdf> last accessed on 2 February 2019.

C. Anti-profiteering measures

1. Background

The GST law brought with it a fresh tax rate structure and the availability of additional input tax credit. Typically, these moves lead to a reduction in the price of goods and services. However, implementation of GST in certain countries[133] was followed by periods of high inflation caused due to an increase in prices of commodities. This was happening because suppliers were not passing benefits of rate reduction and additional credit, to consumers.[134] According to a study conducted by the Controller Auditor General ('CAG') based on records of thirteen manufacturers, even the introduction of Value Added Tax ('VAT') in India too was found to have resulted in an increase in the price of commodities to end-customers, despite a decline in the tax rates.[135]

In anticipation of GST's introduction leading to price increase and inflation, an anti-profiteering body was set up. The CGST Act and corresponding SGST Acts authorise the Central Government to notify an authority, on the recommendation of the GST Council, to ascertain whether GST benefit have been passed on to consumers by way of commensurate reduction in the price of products.[136]

Accordingly, the National Anti-profiteering Authority ('NAA' or 'Authority') was constituted on 16 November 2018.[137] The NAA was set up to examine complaints of customers, that benefits of reduced rate of tax, and additional availability of credit are not being passed on to them. The Authority was initially set up to operate only for a limited period, and it is to cease to exist after the expiry of two years from the date of appointment of its chairperson. However, the GST Council has the power to recommend otherwise and extend its existence.[138] Given the frequent alterations in the rate of GST, it has been reported that the GST Council is likely to step in and extend the term of the NAA.[139]

Before delving into the details of the legal framework, we want to firstly examine the relevance of the NAA as a part of the GST regime.

As noted above, many other countries also set up a mechanism similar to India's GST anti-profiteering scheme. In Australia for instance, the GST implementation had a three-year transition period from 1 July 1999 to 30 June 2002. During this period, the national competition regulator, the Australian Competition and Consumer Commission ('ACCC') was entrusted with the responsibility of overseeing the pricing responses to the GST and taking action against businesses that adjust prices inconsistent with tax rate changes consequent to the GST implementation.[140]

Malaysia too had adopted GST in 2015, whereby they brought Anti Profiteering provisions through their existing legislation called 'Price Control and Anti-profiteering Act 2011.'

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[133] Australia, Canada, Malaysia, and New Zealand.

[134] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Tax and Customs, '*Goods and Services Tax, Concept and status*' (1 January 2019) available at <http://gstcouncil.gov.in/sites/default/files/01012019-GST-Concept-and-Status.pdf> accessed 23 October 2018.

[135] Comptroller and Auditor General of India, '*Implementation of Value Added Tax in India – Lessons for transition to Goods and Services Tax – A study Report*' (June 2010) available at https://cag.gov.in/sites/default/files/publication_files/SRA-value-added-tax.pdf accessed 23 October 2018.

[136] Central Goods and Services Tax Act 2017, Section 171(2) and Maharashtra Goods and Services Tax Act, 2017, Section 171(2).

[137] Press Information Bureau, Government of India, Ministry of Finance '*Cabinet approves the establishment of the National Anti-profiteering Authority under GST*' (16 November 2017) available at < http://pib.nic.in/newsite/PrintRelease.aspx?relid=173564> accessed 23 October 2018.

[138] See 'n 133'.

[139] 'Govt. may extend term of GST anti-profiteering watchdog' (Live mint, 4 October, 2018) available at <https://www.livemint.com/Politics/sQUPb6hC5Ol6YOcY1z6GuI/Govt-may-extend-term-of-GST-antiprofiteering-watchdog.html> accessed 15 March 2018.

[140] Sthanu R Nair and Leena Mary Eapen, '*Price Monitoring and Control under GST Lessons from Australia*' (2017) Vol. 52, Issue No. 25-26, EPW available at <https://www.epw.in/journal/2017/25-26/web-exclusives/price-monitoring-and-control-under-gst.html> accessed 15 March 2018.

On the same lines, prior to the implementation of the GST, India also had various special legislations dealing with the concerns that the Anti-profiteering authority was set up to address. For instance, the Competition Act, 2001 establishes a Competition Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets.[141] Similarly, The Consumer Protection Act, 1986 was enacted to better protect the interests of consumers and for this purpose, it establishes consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.[142]

Therefore, at the outset itself, one of the primary questions in relation to the establishment of the NAA is whether there was any need for a tax statute to set up a body that primarily evaluates the price of goods, despite the existence of special statutes such as the Competition Act and the Consumer Protection Act.

2. Analysis of the legal framework

Without prejudice to the above, since the anti-profiteering mechanism did find a place in the India's GST regime, in this section, we analyse its legal framework and certain orders passed by the NAA. We then suggest changes to make the mechanism more taxpayer friendly.

The CGST Act and corresponding SGST Acts mandate that any reduction in rate of tax, or the benefit of input tax credit shall be passed on, to the recipient by way of commensurate reduction in prices.[143]

The provisions pertaining to the NAA are spread out across the Acts, the Rules and the Procedure and Methodology enacted by the NAA itself.[144]In this section, we study each of these legislations/subordinate legislations/by-laws and analyse the anti-profiteering provisions.

2.1. Anti-profiteering provisions under the Act

The Act firstly mandates that benefit accrued from reduction in GST rate, and additional availability of input tax credit must be passed on to the recipient by way of commensurate reduction in price.[145]

The Act further empowers the Central Government, to, on the recommendation of the GST Council, either constitute an authority, or empower an existing authority to examine whether the aforementioned benefits available to suppliers have actually resulted in a commensurate reduction in the price of the goods or services supplied by them.[146]

Lastly, the Act delegates the framing of the Authority's powers and functions, and empowers the Authority to exercise said powers and discharge such functions.[147]

[141] The Competition Act, 2002, Long title.
[142] The Consumer Protection Act, 1986.
[143] Central Goods and Services Tax Act 2017, Section 171(1) and Maharashtra Goods and Services Tax Act, 2017, Section 171(1).
[144] Anti-profiteering Authority, Procedure and Methodology, available at <http://www.naa.gov.in/docs/procedure%20_methodology_18.pdf> accessed 15 March 2018.
[145] Central Goods and Services Tax Act 2017, Section 171(1).
[146] Central Goods and Services Tax Act 2017, Section 171(2).
[147] Central Goods and Services Tax Act 2017, Section 171(3).

2.2. *Anti-profiteering provisions under the Rules*

In exercise of the authority delegated by the Act, the Rules lay down various aspects relating to the anti-profiteering scheme.

2.2.1. Structure of the authorities involved in the anti-profiteering scheme

The Rules prescribe for a State level Screening Committee ('Screening Committee') to be constituted in each State by the State Governments.[148] The Committee consists of one officer of the State Government, to be nominated by the Commissioner, and one officer of the Central Government, to be nominated by the Chief Commissioner.[149]

Further, the Rules provide for the establishment of a Standing Committee on Anti-profiteering ('Standing Committee') consisting of officers of the State Government and Central Government, nominated by it.[150]

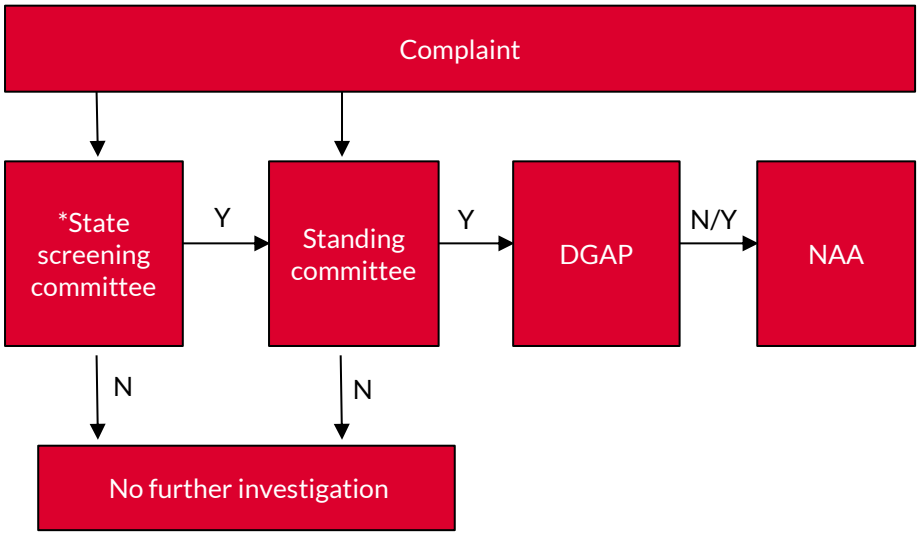
Moreover, the Rules establish the NAA. The NAA is to consist of a Chairman who either holds, or has held a post equivalent in rank to a Secretary to the Government of India; and four Technical Members who are, or have been Commissioners of State tax or Central tax, or have held an equivalent post under the existing law. All these members are to be nominated by the GST Council.[151] The Additional Director General of Anti-profiteering under the Board has been designated the Secretary to the Authority.[152]

2.2.2. Initiation and examination of applications

The Rules lay down the following process for initiating anti-profiteering proceedings:

Flow Chart: I

The process for initiation of anti-profiteering proceedings as laid down under the Rules



Y - The supplier has contravened with provisions of Sec. 171
N - The supplier has not contravened with provisions of Sec. 171
* Only in cases of issues of local nature

[148] See 'n 145'.
[149] Central Goods and Services Tax Rules 2017, Rule 123(2).
[150] Central Goods and Services Tax Rules 2017, Rule 123(1).
[151] Central Goods and Services Tax Rules 2017, Rule 122.
[152] Central Goods and Services Tax Rules 2017, Rule 125.

The Standing Committee is the body that receives applications from an interested party or from a Commissioner or any other person. An 'interested party' has been defined to include suppliers of goods or services under the proceedings; recipients of goods or services under the proceedings; and any other person alleging before the Standing Committee that a registered person has not passed on the benefit of reduction in the rate of tax or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.[153]

Upon receipt of a complaint, the Standing Committee examines the accuracy and adequacy of the evidence, to determine whether there is *prima-facie* evidence to support the claim of the applicant that the benefit of reduction in the rate or additional input tax credit has not been passed on to the recipient by way of commensurate reduction in prices.[154] The Standing Committee is required to make this determination within a period of 2 months from the date of the receipt of a written application.[155]

Prior to being put before the Standing Committee, applications from interested parties on issues of local nature are first to be examined by the State level Screening Committee.[156] The expression 'local nature' however, has not been defined under the provisions. Upon being satisfied that the supplier has contravened the provisions of Section 171, the Screening Committee must then forward the application with its recommendations to the Standing Committee for further action.[157]

Anti-profiteering proceedings are initiated when the Standing Committee is satisfied that there is *prima facie* evidence to show that the supplier has not passed on the benefit of reduction in the rate or additional input tax credit to the recipient by way of commensurate reduction in prices. The Standing committee then refers the matter to the Director General of Anti-profiteering ('DGAP') for a detailed investigation.[158]

The DGAP is then required to issue SCNs to the interested parties containing details such as description of goods/services, facts of the case etc.[159] The DGAP is also required to conduct investigation and collect necessary evidence.[160] Moreover, the DGAP, is empowered to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing as may be required.[161] The DGAP has the same powers during inquiries, as provided to civil courts under the provisions of the Code of Civil Procedure, 1908.[162] The DGAP has also been allowed to authorise any other officer to carry on these activities.[163] Every such inquiry is deemed to be a judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860).

Subsequently, within a period of 3 months of the receipt of the reference from the Standing Committee, the DGAP is required to furnish to the Authority, a report of its findings along with the relevant records to the NAA.[164] This period of 3 months may be extended to a period not exceeding 3 additional months for reasons to be recorded in writing, as may be allowed by the NAA.[165]

2.2.3. Duties of the NAA

According to the Rules, the Authority has the following duties[166]:

a. to determine whether the reduction in the rate or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;
b. to identify the registered person who has not passed on such benefit to order,
    1) reduction in prices;

[153] Central Goods and Services Tax Rules 2017, Rule 137(c).
[154] Central Goods and Services Tax Rules 2017, Rule 128 (1).
[155] *Ibid.*
[156] Central Goods and Services Tax Rules 2017, Rule 128 (2).
[157] Ibid.
[158] Central Goods and Services Tax Rules 2017, Rule 129.
[159] Central Goods and Services Tax Rules 2017, Rule 129(3).
[160] Central Goods and Services Tax Rules 2017, Rule 129(2).
[161] Central Goods and Services Tax Rules 2017, Rule 132.
[162] Central Goods and Services Tax Rules 2017, Rule 130.
[163] Central Goods and Services Tax Rules 2017, Rule 129(6).
[164] *Ibid.*
[165] *Ibid.*
[166] Central Goods and Services Tax Rules 2017, Rule 127.

2) return to the recipient, an amount equivalent to the amount not passed on, along with interest at the rate of eighteen percent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned. However, if the eligible person does not claim return of the amount or is not identifiable, the Authority may order the depositing the same in the Consumer Welfare Fund
3) imposition of penalty as specified in the CGST Act; and
4) cancellation of the registration under the CGST Act

2.2.4. Procedure for passing orders

As noted above, passing orders is one of the NAA's duties. The Authority is required to pass orders within a period of 3 months from receipt of the report from the DGAP.[167] Moreover, the Authority is mandatorily required to grant an opportunity of hearing to the interested parties where any request for such a hearing is received in writing from the interested parties.[168] All orders of the Authority are to be passed by majority.[169] A minimum of three members of the Authority constitute quorum at its meetings.[170] If the Members of the Authority differ in their opinion on any point, the point shall be decided according to the opinion of the majority of the members present and voting, and in the event of equality of votes, the Chairman will have the second or casting vote.[171]

In addition to the duties mentioned in the provisions detailed above, the Rules further detail that in cases where the Authority determines that a registered person has not passed on the benefit of the reduction in the rate or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, the Authority may order.[172]-

a. a reduction in prices;
b. return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount including interest not returned, as the case may be;
c. where the eligible person does not claim return of the amount or is not identifiable the deposit of an amount equivalent to fifty per cent of the amount determined under the above clause in the Consumer Welfare Fund under the CGST Act and the remaining fifty per cent of the amount in the Consumer Welfare Fund set up under the concerned State GST Act; and
d. imposition of penalty as specified under the Act; and
e. cancellation of registration under the Act.

2.3. Anti-profiteering provisions under the Procedure and Methodology

The NAA has been empowered to implement the procedure and methodology to determine whether the reduction in the rate or the benefit of input tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices.[173] In exercise of the powers granted under this provision, the Authority has prescribed its procedure and methodology.[174] As per this Procedure and Methodology, the Authority is required to be guided by the principles of natural justice and no order, whether interim or final can be passed without affording opportunity of being heard to the concerned interested party.[175] An SCN giving details of the hearing is required to be issued by the Authority.[176]

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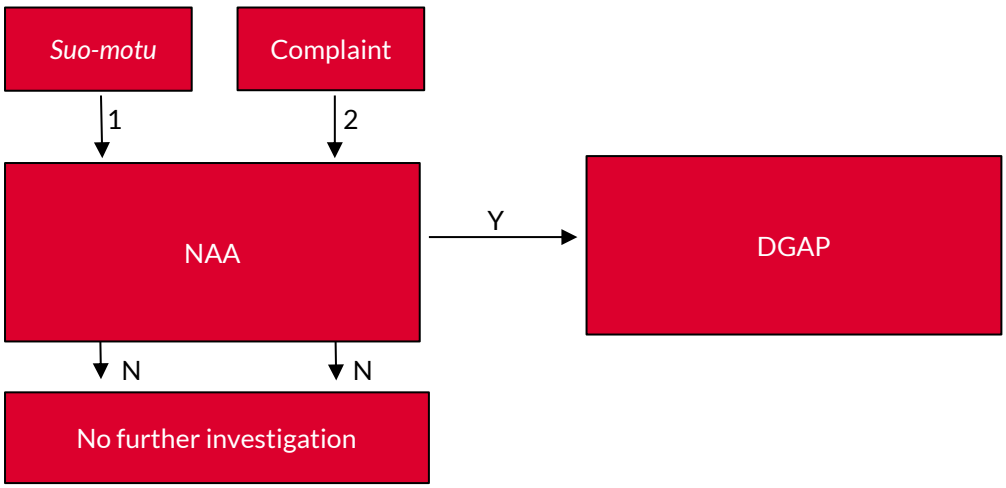
[167] Central Goods and Services Tax Rules 2017, Rule 133(1).
[168] Central Goods and Services Tax Rules 2017, Rule 133(2).
[169] Central Goods and Services Tax Rules 2017, Rule 134.
[170] Central Goods and Services Tax Rules 2017, Rule 134(1).
[171] Central Goods and Services Tax Rules 2017, Rule 134(2).
[172] See 'n 167'.
[173] Central Goods and Services Tax Rules 2017, Rule 126.
[174] See 'n 143'.
[175] *Ibid.*
[176] *Ibid.*

This Procedure and Methodology also empowers the Authority to inquire into any alleged contravention of the provisions of section 171 of the CGST Act on its own motion or on receipt of information from any interested party, person, body, association or on a reference having been made to it by the Central Government or the State Government.[177] On receipt of such information, if the Authority is of the opinion that there exists a prima facie case it is required to direct the DGAP to cause an investigation to be made in a fixed time frame and submit report.[178] The Procedure and Methodology therefore allow the following additional ways to initiate proceedings.

Flow chart: II

The process for initiation of anti-profiteering proceedings as laid down under the Procedure and Methodology



1 – Inquiries instituted by the NAA on its own motion on account of alleged contravention
2 - Inquiries instituted by the NAA upon receipt of information
Y – The NAA decides prima facie that the supplier has contravened with provisions of Sec. 171
N - The supplier has not contravened with provisions of Sec. 171

Regardless of whether the report of the DGAP recommends that there is contravention or non-contravention of the provisions of Section 171 of the CGST Act or the CGST Rules, if the Authority is of the opinion that further investigation or inquiry is called for in the matter, it may, for reasons to be recorded in writing, refer the matter to the DGAP to cause further investigation or inquiry in accordance with the provisions of the CGST Act and the CGST rules.[179]

Additionally, the Procedure and Methodology document states that in cases where the DGAP recommends that there is no violation of the provisions of section 171 of the CGST Act, the Authority may send a copy of the report to the complainant interested party and invite objections from it. After hearing these objections, the Authority may choose to either close the matter, or pass any order it may deem, or even direct the DGAP to further investigate the matter.

The Procedure and Methodology also empowers the Authority to re-institute the proceedings dismissed or disposed-off by it *ex-parte* in case any interested party applies to re-institute them, duly supported by an affidavit mentioning the grounds on which it wants to reinstitute the proceedings.[180] In case the Authority is satisfied that the interested party was prevented by sufficient cause from attending the proceedings it may re-institute the same with or without imposing cost.

[177] *Ibid.*
[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid.*

3. Orders passed by the NAA

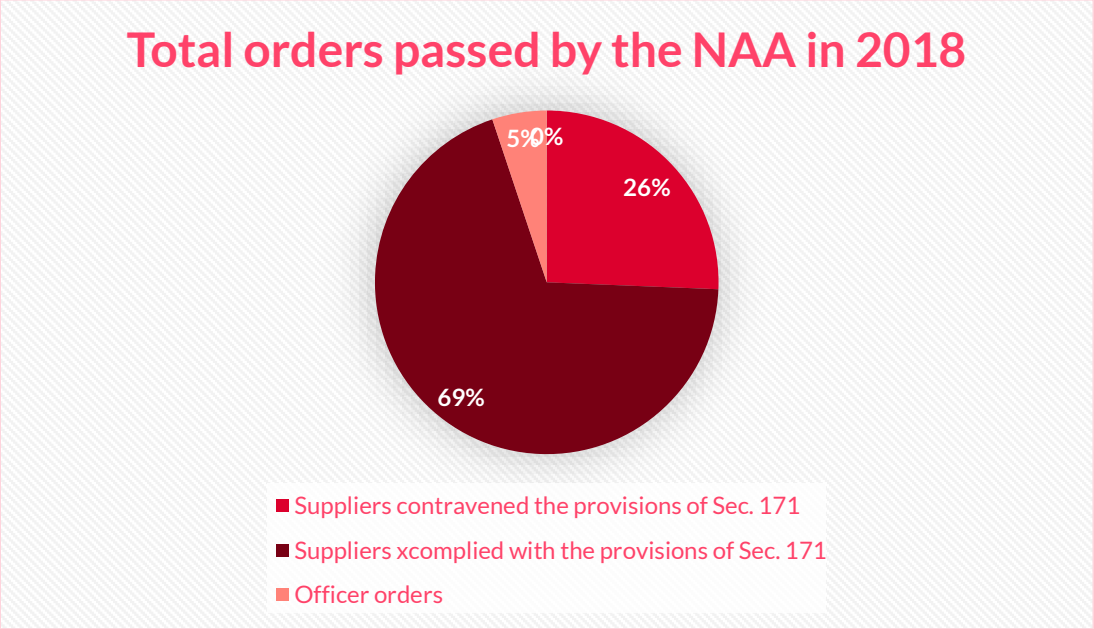
In 2018, since its first order in March, the NAA has passed 28 orders. In this section, we capture an overview of certain specific orders.[181]

In accordance with the provisions of Sec. 171, the first question typically answered by the NAA under these orders, is whether there was any reduction in tax rate, or additional input tax benefit available to the supplier. If the answer to this question is in the affirmative, the NAA generally proceeds to analyse whether such benefit has been passed on to the customer by way of commensurate reduction in the price of the goods/services.

There have been numerous lengthy discussions in many orders regarding the methodology of calculating whether the supplier has indeed made such commensurate reduction in price. In the cases where the NAA finds there has been a commensurate reduction, it has held that the supplier has not engaged in profiteering. As far as cases where the supplier has failed to make commensurate reduction in prices, the NAA has typically examined the reasons behind such failure. If the reasons are found to be satisfactory, the NAA has ruled against the complainant and held that the supplier has not profiteered. However, in cases where reasons offered by the supplier for failing to reduce price of goods/services to pass on GST benefits is found to be unsatisfactory, the NAA has ruled that such supplier has profiteered.

Through the following charts, we endeavour to give a snapshot of the 28 cases reviewed by us and the aforementioned findings of the NAA.

Pie Chart: I



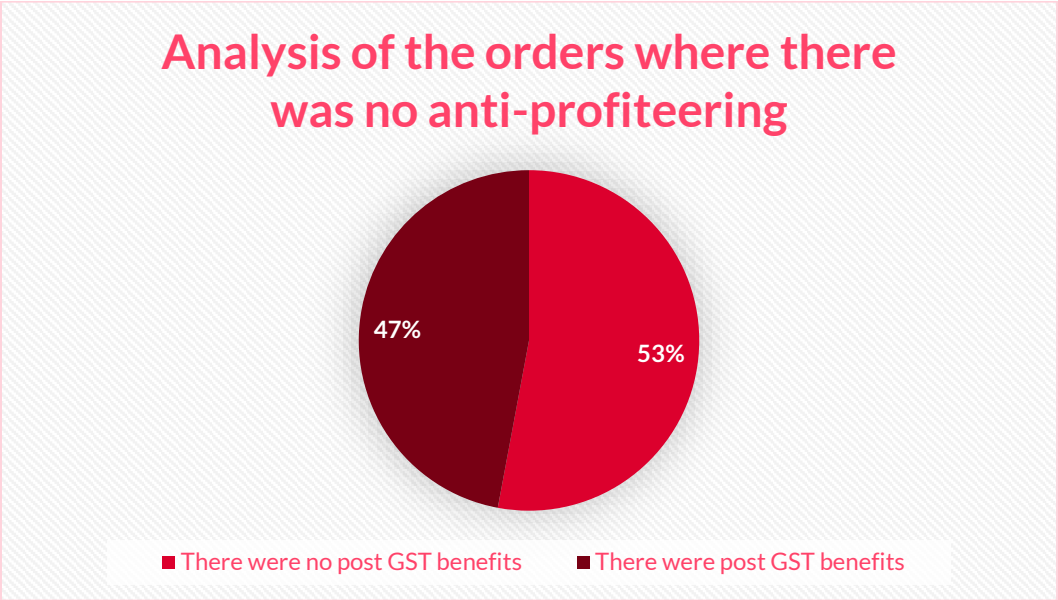
As far as cases where the NAA held that the supplier has indulged in profiteering are concerned, one of the primary contentions raised by the suppliers was regarding the uncertainty surrounding the calculation of commensurate reduction in price. It was also argued that the word 'profiteering' is not defined under the statute. Suppliers also sought to place reliance on Article 19(1)(g) of The Constitution of India, so as to argue that the NAA had no authority to intervene in price fixing. Moreover, in certain cases where the respondent were distributors, they sought to argue that only manufacturers retain the right to alter maximum retail prices, therefore the distributors are not obligated to act. All of these arguments however were rejected by the NAA.

In the second pie chart, we have briefly analysed the orders where the NAA held that there was no anti-profiteering. In some of these cases the supplier had not earned any additional benefit on account of reduction in

[181] We have reviewed the orders passed since the NAA's inception in March 2018 to December 2019.

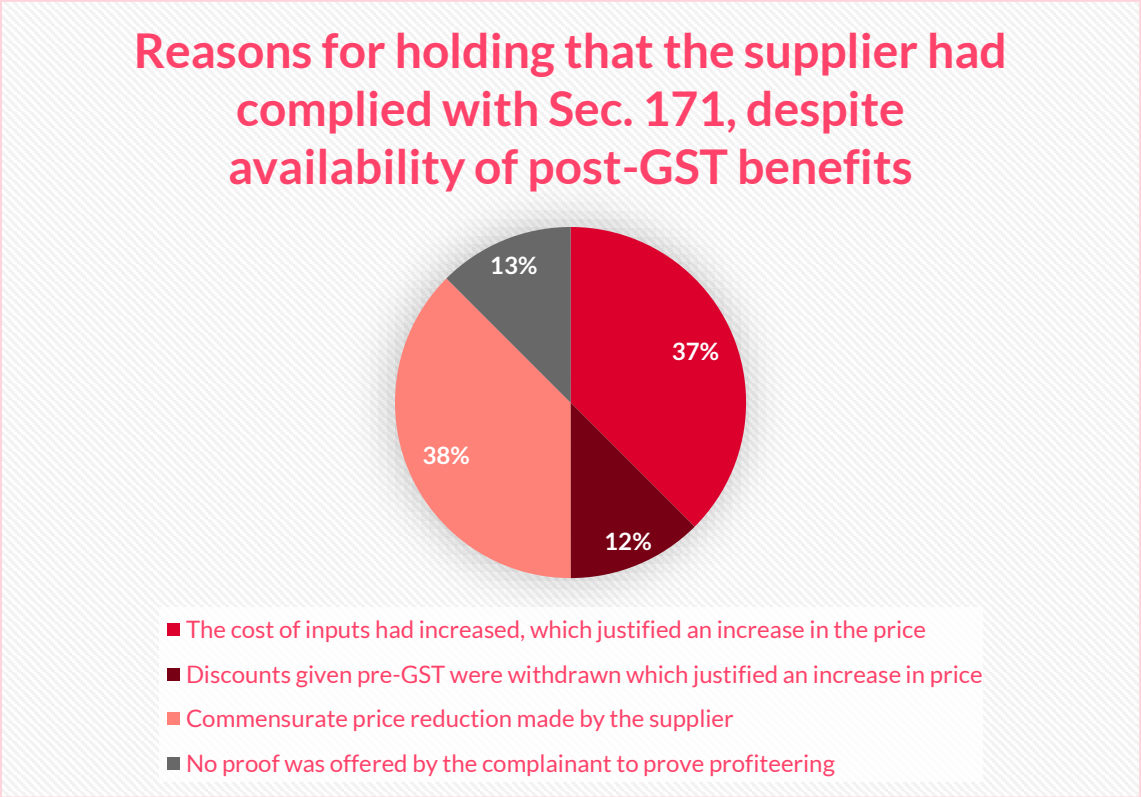
the rate of tax, or additional availability of input tax credit. However, in other cases, even though the supplier earned additional benefits post implementation of the GST, the NAA still concluded that he had complied with the provisions of Section 171.

Pie Chart: II



In the next pie chart, we demonstrate some reasons accepted by the NAA to hold that the supplier had complied with the anti-profiteering clause in the Act, even when such suppliers had benefited either on account of reduction of GST rate, or availability of additional input tax credit post introduction of GST.

Pie Chart: III



4. Identification of issues in the anti-profiteering scheme

In this section, we critically analyse the provisions of the GST law and the orders passed by the NAA.

4.1. Uncertainty in calculation of commensurate reduction

We believe that a primary critique of the anti-profiteering scheme under the GST law, is the absence of clarity over how and when the 'profiteering' and 'commensurate reduction in price' is to be calculated. This issue has come to light in many NAA hearings. For instance, the Respondent in the *M/s Sharma Trading Company* order[182]argued that the Act did not provide any methodology for determining the commensurate reduction in prices. The NAA held this argument to be frivolous and stated that the determination only requires mathematical calculation. The NAA held that the supplier is required to determine the amount by which tax is reduced and subtract the same from the existing MRP of the product.

The absence of a methodology was also subsequently raised as an issue in other NAA orders. In one case.[183] the NAA drew the Respondent's attention to the Procedure and Methodology[184] issued by the NAA on its website and dismissed the claim. However, the Procedure and Methodology[185] does not provide a procedure for calculating the benefit accrued to the seller or the commensurate reduction in price.

Further, we believe that it is apparent from a review of the orders passed so far, that the calculation of profiteering is not simple and straightforward. The process involves various nuances. We have identified certain issues that were discussed in the NAA orders passed during the review period:

4.1.1. Time frame and applicability of the requirement to reduce prices

In numerous orders including the NAA order in HUL's distributor's case,[186] it was pointed out that the law does not prescribe a time period or a time frame within which reduction in prices are to take place. It was argued that in the absence of such a provision, reasonable time should be given to execute the necessary changes. In support of his argument, the Respondent cited the steps that need to be undertaken in this regard such as labelling, packaging *et al*. However, the Authority held that the law did not require the Respondent to perform an impossible activity and the argument was not accepted.

While a time limit of 31 December 2018 was initially prescribed as a part of the FAQ on Relaxation of Legal Metrology (Packaged Commodities) Rules, given that rate reduction seems to have become a common feature of the GST regime, a standard provision in this regard would help eliminate confusion.[187]

4.1.2. Level at which commensurate reduction should be made

Another issue that instantly comes to mind is the level at which commensurate reduction in price must be made. For instance, should the supplier reduce the price to ensure that the no additional profit is earned by the entity, or should each product-line see a reduction in prices?

In an NAA order,[188] the Respondent was dealing in multiple products and passed on benefit accruing from one product, by way of reduction in price in the other. In this specific case, the original pricing of the product for which benefit was to be passed on was INR 5/- and the amount of benefit per pack was around INR 0.21/-. The

[182] *Shri Pawan Sharma and Ors. vs. M/s Sharma Trading Company* 6/2018 dated 7 September 2018.
[183] *Shri Ravi Charaya and Ors. vs. M/s Hardcastle Restaurants Pvt. Ltd* 14/2018 dated 16 November 2018.
[184] See 'n 143'.
[185] *Ibid.*
[186] *Shri Pawan Sharma and Ors. vs. M/s Sharma Trading Company* 6/2018 dated 7 September 2018.
[187] FAQ on Relaxation of Legal Metrology (Packaged Commodities) Rules, 2011 for facilitation of implementation of the provisions of the GST Act and GST Rules dated 30 July 2018.
[188] *Shri Ankur Jain and Ors. vs. M/s Kunj Lub Marketing Pvt. Ltd.* 10/2018 dated 8 October 2018.

Respondent argued that pricing the product after giving such benefit would have been inconvenient to both the retailer and the consumer due to legal tender issues. He therefore passed on the benefit in the pricing of other products that cost INR 12/- and INR 7/-. However, the NAA rejected this argument. It was held that since the Legal Metrology (Packaged Commodities) Rules, 2011 prescribe the methodology of fixing the MRP keeping in view the rounding off the price, the Respondent had no mandate to deny the benefit of reduction of the tax rate due to the problem of legal tenders. The NAA stated that it was up to the customers to furnish the required legal tenders and the Respondent had no liberty to arbitrarily decide the products in respect of which he would pass on the benefit, and the ones in respect of which products he would not pass such benefit. The NAA further went on to hold that Section 171 of the Act requires the benefit to be passed on to each recipient and the same cannot be selectively granted or denied.

Similarly, in another order,[189] the Respondent claimed that there was no clarity regarding the level at which price is to be reduced. It was held that the benefit needs to be passed on to the product level as the recipient for each supply of the product would be different and every customer is entitled to such benefits. The order clearly stated that passing on such benefits at the entity, state, or SKU level would not be sufficient.

4.1.3. What constitutes reduction in price

Another issue that seems to have no clear answer is what would amount to a reduction in price. Would the grant of additional discounts satisfy the requirement? Or would an increase in quantity supplied make the cut? In an NAA order[190]the Respondent M/s Sharma Trading Company argued that while calculating whether the benefit was passed on to the consumer, the authorities had failed to account for the benefit of additional grammage given to the customer. However, the authority held that since the Respondent was only the distributor and not the manufacturer, he was therefore in no position to increase the quantity of the product. Thus, the units sold by him after the rate was reduced to 18% were those that were purchased by him at the rate of 28%. Since he had taken additional credit, he was duty bound to pass the same to his customer and this argument was accordingly rejected.

In another order[191] the NAA seemed like it would account for the supply of additional material as a valid mechanism to pass on GST benefit. However, in this particular case, there was no proof placed on record to support the Respondent's claim that additional material was indeed supplied to the customer.

As far as offering discounts is concerned, in an order[192] the NAA held that discounts are provided by suppliers out of their own resources and the same can thus not be said to be a part of the taxable value of the product. It was held that such a reduction could thus not attributed to their compliance with the anti-profiteering provision. In another order[193]the NAA was of the view that discounts offered by the supplier on the product cannot be taken to have been given in lieu of the reduction in the rate of tax as such discounts are regular trade practices.

As regards increase in cost of inputs, the NAA has accepted the argument and not prosecuted the taxpayer under the anti-profiteering. It was held that given the increase in the cost of inputs, an increase in the price of the output product was justified.[194]

However, in another order[195] the Respondent tried to argue that the non-availability of Central Sales Tax credit from the erstwhile regime had added to their cost. However, the NAA dismissed the contention. Further, another argument regarding increase in cost was raised. The Respondent stated that the cost of certain inputs had also increased. The Respondent contended that they had an agreement with the customer to increase the selling price to that extent. This claim was also rejected due to the Respondent's failure to produce proof of such an agreement.

A call on issues like these seem to be taken by the NAA on a case-to-case basis. In order to give certainty to suppliers and to facilitate compliance with the anti-profiteering provisions, we believe that it is important to issue

[189] *Shri Ravi Charaya and Ors. vs. M/s Hardcastle Restaurants Pvt. Ltd* 14/2018 dated 16 November 2018.
[190] *Shri Pawan Sharma and Ors. vs. M/s Sharma Trading Company* 6/2018 dated 7 September 2018.
[191] *Crown Express Dental Lab vs. M/s Theco India Pvt. Ltd.* 15/2018 dated 28 November 2018.
[192] *Ibid.*
[193] *Miss Neeru Varshney vs. M/S Lifestyle Inter national Pvt. Ltd.* 8/2018 dated 25 September 2018.
[194] *Sh. Kumar Gandharva vs. KRBL Ltd. 3/2018* dated 4 May 2018.
[195] *Crown Express Dental Lab vs. M/s Theco India Pvt. Ltd.* 15/2018 dated 28 November 2018.

a methodology that could be used as guidance for all suppliers who have benefitted by way of reduction of rate or availability of additional credit.

4.2. Flawed structure of the Acts, Rules and Notifications

As noted above, there is only one provision under the CGST Act that pertains to anti-profiteering[196]. However, there are Rules and a Procedure and Methodology document detailing the body's powers, functions and duties.[197]

As per the CGST Act, the NAA is set up to 'examine' whether the grant of additional input tax credit to suppliers,, and the reduction in tax rate allowed to them, have actually resulted in a commensurate reduction in the price of goods.[198] However, the Rules grant the Authorities powers that range from issuing orders that require a reduction in the price of supply, collection of interest, penalty, to cancellation of the supplier's GST registration.[199] It is settled law that Rules cannot grant substantive rights or exercise primary legislative functions. Rule-making power for carrying out the purpose of the Act is a general delegation. By reason of such a provision alone, the regulation making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act.[200]

Based on the above, we believe that though the current scheme of the CGST Act empowers Rules to determine the powers and function of the NAA, the Rules so formulated go beyond the scheme of the Act and often contradict either the Act, or its own provisions. Alternatively, the Act is not exhaustive in laying boundaries for the subordinate legislation to function within. Instances of such deviations/contradictions are captured in the tables below.

Table: II

Lack of consonance between the Act and the Rules

Particulars	Provisions	
	Act	Rules
Purpose and duties of the NAA	To **examine** whether input tax credits availed or the reduction in the tax rate have resulted in a commensurate reduction in the price of the goods or services	Duties of the NAA: a) to determine whether reduction in the rate of tax or the benefit of input tax credit has been passed on by way of commensurate reduction in prices; b) to identify the registered person who has not passed on the benefit c) to order, - reduction in prices; - return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices - levy of interest - impose penalty - cancel GST registration

We believe that the grant of powers, such as imposition of penalty and cancellation of GST registration, are legislative functions that should form a part of the Act. Further, these powers do not appear to be in consonance

[196] Central Goods and Services Tax Act 2017, Section 171.
[197] Central Goods and Services Tax Rules 2017, Rule 126.
[198] Central Goods and Services Tax Act 2017, Section 171(2).
[199] Central Services Tax Rules 2017, Rule 133(2).
[200] *Indian Aluminium Co. Ltd. And ANR vs. The State of Bihar* 1994 (1) PLJR.

with the limited purpose of the NAA under the parent Act, which is to examine whether commensurate reduction of prices have been made by suppliers.

Further, contradictions between the Rules and the Procedure and Methodology of the NAA are captured in the table below:

Table: III

Lack of consonance between the Rules and the Procedure and Methodology

Particulars	Provisions	
	Rules	Procedure and Methodology
Procedure of the proceedings	Application may be filed before the State screening committee in case the matter is local in nature, otherwise all complaints are taken up by the Standing Committee	The NAA is permitted to inquire into any alleged contravention of the provisions of profiteering either on its own motion, or on receipt of information from any interested party, person, body, association or on a reference having been made to it by the Central Government or the State Government
Grant of hearings	An opportunity of hearing must be granted to the interested parties by the Authority where any request is received in writing from such interested parties	No order may be passed without granting an opportunity of being heard to the concerned interested party
Other powers of the NAA	N/A	The Authority is competent to initiate, recommend and file disciplinary, civil, criminal and contempt proceedings against any person, interested party or authority of the Central or the State Governments before the appropriate Courts of law or administrative authority as it deems fit Further, the NAA can re-institute the proceedings dismissed or disposed-off by it *ex-parte* in case any interested party applies to re-institute them, duly supported by an affidavit mentioning the grounds on which it wants to reinstitute the proceedings

From the above, we are of the view that the Procedure and Methodology appear to grant/restrict the NAA's powers and it goes beyond the Rules in doing so. We therefore believe that the same merit a re-evaluation.

D. Key takeaways and way forward

Ever since the GST regime was implemented, frequent changes have been brought out to in the rate of tax applicable on supply of goods and services. With talk of rationalising the rate slabs under the GST in the future, it seems that the Anti-profiteering authority will continue to receive complaints. In order to streamline the process of addressing these complaints, we believe that it is important to reform the Authority.

From the analysis above, it is clear that there are numerous ambiguities in the anti-profiteering scheme under the GST law. First, there are numerous uncertainties surrounding the methodology for calculating 'profiteering' and 'commensurate reduction of price'. The absence of a clear mechanism has also been the primary argument against the constitutional validity of the anti-profiteering scheme.

While we understand that due to the complexity involved in such computation, no straightjacket formula can be prescribed. However, illustratively defining concepts just as 'anti-profiteering' and 'commensurate reduction' would be fruitful. It is important that the Government uses the 30 odd orders passed so far to answer certain contentious questions. For instance, concerns such as - whether grant of additional discounts would amount to commensurate reduction in price? or whether price reduction is to be calculated for each and every product? – should be clarified. This would act as guidance for the suppliers and facilitate compliance.

Further, the powers granted to the NAA need to be re-thought in light of the purpose behind its establishment as mentioned in the parent Act. As noted above, some of the powers envisaged under the Rules are excessive in light of the limited purpose for which the NAA was established. Necessary amendments need to be made to address this concern. Moreover, the provisions regarding the NAA in the Act, the Rules and the Procedure and Methodology require re-structuring to ensure that there is no contradiction between them.

www.vidhilegalpolicy.in

Vidhi Centre for Legal Policy
D-359, Defence Colony
New Delhi – 110024

011-43102767/43831699

vidhi@vidhilegalpolicy.in