

A SECOND BITE AT THE ANTI-PROFITEERING APPLE UNDER GOODS AND SERVICE TAX

- Dhanshree Sharma*

ABSTRACT

Globally, the observation of the implementation of Goods and Services Tax ('GST'), in various jurisdictions, has shown a steady rise in inflation in the transition period. Thus, an anti-profiteering mechanism was adopted to mitigate the effects of GST. And comparably, India introduced the Anti-Profiteering clause in the Central Goods and Services Tax, which may be a lesson learnt from the defective implementation of Value Added Tax. The GST Council made Anti-Profiteering Rules ('APR') to operationalize the clause. And a three-stage anti-profiteering administrative structure and mechanism to address consumer complaints about profiteering was brought into effect. However, the Australian experience of GST, with respect to price monitoring and control during the GST transition period can be of assistance to the Indian context. The paper has attempted to identify the grey areas of affixing liability on the digital platforms that act as agents between the consumers and the sellers. Moreover, the paper suggests the possible steps to be taken in order to ensure better enforcement, by way of cooperation between the regulatory Authority and the businesses. In light of the shortcomings, there are many lessons for India for a more extensive procedure to address the woes of the consumer and disconfirm the imputations put by the corporates in default. Since the Indian government is yet to take the industry into confidence on APR, an interaction of different approaches and mechanisms will certainly be effective to monitor price movements in a transparent and reliable way.

* The author is a third-year student of B.A., LL.B. (Hons.) Five-Year Integrated Course at the Rajiv Gandhi National University of Law, Punjab.

I. INTRODUCTION

The implementation of any legislation has two prerequisites glued to it: the theoretical aspect and the practicality of enforcing it. And needless to say, that it is a herculean task to fulfil both the requirements. Tax reform systems prove to be a different ball game all together. The changeover from an erstwhile indirect tax system to a single tax regime is usually not received well by many countries. This can be primarily due to the significant gaps between the intended objective of the legislation and the conception of methods to remove practical roadblocks on the way.

When the Goods and Service Tax (hereinafter ‘GST’) was introduced, the Indian economy had experienced inflationary pressure. And to mitigate the inflationary effects post implementation of GST, the anti-profiteering measure was introduced in India. Although internationally anti-profiteering is a full-fledged concept, countries have been very cautious in implementing it. In some jurisdictions the anti-profiteering could not be successful, while others termed it a ‘public policy success’¹. The anti-profiteering method was not preferred by all, and thus many resorted to price oversight and price freeze control.

This paper analyses the effectiveness of anti-profiteering in the Indian context while taking cues from the international practice in dealing with the effect on prices during a changeover of a tax system. The first part of the paper deals with the policies used to counter the price changes post the implementation of a new indirect tax system. The second part

¹ Joannah Luetjens et al., *Successful Public Policy: Lessons from Australia and New Zealand* (ANU Press, 2019), ResearchGate, <https://www.researchgate.net/publication/335882991>.

deals with Australian experience and the initiatives taken by them during the transition period. And thirdly, the paper identifies the problems and ambiguities in the Indian anti-profiteering regime. Part four suggests the possible way to affix the liability of profiteering on the 'digital platform'. Lastly, the fifth part encapsulates the suggestions and recommendations that might be helpful going forward.

II. INTERNATIONAL EXPERIENCE OF CHANGEOVER TO A NEW TAX SYSTEM

The fresh tax structure evades the cascading effect of taxes and makes available the input tax credit system, which leads to a reduction in the prices of commodities. The introduction of a new tax system, like the GST in many countries, is known to have the opposite effect of what it was typically believed to be. The implementation of such a new tax system was followed by inflation due to hike in the prices of the commodities.² But having said that, the effects of GST are difficult to be evaluated empirically. There are many variables intertwined, to objectively and singularly attribute inflation to the introduction of a new tax system. Furthermore, in many countries the introduction of a new tax system has often coincided with a parallel economic downfall which subsequently led to the massive increase in prices; like the introduction of the Consumption Tax in Japan which coincided with recession.³ And the predominant perception about a new tax system like the GST, is associated

² COMPTROLLER AND AUDITOR GENERAL OF INDIA, IMPLEMENTATION OF VALUE ADDED TAX IN INDIA: LESSONS FOR TRANSITION TO GOODS AND SERVICES TAX—A STUDY REPORT (2010), http://www.cag.gov.in/sites/default/files/publication_files/SRA-value-added-tax.pdf.

³ ALAN A. TAIT, VALUE ADDED TAX: INTERNATIONAL PRACTICE AND PROBLEMS (2001).

with the rise in retail prices.⁴ Regardless, the undoubted trait of the introduction of GST is uncertainty.

Since the impact and possible outcome of GST is up in the air, the media sometimes enhances the situation and concretes the public belief of a likely price rise.⁵ Whilst the traders, still unsure of compliance costs and profit margins, opportunistically widened their profit margins, consequently the consumers helplessly accepted the price rise, believing the speculated hike in the prices.

A. Different Mechanisms Implemented During the Transition Period

When Belgium introduced the Value Added Tax (hereinafter ‘VAT’) on 1st January 1971, the government-maintained price freeze control for the following three months of its introduction. The price rise policy also mandated a three-month notice to change the prices. But during the transition period, it is believed that the business houses did widen the profit margins owing to the confusion and apprehension about higher rates.⁶ Whereas when Germany introduced the retail stage VAT at 10 and 5 percent, there was no significant change in prices that were expected. However, the German economy noted a 0.4 percent rise in the consumer price index in the first year of the implementation of the new tax

⁴ Arun Kumar, *With Prices Rising Post-GST, Has The Government Taken The Public For A Ride?*, THE WIRE (2017), <https://thewire.in/business/gst-and-price-rise-public-taken-for-a-ride>.

⁵ Vivina Vishwanathan, *One Year of GST: Blame New Tax Regime for More Expensive Services*, THE HINDUSTAN TIMES (2018), <https://www.hindustantimes.com/india-news/one-year-of-gst-blame-new-tax-regime-for-more-expensive-services/story-hGvbneT2vYJNaAHreWe9PO.html>.

⁶ *supra* note 3.

system.⁷ Later it was seen that the introduction of the VAT coincided with a recession that hit Germany in the early 1970s. And many believe that the price rise could be because of the economic situation. Nevertheless, the state authorities were quick to take matters in their own hands and followed a three-pronged step to combat the state of affairs: firstly, the traders were informed about the workings of VAT, secondly, the states operated a price monitoring system and thirdly, the retail price surveys conducted by the consumer organizations monitored the prices.

The Irish experience was unlike what many countries experienced in terms of price rise. This was primarily because of the proactive role undertaken by the government prior to the changeover of the tax system. The government had taken cognizance of the turbulence in the transitory period well in advance. A price monitoring mechanism was put in place in 1972 that monitored the price changes in the transition period. The outcome of this exercise suggested a steady consumer price index and an undisturbed market reaction to the introduction of the new tax system. In 1973, the National Price Commission published a report which suggested that the effect of the changeover to the new tax system had no substantial impact on the retail prices.⁸ Moreover, to counter the potential ‘media scares’ that shaped the public perception about the transition, the Minister of Finance carried out publicity campaigns to caution customers against any unprecedented overcharging by the traders. In addition to that, ‘Price Desks’ were established where the consumers could report the cases of

⁷ Alexander Gelardi, *Value Added Tax and Inflation: A Graphical and Statistical Analysis*, 6 ASIAN JOURNAL OF FINANCE & ACCOUNTING 138 (2014), available at <http://www.macrothink.org/journal/index.php/ajfa/article/view/5065> (last visited Feb 15, 2020).

⁸ *supra* note 3.

overcharging or generally inquire about the prevailing prices. The little effect on prices can very well be attributed to the execution of price monitoring and public awareness.

Apprehending a public fear about price increase, New Zealand and South Korea had heavily relied on extensive advertising and campaigning for an orderly and stable implementation of GST.⁹ The government portrayed the change to be a smooth transition as opposed to an orchestrated dramatic change depicted by the traders. But the Netherlands experienced a steep price rise in the first three months following the changeover. The government had no choice but to introduce price-freeze control, which coerced the specific industries to roll back the excessive prices. After the prices had stabilized, the government had moderately relaxed the control.¹⁰

As seen from the discussion above, there are inflationary tendencies that arise when there is a changeover from one tax system to another. The recent example of the Australian implementation of the anti-profiteering regime under the GST has been a guiding principle for many countries. The next part of the paper discusses the Australian experience regarding its accomplishment of making the GST a public policy success.

III. THE AUSTRALIAN EXPERIENCE

The Australian indirect tax system underwent a significant reform in 2000, with the introduction of the Goods and Services Tax under the

⁹ Richard Prebble, *A Personal Reflection on the Goods and Services Tax — The New Zealand Experience*, 64 THE AUSTRALIAN QUARTERLY 115–122 (1992), available at www.jstor.org/stable/20635669.

¹⁰ *supra* note 3.

New Tax System Acts (hereinafter ‘NTS Act’), it was seen to be the most ambitious reform. The Australian Competition and Consumer Commission (hereinafter ‘ACCC’) was entrusted with the responsibility to check the changes in pricing and to minimize the inflationary impact thereof.¹¹ However, the role of ACCC was argued to be harmful in a competitive economy and claimed that the prices oversight would lead to increase in compliance costs for the businesses.¹²

Prior to the introduction of the GST in Australia, the ACCC focused on proper information dissemination and took steps to ensure compliance from the traders and corporates. And before the reform was rolled out, the ACCC ensured that the consumers as well as businesses were informed about their rights and obligations under the new tax system¹³. Since ACCC is conferred with statutory responsibilities, it can formulate guidelines about the meaning and constituents of price exploitation.¹⁴ These guidelines act as a touchstone for not only the ACCC to issue notices to the profiteer but also for the Courts while granting injunctions and imposing penalties.

¹¹ REPORT ON ACCC PRICE SURVEYS: PRELIMINARY POST-GST PRICE CHANGES, REPORT ON ACCC PRICE SURVEYS: PRELIMINARY POST-GST PRICE CHANGES 33 (2000).

¹² Jeff Borland, *Let's not waste time trying to gauge GST impact*, AUS. FIN. REV. (2000), <https://www.afr.com/policy/lets-not-waste-time-trying-to-gauge-gst-impacts-20000320-k9b3c>.

¹³ Jeff Pope & Prafula Fernandez, *Current tax reform in Australia: an ambitious programme*, BRIT. TAX REV. (2001), available at <https://espace.curtin.edu.au/handle/20.500.11937/10932>.

¹⁴ DAVID COUSINS, THE ROLE OF THE ACCC IN IMPLEMENTATION OF THE NEW TAX SYSTEM CHANGES 29–37 (2000).

A. Guidelines Issued by the Australian Competition and Consumer Commission (ACCC)

Under the guidelines¹⁵, the ACCC is responsible for two aspects of price control: firstly, check the change in the prices if it corresponds to the tax reduction; and secondly, to have regard to the competitiveness of the market while reviewing the prices.¹⁶ The guidelines also envisaged on having a clear method of ascertaining whether a price change was to be considered as an act of ‘profiteering’. The two rules applied were: (i) the Dollar Margin Rule, and (ii) the Price Rule.

The Net Dollar Margin Rule was considered to determine the price variance due to the changes in tax rates. The principle behind it is that if the incremental taxes fall below \$1 then correspondingly the price of the commodity must also fall by \$1. And an increase in the prices is permitted by the net increase in the taxes resulting from the NTS Act. The profit maximizing behaviour in the market was curtailed.¹⁷

The Price Rule mandates that the prices must not rise above 10 percent of the NTS Act alone. However, this rule created more confusion than the intended clarity, as it was expected that the oversight of pricing would raise the compliance cost which would go well above the limit of 10 per cent. But the guidelines provided that the capital expenditure

¹⁵ DAVID COUSINS, ACCC OVERSIGHT OF PRICING RESPONSES TO THE INTRODUCTION OF THE NEW TAX SYSTEM (2003), available at https://www.accc.gov.au/system/files/GST_final_report.pdf.

¹⁶ *supra* note 11, at 12.

¹⁷ Peter Burn, *The ACCC's Price Monitoring Regime*, BUSINESS COUNCIL OF AUSTRALIA BULLETIN (2000) <https://trove.nla.gov.au/work/39290398?q&versionId=52130201>.

incurred to comply with GST could pass on to the prices over several years.¹⁸

B. Public Awareness and Prevention of Media Scares

The public awareness was considered crucial for the consumers to know about the expected changes due to the NTS Act and to have a fair picture of the price changes as well. And to serve this objective the ACCC came up with the '*Everyday Shopping Guide with the GST*'.¹⁹ This shopping guide constituted the estimates of the price changes after the introduction of the NTS Act. The Shopping Guide was useful for both the consumers and the traders. It guided the consumers about the expected price changes, while assisting the traders to price the commodities in accordance with the Shopping Guide so as to avoid the imposition of penalty or sanction from the ACCC. Furthermore, the ACCC was also proactive in instituting proceedings against any company that would deceive or mislead the consumers into believing that there would be a price hike due to the introduction of GST.²⁰

¹⁸ R. Nair Sthanu, *Price Monitoring and Control under GST*, 52 ECO. & POL. WEEKLY (2017).

¹⁹ *Australia's Everyday Shopping Guide with the GST*, 27 THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION JOURNAL 12–15 (2000).

²⁰ *ACCC alleges GST misrepresentations by Meriton Apartments*, THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (Mar. 09, 2000), <https://www.accc.gov.au/media-release/accc-alleges-gst-misrepresentations-by-meriton-apartments>; *ACCC takes court action against Video Ezy and senior managers with first GST price exploitation case*, THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (May 26, 2000), <https://www.accc.gov.au/media-release/accc-takes-court-action-against-video-ezy-and-senior-managers-with-first-gst-price>.

C. Conducting Price Surveys

The Shopping Guide and Price Monitoring went hand in hand. The ACCC would conduct inquiries and investigate the complaints filed by the aggrieved consumers. Moreover, these activities were preceded by the price surveys that were undertaken to monitor the price movements. The price surveys had been implemented in three phases: (i) Pre-GST, (ii) During the Transition Period and, (iii) Post-GST. The surveys mostly covered the commonly produced retail goods under the ‘Monthly Supermarket Surveys.’²¹ These surveys had a two-fold objective: firstly, it helped to take the consumers into confidence on the accuracy of the predicted changes in the prices and to disconfirm the imputations put by the corporates in default; and secondly, to counter the unauthentic reports by the media leading to a potential panic in the market.²²

D. Seeking Commitment from the Businesses

The ACCC invited the biggest retailers, telecommunication companies and manufacturers to register for the Public Compliance Commitment. Once signed, the commitment meant that the corporate will adhere to the Guidelines and the NTS Act. On the other hand, the small

²¹ *ACCC reports on price changes before and after GST*, AUSTRALIAN COMPETITION & CONSUMER COMMISSION (Sep. 8, 2000), <https://www.accc.gov.au/media-release/accc-reports-on-price-changes-before-and-after-gst>.

²² *Home building industry focus of ACCC price watch*, THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (Jan. 5, 2000), <https://www.accc.gov.au/media-release/home-building-industry-focus-of-accc-price-watch>.

businesses were provided with the ‘Small Business Pricing Kit’, which contained the compliance guide and a retail price adjuster respectively.²³

The initiatives and efforts undertaken by the ACCC have certainly contributed in curbing and stabilizing inflation post the NTS Act.²⁴ Since the enforcement worked well in Australia, the Indian Government introduced the anti-profiteering clause along similar lines. The next part examines the anti-profiteering provision in India and analyses its shortcomings in the emerging markets.

IV. ANTI-PROFITEERING IN INDIA

A situation akin to the one faced by the countries mentioned above, was emanating in the Indian context as well. During the time when VAT was applicable, the revenue authorities did not pay heed to the fluctuating prices and did not establish a mechanism to monitor the prices to counter profiteering. A report published by the Comptroller and Auditor General, recorded a rise in prices of commodities since the introduction of VAT.²⁵ It concluded that even though there was decline in the tax rates, the suppliers did not pass on the benefits of the reduction in taxes to the end-consumers.²⁶ This provided a valuable learning experience for when GST was to be introduced in India. The legislature proposed to set up an anti-profiteering body which would check profiteering by the traders. Although

²³ *supra* note 11.

²⁴ RESERVE BANK OF AUSTRALIA, (2001), <https://www.rba.gov.au/publications/>.

²⁵ 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) https://cag.gov.in/sites/default/files/publication_files/SRA-value-added-tax.pdf.

²⁶ Ministry of Finance, Deduction of tax at source-income-tax deduction from salaries under section 192 of the income tax act, Circular No. 1/2017, 2017.

anti-profiteering measures were implemented under the West Bengal Anti-Profiteering Act, 1958, the term has disseminated to the masses with the introduction of GST.

The GST Council made Anti-Profiteering Rules ('APR') to operationalize the anti-profiteering clause. And a three-stage anti-profiteering administrative structure and mechanism to address consumer complaints about profiteering was brought into effect. The APR lays down the mechanism related to: (i) structure of the Authorities in the anti-profiteering scheme, (ii) mechanism for initiation of anti-profiteering proceedings, (iii) Procedure to be followed by the National Anti-Profiteering Authority to pass the orders.²⁷

The Central Goods and Services Tax Act (hereinafter 'CGST') and State Goods and Services Tax Acts (hereinafter 'SGST') authorized the Central Government to notify an authority to ensure that the benefit of reduction in tax rates passes on to the consumers by way of corresponding reduction in the prices of commodities.²⁸ Accordingly, the National Anti-Profiteering Authority (hereinafter 'NAA') was set up in 2018²⁹ to enforce

²⁷ VIDHI CENTRE FOR LEGAL POLICY, LEGISLATIVE CHANGES TO STRENGTHEN THE GST REGIME FIRST REPORT ON SPECIFIC RESEARCH ISSUES (Mar. 2019), available at <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/LegislativechangestostrenghtentheGSTregimeFirstreportonidentifiedissues.pdf>.

²⁸ Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, 2017, § 171(2); Maharashtra Goods and Services Tax Act, 2017, No. 43, Acts of Maharashtra Legislative Assembly, 2017, § 171(2).

²⁹ *Cabinet approves the establishment of the National Anti-profiteering Authority under GST*, PRESS INFORMATION BUREAU (Nov. 16, 2017), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=173564>.

them. Earlier the authority had a sunset clause of two-years, but the GST Council extended the term of the NAA.³⁰

A. The Ambiguity over ‘Commensurate Reduction’

Section 171 (1) of the CGST Act provides: “[a]ny reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices”. This provision casts a responsibility on the traders to pass on the benefit of GST to the recipient. However, the question that remains unanswered is the approach to commute the ‘commensurate reduction’.³¹ The apparent lack of a clear guideline and method to calculate ‘commensurate reduction’ was considered insubstantial by the NAA on account of it being simply mathematical.³² A possible explanation that germinates from the argument given by the NAA can be related to the meaning of ‘profiteering’. Since neither profiteering nor commensurate reduction is defined in the legislation³³, the meaning has to be interpreted in a manner that facilitates the mechanism.

Profiteering is defined as “[t]he wilful action of not passing on the benefits of any reduction in the rate of tax or the benefit of input tax credit

³⁰ Gireesh Prasad & Remya Nair, *Govt may extend term of GST anti-profiteering watchdog*, LIVE MINT (Oct. 04, 2018), <https://www.livemint.com/Politics/sQUPb6hC5Ol6YOcY1z6GuI/Govt-may-extend-term-of-GST-antiprofitteering-watchdog.html>.

³¹ Pawan Sharma v. M/s Sharma Trading Company 6/2018 NAA 2018.

³² Ravi Charaya v. Hardcastle Restaurants Pvt. Ltd 14/2018 NAA 2018.

³³ S. Ganesh Aravindh & Shobhana Krishnan, *Anti-profiteering under GST: An interminable inquest?*, 90 TAXMANN 257 (2018).

to the recipients by way of commensurate reduction in prices.”³⁴ Hence, ‘commensurate reduction’ has to be interpreted in a way that counters profiteering and not the profits per se. And the manufacturers/ traders are not at the liberty to choose the products they will pass the benefit on.³⁵

The focal argument is about the reduction in prices followed by the reduction in the tax rates. However, if the tax rates were to increase at some point, will the traders/manufacturers be allowed to widen their profit margins by increasing the prices of the commodities which is not commensurate to the increase in the tax rates? A strict interpretation of the legislation certainly indicates the reduction of prices and not an increase due to increased tax rates.³⁶

Furthermore, this provision has a one-dimensional approach while considering the reasons for increase in the prices. It does not take into account the changes in the prices due to the increase in the costs and appreciation in the commercial factors in the market.³⁷ However, the erstwhile orders of the NAA suggest an approach contrary to the above-mentioned. The NAA had previously absolved the liability of the traders/manufacturers from the anti-profiteering charges levelled against them, due to the increase in the price of raw materials.³⁸ These rather

³⁴ Goods and Services Tax Council, FAQ on Anti-Profiteering Provisions, CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS (2018) <http://www.cbic.gov.in/resources/htdocs-cbec/gst/Anti-prof-FAQs-FINAL-FAQs.pdf>.

³⁵ Ankur Jain v. Kunj Lub Marketing Pvt. Ltd., [TS-546-NAA-2018-NT].

³⁶ Saurav Agarwala, *Anti-Profiteering Provision: A Toothless Provision or a Dangerous Weapon*, 5 NLUJ LAW REV. 1, at 76 (2018), [http://nlujodhpur.ac.in/uploads/5\(1\)%20nluj%20law%20review%2076%20\(2018\).pdf](http://nlujodhpur.ac.in/uploads/5(1)%20nluj%20law%20review%2076%20(2018).pdf).

³⁷ Sukhbir Rohilla v. Pyramid Infratech, TS-455-NAA-2018-NT.

³⁸ Kumar Gandharv v. KRBL Limited, Case No. 3/2018, 2018-VIL-02-NAA.

contradicting approaches³⁹ that appear in the NAA orders throw the trader into confusion. And the last resort appears to knock at the High Court's doors.⁴⁰ Presently, the system follows a 'one size fits all' approach to compute the 'commensurate reduction' across different sectors. The difference in behaviour and consumer patterns in different industries is discernible; for example, the real estate sector, a restaurant and the Fast Moving Consumer Goods sector is incomparable.

V. ASSESSING THE POTENTIAL ROLE PLAYED BY THE DIGITAL PLATFORMS

The hyper digitization of the economy has changed the nature of retail distribution of goods. The traditional sale and purchase have now gone online to digital platforms. And these 'digital platforms' provide two sides wherein, on one side there are consumers and the other side has the businesses that access the consumers by using the platform.⁴¹ However, this industry has not yet reached saturation because of the growing internet penetration across regions thereby increasing its consumer base. And since the growth is monumental, the collection of GST poses a rational challenge. The starting point of the debate over the liability of such

³⁹ Bela Sheth Mao, *Anti-profiteering in GST: Caught in litigation, extension in tenure may not be enough*, THE ECONOMIC TIMES (Jul. 11, 2019), <https://economictimes.indiatimes.com/small-biz/gst/anti-profiteering-in-gst-caught-in-litigation-extension-in-tenure-may-not-be-enough/articleshow/70168665.cms?from=mdr>.

⁴⁰ Mekhla Anand, *The Emerging Dynamics of Anti-Profiteering*, GST SUTRA (Dec. 13, 2018), <http://gstsutra.com/experts/column?sid=467>.

⁴¹ ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), INTERNATIONAL VAT/GST GUIDELINES (OECD Publishing, Paris, 2017), available at <http://dx.doi.org/10.1787/9789264271401-en>.

platforms regarding GST, is the ability of these platforms to comply with the liability regime.⁴²

In the recent case of *Rishi Gupta v. Flipkart Internet Pvt. Ltd.*,⁴³ the Director General of Anti-Profiteering observed that upon the direction of the supplier the respondent had refunded the excess amount paid by the applicant and it was not a case of profiteering. The NAA noted that the respondent in the case was not the supplier but only the agent facilitating the trade between the consumer and the seller, and thereby cannot be held liable for contravention under Section 171 of the CGST Act.⁴⁴ However, the Director General of Audit, Central Board of Indirect Taxes and Customs decided to audit the major e-commerce platforms.⁴⁵

A suggested method to affix liability and support the compliance under the GST regime, is by Joint and Several Liability (hereinafter “JSL”). Generally, in cases of collection of GST, either the digital platform or the supplier is made liable. But if the digital platform is also made liable, it will act as an incentive for the digital platforms to perform due diligence and to ensure that the suppliers are compliant. Under this mechanism, the NAA would inform the digital platform of the suppliers that are detected to be non-compliant. Subsequent to the notice, the digital

⁴² ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), THE ROLE OF DIGITAL PLATFORMS IN THE COLLECTION OF VAT/GST ON ONLINE SALES (OECD Publishing, Paris, 2019), available at <https://doi.org/10.1787/e0e2dd2d-en>.

⁴³ *Rishi Gupta v. M/s Flipkart Internet Pvt. Ltd.*, Case, 5/2018, 2018-VIL-04-NAA.

⁴⁴ Mekhla Anand & Abhilasha Singh, *India: Anti-Profiteering Orders – A Right Step Forward? Part II*, MONDAQ (Dec. 10, 2018), <https://www.mondaq.com/india/Tax/756102/Anti-Profiteering-Orders-A-Right-Step-Forward-Part-II>.

⁴⁵ *Amazon face tax audit over GST refunds*, Live Mint (Jul 25, 2018), <https://www.livemint.com/Companies/AalYIamM32ivx69Yo9kvRO/Flipkart-Amazon-face-tax-audit-over-GST-refunds.html>.

platform will mandatorily have to either block the suppliers from the platform or compel the supplier to comply with the GST obligations. And upon failure to take action, the digital platform will be held jointly and severally liable for any future sales made without complying with Section 171 of the CGST Act.

This is not to suggest that the digital platforms will have to bear the brunt of the profiteering done by the suppliers, but just to enable them to assist in better enforcement. This approach achieves two objectives at once: *firstly*, the NAA will not have to prove the non-compliant behaviour of the supplier (it can issue a notice to the digital platform on a mere suspicion), nor the fact that the platform had prior knowledge of the apparent profiteering. And *secondly*, this will provide ample time to both, the supplier and the digital platform to rectify the issues and comply with their GST obligations.

VI. IS THE EXISTENCE OF A NEW REGULATORY BODY WARRANTED?

Lately, it has been argued that the constitution of an entirely new statutory body was uncalled for and the anti-profiteering measure should rather be regulated by the existing Competition Commission of India.⁴⁶ By the same token the ACCC's role in Australia was criticized on the pretext of the NTS Act promoting anti-competitive behaviour.⁴⁷ The price control

⁴⁶ Gaurav S. Ghosh, *Using anti-profiteering rules under the GST*, LIVE MINT (Sep. 7, 2017), https://www.livemint.com/Opinion/cZtYybHnqWCNmCrHPn2_v6J/Using-anti-profiteering-rules-under-the-GST.html.

⁴⁷ ALLAN FELS, THE GST ACTIVITIES OF THE ACCC SINCE JUNE 5–11.

methods were termed as ‘price surveillance methods’.⁴⁸ And, it was anticipated that the balancing act of the ACCC was bound to fail to instil confidence in the market.⁴⁹ Despite the inhibitions, the role of ACCC ensures that there was no unwarranted price rise.⁵⁰ The international experience regarding price monitoring authorities has been of little or no importance. After the introduction of GST in Canada in 1991, a separate Consumer Information Office was established to monitor price changes.⁵¹ And to monitor the effects of the Consumption Tax on the Japanese economy, the Price Bureau of the Economic Planning Agency was entrusted with the task to check the effects on prices when the tax rate rose from three percent to five percent in 1997.⁵² Therefore, the pertinent question is not whether the NAA is the right body to perform the task but whether the price oversight role in relation to tax changes is monitored properly.

VII. A STEP TOWARDS A COLLABORATIVE EFFORT

The crucial component of the ACCC’s price oversight strategy was public awareness and campaigns that enabled the customer to be vigilant against any price rise. This step, however, was taken as a premeditated

⁴⁸ Ian McEwin, *Watchdog needs an overhaul*, AUS. FIN. REV. (2000), available at <https://www.afr.com/policy/watchdog-needs-an-overhaul-20000501-k9gn1>.

⁴⁹ Warren Pengilley, *Who administers our Competition and Consumer Protection Laws?*, COMP. & CONSUMER LAW J. (1999), available at <http://classic.austlii.edu.au/au/journals/QUTLawJJ1/2002/1.html>.

⁵⁰ *Supra* note 11.

⁵¹ Pierre-Pascal Gendron, *Canadas GST at 21: a tax expenditure view of reform*, 1 WORLD JOUR. OF VAT/GST LAW 125–148 (2012), available at <https://www.tandfonline.com/doi/abs/10.5235/WJOVL.1.2.125>.

⁵² Japan, Price Bureau, Economic Planning Agency, *Price Report*, 1997.

action prior to the roll out of GST. In the Indian context, the time to take such pre-emptive actions is long gone. Nevertheless, the time is still appropriate for the NAA to conduct ‘monthly market surveys’ and retail price surveys. These surveys can be great indicators for the potential profiteering in the market, which would not only help the consumers but also help in issuing pre-notice to the e-commerce websites, in case of non-compliance by the suppliers.

In order to make compliance stricter, yet less burdensome for the NAA, both the vendors and the manufacturers must be included in the mechanism. A joint effort can be made by the companies in a specific industry and the NAA to publish a sample cost sheet to examine the accuracy of the total benefit passed on to the consumers. The company can obtain the cost data from the vendors and verify it with the sample sheet while keeping in mind commercial considerations. The incorporation of the vendors in the mechanism can be done by including an anti-profiteering clause in the agreement between the vendor and the company. Subsequently the vendor will be required to furnish the details of the sale that indicate that the benefit is passed on.⁵³

VIII. CONCLUSION

The transition period in the changeover to a new tax system is marked with turbulence and confusion in almost every country. At the outset, the government struggles to maintain a delicate balance between the market considerations and consumer protection. But over-regulation

⁵³ Anita Bhadra, *Anti – Profiteering under GST Issues & Challenges*, TAX GURU (Dec. 28, 2018), <https://taxguru.in/goods-and-service-tax/anti-profiteering-gst-issues-challenges.html>.

and lack of transparency only adds to the confusion. There is a need for specific guidelines and procedures that ascertain the calculation of 'commensurate reduction'.⁵⁴ Having said that, the procedure must not follow a strait-jacket formula to calculate profiteering, instead it must incorporate relevant commercial factors as well.

Moreover, the NAA must work with the industries and corporates to ensure effective compliance and better enforcement. This would not only reduce the burden on the NAA, but also give a chance to the industry to participate in better regulation. And lastly, to debate if at all price control or curb on profiteering is the right remedy for inflation caused due to a new tax regime,⁵⁵ can be guided by international experience. Although it is believed that in a free economy, price control may disrupt the normal course of demand and supply, the prospective regulations must be guided by past experiences.

As seen from the discussion above, the Indian position requires reconsideration of the current mechanism. And perhaps the first step in the right direction could be to remove the ambiguity in the provisions. Following which the regulator and the businesses can collaboratively participate in the effective implementation of the anti-profiteering clause under GST.

⁵⁴ Tasneem Bint Ghazi, *Incomplete provisions: Anti-Profiteering Measures in India under the CGST 2017*, KSLR COMMERCIAL FINANCIAL LAW BLOG (Oct. 10, 2019), https://blogs.kcl.ac.uk/kslrcommerciallawblog/2019/10/10/an-incomplete-provision-anti-profiteering-measures-in-india-under-the-cgst-2017/#_ftn4.

⁵⁵ Debashish Bandopadhyay, *Rationale for Anti-Profiteering under GST - A Game of Truth or Dare!*, TAX INDIA ONLINE, (Aug. 06, 2018), https://taxindiaonline.com/RC2/inside2.php3?filename=bnews_detail.php3&newsid=34340.