GST ON REAL ESTATE INDUSTRY

TOPIC: Long Term Lease & Anti-Profiteering

DATE: - 18th July, 2021

VENUE: - Navi Mumbai Branch of WIRC

TIME: - 5:00 P.M. to 7:00 P.M

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A. LONG TERM LEASE

The definition of the term ‘supply’ as given in Section 7 of the GST Act includes all forms of supply. The clause (a) of Section 7(1) of the said Act specifies some of the transaction as ‘supply’. The lease has been specified as one of the transaction which will constitute supply.

Further, as per Section (1A) the transaction specified in Schedule-II shall be considered as goods or services as specified therein. The clause (2) of Schedule-II specifies lease as a supply of service. Therefore, the lease transaction will be considered as ‘supply of service’. However, the dispute arises when long term lease is taken on payment of substantial amount known as premium, salami, etc. This dispute is prevalent since the service tax era 2007 when the service tax was levied on renting of immovable property.

- The constitutional validity on levying of service tax on renting of immovable property is yet to be decided by the Supreme Court.
- However, that is not relevant for GST as the tax is levied on such transaction by State also.
- The following judgments and the observation thereon holds the amount paid as premium/salami which cannot be considered as a ‘rent’ paid for the lease.

1. NATURE OF LEASE PREMIUM

1.1. The taxability of lease premium was subject matter of dispute under the Income tax Act. The nature of lease premium is discussed by the Supreme Court of India in the case of Commissioner of Income tax Vs. The Panbari Tea Co. as reported in 1965 AIR 1871.

1.2. In the said case two tea estates along with machinery and building were leased out for a period of 10 years on payment of premium of Rs.2,25,000/- as lease premium and an annual rent of Rs.54,000/-. The dispute in the said case was whether the lease premium paid can be treated as rent or a capital receipt not attracting tax as income. The Supreme Court discussed the difference between lease premium and rent as under:

The section, therefore, brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami

1.3. Applying the above principle, the Supreme Court observed that the lessor had parted the estate along with bungalows, buildings, machinery etc for 10 years and the lessee could enjoy the same. Therefore, there was a transfer of substantive interest of the lessor in the estates to the lessee and a conferment of a right on the lessee to use the said estates by exploiting the same. Accordingly, the Supreme Court held that lease premium is a capital receipt and not subject to income tax.

2. LEASE PREMIUM IS TOWARDS TRANSFER OF INTEREST IN PROPERTY

2.1. The levy of service tax on lease premiums is also subject to service tax as the department classified the services under the category of “renting of immovable property services”.

2.2. The question whether service tax on the same that is lease premium is subject to service tax and is covered under category of renting of immovable property services was answered in the Tribunal judgement in the case of M/S. GREATER NOIDA INDUSTRIAL DEVELOPMENT AUTHORITY VERSUS CCE & ST, NOIDA reported in 2014 (9) TMI 306 - CESTAT NEW DELHI in para 10.1 as under:

10.1. A lease is a transaction, which has to be supported by consideration. The consideration may be either premium or rent or both. The consideration which is paid periodically is called rent. As regards premium, the Apex Court in the case of Commissioner of Income Tax, Assam and Manipur Vs. Panbari Tea Co. Ltd. reported in (1965) 3 SCR 811 has made a distinction between premium and rent observing that when the interest of the lessor is parted with for a price, the price paid is premium or salami, but the periodical payments for continuous enjoyment are in the nature of rent, the former is a Capital Income and the latter is the revenue receipt. ***Thus, the premium is the price paid for obtaining the lease of an immovable property. While rent, on the other hand, is the payment made for use and occupation of the immovable property leased. Since taxing event under Section 65(105)(zzzz) read with Section 65(90a) is renting of immovable property, service tax would be leviable only on the element of rent i.e. the payments made for continuous enjoyment under lease which are in the nature of the rent irrespective of whether this rent is collected periodically or in advance in lumpsum. Service tax under Section 65(105)(zzzz) read with Section 65 (90a) cannot be charged on the 'premium' or 'salami' paid by the lessee to the lessor for transfer of interest in the property from the lessor to the lessee as this amount is not for continued enjoyment of the property leased. Since the levy of service tax is on renting of immovable property, not on transfer of interest in property from lessor to lessee, service tax would be chargeable only on the rent whether it is charged periodically or at a time in advance.***

2.3. It will be evident from the above judgement that the Tribunal has relied upon the case of Panbari Tea Co. Ltd. supra to hold that the lease premium paid is for transfer of interest in the property and that such transfer is not covered under the purview of the definition of “renting of immovable property services” and is not liable to service tax.

2.4. However, the tribunal held that with respect to the charges recovered by the authority other than lease premium is covered under the category of “renting of immovable property services” w.e.f. 1 July 2010 after the introduction of clause (v) in explanation 1 to section 65(105) (zzzz) of Finance Act 1994.

2.5. The assessee has filed an appeal before the Allahabad High Court against the said judgement reported in GREATER NOIDA INDUSTRIAL DEV. AUTHORITY versus COMMR. OF CUS., C. EX. Reported in 2015 (40) S.T.R. 95 (All.) for holding that tax is levied from 1-7-2010. The High Court agreed with the view of the tribunal that annual rent payment for such a long-term lease are covered in the definition from 1-7-2010. However, the tribunal made the following observation with respect to inclusion of lease premium in the value of taxable supply in para 36 which is reproduced below:

36. *We may not enter into the issue as to whether premium paid along with rent fixed should form the total consideration for levy of Service Tax or not as no appeal has been filed by the Department against the order of the Tribunal. But at the same time if the Tribunal has held that only rent charged be considered for computation of Service Tax, it will not mean that the Tribunal has held that a part of the same transaction was taxable and part of it as not taxable. In our opinion, the Tribunal has rightly held that the lease of open land for use as commercial/business purpose, as an taxable event, but what amount is to be taken into consideration for computation of Service Tax has been confined to the periodical rent only. The plea raised to the contrary by the learned counsel for the appellant has therefore, to be rejected.*

2.6. The assessee has filed an appeal before the Supreme Court and an interim stay in respect of the said judgement of the High Court has been granted by the Supreme Court. The said appeal is pending before the Supreme Court as reported in 2015 (40) S.T.R. J231 (SC).

2.7. The Bombay High Court in the case of CITY & INDUS. DEV. COPRN. OF MAHARASHTRA LTD. reported in 2015 (37) S.T.R. 165 (Bom.) referred to judgment of M/S. GREATER NOIDA INDUSTRIAL DEVELOPMENT AUTHORITY (supra) granting waiver of pre-deposit to the assessee wherein the tax demand was confirmed on the lease premium charged by the corporation under the category of renting of immovable property services.

3. LEASE PREMIUM IS ADVANCE RENT

3.1. The Tripura High Court in the case of HOBBS BREWERS INDIA PVT. LTD. reported in 2016 (45) S.T.R. 60 (Tripura) has held that lease premium paid for leased out land is like charging one time rent and then rebate given for yearly rent to be paid and thus chargeable to service tax under the category of renting of immovable property services. The para 5 of the said judgement is reproduced below:

> *5. It is urged on behalf of the petitioner that what is taxable is the rent and not premium. This argument is without any basis whatsoever. What is taxable is the consideration for the transfer. Even if premium is charged that is like charging of one time rent and then rebate is given for the yearly rent to be paid. Premium is also part of the lease money. Therefore, the entire transaction both premium and rent are amenable to service tax and service tax will have to be paid on the same.*

4. LEVY OF GST ON LEASE PREMIUM

4.1. The levy of GST on lease premium was decided by the Bombay High Court in the case of Builders Association of Navi Mumbai reported in 2018 (12) G.S.T.L. 232 (Bom.). The High Court has considered the judgement of Supreme Court in the case of The Panbari Tea Co. (supra) and observed that the said judgement is not relevant as the Supreme Court in the said case was essentially concerned with is not the transaction or the nature thereof, but the income generated or derived from it. The relevant para 15 of the Bom HC judgment is reproduced below:

15. ……. Even by terming the gain or income as Salami, what the Hon'ble Supreme Court was essentially concerned with is not the transaction or the nature thereof, but the income generated or derived from it. Its treatment, therefore, led to the Hon'ble Supreme Court referring to Section 105 of the Transfer of Property Act, 1882. In these circumstances, the opinion rendered is that the income was treated rightly as a capital receipt. In the context, a lease of immovable property is a transfer of right to enjoy the property as termed by the Transfer of Property Act, 1882 for a price paid. That is how it being a transfer that the income derived in relation to lease of immovable property was treated as above.

4.2. The Bombay High Court in para 18 has also considered whether granting of lease and charging lease premium amounts to discharge of sovereign or statutory function by the corporation and thus whether can be said to be beyond the purview of GST. The relevant para 18 is reproduced below:

18. In the case of Commissioner of Central Excise, Nashik (supra), the demand of service tax was in issue. The Finance Act, 1994 and particularly Section 65 Clause (64) was relied upon to urge that the service charges collected by the MIDC from the allottees of the plots are in relation to services provided by the MIDC to the plot holders and the same is covered by the category "maintenance, management and repairs" under Clause (64) of Section 65 of the Act. It is in relation to such a controversy that the Hon'ble Supreme Court's judgment in the case of Shri Ramtanu Co-operative Housing Society Ltd. (supra) outlining the legal position and the status of the Corporation is referred by the Division Bench. The issue raised related to collection of service charges, but whether the services rendered are taxable services or not. The Division Bench noted that this consideration is an amount received for the facilities and amenities provided. That is a statutory function. It is in these circumstances that the Revenue's appeal was dismissed. All the observations in the paragraphs relied upon must be seen in the backdrop of the essential controversy noted above. With respect, it cannot be said that the activities performed by sovereign or public authorities under the provisions of law, which are in the nature of statutory obligations are excluded from the purview of the present enactment. Pertinently, the dividing line between governmental and non-governmental, sovereign and regal functions and otherwise is not very thin and post globalisation, liberalisation and privatization. In that context, a useful reference can be made to a judgment of the Hon'ble Supreme Court in the case of N. Nagendra Rao and Co. v. State of Andhra Pradesh - AIR 1994 SC 2663. The observations in Paras 23 and 24 are extremely relevant.

4.3. Further the Bom High Court in para 20 has relied upon the judgement of the Allahabad High Court holding that it was right in arriving at the conclusion that the same was a taxable service. An appeal has been filed before the Supreme Court by the Builders Association of Navi Mumbai which is pending for disposal.

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5. WHETHER MIDC OR ANY OTHER CORPORATION CARRYING OUT SIMILAR ACTIVITIES CAN BE CONSIDERED AS STATE

5.1. The Supreme Court in the case of Balmer Lawrie and Co Ltd reported in 2013 (8) SCC (345) vide order dated 20 February 2013 decided the issue whether the appellant can be considered as state and falls within the purview of article 12 of Constitution of India. The Supreme Court in para 11 observed as under:

> *11……Every governmental function need not be sovereign. State activities are multifarious. Therefore, a scheme or a project, sponsoring trading activities may well be among the States essential functions, which contribute towards its welfare activities aimed at the benefit of its subjects, and such activities can also be undertaken by private persons, corporates and companies. Thus, considering the wide ramifications, sovereign functions should be restricted to those functions, which are primarily inalienable, and which can be performed by the State alone. Such functions may include legislative functions, the administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon etc. Therefore, mere dealing in a subject by the State, or the monopoly of the State in a particular field, would not render an enterprise sovereign in nature. (Vide: Agricultural Produce Market Committee v. Ashok Harikuni & Anr. etc. AIR 2000 SC 3116; State of U.P. v. Jai Bir Singh, (2005) 5 SCC 1; Assam Small Scale Ind. Dev Corporation Ltd. & Ors. v. M/s. J.D. Pharmaceuticals & Anr., AIR 2006 SC 131; and M.D., H.S.I.D.C. & Ors. v. M/s. Hari Om Enterprises & Anr., AIR 2009 SC 218)*

5.2. Further in para 17 the Supreme Court laid down the factors to decide whether a company/corporation owned by the government can be considered an instrumentality or an agency of the state. The said para is reproduced below:

> *17. In order to determine whether an authority is amenable to writ jurisdiction except in the case of habeas corpus or quo warranto, it must be examined, whether company/corporation is an instrumentality or an agency of the State, and if the same carries on business for the benefit of the pubic; whether the entire share capital of the company is held by the government; whether its administration is in the hands of a Board of Directors appointed by the government; and even if the Board of Directors has been appointed by the government, whether it is completely free from governmental control in the discharge of its functions; whether the company enjoys monopoly status; and whether there exists within the company, deep and pervasive State control. The other factors that may be considered are whether the functions carried out by the company/corporation are closely related to governmental functions, or whether a department of government has been transferred to the company/corporation, and the question in each case, would be whether in light of the cumulative facts as established, the company is financially, functionally and administratively under the control of the government. In the event that the Government provides financial support to a company, but does not retain any control/watch over how it is spent, then the same would not fall within the ambit of exercising deep and pervasive control. Such control must be particular to the body in question, and not general in nature. It must also be deep and pervasive. The control should not therefore, be merely regulatory.*

5.3. Based on the above guidelines the Supreme Court held in para 27 held that Balmer Lawrie and Co Ltd falls within the definition of state. The said para is reproduced below

> *27. In order to determine whether the appellant company is an authority under Article 12 of the Constitution, we have considered factors like the formation of the appellant company, its objectives, functions, its management and control, the financial aid received by it, its functional control and administrative control, the extent of its domination by the government, and also whether the control of the government over it is merely regulatory, and have come to the conclusion that the cumulative effect of all the aforesaid facts in reference to a particular company i.e. the appellant, would render it as an authority amenable to the writ jurisdiction of the High Court.*

5.4. Applying the said principle in the case of KIAD, the Bangalore Tribunal in the case of Karnataka Industrial Area Development Board reported 2020 (6) TMI 227 - CESTAT, BANGALORE held that KIADB is a state undertaking and a creature of a statute to exercise the power and thus the said board is a limb or an agent of the state government.

6. WHETHER MIDC IS STATUTORY BODY AND CARRYING OUT SOVEREIGN FUNCTION

6.1. The issue whether functions carried out by MIDC can be considered as sovereign functions is decided by the Tribunal in the case of MAHARASHTRA INDUSTRIAL DEVELOPMENT CORPORATION reported in 2014 (36) S.T.R. 1291 (Tri.-Mumbai).The Tribunal after going through the provisions of the MIDC Act,1961 and MIDC Rules 1962 in para 7 observed as under:

> *7…….. After going through the provisions of MID Act, 1961, we find that the appellant is discharging their statutory function cast on them by MID Act and Rules framed thereunder.*

6.2. The department filed an appeal against the above order before the Bombay High Court as reported in 2018 (9) G.S.T.L. 372 (Bom.). The Bombay High Court in para 10 relied upon the judgement of Supreme Court in the case of Ramtanu Co-operative Housing Limited and Another reported in AIR 1970 SC 1771 wherein the Supreme Court in para 16 observed as under:

16. ……In the present case, these attributes of a trading Corporation are absent. The Corporation is established by the Act for carrying out the purposes of the Act. The purposes of the Act are development of industries in the State. The Corporation consists of nominees of the State Government, State Electricity Board and the Housing Board. The functions and powers of the Corporation indicate that the Corporation is acting as a wing of the State Government in establishing industrial estates and developing industrial areas, acquiring property for those purposes, constructing buildings, allotting buildings, factory sheds to industrialists or industrial undertakings. It is obvious that the Corporation will receive moneys for disposal of land, buildings and other properties and also that the Corporation would receive rents and profits in appropriate cases. Receipts of these moneys arise not out of any business or trade but out of sole purpose of establishment, growth and development of industries."

6.3. The Bombay High Court after relying upon the said SC judgment observed in para 11,12, 14 as under :

> *11……. The Apex Court held that the said Corporation discharges sovereign functions…….*
>
> *12…….. Thus, we find that the activities for which the demand was made are part of the statutory functions of the MIDC under MID Act……..*
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> *14. MIDC is a statutory Corporation which is virtually a wing of the State Government. It discharges several sovereign functions…….*

6.4. The term “business” is defined under section 2(17) of the CGST Act 2017. The said definition is an inclusive definition and at clause (i) includes the following activities under the definition of business.

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

6.5. It will be evident from the above that any activity or transaction carried out by the state government engaged as public authority is also covered in the definition of business. Therefore, whether the judgement of Ramtanu Cooperative Housing Ltd supra holding that the activities carried out by the corporation is not a business will have to be further analysed in view of the above provisions.

7. APPLICABILITY OF PRINCIPLE OF EMINENT DOMAIN

7.1. Eminent Domain is power of the sovereign to acquire property of an individual for public use without the necessity of his consent. Payment of just compensation to the owner of the land which is acquired is part of exercise of this power. Eminent domain power is regarded as an inherent power of the State to take private property for public purpose.

7.2. The Supreme Court in the case of Peerappa Hanmantha Harijanand others Vs. State of Karnataka and anr. reported in [(2015) 10 SCC 469] had decided the matter where the State government of Karnataka in exercise of its power of eminent domain under section 28 of Karnataka Industrial Areas Development Act had acquired land. The Supreme Court made the following observations with respect to the land acquired and transferred to KIAD by the state as under:

Thus, the acquisition of land in favour of the KIADB is abundantly clear from the preliminary and final notifications issued by the state government and thereafter following the procedure under sub-Sections (6) and (7) of Section (28) of the KIAD Act, it took possession of the acquired land from the owners who were in possession of the same and was transferred in favour of the KIADB for its disposal for the purpose for which lands were acquired as provided under Section 32(2) of the KIAD Act read with the Regulations referred to supra framed by the KIADB under Section 41(2) (b) of the KIAD Act.

7.3. Therefore, on a combined reading of the above judgement in the case of Balmer Lawrie and Co Ltd supra and Peerappa Hanmantha Harijanand others supra it is evident that such corporations falls within the definition of the state and carry out the function of eminent domain of the state.

8. WHETHER KIAD IS STATUTORY BODY AND CARRYING OUT SOVEREIGN FUNCTION

8.1. The Bangalore Tribunal in the case of KARNATAKA INDUSTRIAL AREAS DEVELOPMENT BOARD reported in 2020 (6) TMI 227 - CESTAT, BANGALORE has held that KIDC is a state undertaking and a creature of statute to exercise the power of “eminent domain”. Accordingly, KIDC is held to be a statutory body discharging the statutory function as per the KIAD Act, 1966 and thus the activity carried out by the said authority cannot be considered as a service and thus service tax cannot be levied or charged for executing such activities. The observation of the tribunal is reproduced below:

……A careful reading of the aforesaid provisions of KIADAct and KIADB Regulations would clearly go to show that the appellant is a State undertaking and creature of a statute to exercise the power of 'eminent domain'. The appellant is engaged in discharging statutory functions under an act of Legislature viz. KIAD Act, 1966. It is a statutory body performing statutory functions and exercising statutory powers. Once carrying out the objectives of the Act, then it cannot be treated as a service provider under the Finance Act, 1994. Further we find that there is no service provider-client relationship so as to warrant the levy of service tax under the provisions of Finance Act, 1994. Appellant has undertaken various activities and functions in the State of Karnataka as per the directions of the State Government given from time to time under the provisions of the Act and hence their activities cannot be considered as taxable service and no service tax can be levied for these activities.

9. DIFFERENCE BETWEEN SOVEREIGN AND NON-SOVEREIGN POWERS

9.1. The Supreme Court in the case of N. Nagendra Rao and Co. v. State of Andhra Pradesh reported in AIR 1994 SC 2663 in para 23 & 24 observed as under:

> *23. In Federated State School Teachers' Assn. of Australia v. State of Victoria3O, the distinction between sovereign and non-sovereign functions was categorised as regal and non-regal functions. The former was confined to legislative power, the administration of the laws and exercise of the judicial power. In respect of non-regal functions, which could be assumed by legislative power, the State was held as a corporation analogous to a private company. The learned Judge observed as under:*
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> > *"Regal functions are inescapable and inalienable. Such are the legislative power, the administration of the laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of the law is merely analogous to that of a private company similarly authorised."*
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> *This decision reflects modem thinking. The State is treated in performance of its functions like a private company. It would obviously be answerable for negligence of its employees.*

24. In the modem sense the distinction between sovereign or non sovereign power thus does not exist. It all depends on the nature of power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topics and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but since it is an exercise of legislative power, a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government in exercise of its executive action be sued for its decision on political or policy matters. It is in public interest that for acts performed by the State either in its legislative or executive capacity it should not be answerable in torts. That would be illogical and impractical. It would be in conflict with even modem notions of sovereignty. One of the tests to determine if the legislative or executive function is sovereign in nature is whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matter is impliedly barred.

9.2. It will be evident from the above observation that sovereign function includes acts such as defence of the country, foreign affairs etc which are indicative of external sovereignty and are political in nature. Further it also laid down a test as to how to determine if the legislative or executive function is sovereign in nature and whether the state is answerable for such action in the courts of law.

9.3. Further the Supreme Court in the case of Haryana State industrial development Corporation versus Hari Om Enterprise reported 2009 (16) SCC 208 has observed that the function of the appellant is a sovereign function at page 6 of the judgement. The relevant para is reproduced below:

> *……... Indisputably, the function of the appellant is a sovereign function. It, in any event is a State, within the meaning of Article 12 of the Constitution of India. Its action, therefore, must be fair and reasonable so as to subserve the requirements of Article 14 of the Constitution.*

9.4. Therefore, whether the function of eminent domain can be said to be a sovereign function needs to be analysed in view of the above judgements.

10. Assignment of lease – Scope of entry no. 41

The Notification No. 12/2017 dated 28-06-2017 – Central Tax (Rate) at entry Number 41 provides exemption with respect to granting of long-term lease which is reproduced below: -

> *One time upfront amount (called as premium, salami, cost, price, development charges or by any other name) leviable in respect of the service, by way of granting long term (thirty years, or more) lease of industrial plots, provided by the State Government Industrial Development Corporations or Undertakings to industrial units.*

The provisions of section 108 (j) of Transfer of Property Act, 1882 provides the manner in which the lessee may transfer or sub-lease any property. The said provision provides that the lessee may transfer the whole or any part of his interest in the property, (i) absolutely (ii) by way of mortgage, or (iii) sub-lease. So also, any transferee of such interest or part may again transfer it. However, such transfer shall not exonerate him from liabilities attached to the lease.

The judgement of Devidasa Bhatta V. B. Ratnakara Rao, AIR 1966 Mys 147, court held as under:

> *6. …….If the true principle is that although a liability arising out of a privity out of estate comes to an end when there is an assignment of the lease and that a liability arising out of privity of contract does not so come to an end, it is difficult to understand on what principle it could be said that even the liability arising out of a privity of contract can be made to perish by mere assignment by the lessee to someone.* ***Such assignment can produce only a privity of estate between the lessor and the assignee and until that privity of estate gets transformed into a privity of contract which can happen if the lessor collects the rents from the assignees the assignor lessee continues to be liable to perform his obligations under the lease.***

It will be evident from the above provisions and judgements that in case of assignment of lease there is only privity of estate between the lessor and assignee which gets transformed into a privity of contract if the lessor collects the rents from the assignee the assignor.

B. Anti-Profiteering

The Section 171 of the GST Act reads as follows:

***171. Antiprofiteering measure**.— (1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*

(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

[(3A) Where the Authority referred to in sub-section (2), after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:

Provided that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

Explanation.—For the purposes of this section, the expression —profiteered‖ shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both].

As per the procedure the application by any person is required to be filed before the relevant screening committee of the State. As per Section 128 of the GST Act, the application from entrusted parties complaining about anti-profiteering will be received by the screening committee. They make a preliminary inquiry on the application filed by entrusted party and if they are satisfied with the complain, they will forward the application to National Anti-Profiteering Authority.

The Director General of Anti-Profiteering (DGAP) investigates in order to arise on the benefit received by the registered person and gives a report. The registered person should submit the data to substantiate that no profit has accrued to him or if the profit has accrued to him, then he has passed on the benefits.

The manner of computing the anti-profiteering by the authority is comparison of its availability of credit in pre-GST era and post-GST era. The said credit is compared with the taxable turnover in order to arrive at the ratio of credit with the taxable turnover. The following table will substantiate the same.

	ITC available pre-GST			ITC available post-GST		
Period	FY 2016-17	FY 2017-18 (April to June 2017)	Total	July, 2017 to January 2018	February, 2018	July, 2017 to February, 2018
VAT	21557942	11476408	33034350	-	-	-
CGST	-	-	-	31095595	5478788	36574383
SGST	-	-	-	31095595	5478788	36574383
IGST	-	-	-	11972568	1829277	13801845
Total	21557942	11476408	33034350	74163758	12786853	86950611

	ITC available pre-GST			ITC available post-GST		
Taxable turnover	2924955429	76935214	3001890643	725620566	482186312	1207806878
ITC ratio to taxable value (%)	0.74	14.92	1.1	10.22	2.65	7.2
Additional ITC availed (%)						6.1
Tax rate	5.25% (VAT)	5.25% (VAT)		12% (GST)	8% (GST)	

Such method of arriving at the anti-profiteering is erroneous due to the following factors:

a) Synchronization of credit with milestone payment
b) Increase in tax rate of input service
c) Increase in output tax rate

The points should be substantiated based on the evidence in the reply. However, the authorities have not accepted these points and the entire issue is before the Delhi High Court in the case of Jubilant Foods reported in 2019 (5) TMI 568 where the preliminary points have been raised.

a) There is no constitutional power to recover such amount.
b) National Anti-Profiteering has not made any rules for determination of profit. In absence of any guidance, the entire matter is decided by authority on whims and fancies.

It has been observed that many builders/developers have passed on the benefit, but the credit note describes the benefit as a “discount”. The National Anti-Profiteering Authority has not considered such discount as passing of benefit u/s. 171 of the Act. Therefore, it is advisable to always indicate clearly in the credit note the description as ***“benefit passed under Section 171 of the GST Act.”***

Further, the benefit should be exactly matching with the amount as shown above. Any more benefit to be given shall be separately stated in the credit note. Otherwise the National Anti-Profiteering Authority will not agree with the benefit which are passed on.

The benefit only accrues to the customer who has purchased the premises in pre-GST era and has paid certain amount on post-GST era. If the project itself has started in GST era, or the customer has purchased the premises in GST era, the section will not apply.

THANK YOU

BALANCED VIEW

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