HIGH COURT OF DELHI
Bench: Acting Chief Justice Manmohan and Justice Dinesh Kumar Sharma
Date of Decision: 29th January, 2024

W.P.(C) 7743/2019
With W.P.(C) 7743/2019
W.P.(C) 10999/2018
W.P.(C) 12444/2018
W.P.(C) 12647/2018
W.P.(C) 13194/2018
W.P.(C) 378/2019
W.P.(C) 1418/2019 & CM APPL. No.6501/2019
W.P.(C) 1655/2019 W.P.(C) 2347/2019
W.P.(C) 3759/2019 W.P.(C) 4213/2019
W.P.(C) 5558/2019 & CM APPL.No.24368/2019
W.P.(C) 8162/2019
W.P.(C) 7910/2019 & CM APPL.No.32779/2019
W.P.(C) 7911/2019
W.P.(C) 8078/2019
W.P.(C) 9053/2019

W.P.(C) 11253/2019 & CM APPL. No.46337/2019 W.P.(C) 12355/2019
W.P.(C) 12717/2019 W.P.(C) 12847/2019 & CM APPL.No.52474/2019
W.P.(C) 969/2020 & CM APPL.5342/2020
W.P.(C) 1171/2020
W.P.(C) 1406/2020 & CM APPL. No.4879/2020
W.P.(C) 1780/2020 W.P.(C) 2083/2020 & CM APPL.No.7369/2020
W.P.(C) 2084/2020 & CM APPL. No.7371/2020
W.P.(C) 2445/2020
W.P.(C) 2490/2020 W.P.(C) 2742/2020 & CM APPL. No.9552/2020
W.P.(C) 3737/2020 W.P.(C) 3910/2020
W.P.(C) 3911/2020 W.P.(C) 4131/2020
W.P.(C) 4345/2020
W.P.(C) 4348/2020
W.P.(C) 4375/2020 W.P.(C) 4516/2020 W.P.(C) 4607/2020
W.P.(C) 4824/2020 & CM APPL.No.2183/2021
W.P.(C) 4957/2020 W.P.(C) 5347/2020 & CM APPL. No.23558/2020
W.P.(C) 5798/2020 W.P.(C) 5979/2020 & CM APPL. No.21655/2020
W.P.(C) 6671/2020 W.P.(C) 7412/2020 & CM APPL. No.24800/2020
W.P.(C) 7736/2020 W.P.(C) 8229/2020
W.P.(C) 8751/2020 & CM APPL.No.28192/2020
W.P.(C) 9146/2020 & CM APPL. No.29630/2020
W.P.(C) 9935/2020 & CM APPL. Nos.31625-26/2020W.P.(C) 10901/2020 & CM APPL. 34162-34163/2020

W.P.(C) 10932/2020 & CM APPLs..34237-34238/2020 AND 8172/2022
W.P.(C) 997/2021 & CM No.2721/2021
W.P.(C) 1357/2021
W.P.(C) 1366/2021
W.P.(C) 1593/2021 & CM APPL. No.4529/2021
W.P.(C) 1765/2021
W.P.(C) 1766/2021
W.P.(C) 1852/2021 & CM Nos.5359/2021, 29026-29027/2021
W.P.(C) 1951/2021 & CM APPL. Nos.5705-06/2021

W.P.(C) 2440/2021

Reckitt Benckiser India Private Limited And Others ..... Petitioners

Versus

Union Of India And Ors. ..... Respondents

Legislation:

Section 171 of the Central Goods and Services Tax Act, 2017 (Act, 2017)
Rules 122, 124, 126, 127, 129, 133, and 134 of the Central Goods and Services Tax Rules, 2017 (Rules, 2017)
Articles 14 and 19(1)(g), 38, 39(b), 39(c), 246A, 300A of the Constitution of India
Section 9A of the Customs Tariff Act, 1975
Section 19(3) of the Competition Act, 2002

Subject: Constitutional Validity of GST Anti-Profiteering Provisions – Upheld constitutionality of Section 171 of the Central Goods and Services Tax Act, 2017, and related Rules (122, 124, 126, 127, 129, 133, and 134) – The provisions ensure consumer welfare by mandating suppliers to pass on benefits of tax reduction and Input Tax Credits to consumers – Powers of National Anti-Profiteering Authority (NAA) and Director General of Anti-Profiteering (DGAP) are in line with the objectives of GST and do not constitute over-delegation or violation of fundamental rights.

Headnotes:

Constitutional Validity Upheld - Section 171 of Act, 2017 and Rules 122, 124, 126, 127, 129, 133, and 134 of Rules, 2017 - Addressing unjust enrichment and consumer welfare - Provision mandates suppliers to pass on benefits of reduced tax rates or Input Tax Credits to consumers - Authority established to ensure compliance [Paras 1-3, 86-163].

Anti-profiteering Measure - Section 171 - Ensuring benefits of reduced tax rates and Input Tax Credits reach consumers - Prevents suppliers from unjust enrichment at the expense of consumers [Paras 95-98, 100, 102].

Judicial Review and Appeals - No direct right of appeal against NAA decisions - Judicial review available under Article 226 - Legislative prerogative to determine appellate mechanisms [Paras 141-144, 150].

Composition and Function of NAA - Comprising domain experts, not requiring judicial members - Performing primarily fact-finding functions in ensuring GST benefits are passed to consumers [Paras 146-150].

Time Limits in Rules - Directory, not mandatory - Beneficial legislation for consumer welfare to be liberally construed - Non-adherence to time limits does not vitiate proceedings [Para 158].

Expanding Investigation Scope - DGAP empowered to investigate beyond initial complaint - Ensuring comprehensive examination and consumer protection [Paras 158-160].

Methodology for Determining Profiteering - No fixed formula - Case-specific approach required - NAA to determine fair and reasonable methodology [Paras 124-127].

Decision: The constitutional validity of Section 171 of Act, 2017 and certain rules of Rules, 2017 is upheld. Anti-profiteering measures in GST law are legal and necessary for consumer protection and prevention of unjust enrichment.

Referred Cases:

- Ahmedabad Urban Development Authority v. Sharakumar Jayantikumar Pasawala, (1992) 3 SCC 285
- V.V.S. Sugars v. Govt. of A.P., (1999) 4 SCC 192
- Ramesh Birch vs. Union of India, 1989 Supp SCC 430
- Barium Chemicals Ltd. & Ors. v Company Law Board & Ors. [AIR 1967 SC 295]
- Madras Bar Association v. Union of India, (2015) 8 SCC 583
- Madras Bar Association v. Union of India, (2010) 11 SCC 1
- L. Chandra Kumar v. Union of India, (1997) 3 SCC 261
- Indian Carbon Limited v. State of Assam (1997) 6 SCC 479
- Shree Bhagwati Steel Rolling Mills v. CCE 2015 (326) E.L.T. 209 (SC)
- Pioneer Urban Land and Infrastructure Ltd. vs. Union of India, (2019) 8 SCC 416
- State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312
- R. K. Garg v. Union of India, 1981(4) SCC 675
- Steelworth Ltd. vs. State of Assam [1962] Supp (2) SCR 589]
- Gopal Narain vs. State of U.P. [AIR 1964 SC 370]
- Ganga Sugar Corp. Ltd. vs. State of U.P. [(1980) 1 SCC 223]
- Lohia Machines Ltd. vs. Union of India, (1985) 2 SCC 197
- Pt. Banarsi Das Bhanot vs. State of Madhya Pradesh, AIR 1958 SC 909
- Sita Ram Bishambher Dayal vs. State of U.P. (1972) 4 SCC 485)
- Bhatnagars & Co. Ltd. vs. Union of India, AIR 1957 SC 478
- Mohmedalli and Ors. vs. Union of India and Ors., AIR 1964 SC 980
- M.K. Papiah vs. Excise Commr. (1975) 1 SCC 492
- McDowell & Co. Ltd. v. CTO, (1985) 3 SCC 230
- Diwan General and Sugar Mills Pvt. Ltd. & Ors. vs. Union of India, AIR (1959) SC 626
- Union of India vs. Cynamide India Ltd., (1987) 2 SCC 720
- Madras Bar Association v. Union of India & Anr., (2021) SCC OnLine SC 463
- Excel Crop Care Ltd. vs. Competition Commission of India, (2017) 8 SCC 47

- Dhanjibhai Ramjibhai vs. State of Gujarat, (1985) 2 SCC 5
- Ramanarayan Popli v. CBI (2003) SCC (Crl.) 869
- P.K. Narayanan v. State of Kerala (1995) 1 SCC 142
- Mohd. Naushad v. State (NCT of Delhi) 2023 SCC Online SC 784
- Hari and Anr. v. State of UP 2021 SCC Online SC 1131
- Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624
- State through Superintendent of Police v. Nalini & Ors. (1999) 5 SCC 253
- Yakub Abdul Razak Memon v. State of Maharashtra (2013) 13 SCC 1
- Arvind Singh v. State of Maharashtra (2021) 11 SCC 1
- State of Haryana v. Krishan (2017) 8 SCC 204
- Phula Singh v. State of Himachal Pradesh AIR 2014 SC 1256
- Indrakunwar v. State of Chhattisgarh 2023 SCCOnline 1364
- Chandran v. State of Kerala (2011) 5 SCC 161
- P.N. Krishna Lal v. Govt. of Kerala 1995 Supp (2) SCC 187
- Mekala Sivaiah v. State of A.P. (2022) 8 SCC 253
- Ravasaheb and Ors. v. State of Karnataka (2023) 5 SCC 391

J U D G M E N T

MANMOHAN, ACJ:

THE CHALLENGE

1. Present writ petitions have been filed challenging the constitutional validity of Section 171 of the Central Good and Services Tax Act, 2017 (for short 'Act, 2017') and Rules 122, 124, 126, 127, 129, 133 and 134 of the Central Good and Services Tax Rules, 2017 (for short 'Rules, 2017') as well as legality of the notices proposing imposition or orders imposing penalty issued by the National Anti-Profiteering Authority ('NAA') under Section 122 of the Act, 2017 read with Rule 133(3)(d) of the Rules, 2017 and the final orders passed by NAA, whereby the petitioners, who are companies running diverse businesses ranging from hospitality, Fast-Moving Consumer Goods ('FMCG') to real estate, have been directed in accordance with Section 171 of Act, 2017, to pass on the commensurate benefit of reduction in the rate of tax or the Input Tax Credit to its consumers / recipients along with interest.

2. Learned counsel for the parties prayed that this Court may first decide the plea of constitutional validity of Section 171 of Act, 2017 as well as Rules 122, 124, 126, 127, 129, 133 and 134 of the Rules, 2017. They stated that only in the event this Court were to uphold the constitutional validity of the aforesaid Section and Rules, would the need to examine the matters on merits arise.

3. Accepting the suggestion of the learned counsel for the parties, this Court proceeded to hear the issue of constitutional validity of Section 171 of

Act, 2017 as well as Rules 122, 124, 126, 127, 129, 133 and 134 of the Rules, 2017. The said provisions are reproduced hereinbelow:-

Section 171

*"**171. Anti-profiteering 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.]

Rule 122

***122.Constitution of the Authority**.- The Authority shall consist of,-*

(a) a Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India; and (b) four Technical Members who are or have been Commissioners of State tax or central tax [for at least one year] or have held an equivalent post under the existing law, to be nominated by the Council.

Rule 124

***124. Appointment, salary, allowances and other terms and conditions of service of the Chairman and Members of the Authority**:-*

(1) The Chairman and Members of the Authority shall be appointed by the Central Government on the recommendations of a Selection Committee to be constituted for the purpose by the Council.

(2) The Chairman shall be paid a monthly salary of Rs. 2,25,000 (fixed) and other allowances and benefits as are admissible to a Central Government officer holding posts carrying the same pay: Provided that where a retired officer is selected as a Chairman, he shall be paid a monthly salary of Rs. 2,25,000 reduced by the amount of pension.

[(3) The Technical Member shall be paid a monthly salary and other allowances and benefits as are admissible to him when holding an equivalent Group 'A' post in the Government of India: Provided that where a retired officer is selected as a Technical Member, he shall be paid a monthly salary equal to his last drawn salary reduced by the amount of pension in accordance with the recommendations of the Seventh Pay Commission, as accepted by the Central Government.]

(4) The Chairman shall hold office for a term of two years from the date on which he enters upon his office, or until he attains the age of sixty- five years, whichever is earlier and shall be eligible for reappointment:

Provided that [a] person shall not be selected as the Chairman, if he has attained the age of sixty-two years. [Provided further that the Central Government with the approval of the Chairperson of the Council may terminate the appointment of the Chairman at any time.]

(5) The Technical Member of the Authority shall hold office for a term of two years from the date on which he enters upon his office, or until he attains the age of sixty-five years, whichever is earlier and shall be eligible for reappointment:

Provided that [a] person shall not be selected as a Technical Member if he has attained the age of sixty-two years. [Provided further that the Central Government with the approval of the Chairperson of the Council may terminate the appointment of the Technical Member at any time.]

Rule 126

126. ***Power to determine the methodology and procedure***

The Authority may determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services 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.

Rule 127

127. ***Duties of the Authority****.*

It shall be the duty of the Authority,-

(i) to determine whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;

(ii) to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;

(iii) to order,--

(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 percent. from the date of collection of the higher amount till the date of the return of such amount orrecovery of the amount not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in section 57;

(c) imposition of penalty as specified in the Act; and (d) cancellation of registration under the Act.

[(iv) to furnish a performance report to the Council by the tenth [day] of the close of each quarter.]

Rule 129

***129. Initiation and conduct of proceedings**.-(1)Where the Standing Committee is satisfied that there is a prima-facie evidence to show that the supplier has not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, it shall refer the matter to the Director General of [Anti-profiteering] for a detailed investigation.*

(2) The Director General of [Anti-profiteering] shall conduct investigation and collect evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices.

(3)The Director General of [Anti-profiteering] shall, before initiation of the investigation, issue a notice to the interested parties containing, inter alia, information on the following, namely:-

(a) the description of the goods or services in respect of which theproceedings have been initiated;

(b) summary of the statement of facts on which the allegations are based;and

(c) the time limit allowed to the interested parties and other persons whomay have information related to the proceedings for furnishing their reply.

(4)The Director General of [Anti-profiteering] may also issue notices to such other persons as deemed fit for a fair enquiry into the matter.

(5)The Director General of [Anti-profiteering] shall make available the evidence presented to it by one interested party to the other interested parties, participating in the proceedings.

(6)The Director General of [Anti-profiteering] shall complete the investigation within a period of [six] months of the receipt of the reference from the Standing Committee or within such extended period not exceeding a further period of three months for reasons to be recorded in writing [as may be allowed by the Authority] and, upon completion of the investigation, furnish to the Authority, a report of its findings along with the relevant records.

Rule 133

***133. Order of the Authority**.*

(1) The Authority shall, within a period of [six] months from the date of the receipt of the report from the Director General of [Anti-profiteering] determine whether a registered person has passed on the benefit of the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices.

(2) An opportunity of hearing shall be granted to the interested parties by the Authority where any request is received in writing from such interested parties.

[(2A) The Authority may seek the clarification, if any, from the Director General of Anti Profiteering on the report submitted under sub-rule (6) of rule 129 during the process of determination under sub-rule (1).]

[(3) Where the Authority determines that a registered person has not passed on the benefit of the reduction in the rate of tax on the supply of goods or

services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, the Authority may order –

(a) reduction in prices;

(b) return to the recipient, an amount equivalent to the amount not passed on by way ofcommensurate 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) the deposit of an amount equivalent to fifty per cent. of the amount determined under the above clause[along with interest at the rate of eighteen per cent. from the date of collection of the higher amount till the date of deposit of such amount] in the Fund constituted under section 57 and the remaining fifty per cent. of the amount in the Fund constituted under section 57 of the Goods and Services Tax Act, 2017 of the concerned State, where the eligible person does not claim return of the amount or is not
identifiable;

(d) imposition of penalty as specified under the Act;

and (e) cancellation of registration under the Act.

Explanation: For the purpose of this sub-rule, the expression, "concerned State" means the State [or Union Territory] in respect of which the Authority passes an order.] [(4) If the report of the Director General of [Anti-profiteering] referred to in sub-rule (6) of rule 129 recommends that there is contravention or even non-contravention of the provisions of section 171 or these rules, but 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 Director General of [Anti-profiteering] to cause further investigation or inquiry in accordance with the provisions of the Act and these rules.]

[(5) (a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry.]"

Rule 134

134. Decision to be taken by the majority.- *(1) A minimum of three members of the Authority shall constitute quorum at its meetings.*
(2) 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 shall have the second or casting vote."

ARGUMENTS ON BEHALF OF THE PETITIONERS

4. Mr. P. Chidambaram, Mr. S. Ganesh, Mr. Tarun Gulati, Mr. Chinmoy Pradip Sharma and Mr.Pritesh Kapoor, learned Senior counsel as well as Mr. V. Lakshmikumaran, Mr. Monish Panda, Mr. Rohan Shah, Mr. Abhishek A. Rastogi, Mr. Tushar Jarwal, Mr. Sparsh Bhargava, Mr. Puneet Aggarwal, Mr. Sujit Ghosh, Mr. K. S. Suresh, Mr. Nikhil Gupta, Mr. Shashank Shekhar and Mr. Priyadarshi Manish, learned counsel addressed arguments on behalf of the petitioners.

5. Learned counsel for the petitioners submitted that Section 171(1) of the Act, 2017 and the Rules 126, 127 and 133 of the Rules, 2017 framed thereunder are unconstitutional as they are beyond the legislative competence of Parliament. They submitted that the impugned provisions do not fall within the law-making power of Parliament under Article 246A of the Constitution of India.

6. Some of the learned counsel for the petitioners submitted that the antiprofiteering provision, as provided under Section 171 of the Act, 2017, is in the nature of a tax or financial exaction. They submitted that a tax can be levied from a subject only if there is a specific and unequivocal provision in the parent statute authorising such an exaction. According to them, such a financial exaction cannot be made lawfully by a subordinate legislation, when there is no empowering provision in the parent statute. In support of their submissions, they relied on the decisions of the Supreme Court in ***Ahmedabad Urban Development Authority v. Sharakumar Jayantikumar Pasawala, (1992) 3 SCC 285*** and ***V.V.S. Sugars v. Govt. of A.P., (1999) 4 SCC 192***.

7. Learned counsel for the petitioners further submitted that the impugned Section and Rules suffer from vice of excessive delegation as they delegate essential legislative functions to the Government. Additionally, they submitted that the impugned provisions are ambiguous, arbitrary, violative of Article 14 and confer excessive powers on NAA to determine profiteering as no guidelines and/or legislative policy for the exercise of such powers by the authority so constituted have been laid down in the statute. They submitted that the failure to provide clear statutory guidance for exercise of powers by NAA in the formulation of such methodology amounts to "*delegation of essential legislative function*" as these formulations were essential and therefore, the same should have been stipulated by the Legislature. They submitted that it is settled law that the legislative authority cannot be delegated under a statute without appropriate guidelines or safeguards. In

support of their submissions, they relied on the judgment of the Supreme Court in ***Ramesh Birch vs. Union of India, 1989 Supp SCC 430***.

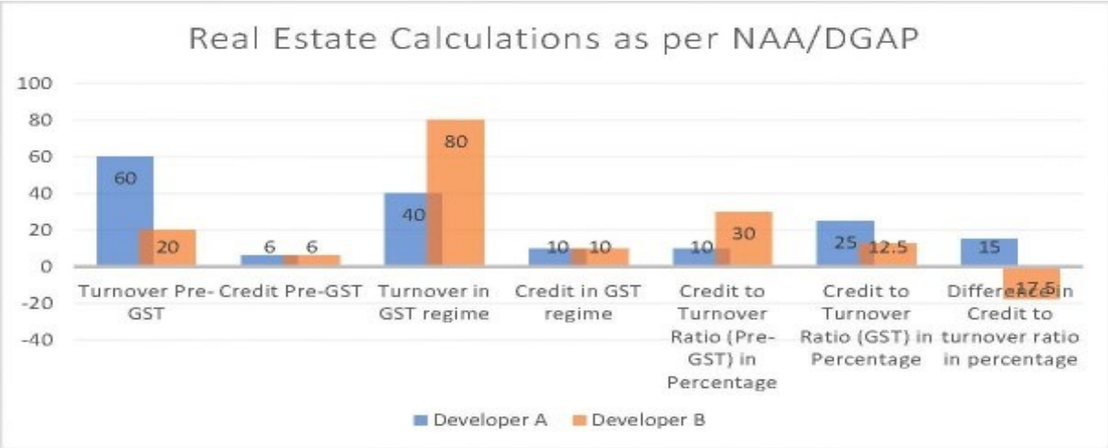
8. They submitted that it is settled law that *delegatus non potest delegare* which essentially means that a delegatee cannot further delegate unless expressly or impliedly authorized. They contended that the Legislature vide Section 171 of the Act, 2017 delegated the authority to determine/prescribe powers and functions of NAA to the Executive i.e. the Government of India. They submitted that the Government of India by way of Rule 126 of the Rules, 2017, contrary to the legislative mandate contained in Section 171 of the Act, 2017, further delegated the power to NAA to determine the methodology and procedure for determining whether the reduction in taxes or the benefit of Input Tax Credit had been passed on to the recipients. They stated that even NAA did not issue any guidelines as to how to determine profiteering. In support of their submission, they relied on the judgment of the Supreme Court in ***Barium Chemicals Ltd. & Ors. v Company Law Board & Ors. [AIR 1967 SC 295]***.

9. They submitted that the term '*commensurate*' is not defined in the Act, 2017 and the expression '*profiteering*' in Section 171 is dependent upon the scope and meaning of the phrase '*commensurate reduction in the price*'. According to them, as a result of this circular reasoning, NAA had complete and unfettered discretion to determine the extent of profiteering. They pointed out that the definition of profiteering inserted by way of amendment (that came into force only on 01st January, 2020) is vague and uncertain as to how the amount of profiteering or commensurate reduction in price has to be determined and therefore, the same is ex facie arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India. They pointed out that even NAA, in the orders passed by it, had not been consistent in its interpretation of the term "*commensurate reduction*".

10. They stated that without stipulating the specifics of the methodology to be adopted to determine profiteering, the petitioners could not have been asked to reduce prices. They contrasted the lack of guidelines in Section 171 of the Act, 2017 with Section 9A of the Customs Tariff Act, 1975 which lays down the broad guidelines on the basis of which the extent of dumping and anti-dumping duty is to be quantified and Section 19(3) of the Competition Act, 2002, which lays down the factors to be taken into consideration while determining whether an agreement has an appreciable adverse effect. They stated that in the absence of any guidelines, NAA had acted arbitrarily as is

evident from the varied approaches taken by it while adjudicating cases of entities belonging to the same industry and dealing with similar products.

11. Learned counsel for the petitioners emphasised that the formula used by the respondents, for instance, for real estate companies during the course of investigation/adjudication, had not been notified. They stated that the methodology adopted by NAA and the Director General of Anti-Profiteering ('DGAP') to arrive at the profiteering amount of the real estate industry was generally based on the difference between the ratio of Input Tax Credit to turnover under the pre-Goods and Services Tax and post-Goods and Services Tax period. To drive home the point that the methodology adopted by the respondents was flawed, the learned counsel for the petitioners gave an illustration of the contrasting results one would get after calculating the amount profiteered/required to be passed on in case of two identical real estate projects being developed by Developers A & B with the only difference being the advance payment received by them prior to the Goods and Services Tax Regime. They stated that assuming that two Developers (A & B) commenced construction of the two identical projects (having hundred flats of rupees one crore each) in 2017 and the projects were executed at an identical pace with identical inputs and with Developer A receiving sixty per cent of the amount (total sale price of the project) as advance during the pre-Goods and Services Tax period, Developer B receiving only twenty per cent as advance during that period, with all other factors being identical (like the credit availed/available during the pre-Goods and Services Tax period), the credit to turnover ratio for the two projects would vary drastically depending on the time when the payments from the customers were received. According to the petitioners, if the methodology adopted by NAA /DGAP is to be accepted, Developer A would be required to pass on 15% benefit to the flatbuyers and Developer B who received 80% of the payment/amount post-Goods and Services Tax receive would be required to pass no benefit to the flat-buyers. A graphical representation of the same, as furnished by the petitioners, is as follows:



12. They stated that it is for this reason, the percentage of credit to turnover ratio (in Goods and Services Tax regime) had varied from 0.2% (in ***Vatika Limited, Case No. 64/2019***) to 20.98% (in ***Emaar MGF Land Ltd, Case No. 26/2020***) in the orders passed by NAA.

13. Learned counsel for the petitioners in ***Writ Petition No. 13657/2022*** pointed out that DLF calculated the total savings on account of introduction of Goods and Services Tax for each project. He stated that the total savings/benefits were then divided by total area to arrive at the per square feet benefit to be passed on to each flat buyer. He stated that as a result the flat-buyers with equal area received equal benefit. In contrast to this, he pointed out that the NAA/DGAP calculated the benefit by comparison of ratios as explained above and then computed the profiteered amount as a percentage of consideration received from each flat-buyer in the Goods and Services Tax regime. Therefore, as per NAA/DGAP, similarly placed flat-buyers received inconsistent benefits. For the project Camellias, the benefits computed by both NAA/DGAP & DLF are tabulated below:

DLF- PROJECT (Camellilas)					
S. No.	Customer	Unit Number	Area of unit	Percentage of benefit computed by DGAP	Amount Computed by DGAP
1.	Gopal Chopra	CM405A	7361 Sq.Ft.	1.18%	83,274
2.	Rachna Sawhney	CM504A	7361 Sq.Ft.	1.18%	83,450
3.	Rachna Sawhney	CM505A	7361 Sq.Ft.	1.18%	83,450
4.	Anil Sarin	CM510A	7361 Sq.Ft.	1.18%	99,874
5.	S J Rubber	CM504B	7361 Sq.Ft.	1.18%	83,265

	Industries Ltd.				
6.	Splendid Residences Pvt. Ltd.	CM419A	7361 Sq.Ft.	1.18%	11,328
7.	Rachna Sawhney	CM503B	7361 Sq.Ft.	1.18%	83,450
8.	Vineet Kanwar	CM418B	7361 Sq.Ft.	1.18%	2,30,148
9.	Vishal Swara	CM516B	7361 Sq.Ft.	1.18%	1,47,047
10.	Sanjeev Aggarwal	CM819B	9419 Sq.Ft.	1.18%	10,01,928
11.	Mohan Agarwal	CM804B	9419 Sq.Ft.	1.18%	20,66,050
12.	Deep Kalra	CM818B	9419 Sq.Ft.	1.18%	33,72,998
13.	Action Construction Equipment Ltd.	CM602A	9419 Sq.Ft.	1.18%	34,356

14. They also submitted that determination of profiteering can be made at different levels such as entity level, Stock Keeping Unit (hereinafter referred to as 'SKU') level, product level, customer level etc. Hence, an assessee intending to comply with the law has no way of ensuring whether its methodology is in compliance with Section 171(1) of the Act, 2017 or not.

15. Learned counsel for the petitioners also submitted that the operation of Section 171 of the Act, 2017 amounted to price-fixing and is therefore violative of Articles 19(1)(g) and 300A of the Constitution. They submitted that according to NAA's interpretation of Section 171 of the Act, 2017, once any of the events contemplated in Section 171 of the Act, 2017 occurs, i.e. either there is reduction in tax rate or benefit of Input Tax Credit is availed, then the price of the product must be adjusted to (a) the extent of the tax reduced and/or (b) the extent of increase in the credit availability. They stated that there is no clarity on adjustments allowed on account of rise either in input costs or in customs duty on import of inputs, supply and demand conditions and other factors which impact pricing. They submitted that Section 171 of the Act, 2017, to the extent it eliminates all factors from consideration in price fixation, other than the rate of tax and credit availability, was clearly excessive, disproportionate and unwarranted.

16. They pointed out that similar anti-profiteering provisions had been introduced in Australia (in 2000) and in Malaysia (in 2015) to ensure that the benefit of reduction of tax rate was passed on to the recipients. They stated

that the provisions so introduced prescribed clear policy guidelines before imposing the restrictive conditions.

17. They stated that when Australia implemented the Goods and Services Tax replacing the erstwhile Wholesale Sales Tax, the Australian Competition and Consumer Commission ('ACCC') was entrusted with the responsibility to oversee pricing responses to the introduction of Goods and Services Tax for a period of three years between 1999 and 2002. They stated that Section 75AU of the Trade Practices Act, 1974 which prohibited price exploitation in relation to the New tax System provided that factors such as increase in supplier's input costs, supply and demand conditions and other relevant factors shall be taken into consideration while determining price exploitation. They further stated that Section 75AV(1) of the aforesaid Act provided that the ACCC must formulate detailed guidelines to explain when prices may be regarded to be in contravention of the price exploitation provision. They stated that the ACCC had framed detailed guidelines in July, 1999 which were later revised in March, 2000 after taking inputs from all stakeholders. It was pointed out that the fundamental principle laid down in the aforesaid guidelines was based on a '*net dollar margin rule*'. According to them, the said guidelines enumerated all the relevant factors to be taken into consideration for price adjustments and provided for considering the increase in procurement cost and additional costs due to the tax change. They stated that it also allowed averaging the impact of taxes and costs across goods or services under specific circumstances.

18. While referring to the Goods and Services Tax system introduced in Malaysia, they stated that the Anti- Profiteering measures had been incorporated under the Price Control and Anti-Profiteering Act, 2011 to control prices of goods, charges of services and to prohibit unreasonably high profiteering by suppliers. They stated that making unreasonably high profit was an offence under Section 14 of the said Act. They further stated that Section 15 of the said Act provided that the Minister shall prescribe the mechanism to determine whether the profit is unreasonably high considering different conditions and taking into consideration factors such as: tax imposition, suppliers' cost, supply and demand conditions and other relevant matters in relation or price of goods and services etc. It was pointed out that detailed guidelines were laid down under the Regulations issued in 2014 and 2016.

19. Learned counsel for the petitioners further submitted that Section 171 of the Act, 2017 is manifestly arbitrary and unreasonable, as it does not fix a

period of time during which the reduced prices of the goods and services had to be maintained. They emphasised that the time-frame for which an assessee could be subject to the discipline of Section 171 of the Act, 2017 has been left undefined and open-ended. According to them, this indefinite obligation hinders the petitioners' right to trade and commerce and hence, the same is violative of Articles 14 and 19(1)(g) of the Constitution of India.

20. They further stated that price reduction is not the only method by which commensurate benefit can be passed on to the recipient. They stated that an increase in the volume or weight of the product being sold for the same price is an equally effective and legal way of commensurately reducing the price of the product. They stated that mandating price reduction as the only way to pass the commensurate benefit to the recipient is manifestly arbitrary and unreasonable. 21. Learned counsel for the petitioner in ***W.P.(C) 12557/2022, M/s. L'Oreal India Pvt. Ltd.,*** stated that in the FMCG industry, for low priced products, since the resultant reduction in price is often miniscule, it was not feasible to pass on the benefit because of the restriction in the Legal Metrology Act, 2009 and Legal Metrology (Packaged Commodities) Rules, 2011 that require the prices of the goods to be rounded off to the nearest fifty paisa. In support of his contention, he referred to the following table:

Original MRP	Price exclusive of 28% GST	18% GST	Ideal revised MRP	MRP suggested by Respondent
5	3.90625/-	0.703125/-	4.609375/-	4.5/-
4	3.125/-	0.5625/-	3.6874/-	3.5/-
3	2.34375/-	0.421875/-	2.765625/-	3/-
2	1.5625/-	0.28125/-	1.84375/-	2/-

22. Therefore, according to him, there is a legal impossibility in reducing the Maximum Retail Price ('MRP'). As a result he stated that some of the companies had passed on the commensurate benefit by way of increasing the grammage. He pointed out that NAA vide order dated 24th December, 2018 passed in ***Ankit Kumar Bajoria vs. M/s Hindustan Unilever Ltd., Case No.20/2018,*** had accepted the practice of increasing grammage. However, this practice had not been accepted as a mode of passing on commensurate benefit by NAA in subsequent orders.

23. Learned counsel for the petitioners pointed out that there is no provision of appeal against the orders passed by NAA. They submitted that the absence of a provision to appeal means that there is no judicial oversight over the decisions of NAA and indicates that there is a presumption that the findings of NAA are infallible. They submitted that Tribunals and Authorities which exercise functions similar to NAA have a robust appellate mechanism. They submitted that lack of a provision to appeal against the findings of NAA makes the Act, 2017 unconstitutional.

24. They submitted that Rule 124 of Rules, 2017 to the extent it deals with appointment and terms and conditions of service of the Chairman and Members of NAA is not in consonance with Article 50 of the Constitution of India as there is scope for governmental interference in the functioning of NAA.

25. Learned counsel for the petitioners submitted that NAA essentially determines the rights of those complainants who filed complaints and determines liabilities of the tax assessees against whom such an application/complaint is made / received. Therefore, according to them, since the exercise of power by NAA is a quasi-judicial function, the absence of a judicial member in the constitution of NAA renders Section 171 of the Act, 2017 and Rule 122 of the Rules, 2017 illegal and void. In support of their submissions, they relied on the decision of the Supreme Court in ***Madras Bar Association v. Union of India, (2015) 8 SCC 583***, ***Madras Bar Association v. Union of India, (2010) 11 SCC 1*** and ***L. Chandra Kumar v. Union of India, (1997) 3 SCC 261***.

26. They further submitted that in case of equality of votes amongst the members of NAA, the Chairperson has a second or casting vote, which renders Rule 134(2) illegal and unconstitutional.

27. Learned counsel for the petitioner in ***W.P.(C) 12647/2018*** stated that the report issued by DGAP and the order passed by NAA in its case were barred by limitation as provided under Rule 133 of the Rules, 2017. He submitted that Rule 133 uses the word "*shall*" and thus mandates that NAA must determine and pass an order within a period of three months (prior to amendment dated 28th June, 2019) from date of receipt of the report from DGAP. He further submitted that the procedure that has been prescribed under the Rule 129(6) ought to have been strictly followed by the DGAP while investigating other products. He pointed out that in the case of the petitioner in ***W.P.(C) 12647/2018,*** Rule 129(6) of the Rules, 2017 as on 25th September, 2018 (the date on which NAA passed its order directing the DGAP to conduct

investigation on the amount allegedly profiteered by the petitioner) or 30th October, 2018 (the date when the notice was issued by DGAP) mandatorily provided that DGAP was required to complete its investigation within three months. However, the report was submitted on 30th September, 2019 which is beyond the prescribed limitation period and thus, the same was without jurisdiction. He submitted that at the time the proceedings were initiated by NAA, Rule 129(6) of the Rules, 2017 mandated that the DGAP "*shall*" submit its report to NAA within three months which could be further extended to six months. Such time period was subsequently extended to six months vide Notification No. 31/2019 dated 28th June, 2019 which could be further extended to nine months. However, the impugned order is barred by limitation even if period is taken as six months as applicable from 28th June, 2019.

28. Learned counsel for the petitioners submitted that under Rule 133(3) of the Rules, 2017, NAA does not have any power or authority in law to pass an order in relation to any product, other than the product against which complaint has been received by the authorities. They submitted that till 28th June, 2019 (when Rule 133(5) was enacted), NAA had no powers to direct investigation in respect of any product, other than the product complained of. However, with effect from 28th June, 2019, Rule 133(5) was introduced, whereby for the first time, NAA was statutorily empowered in the course of the proceedings before it, to direct the DGAP, to conduct an investigation in relation to products, other than the product complained of. They submitted that as a result of the amendment, the power to expand the scope of the investigation vests only with NAA and not with DGAP. They pointed out that in many cases, DGAP had on its own expanded the scope of the investigation to other products, which according to them, is without jurisdiction and ultra vires the provisions of the Act, 2017 and Rules, 2017.

29. Learned counsel for the petitioners submitted that the levy of penalty and interest cannot be ordered in the absence of corresponding specific substantive provisions under the Act, 2017. They submitted that the consequences of the breach of Section 171 of Act, 2017 should have been provided for in the first instance in the Act, 2017 itself and such wide and uncontrolled powers could not have been conferred on NAA under Rules 127 and 133 of Rules, 2017. In support of their submission, they relied upon the judgments of the Supreme Court in ***Indian Carbon Limited v. State of Assam (1997) 6 SCC 479*** and ***Shree Bhagwati Steel Rolling Mills v. CCE 2015 (326) E.L.T. 209 (SC)***.

30. They stated that the petitioners have been issued show cause notices directing them to explain why penalty prescribed under Section 171(3A) of the Act, 2017 read with Rule 133 (3) (d) of the Rules, 2017 should not be imposed upon them. They, however, submitted that Section 171 (3A) has been inserted in the Act, 2017 under Section 112 of the Finance Act, 2019 which came into force only from 01st January, 2020 and so penalty under the aforesaid Section could not have been imposed on the petitioners retrospectively.

31. Learned senior counsel for the petitioner in ***W.P.(C) 1171/2020*** submitted that on a plain reading of Section 171(1) with Section 2(108) of the Act, 2017, it is clear that it applies to a reduction in the rate of Goods and Services Tax levied on a particular commodity or a grant of Input Tax Credit under the Act, 2017. He stated that the term '*tax on any supply of goods or services*' and Input Tax Credit in Section 171 do not refer to any tax levied prior to 1st July, 2017 or to any Input Tax Credit granted under any such prior statute. Therefore, according to him, Section 171(1) of the Act, 2017 does not contemplate a comparison of the taxes levied after the introduction of the Act, 2017 with a basket of distinct indirect taxes applicable on goods and services before the operation of the Act. He stated that the indirect taxes levied on goods and services prior to July, 2017 by the States such as the VAT/Sales-tax, Octroi duty and Entry tax varied widely from State to State and often from area to area within a State. He stated that as a result, it is impossible to make any meaningful comparison between the rates of the preGoods and Services Tax taxes with the rates of tax levied under the Goods and Services Tax regime.

32. According to him, Section 171 of the Act, 2017 only permits a comparison between two single rates and not a comparison between one single tax rate (Goods and Services Tax) and a basket or combination of several other tax rates (pre-Goods and Services Tax indirect taxes). He submitted that Sections 2(62) and 2(63) of the Act, 2017 make it clear that the benefit of Input Tax Credits referred to in Section 171(1) are the Input Tax Credit granted under the Act, 2017 and not the Input Tax Credits granted under the Central Excise Act, the ServiceTax statute or the Sales-tax Acts. He further submitted that Section 9 of the Act, 2017 which provides for the levy of '*a tax called the central goods and services tax on all intra-State supplies of goods or services or both…*' uses the same language as Section 171 and therefore Section 171 refers only to a reduction in the rate of tax levied / referred to under Section 9 of the Act, 2017.

33. Learned senior counsel for the petitioners in ***W.P.(C) 2897/2021,*** submitted that in a contract made after the reduction in the tax rate has come into effect, the parties are free to agree on any price. In support of his submission, he relied on Section 64-A of the Sale of Goods Act, which reads as under:-

*"**64A. In contracts of sale, amount of increased or decreased taxes to be added or deducted**.—*

(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,—

(a) if such imposition or increase so takes effect that the tax or increasedtax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased taxonly, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of sub-section (1) apply to the following taxes, namely:—

(a) any duty of customs or excise on goods;
(b) any tax on the sale or purchase of goods."

34. Learned counsel for the petitioner in ***W.P.(C) 2785/2021*** submitted that as per Section 171(2) read with Section 2(80) of the Act, 2017, the authority (empowered to examine whether there has been commensurate reduction in price) has to be constituted by way of a duly gazetted notification and as per Section 166 of the Act, 2017, such notification has to be laid before the Parliament. He stated that contrary to these requirements, NAA had been constituted vide an administrative order No.343/2017 dated 28th November, 2017. He stated that Rule 122 of the Rules, 2017 has been notified and gazetted vide Notification No. 10/2017-Central Tax dated 28th June, 2017, which, at first blush, suggests that NAA had been constituted thereunder. However, on a closer analysis, it is clear that the said Rule cannot be said to be the fountainhead of constitution of NAA as Rule 122 essentially provides for composition of NAA and not for the constitution of NAA, even though the heading of the Rule is couched to suggest that the same apparently constitutes NAA. He submitted that if the said Rule (which was notified on 28th June, 2017) was indeed the fountainhead of constitution of NAA, the same

would go against the very understanding of the respondents as recorded in the 35th and 45th Goods and Services Tax Council Minutes of Meeting as well as the Memo dated 09th September, 2019 of the Department of Revenue, Ministry of Finance, wherein it has been specifically observed that NAA had been constituted vide an office order dated 28th November, 2017.

ARGUMENTS ON BEHALF OF THE RESPONDENTS

35. Mr. Zoheb Hossain, learned counsel appearing on behalf of the Respondent-authorities, prefaced his submissions by stating that Parliament introduced the Act, 2017 in order to simplify and harmonise the indirect taxes regime in the country by eliminating the multiplicity of taxes that were levied on the same supply system as a result of which there was a cascading effect.

36. According to him, the "anti-profiteering" measures were introduced in the Goods and Services Tax regime in order to provide for a mechanism to ensure that the full benefits of input tax credits and reduced Goods and Services Tax rates flow to the consumers who bear the burden of tax and to prevent the suppliers from appropriating these benefits for themselves. He contended that anti-profiteering provisions under the Act, 2017 and the Rules, 2017 have been brought into force in the interest of consumer welfare and so any interpretation of the same must be in favour of the consumer.

37. He stated that the provisions essentially create a substantive restriction on the suppliers from appropriating the benefits of the Goods and Services Tax regime which may either be in the form of reduction in the tax rate effected pursuant to a decision of the Goods and Services Tax Council or in the form of benefit of Input Tax Credit which was unavailable under the earlier regime. He stated that correspondingly a substantive right has been created in favour of consumers to receive the benefit of reduction in rates and benefit of Input Tax Credit. He stated that in considering the constitutional vires of such a provision, the larger public welfare intended to accrue from the provision ought to be taken into consideration. He relied upon the decision of the Supreme Court in ***Pioneer Urban Land and Infrastructure Ltd. vs. Union of India, (2019) 8 SCC 416,*** wherein the Supreme Court examined a challenge to the amendments to the Insolvency and Bankruptcy Code, 2016. He stated that in the aforesaid case the fact that the impugned provisions were part of a beneficial legislation was treated as an important factor in order to uphold the provisions.

38. He further submitted that Section 171 of the Act, 2017 has been enacted in furtherance of the goals of redistributive justice contained in the Directive Principles of State policy in Articles 38, 39(b) and 39(c) of the

Constitution of India. The relevant portion of Articles 38, 39(b) and 39(c) are reproduced hereinbelow:-

*"**Article 38** - State to secure a social order for the promotion of welfare of the people*
*(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in **which justice**, social, **economic** and political, **shall inform all the institutions of the national life**.*

***Article 39** - Certain principles of policy to be followed by the State **The State shall, in particular, direct its policy towards securing**-. . .*
*(b) **that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good**;*

*(c) **that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;"***
(emphasis supplied)

39. He submitted that the scope of judicial review in a fiscal statute is fairly limited as laid down by the Supreme Court in multiple judgments such as ***State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312*** and ***R. K. Garg v. Union of India, 1981 (4) SCC 675***.

40. He further submitted that Article 246A of the Constitution of India empowers the Legislature to make laws 'with respect to' Goods and Services Tax.

Article 246A of the Constitution reads as under:-

"***246A. Special provision with respect to goods and services tax.***—
(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council."

41. He submitted that the impugned Section 171 of the Act, 2017 does not violate Article 246A of the Constitution of India as the said Section is not a taxing provision but is only meant to ensure that the sacrifice of tax revenue by the Central and State Governments for the welfare of the consumer is passed on to them by the supplier.

42. He stated that the reduction of the tax burden and elimination of the cascading effect of taxes were important objectives behind the introduction of the Goods and Services Tax and so the impugned Section 171 of the Act, 2017 is very much a provision 'with respect to' Goods and Services Tax and, therefore, Section 171 of the Act, 2017 falls well within the ambit of law-making powers of the Parliament and the State legislatures. He further submitted that it is a well settled principle that in the field of taxation, the legislature enjoys a greater latitude for classification as has been noted by the Supreme Court in various cases [See: ***Steelworth Ltd. vs. State of Assam [1962] Supp (2) SCR 589]; Gopal Narain vs. State of U.P. [AIR 1964 SC 370]; Ganga Sugar Corp. Ltd. vs. State of U.P. [(1980) 1 SCC 223]***.

43. Countering the submissions of the Petitioners that Section 171 of the Act, 2017 suffers from the vice of excessive delegation, Mr. Zoheb Hossain, learned counsel, submitted that no essential legislative function has been delegated by the Legislature to NAA by way of Section 171 of the Act, 2017. He stated that Section 171 of the Act, 2017 is very clear when it states that any reduction in the rate of tax or the benefit of input tax credit has to be passed on to the recipient by way of commensurate reduction in prices, that is to say that every person who is a recipient of goods or services has to get the benefit. He further stated that it cannot be said that Section 171 of the Act, 2017 does not provide method and procedure for determining profiteering as it clearly stipulates that 'any reduction' in the 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*'.

44. He emphatically denied that the word 'commensurate' as used in Section 171 of the Act, 2017 has no clear and definite meaning. He referred to the Cambridge Dictionary where the word 'commensurate' is defined as '*in a correct and suitable amount compared to something else; suitable in amount or quality compared to something else; matching in degree'*. Thus, according to him, Section 171 lays down a clear legislative policy and hence, no essential legislative function has been delegated. He submitted that the Courts have consistently held that after laying down the broad legislative policy, the *minutiae* can always be left to be decided by way of a subordinate legislation (See: ***Lohia Machines Ltd. vs. Union of India, (1985) 2 SCC 197, Pt. Banarsi Das Bhanot vs. State of Madhya Pradesh, AIR 1958 SC 909, Sita Ram Bishambher Dayal vs. State of U.P. (1972) 4 SCC 485***). He further stated that it is well settled that the question whether any particular legislation

suffers from excessive delegation, has to be determined by the Court having regard to the subject matter, the scheme, the provisions of the statute including its preamble and the background on which the statute is enacted. In support of his contentions, he relied upon the decision of the Supreme Court in ***Bhatnagars & Co. Ltd. vs. Union of India, AIR 1957 SC 478*** and ***Mohmedalli and Ors. vs. Union of India and Ors., AIR 1964 SC 980.***

45. He further submitted that power of NAA to determine procedure and methodology flows from Section 171 of the Act, 2017 itself which empowers the Authority to examine whether Input Tax Credits availed by any registered person or the reduction in the tax rate on the goods or services had actually resulted in commensurate reduction in the price of such goods or services. He stated that the rule-making powers of the Central Government as prescribed in sub section (2) of Section 171 of the Act, 2017 as well as Section 164 of the Act, 2017 empower the Central Government to prescribe the powers and functions of the authority as well as to prescribe a Rule conferring the Authority with the power to determine the methodology for determining whether the benefits of Goods and Services Tax rate reductions and Input Tax Credits have been passed on. According to him, it is in this background that the power to prescribe the powers and functions of NAA was delegated to the Central Government by the Section. He, therefore, submitted that the principle *delegatus non potest delegare* is not applicable to the present batch of matters.

46. He stated that Section 171(3) of the Act, 2017 duly provides that the Authority shall exercise such powers and discharge such functions as may be prescribed. Accordingly, he stated that the Goods and Services Tax Council which is a federal, constitutional body, comprising all the Finance Ministers of all the States and UTs and the Union Finance Minister, in its due wisdom, and the Central and the State Governments have framed Rules 127 and 133 which prescribe the functions and powers of the Authority. He pointed out that these rules have been framed under the provisions of Section 164 of the Act, 2017 which also has sanction of the Parliament and the State Legislatures. Therefore, since the functions and powers to be exercised by the Authority have been approved by competent legislatures, the same are legal and binding on the Petitioners. In support of his submissions, he relied on the decision of the Supreme Court in ***M.K. Papiah vs. Excise Commr. (1975) 1 SCC 492***.

47. Mr. Zoheb Hossain, learned counsel stated that even if the petitioners' contention that no methodology for calculating the profiteered amount had been prescribed is accepted, then also the said Section will not be rendered

unconstitutional because as per Rule 126 of the Rules, 2017, NAA has been empowered to determine the said methodology. He pointed out that the Rule does not stipulate that NAA must necessarily determine the methodology and procedure to compute profiteering as it merely stipulates that the authority 'may' determine the methodology and procedure for such computation. He stated that substantive provision of Section 171 of the Act, 2017 provides sufficient guidance to the NAA to determine the methodology on a case to case basis depending on the peculiar facts of each case and the nature of the industry and its peculiarities.

48. Additionally he stated that no uniform calculation method can be prescribed because the computation of commensurate reduction in prices is purely a mathematical exercise and would vary from SKU to SKU or unit to unit or service to service and hence for determining the quantum of benefit as the extent of profiteering has to be arrived at on a case to case basis, by adopting suitable method based on the nature and facts of each case. He further stated that NAA in exercise of the powers conferred under Rule 126 of the Central Goods and Services Tax has notified the "National Anti-Profiteering Authority: Methodology and Procedure, 2018" dated 28th March, 2018 which contains the methodology and procedure for determination as to whether the reduction in the rate of tax on supply of goods or services 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.

49. In the context of the real estate sector, he stated that in cases where completion certificate had not been issued prior to 01st July, 2017 and the supply of service by the developer continued past 01st July, 2017, the supplier got the benefit of Input Tax Credits under the Goods and Services Tax regime. That being the case, there is no reason why a supplier ought not to be required to pass on the benefit of Input Tax Credits under the Goods and Services Tax regime, with respect to the remaining supply. According to him, a plain reading of Section 171 of the Act, 2017 would require such developers to pass on the benefit of Input Tax Credits.

50. He stated that Section 171 of the Act, 2017 when it uses the term 'any supply' refers to each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by any supplier is not allowed. Hence, according to him, this benefit has to be calculated for the SKU of every product and has to be passed on to every buyer of such SKU. These benefits, he stated cannot be passed on at the entity/organization/branch/invoice/ product/business vertical level as they

have to be passed on to each and every buyer at each SKU/unit/service level by treating them equally. Additionally, he stated that the language of the impugned provisions does not provide flexibility to adopt any other mode for transferring benefit of reduction in tax rate and benefit of Input Tax Credit. He, thus, stated that the Methodology & Procedure for passing on the benefits and for computation of the profiteered amount has been duly prescribed in Section 171 of the Act, 2017 itself and hence, it is not required to be prescribed separately.

51. He stated that in the case of reduction in the rate of tax, the quantum of benefit would depend upon the pre reduction base price of the product which is required to be maintained during the post rate reduction period on which the reduced rate of tax is required to be charged which would result in reduction in the price. According to him, the new MRP is required to be declared by affixing additional sticker or stamping or online printing in terms of letter No. WM/10(31)/2017 dated 16th November, 2017 issued by the Ministry of Consumer Affairs, Food and Public Distribution, Government of India.

52. While dealing with the argument of the Petitioners that it is legally impossible to pass on the benefits of the reduction of rate of tax in cases of low priced products in the FMCG industry, Mr.Zoheb Hossain, learned counsel, submitted that the Rules 2(m) and 6(1)(e) of Legal Metrology (Packaged Commodities) Rules, 2011 (as amended from time to time) provide guidance to the suppliers on how the MRP of the products is to be rounded off. The relevant portion of the aforesaid Rules are reproduced as hereinunder:-

"*Legal Metrology (Packaged Commodities) Rules, 2011 dated 7th March, 2011 as enacted with effect from 1st April, 2011:*

"*2. Definitions:…..*
(m) "retail sale price" means the maximum price at which the commodity in packaged form may be sold to the consumer and the price shall be printed on the package in the manner given below; 'Maximum or Max. retail price Rs/
.....inclusive of all taxes or in the form MRP Rs/ .....incl., of all taxes after taking into account the fraction of less than fifty paisa to be rounded off to the preceding rupees and fraction of above 50 paise and up to 95 paise to the
rounded off to fifty paise;

xxx *xxx* *xxx*

6. Declarations to be made on every package. –

(1) Every package shall bear thereon or on the label securely affixed thereto, a definite, plain and conspicuous declaration made in accordance with the provisions of this chapter as, to – ….
(e) the retail sale price of the package; Provided that for packages containing alcoholic beverages or spirituous liquor, the State Excise Laws and the rules made there under shall be applicable within the State in which it is manufactured and where the state excise laws and rules made there under do not provide for declaration of retail sale price, the provisions of these rules shall apply."

Legal Metrology (Packaged Commodities) Rules, 2011 as amended by the Legal
Metrology (Packaged Commodities) Amendment Rules, 2017 with effect from 1st January, 2018:

(2) Definitions:-
'(m) "retail sale price" means the maximum price at which the commodity in packaged form may be sold to the consumer inclusive of all taxes;';
xxx xxx xxx
4. In the said rules, in rule 6,-
(d) in clause (e), after the words "the retail sale price of the package;", the following words and figures shall be inserted, namely:- "shall clearly indicate that it is the maximum retail price inclusive of all taxes and the price in rupees and paise be rounded off to the nearest rupee or 50 paise; ……"

53. He agreed with the contention of the petitioners that in some cases, commercial factors might necessitate an increase in price despite reduction in rate of tax or availability of benefit of Input Tax Credits. However, he stated that the prices must not be increased to appropriate the benefit of the reduced tax rate or benefit of additional Input Tax Credit that accrues to the Petitioners. According to him, if the supplier never passed on the benefit of such reduced tax rate or Input Tax Credit by way of a commensurate reduction in prices of the goods or services, by increasing the base price of such goods or services, he would be depriving the recipients of the benefits of the reduction of tax rates or Input Tax Credits. Hence, he stated that if the supplier when increasing the base prices of the goods or services does not account for the (commensurate) reduction of prices as a result of the reduction of the tax rates or benefit of the Input Tax Credits, the supplier would be said to be profiteering under Section 171 of the Act, 2017. He, however, stated that NAA as well as this Court ought to be cautious of attempts of entities to justify suspicious increase in base prices contemporaneous with the reduction in tax rates or accruing of benefits of Input Tax Credits, under the garb of other commercial factors. According to him, the Courts and implementing authorities must be vigilant about devices designed for avoidance and must seek to adopt interpretations of the provisions that are least prone to resulting

in avoidance. He referred to the judgment in ***McDowell & Co. Ltd. v. CTO, (1985) 3 SCC 230*** where it has been held that *"the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it" and that "it is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of "emerging" techniques of interpretation."* He submitted that although the aforesaid findings were made in the context of tax avoidance, they would apply with equal force in the context of any beneficial legislation.

54. Mr. Zoheb Hossain, learned counsel further stated that reference made by the petitioners to guidelines under other laws and to certain foreign laws, is irrelevant to the issue of the constitutional validity of Section 171 of the Act, 2017 as validity has to be determined on its own merits.

55. He further stated that according to petitioners' own submissions the antiprofiteering provisions introduced in Australia and Malaysia were essentially price control mechanisms as the legislation enacted in Australia was aimed at prohibiting 'price exploitation' and the Act enacted in Malaysia was aimed at prohibiting manufacturers from 'making unreasonably high profits'.

56. He stated that Section 171 of the Act, 2017 is not a price-fixing provision as was sought to be asserted by the Petitioners. He submitted that Section 171 of the Act, 2017 only concerns itself with the indirect-tax component of the price of goods and services and does not impinge upon the freedom of suppliers to fix prices of their goods and services keeping in view relevant commercial and economic factors. He stated that the impugned section in pith and substance is a provision pertaining to the Goods and Services Tax and through its enactment the Parliament sought to ensure that the businesses pass on the benefits granted by the Government in term of reduction of tax rate and availability of Input Tax Credit to the consumers and does not seek to interfere with the right to trade by fixing the price at which the goods and services ought to be supplied. He pointed out that the impugned provision applies irrespective of the price of the goods or services. He stated that it cannot be said that a law which forbids recovery of Goods and Services Tax at a rate higher than that applicable on the goods and

services and which forbids suppliers from recovering Input Taxes from the recipients where credits are obtained on such Input Taxes, amounts to pricecontrol or price-fixing.

57. He further submitted that even if Section 171 of the Act, 2017 is presumed to be a price-fixing legislation, it would not render the Section violative of Article 19(1)(g) of the Constitution of India. He submitted that the Supreme Court in several cases such as ***Diwan General and Sugar Mills Pvt. Ltd. & Ors. vs. Union of India, AIR (1959) SC 626; Union of India vs. Cynamide India Ltd., (1987) 2 SCC 720*** where price fixing orders had been challenged, had upheld such orders by examining whether the orders take into account relevant factors/considerations.

58. He submitted that there is no legal principle on the basis of which the petitioners can contend that the mere absence of a time period**,** up to which reduced prices are required to be maintained, would render the provision unconstitutional.

59. He submitted that recently, a three-Judge Bench of the Supreme Court in ***Madras Bar Association v. Union of India & Anr., (2021) SCC OnLine SC 463***, while considering the challenge to the *vires* of Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021 and Sections 184 and 186(2) of the Finance Act, 2017 as amended by the Tribunal Reforms (Rationalisation and Conditions of Service) Ordinance, 2021, held that "*the apprehensions of misuse of a statutory provision is not a ground to declare the provisions of a statute as void*."

60. Mr. Zoheb Hossain, learned counsel, submitted that for an appeal to be maintainable, it must have its genesis in the authority of law [See: ***M. Ramnarain (P) Ltd.*** **v.** ***State Trading Corpn. of India Ltd.*** **[(1983) 3 SCC 75** and ***Gujarat Agro Industries Co. Ltd.*** **v.** ***Municipal Corpn. of the City of Ahmedabad*** **(1999) 4 SCC 468]**. He submitted that the principle of "appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure" is now well settled as held by the Supreme Court in ***CCI v. SAIL, (2010) 10 SCC 744***. According to him, the right to appeal is not a right which can be assumed by logical analysis much less by exercise of inherent jurisdiction. It essentially should be provided by the law in force. In the absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party.

61. He stated that Section 171(2) of the Act, 2017 lays down the role of NAA which is to examine whether Input Tax Credit availed by any registered

person and/or the reduction in tax rates have actually resulted in a commensurate reduction in the price of goods or services supplied by him and the duties of NAA have been further elaborated upon in Rule 127 of the Rules, 2017. He further stated that from a perusal of the aforesaid provision, it is clear that the functions of NAA are in the nature of a fact-finding exercise. He submitted that even if it is assumed that the Authority undertakes an exercise which determines the rights and liabilities of registered persons under the Act, the contention of the Petitioners that the absence of a judicial member in NAA renders the authority unconstitutional is not tenable as there is no universal principle that every quasijudicial authority at every level must have a judicial member. According to him, such a requirement would not only be wholly impractical but also be legally suspect. He stated that the judgments which have been relied upon by the petitioners follow a uniform principle that whenever a judicial tribunal is intended to replace or supplant the High Court with respect to judicial power which was hitherto vested in or exercised by Courts, such Tribunals must be manned by judicial members in addition to technical members who have specialized knowledge or expertise in a given field. In support of his submissions, he relied on the judgments of the Supreme Court in ***Union of India vs. R. Gandhi, (2010) 11 SCC 1, Rojer Mathews vs. South Indian Bank, (2019) SCC OnLine SC 1456.*** He stated: (a) the NAA did not replace or substitute any function which Courts were exercising hitherto; (b) it performs quasi-judicial functions but cannot be equated with a judicial tribunal; (c) it performs its functions in a fair and reasonable manner in accordance with the Act but does not have the trappings of a Court and (d) absence of a judicial member does not render the constitution of the NAA unconstitutional or legally invalid.

62. He further stated that there are several statutory bodies that exercise quasijudicial functions, but are not required to have judicial members. For example, Section 4(1) of the Securities and Exchange Board of India Act, 1992 which provides for the composition of the Securities and Exchange Board of India ('SEBI'), does not necessarily require the presence of Judicial Members in SEBI. He pointed out that the fact that the SEBI inter-alia performs judicial functions has been recognized by the Supreme Court in ***Clariant International Ltd. & Anr. vs. Securities and Exchange Board of India (2004) 8 SCC 524***. Similarly, he stated that Telecom Regulatory Authority of India, Medical Council of India, Institute of Chartered Accountants of India and the Assessing Officers, CIT (Appeals), Dispute Resolution Panel under the Income Tax Act perform quasijudicial functions but there is no

requirement that such members must possess either a law degree or have had judicial experience.

63. He submitted that a casting vote in the hands of the chairperson is a fair and reasonable manner of deciding a tie in votes and is commonly provided for in several laws.

64. He stated that NAA has been constituted as per the provisions of Rule 122 of the Rules, 2017. The Rules, 2017, including Rule 122, have been duly notified by the Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes & Customs vide Notification No. 3/2017- Central Tax dated 19th June, 2017 and published in the Gazette of India- Extraordinary vide G.S.R. No. 610(E) on the same date and hence NAA has been duly constituted by a Notification as required under Section 171(2) of the Act, 2017. The above notification dated 19th June, 2017 was laid before the Lok Sabha on 11th August, 2017 and before the Rajya Sabha on 08th August, 2017 as required by Section 166 of the Act, 2017.

65. He submitted that in the absence of an express provision to the effect that anti-profiteering proceedings would abate if time-lines are not strictly adhered to, and if the time-lines are read to be mandatory, it would result in gross injustice to the consumers who would be left remediless on account of no fault of theirs.

66. Further, in the absence of anything to the contrary in the amendment or the amended provision, on a plain reading of the provision, the amended/extended time-period for passing of an order would apply to all pending and future proceedings before NAA. He submitted that the time-frames provided in the antiprofiteering provisions are merely directory in nature and not mandatory.

67. Mr. Zoheb Hossain, learned counsel, stated that Section 171 of the Act, 2017 is widely worded and does not limit the scope of examination to only the goods and services in respect of which a complaint is received by the authorities. He submitted that Rule 129 of the Rules, 2017, which provides for the scope of powers of the DGAP, uses the words 'any supply of goods or services' and so the scope of powers of DGAP is very wide.

68. He stated that the contention of the petitioners that there was no mechanism for recovery of the alleged profiteered amount under Section 171 of the Act, 2017 overlooks Rule 133(3)(b) of the Rules, 2017 prescribed under Section 171(3) of the Act, 2017 which empowers NAA to order a supplier to 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 [18%] 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 including interest, as the case may be.

69. Mr. Zoheb Hossain, learned counsel, submitted that the judgments of Supreme Court in ***Indian Carbon Ltd. Vs. State of Assam, (1997) 6 SCC 479*** and ***Shree Bhagwati Steel Rolling Mills vs. CCE (2016) 3 SCC 643*** etc. relied upon by the petitioners were delivered in the context of considering the question of whether interest can be levied for delayed payment of tax and whether penalty can be imposed for non-payment of tax under a Rule where the Statute does not authorize the same.

70. He submitted that by virtue of Rule 133(3)(d) of the Rules, 2017, NAA was already vested with the powers to impose penalties even before Section 171(3A) came into force. According to him, Section 171(3A) of the Act, 2017 is therefore merely clarificatory in nature. He further submitted that in the absence of a power to impose penalties, there would be no consequence arising out of the violation of Section 171(1) of the Act, 2017 by suppliers and consequently, there would be no deterrence against non-compliance.

71. Even otherwise, he stated that show cause notices initiating penalty proceedings in relation to violation of Section 171(1) prior to the coming into force of Section 171(3A) of the Act, 2017, have been withdrawn by NAA and penalty proceedings in all such cases are not being pressed and so this issue has become infructuous. Insofar as the objection regarding levy of interest is concerned, he submitted that the object of the anti-profiteering measures provided in Section 171 of the Act, 2017 is to ensure that the Input Tax Credits availed by any registered person or the reduction in tax rate result in a commensurate reduction in the price of goods or services or both supplied by him and as a result, the benefit of the same passed on to the recipients. He stated that the profiteered amount includes the benefit of reduction in taxes or Input Tax Credits which was required to be passed on by way of reduction in prices as well as the tax thereon which the consumer is forced to pay as a result of the non-reduction of prices as required under Section 171(1) of the Act, 2017. He emphasised that had the supplier passed on the benefit of reduction in tax rates or Input Tax Credit by way of reduction in prices, the consumer would not have been required to pay the additional Goods and Services Tax.

72. Mr. Zoheb Hossain submitted that without prejudice to the fact that each and every Act of NAA is well reasoned and justified and can be defended to the satisfaction of this Court as and when the same are taken up case-

wise, the casespecific submissions of the petitioners have no bearing whatsoever while considering the constitutional *vires* of Section 171 of the Act, 2017 and Rules contained in Chapter XV of the Rules, 2017.

ARGUMENTS ON BEHALF OF THE LEARNED AMICUS CURIAE

73. Mr. Amar Dave, learned Amicus Curiae stated that the cardinal objective with which the Goods and Services Tax had been introduced was *inter alia* to ensure an efficient and robust indirect taxing system.

74. He contended that a perusal of the reports and the discussions preceding the introduction of Goods and Services Tax regime clearly indicated that the impact on prices of various goods and services had been factored in as a necessary consequence of the shift over to the Goods and Services Tax regime.

75. He pointed out that the report of the Comptroller and Auditor General of India ('CAG') of June, 2010 dealt with the manner in which the Value Added Tax ('VAT') was implemented in India and accordingly threw light on the lessons for transition to Goods and Services Tax. One of the elements covered in the said report was the impact that VAT had on prices of goods. The report found that the white paper at the time of introduction of VAT was sanguine that implementation of VAT would bring down the prices of goods due to rationalisation of tax rates and abolition of cascading effect of tax in the legacy systems. However, on the examination and analysis of a small data survey, the CAG found that the manufacturers did not reduce the maximum retail prices after introduction of VAT even when there had been a substantial reduction in tax rates. It was, therefore, found that despite introduction of VAT and reduction in the tax rates, the benefits ensuing from such reduction were not passed on to the consumers by the manufacturers and the dealer networks across the VAT chain had enriched themselves at the cost of the common man. The report highlighted these aspects as those to be borne in mind at the time of considering the shift over to the Goods and Services Tax regime and to ensure mechanism for the purposes of passing on the benefit of tax rationalisation to the ultimate common man. 76. He stated that similarly, another report of the taskforce on Goods and Services Tax i.e. the 13th Finance Commission Report of 15th December, 2009 comprehensively dealt with minute aspects of the contemplated Goods and Services Tax ecosystem and various elements of such switchover. In its introduction, the report contemplated inter alia that the prevailing indirect tax system both at the Central and the State level included high import tariffs, excise duties and turnover tax on domestic goods and services having

cascading effects, leading to a distorted structure of production, consumption and exports and this problem could be effectively addressed by shifting the tax burden from production and trade to final consumption. The report highlighted the implications of the switchover to Goods and Services Tax and the benefits that would entail from such a switchover. He pointed out that para 7.22 of the said report specifically recorded that the benefit to the poor from the implementation of Goods and Services Tax would flow from two sources, first through increase in the income levels and second through reduction in prices of goods consumed by them. It was specifically observed that the proposed switchover to the flawless Goods and Services Tax system should therefore be viewed as a pro-poor system and not regressive. The report further specifically went into the implications of the proposed switchover to Goods and Services Tax on various products and sectors including prices of the goods.

77. He further stated that the Report of the Select Committee (presented to the Rajya Sabha on 22nd July, 2015) dealt with the issues of transition to Goods and Services Tax and the same dealt with *inter alia* issues of consumer benefit that would arise on account of the transition and related aspects.

78. Learned Amicus Curiae contended that the discussions at the time of the introduction of the Goods and Services Tax Bill in the Lok Sabha and the Rajya Sabha with regard to Section 171 of the Act, 2017 left no room for doubt that the said measure was introduced as a consumer benefit measure in order to ensure that the past experiences of the stakeholders retaining the benefit of tax reductions due to lack of legal mechanism is not repeated at the time of the switchover to Goods and Services Tax regime.

79. He submitted that Section 171 of the Act, 2017 is a stand-alone provision and provides for all the parameters which act as navigational tools while applying the said provision. He submitted that the pre-requisites for triggering the provision are specifically provided therein and the consequence of the section is also specifically provided for. He submitted that the beneficiary of the contemplated benefit provided under the provision is clearly specified, and therefore, all critical aspects of its applicability and workability stand embedded in the section itself.

80. Learned Amicus Curiae stated that by its very nature, Section 171 of the Act, 2017 provides for an inherent assumption that the reduction of tax rate or the benefit of Input Tax Credit under the Goods and Services Tax mechanism specifically requires, as a consequence thereof, a commensurate reduction in price. He stated that the contention that Section 171 of the Act,

2017 amounts to price regulation is not correct as the provision has been inserted to ensure specifically that the consequential effect of the tax rate must enure to the benefit of the consumer. The very foundation of the same is based on the concept that when the tax rate undergoes a reduction under the Goods and Services Tax regime, it obviously must translate into price reduction. He submitted that if there is a variation (which can be justified by the supplier) of other factors such as any costs necessitating the setting off of such reduction of price, the inherent presumption is a rebuttable presumption.

81. He submitted that the concept of Section 171 of the Act, 2017 is based on consumer welfare and equity. He contended that it is also the spirit of the constitutional provisions that no entity can be permitted to collect any tax (in any direct or indirect manner or by any implicit representation to that effect) except by the authority of law. Hence, when in spite of the reduction in the applicable tax rate, consequential reduction of the actual price does not take place and the amount is retained by the supplier, it would qualify as an unjust enrichment at the cost of the recipient who is the otherwise beneficiary of the reduction of the tax rate.

82. He stated that any indirect manner of passing on the benefit like '*Diwali Dhamaka*' or cross-subsidisation would be interfering with the right of the recipient to get the direct benefit. According to him, such an indirect method to pass the benefit is not contemplated under the express provisions and is also not in sync with the right of the recipient to get the actual benefit of the change in the tax rate. He stated that no such indirect method to pass on the benefit can be read-into the provision when the same is consciously not provided for therein thereby establishing/cementing the right of the recipient/consumer to get the benefit by way of commensurate reduction of the price itself.

83. Learned Amicus Curiae submitted that under the scheme of the Act, 2017, it is contemplated that the Central Government on the recommendations of the Goods and Services Tax Council (a constitutional body formed under the provisions of Article 279A of the Constitution of India) may constitute an Authority or empower an existing Authority constituted under any law for the purpose of examining whether benefit has actually been passed on to the recipients as contemplated under Section 171 of the Act, 2017. He pointed out that Chapter XV of the Rules deals with the subject of anti-profiteering and interalia provides the different layers of fact-finding examination that have to be undertaken with respect to the actual passing of benefit contemplated under Section 171 of the Act, 2017. According to him, it is clear from the said Rules that the same contemplates constitution of

Standing Committee and Screening Committee at different levels. Further, under the scheme of the Rules, it is provided that the Standing Committee shall within a stipulated time frame after following the process prescribed therein determine whether there is any prima facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax or the benefit of Input Tax Credit or the benefit of Input Tax Credit has, in fact, not been passed on to the recipient. He stated that the scheme of the Rules therefore contemplates that such application(s) from the interested parties shall be first examined by the State level Screening Committee if they pertain to issues local in nature and subsequently be forwarded to the Standing Committee for action. Further, when the Standing Committee reaches a prima facie conclusion, it shall refer the matter to the DGAP for a detailed investigation. Rule 129 of the Rules, 2017 provides for a comprehensive mechanism which the DGAP is required to follow once the matter is forwarded to it. Once the report of the DGAP is forwarded to the Authority, the Rules provide for the mechanism in which the Authority is to undertake the exercise of further considerations and reaching its final conclusions. Thus, according to him, the perusal of the said Scheme under the Rules, 2017 therefore clearly establishes a fact-finding mechanism at different levels culminating in the final determination of the matter by the Authority.

84. He submitted that in view of the purely fact-based nature of the exercise and the different levels contemplated for such findings under the Rules the contention that there is lack of appropriate redressal measures under the Scheme of Anti-Profiteering measures in the Goods and Services Tax framework is clearly negated.

85. Learned Amicus Curiae submitted that there is no question of any unbridled powers being conferred on the authority which is entrusted with the obligation of ensuring the compliance of the said provision as enough guidance emanates from the parent provision itself. He contended that all the factors such as the nature of the exercise to be carried out; the objective sought to be achieved by the said exercise; the incorporation of all critical elements which are to guide any such exercise in the section itself; the nature of the authority contemplated and tasked to carry out the functions; the period monitoring of the same by the Goods and Services Tax Council etc. are to be considered when dealing with the subject matter.

COURT'S REASONING

PRINCIPLES FOR ADJUDICATING THE CONSTITUTIONALITY OF AN ENACTMENT

86. This Court is of the view that the principles for adjudicating the constitutionality of an enactment are well settled. Though they have been succinctly set out in a number of judgments, yet this Court considers it appropriate to reiterate them.

87. A Statute can be declared as unconstitutional only if the Petitioners make out a case that the Legislature did not have the legislative competence to pass such a Statute or that the provisions of the Statute violate the Fundamental Rights guaranteed under Part-III of the Constitution of India or that the Legislature concerned has abdicated its essential legislative function or that the impugned provision is arbitrary, unreasonable or vague in any manner. D.D. Basu in Shorter Constitution of India (16th Edn., 2021) has enumerated the grounds on which a law may be declared to be unconstitutional as follows:-

(i) Contravention of any fundamental right, specified in Part III of theConstitution.

(ii) Legislating on a subject which is not assigned to the relevantlegislature by the distribution of powers made by the Seventh Schedule, read with the connected articles.

(iii) Contravention of any of the mandatory provisions of the Constitutionwhich impose limitations upon the powers of a legislature e.g. Article 301.

(iv) In the case of a State law, it will be invalid insofar as it seeks tooperate beyond the boundaries of the State.

(v) That the legislature concerned has abdicated its essential legislativefunction as assigned to it by the Constitution or has made an excessive delegation of that power to some other body.

88. It must also be kept in mind that there is always a presumption in favour of constitutionality of an enactment and the burden to show that there has been a clear transgression of constitutional principles is upon the person who attacks such an enactment. Whenever constitutionality of a provision is challenged on the ground that it infringes a fundamental right, the direct and inevitable effect/consequence of the legislation has to be taken into account. The Supreme Court in ***Namit Sharma vs. Union of India, (2013) 1 SCC 745*** has held as under:-

"20. Dealing with the matter of closure of slaughterhouses in Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat [(2008) 5 SCC 33] , the Court while noticing its earlier judgment Govt. of A.P. v. P. Laxmi Devi [(2008) 4 SCC 720] , introduced a rule for exercise of such jurisdiction by the courts stating that ***the court should exercise judicial restraint while judging the constitutional validity of the statute or even that of a delegated legislation and it is only when there is clear violation of a constitutional provision beyond reasonable doubt that the court should declare a provision to be unconstitutional****….."*

(emphasis supplied)

COURTS' APPROACH WHILE DEALING WITH TAX OR ECONOMIC LAWS

89. Further, the Courts have consistently held that the laws relating to economic activities have to be viewed with greater latitude than laws touching civil rights and that the Legislature has to be allowed some play in the joints because it has to deal with complex problems. The Supreme Court in its recent judgment in ***Union of India vs. VKC Footsteps India (P) Ltd., 2021 SCC OnLine SC 706*** has reiterated the approach that the Courts have to adopt while dealing with tax or economic regulations. The relevant portion of the said judgment is reproduced hereinbelow:-

"135. *While we are alive to the anomalies of the formula, an anomaly per se cannot result in the invalidation of a fiscal rule which has been framed in exercise of the power of delegated legislation.* ***In R.K. Garg [R.K. Garg v. Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] , P.N. Bhagwati, J. (as the learned Chief Justice then was) speaking for the Constitution Bench underscored the importance of the rationale for viewing laws relating to economic activities with greater latitude than laws touching civil rights.*** *The Court held : (SCC pp. 69091, para 8)*

"8. ***Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature****. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud [Morey v. Doud, 1957 SCC OnLine US SC 105 : 1 L Ed 2d 1485 : 354 US 457 (1957)] where* ***Frankfurter, J., said in his inimitable style:***

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability. The Court must always remember that 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; 'that exact wisdom and nice adaption of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error

method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid*. The courts cannot, as pointed out by the United States Supreme Court in Secy. of*
Agriculture v. Central Roig Refining Co. [Secy. of Agriculture v. Central Roig Refining Co.,
1950 SCC OnLine US SC 14 : 94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. ***The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation.*** *That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.'"*

(emphasis supplied)

ACT, 2017 MARKS A PARADIGM SHIFT IN THE FIELD OF INDIRECT TAXES

90. This Court is of the view that the Act, 2017 not only simplifies and harmonises the indirect tax regime in the country, but it also marks a paradigm shift in the manner in which they are enacted, levied and collected in India.

91. The Act, 2017 primarily intends to provide a common national market for Goods and Services as reflected in its moto *'One Nation One Tax*'. It is a consumer-centric Act, as it eliminates the levy of multiple taxes, avoids any cascading tax effect, streamlines the credit mechanism by weeding out distortions in the supply chains and ensures a smooth pass-through and transparent mechanism for levying tax. This is apparent from the Statement of Objects and

Reasons of the Act, 2017. The same is reproduced hereinbelow:-

"Presently, the Central Government levies tax on, manufacture of certain goods in the form of Central Excise duty, provision of certain services in the form of service tax, inter-State sale of goods in the form of Central Sales tax. Similarly, the State Governments levy tax on and on retail sales in the form of value added tax, entry of goods in the State in the form of entry tax, luxury tax and purchase tax, etc. Accordingly, there is multiplicity of taxes which are being levied on the same supply chain.

2. The present tax system on goods and services is facing certain difficulties as under—

(i) there is cascading of taxes as taxes levied by the Central Government are not available as set off against the taxes being levied by the State

Governments; (ii) certain taxes levied by State Governments are not allowed as set off for payment of other taxes being levied by them;

(iii) the variety of Value Added Tax Laws in the country with disparate tax ratesand dissimilar tax practices divides the country into separate economic spheres; and

(iv) the creation of tariff and non-tariff barriers such as octroi, entry tax, checkposts, etc., hinder the free flow of trade throughout the country. Besides that, the large number of taxes create high compliance cost for the taxpayers in the form of number of returns, payments, etc.

3. In view of the aforesaid difficulties, all the above mentioned taxes are proposedto be subsumed in a single tax called the goods and services tax which will be levied on supply of goods or services or both at each stage of supply chain starting from manufacture or import and till the last retail level. So, any tax that is presently being levied by the Central Government or the State Governments on the supply of goods or services is going to be converged in goods and services tax which is proposed to be a dual levy where the Central Government will levy and collect tax in the form of central goods and services tax and the State Government will levy and collect tax in the form of state goods and services tax on intra-State supply of goods or services or both.

4. In view of the above, it has become necessary to have a Central legislation,namely the Central Goods and Services Tax Bill, 2017. The proposed legislation will confer power upon the Central Government for levying goods and services tax on the supply of goods or services or both which takes place within a State. The proposed legislation will simplify and harmonise the indirect tax regime in the country. It is expected to reduce cost of production and inflation in the economy, thereby making the Indian trade and industry more competitive, domestically as well as internationally. Due to the seamless transfer of input tax credit from one stage to another in the chain of value addition, there is an in-built mechanism in the design of goods and services tax that would incentivise tax compliance by taxpayers. The proposed goods and services tax will broaden the tax base, and result in better tax compliance due to a robust information technology infrastructure.

5. The Central Goods and Services Tax Bill, 2017, inter alia, provides for thefollowing, namely:—

(a) to levy tax on all intra-State supplies of goods or services or both exceptsupply of alcoholic liquor for human consumption at a rate to be notified, not exceeding twenty per cent. as recommended by the Goods and Services Tax Council (the Council);

(b) to broad base the input tax credit by making it available in respect of taxespaid on any supply of goods or services or both used or intended to be used in the course or furtherance of business;

(c) to impose obligation on electronic commerce operators to collect tax atsource, at such rate not exceeding one per cent. of net value of taxable supplies, out of payments to suppliers supplying goods or services through their portals; (d) to provide for self-assessment of the taxes payable by the registered person;

(e) to provide for conduct of audit of registered persons in order to verifycompliance with the provisions of the Act;

(f) to provide for recovery of arrears of tax using various modes includingdetaining and sale of goods, movable and immovable property of defaulting taxable person;

(g) to provide for powers of inspection, search, seizure and arrest to the officers;

(h) to establish the Goods and Services Tax Appellate Tribunal by the CentralGovernment for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority;

(i) to make provision for penalties for contravention of the provisions of theproposed Legislation;

(j) to provide for an anti-profiteering clause in order to ensure that businesspasses on the benefit of reduced tax incidence on goods or services or both to the consumers; and

(k) to provide for elaborate transitional provisions for smooth transition ofexisting taxpayers to goods and services tax regime.

6. The Notes on clauses explain in detail the various provisions contained in theCentral Goods and Services Tax Bill, 2017.

7. The Bill seeks to achieve the above objectives."

92. From the aforesaid, it is apparent that the Act, 2017 levies a single tax on the supply of goods or services on the value addition at each stage of the supply chain from purchase of raw materials, manufacture of product or import, till the finished good reaches the hands of the consumer. This is best illustrated by the following example:-

Stages	**Actions**	**PriceTax=cost**	**Cost/ Addition**	**Total**	**Tax @10% only on addition**	**Total price**
1st	Purchase of raw material by manufacturer	-	2000	2000	200	2200
2nd	Sold finished goods to wholesaler (raw material to finished goods)	2000200 =2200	500	2700	50	2750
3rd	Purchase of finished	270050= 2750	400	31	40	31

	goods by Trader			50		90
4th	Purchase of finished goods by actual consumer	315040=3190	300	3490	30	3520
	Total		**3200**		**320**	**3520**

93. The Goods and Service Tax is a destination-based tax and is levied at the point of consumption. Accordingly, the taxes get accumulated with the original price and due to the effect of Input Tax Credit, the cascading effect i.e. tax on tax is removed. This is best illustrated by the following example:-

OLD SYSTEM		*GOODS AND SERVICES TAX SYSTEM*	
MANUFACTURING COST OF CAR		*MANUFACTURING COST OF CAR*	
ADD: PROFIT @20%		*ADD: PROFIT @20%*	
TOTAL COST	*250,000*	*TOTAL COST*	*250,000*
ADD: EXCISE DUTY @10%	*50,000*	*ADD: EXCISE DUTY @10% NA*	*50,000*
COST AFTER TAX	*300,000*	*COST AFTER TAX*	*300,000*
ADD : VAT @10%	*30,000*	*ADD : VAT @10% NA*	*0*
COST TO CUSTOMER	*3,30,000*		*3,00,000*
	33000		*0*
	3,63,000		*300,000*
		ADD:GOODS And SERVICES TAX @ 20%	*60000*
		COST TO CUSTOMER	*3,60,000*

94. Consequently, the intent of the Act, 2017 is to provide a common national market, boost productivity, increase competitiveness, broaden the tax base and make India a manufacturing hub.

SECTION 171 MANDATES THAT TAX FOREGONE HAS TO BE PASSED ON AS A COMMENSURATE REDUCTION IN PRICE.

95. As rightly pointed out by the learned Amicus Curiae, the introduction of the system of Goods and Services Tax was preceded by a comprehensive examination of the subject by different committees and the reports of such

committees had been factored in while finalizing the framework of the Goods and Services Tax.

96. An area of concern identified in the said reports was that though with the doing away of multiplicity and cascading of taxes, the prices of goods and services would come down, yet would this benefit, if any, be passed on to the consumer by the manufacturers and sellers. To ensure that the benefit is passed on, an anti-profiteering provision in the form of Section 171 of the Act, 2017, was introduced.

97. Section 171 of the Act, 2017 mandates that the suppliers shall pass on the benefit of reduction of the rate of Goods and Services Tax or Input Tax Credits by way of commensurate reduction in prices to the recipient. Section 171 deals with amounts that the Central and State Governments have foregone from the public exchequer in favour of the consumers. This Court is of the view that the amounts foregone from the public exchequer in favour of the consumers cannot be appropriated by the manufacturers, traders, distributors etc. To allow them to do so would amount to unjust enrichment. Consequently, when the Goods and Services Tax rate gets reduced or the benefit of input tax credit, becomes available as a necessary consequence the final price paid by the recipient obviously requires to be reduced. In the absence of such anti-profiteering provisions, there would be no legal obligation to pass on the benefit of the Goods and Services Tax regime and, consequently, the intended objective of reducing overall tax rates and mitigating the cascading effect would not be achieved. 98. The expression *'profiteered'* has been defined in the Explanation to Section 171 of the Act, 2017 to 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'*. According to Collins English Dictionary – Complete and Unabridged, 12th Edition 2014, the word *'commensurate'* means *"1. having the same extent or duration; 2. corresponding in degree, amount, or size; proportionate; 3. able to be measured by a common standard; commensurable."* The word '*commensurate*' has been used in several judgments of the Supreme Court for laying down yardsticks in different contexts, from determining the rightfulness of the posting of a public servant, to assessing the correctness of criminal sentencing and calculating maintenance amounts indicating that the Courts too have a clear and definite understanding of this word. [See: ***P.K. Chinnasamy v. Govt. of T.N., (1987) 4 SCC 601; Centre for PIL v. Housing & Urban Development Corpn. Ltd.,***

***(2017) 3 SCC 605; Dinesh v. State of Rajasthan, (2006) 3 SCC 771; Vimala (K.) v. Veeraswamy (K.), (1991) 2 SCC 375*]**.

99. The obligation of effecting/making a "commensurate" reduction in prices, as mentioned hereinabove, is relevant to the underlying objective of the Goods and Services Tax regime which is to ensure that suppliers pass on the benefits of reduction in the rate of tax and Input Tax Credit to the consumers, especially since the Goods and Services Tax is a consumption-based tax (as adopted in India) and the recipient (consumer) practically pays the taxes which are included in the final price. Section 171 of the Act, 2017, therefore, is not to be looked at as a price control measure but is to be seen to be directly connected with the objectives of the Goods and Services Tax regime. Consequently, the word *'commensurate'* in Section 171 of the Act, 2017 means that whatever actual saving arises due to the reduction in rates of tax or the benefit of the Input Tax Credit, in rupee and paisa terms, must be reflected as equal or near about reduction in price . In other words, tax foregone by the authorities has to be passed on to the consumer as commensurate reduction in price.

100. Accordingly, Section 171 of the Act, 2017 has been enacted, in public interest, with the consumer welfare objective of ensuring that suppliers pass on the benefit of Input Tax Credits and reduction of rate of Goods and Services Tax to the consumers. The Section does this by firstly creating a substantive obligation under sub-section (1) requiring manufacturers / suppliers to pass on benefits of Input Tax Credits and/or reduction in rate of tax by way of commensurate reduction in prices to the recipients. The said Section further enables the establishment of an Authority to determine whether Suppliers have passed on the benefits of Input Tax Credits and reduction of the tax rates, and to exercise such other powers and functions as may be prescribed.

101. This Court is in agreement with the submission of the Respondents that the objective behind Section 171 is directly relatable to the Directive Principles of State Policy contained in Article 38(1) of the Constitution which requires the State to strive to secure a social order in which justice, social, economic and political shall inform all institutions of the national life and Articles 39(b) and (c) of the Constitution which require the State to direct its policy towards ensuring that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

102. To summarise, Section 171 of the Act, 2017 mandates that whatever is saved in tax must be reduced in price. Section 171 of the Act, 2017 incorporates the principle of unjust enrichment. Accordingly, it has a flavor of consumer welfare regulatory measure, as it seeks to achieve the primary objective behind the Goods and Services Tax regime i.e. to overcome the cascading effect of indirect taxes and to reduce the tax burden on the final consumer. Consequently, the judgments of ***Ahmedabad Urban Development Authority*** (supra), ***Indian Carbon Limited*** (supra), ***V.V.S. Sugars*** (supra) and ***Shree Bhagwati Steel Rolling Mills v. CCE*** (supra), relied on by the Petitioners, are not applicable as they deal with the validity of delegated authority imposing tax/fee or charging interest on delayed payment of tax in the absence of empowering provision in the statute.

SECTION 171 FALLS WITHIN THE LAW-MAKING POWER OF THE PARLIAMENT UNDER ARTICLE 246A

103. Article 246A of the Constitution of India defines the source of power as well as the field of legislation (with respect to goods and services tax) obviating the need to refer to the Seventh Schedule of the Constitution. Article 246A is available to both the Parliament and the State Legislatures. The said Article embodies the constitutional principle of simultaneous levy as distinct from the principle of concurrence. However, the Parliament has the exclusive power to enact Goods and Services Tax legislation where the supply of goods or services takes place in the course of inter-State trade or commerce. The Supreme Court in ***Union of India vs. VKC Footsteps India (P) Ltd.*** (supra) has held, '*The One Hundred and First Amendment to the Constitution is a watershed moment in the evolution of cooperative federalism'.*

104. Article 246A of the Constitution of India empowers the Parliament and Legislatures to make laws '*with respect to*' goods and services tax. This expression is similar to that used in Article 246 which empowers the Parliament and State Legislatures to make laws '*with respect to*' the various subject-matters enumerated in the Seventh Schedule. The Supreme Court has consistently held that the expression *'with respect to'* is of wide amplitude and thus, the law making power with regard to Goods and Services Tax includes all ancillary, incidental and necessary matters. In ***Welfare Association, A.R.P., Maharashtra***

Vs. Ranjit P. Gohil, (2003) 9 SCC 358, the Supreme Court has held as under:-

*"28. **The fountain source of legislative power exercised by Parliament** or the State Legislatures is not Schedule 7; the fountain source **is Article 246** and other provisions of the Constitution. The function of the three lists in the Seventh Schedule is merely to demarcate*

legislative fields between Parliament and States and not to confer any legislative power. The several entries mentioned in the three lists are fields of legislation. The Constitution-makers purposely used general and comprehensive words having a wide import without trying to particularize. ***Such construction should be placed on the entries in the lists as makes them effective; any construction which will result in any of the entries being rendered futile or otiose must be avoided.*** *That interpretation has invariably been countenanced by the constitutional jurists, which gives the words used in every entry the widestpossible amplitude.* ***Each general word employed in the entries has been held to carry an extended meaning so as to comprehend all ancillary and subsidiary matters within the meaning of the entry so long as it can be fairly accommodated subject to an overall limitation that the courts cannot extend the field of an entry to such an extent as to result in inclusion of such matters as the framers of the Constitution never intended to be included*** *within the scope of the entry or so as to transgress into the field of another entry placed in another list.*

29. In every case where the legislative competence of a legislature in regard to a particular enactment is challenged with reference to the entries in the various lists, it is necessary to examine the pith and substance of the Act and to find out if the matter comes substantially within an item in the list. ***The express words employed in an entry would necessarily include incidental and ancillary matters so as to make the legislation effective. The scheme of the Act under scrutiny, its object and purpose, its true nature and character and the pith and substance of the legislation are to be focused at. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power*** *(see the Constitution Bench decision in Chaturbhai M. Patel v. Union of India [AIR 1960 SC 424 : (1960) 2 SCR 362]).”*
(emphasis supplied)

105. In ***R.S. Joshi, Sales Tax Officer, Gujarat & Ors. vs. Ajit Mills Limited & Anr., (1977) 4 SCC 98,*** a Seven-Judge Bench of the Supreme Court clearly held that providing for measures dealing with aspects of unjustly retained amounts as tax in the concerned statute were necessary / ancillary aspects connected with the subject of taxation. The relevant portion of the said judgment is reproduced hereinbelow:-

“13. Bearing in mind the quintessential aspects of the rival contentions, let us stop and take stock. The facts of the case are plain. The professed object of the law is clear. The motive of the legislature is irrelevant to castigate an Act as a colourable device. ***The interdict on public mischief and the insurance of consumer interests against likely, albeit, unwitting or “ex abundanti cautela” excesses in the working of a statute are not merely an ancillary power but surely a necessary obligation of a social welfare state. One potent prohibitory process for this consummation is to penalize the trader by casting a no-fault or absolute liability to “cough up” to the State the total “unjust” takings snapped up and retained by him “by way of tax” where tax is not so due from him, apart from other punitive impositions to deter and to sober the merchants whose arts of dealing with customers may include “many a little makes a mickle'.*** *If these steps in reasoning*

have the necessary nexus with the power to tax under Entry 54 List II, it passes one's comprehension how the impugned legislation can be denounced as exceeding legislative competence or as a "colourable device" or as "supplementary, not complementary'. But this is precisely what the High Court has done, calling to its aid passages culled from the rulings of this Court and curiously distinguishing an earlier Division Bench decision of that very Court — a procedure which, moderately expressed, does not accord with comity, discipline and the rule of law. The puzzle is how minds trained to objectify law can reach fiercely opposing conclusions.

xxx xxx xxx

24. ***In a developing country, with the mass of the people illiterate and below the poverty line, and most of the commodities concerned constitute their daily requirements, we see sufficient nexus between the power to tax and the incidental power to protect purchasers from being subjected to an unlawful burden. Social justice clauses, integrally connected with the taxing provisions, cannot be viewed as a mere device or wanting in incidentality****. Nor are we impressed with the contention turning on the dealer being an agent (or not) of the State vis-a-vis sales tax ; and why should the State suspect when it obligates itself to return the moneys to the purchasers? We do not think it is more feasible for ordinary buyers to recover from the common run of dealers small sums than from Government. We expect a sensitive government not to bluff but to hand back.* ***So, we largely disagree with Ashoka while we generally agree with Abdul Quader****. We must mention that the question as to whether an amount which is illegally collected as sales tax can be forfeited did not arise for consideration in Ashoka.*

25. ***We may conclude with the thought that Parliament and the State legislatures will make haste to inaugurate viable public interest litigation procedures cutting costs and delays****.* ***After all, the reality of rights is their actual enjoyment by the citizen and not a theoretical set of magnificent grants****. "An acre in Middlesex', said Macaulay, "is better than a principality in Utopia'. Added Prof. Schwartz : "A legal system that works to serve the community is better than the academic conceptions of a bevy of Platonic guardians unresponsive to public needs."*

(emphasis supplied)

106. Keeping in view the aforesaid, this Court is of the view that the antiprofiteering mechanism as incorporated in Section 171 of the Act, 2017 is in the exercise of the Parliament's power to legislate on ancillary and necessary aspects/matters of Goods and Services Tax apart from being a social welfare measure as it amplifies and extends the earlier concept of barring persons to undertake exercise of collecting monies from the consumers by false representation.

107. Consequently, this Court is of the view that Section 171 of the Act, 2017 falls within the law-making power of the Parliament under Article 246A of the Constitution dealing with the ancillary and necessary aspects of Goods

and Services Tax and is not beyond the legislative competence of the Parliament.

SECTION 171 LAYS OUT A CLEAR LEGISLATIVE POLICY AND DOES NOT DELEGATE ANY ESSENTIAL LEGISLATIVE FUNCTION

108. This Court is of the view that Section 171 of the Act 2017 is a complete code in itself and it does not suffer from any ambiguity or arbitrariness. Section 171 of the Act 2017 sets out the function, duty, responsibility and power of NAA with exactitude. It stipulates that the pre-conditions for applicability of the provision are either the event of reduction in rate of tax or the availability of benefit of input tax credit (resulting in such reduction). Once the said prerequisites/conditions exist, the direct consequence contemplated i.e. reduction of the price must follow. Therefore, if before such reduction of rate of taxes or benefit of Input Tax Credit, the price paid by the recipient inclusive of the applicable tax at the relevant time was a particular amount, then on account of the reduction of the tax rate or the benefit of the Input Tax Credit, there has to be reduction in the subject price. Further, the reduction in the tax rate or the benefit of Input Tax Credit which is mandated to be passed on to the recipient is a matter of right for the recipient and consequentially, the price reduction must be commensurate to such benefit. For instance, when the Goods and Services Tax rate on a service of Rs.100 is 28%, the MRP of the service at which it is sold to the consumer is Rs.128. When the Goods and Services Tax rate is reduced by the Government from 28% to 18%, the provision requires that this reduction in Goods and Services Tax rate should be reflected in the price of the service and the benefit from such reduction of tax rate should be passed on to the consumers by way of commensurate reduction in the price. As a result, the new MRP of the service should be Rs.118.

109. In ***Re The Delhi Laws Act AIR (1951) SC 332***, while answering the question of what is an essential legislative function, the Supreme Court held that "*the essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy.*"

110. Keeping in view the aforesaid mandate of law, it is apparent that Section 171 of the Act, 2017 lays out a clear legislative policy. This Court is of the view that the necessary navigational tools, guidelines as well as checks

and balances have been incorporated in the provision itself to guide any authority tasked with ensuring its workability. Consequently, Section 171 of the Act 2017 neither delegates any essential legislative function nor violates Article 14 of the Constitution of India.

111. As per Section 171(2), the Central Government may, on recommendations of the Council, by notification, constitute an Authority 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. Section 171(3) of the Act, 2017 stipulates that the Authority i.e. NAA shall exercise such powers and discharge such function as may be prescribed. It is in exercise of this power that the Central Government has enacted Rule 126 of the Rules, 2017 empowering NAA to determine the methodology and procedure for determining whether the benefit has been passed on to the recipient by way of commensurate reduction in prices. Consequently, on a conjoint reading of Sections 171(2) and 171(3) of the Act, 2017, it is evident that the powers conferred on NAA by the Central Government under Rule 126 of the Rules, 2017 were intended by the Legislature to be exercised by the NAA itself. In fact, in exercise of its powers under Rule 126 of the Rules, 2017, NAA has issued the 'National Anti-Profiteering Authority: Methodology and Procedure, 2018' dated 28th March, 2018.

112. The Supreme Court in ***Sahni Silk Mills (P) Ltd. v. ESI Corpn., (1994) 5 SCC 346*** while discussing the maxim of *delegatus non potest delegare* has held that, *"The basic principle behind the aforesaid maxim is that "a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute". (Vide John Willis, "Delegatus non potest delegare, (1943) 21 Can. Bar Rev. 257, 259)".* Therefore, the principle of *delegatus non potest delegare* is not applicable to the present batch of matters.

113. Further, Section 166 of the Act, 2017 provides that every rule made by the Government in exercise of its powers under Section 164 of the Act, 2017 shall be laid before each house of the Parliament and that if both Houses agree to make any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect as the case maybe.

114. The Supreme Court in ***D.S. Grewal v. State of Punjab 1958 SCC OnLine SC 9*** in respect of a similar provision in the All-India Services Act, 1951 has observed as follows:

> *" At the same time Parliament took care to see that these rules were laid on the table of Parliament for fourteen days before they were to come into force and they were subject to modification, whether by way of repeal or amendment on a motion made by Parliament during the session in which they are so laid.* ***This makes it perfectly clear that Parliament has in no way abdicated its authority, but is keeping strict vigilance and control over its delegate****."*
> (emphasis supplied)
> *[*

115. Consequently, the Executive by framing Rule 126 of the Rules, 2017 has in no manner encroached upon the jurisdiction of the Parliament. The Petitioners, throughout the hearing of the case, have repeatedly pointed out that the NAA has adopted varied approaches with regard to entities dealing with similar products in identical circumstances. If that is the case, then, it may make the orders passed by NAA bad, but would not invalidate either Section 171 or the Rules framed thereunder. Further, as the substantive mandate under Section 171(1) is itself a sound guiding principle for the framing of Rules and the functioning of NAA, the argument that Rule 126 suffers from excessive delegation is untenable in law.

IMPUGNED PROVISIONS ARE NOT A PRICE FIXING MECHANISM. THEY DO NOT VIOLATE EITHER ARTICLE 19(1)(g) OR ARTICLE 300A OF THE CONSTITUTION

116. Section 171 of the Act, 2017 does not violate Article 19(1)(g) of the Constitution of India, as it is not a price-fixing mechanism. As rightly pointed out by the learned counsel for the Respondents, Section 171 of the Act, 2017 only relates to the indirect-tax component of the price of goods and services and does not impinge upon the freedom of suppliers to fix their own prices keeping in view relevant commercial and economic factors. This Court is in agreement with the learned Amicus Curiae that Section 171 of the Act, 2017 is solely focused on ensuring that the consequential benefit of reduction of the rate of tax by the Government reaches the recipient.

117. The contention of the petitioners that the fundamental presumption under Section 171 that every tax reduction must result in 'price reduction' is not correct. The use of the expression 'shall' in Section 171 of the Act, 2017 means that the supplier is required to pass on the benefit of the reduced tax rate and the benefit of Input Tax Credit, and that such passing on is to be carried out only by way of commensurate reduction of price of the goods or

services. Accordingly, costing and market-related factors are irrelevant for NAA, as it is only required to examine whether or not there is any reduction in tax rate or benefit of accruing Input Tax Credits and if so whether the same has been passed on by way of commensurate reduction of prices. The NAA is not concerned with the price determined by a supplier, for the supply of particular goods or services, exclusive of the GST or Input Tax Credit component. The supplier is at liberty to set his base prices and vary them in accordance with the relevant commercial and economic factors or any applicable laws. Consequently, NAA is only mandated to ensure that the benefit of reduced rates of taxes and Input Tax Credit is passed on. NAA cannot force the petitioners to sell their goods or services at reduced prices.

118. This Court is of the view that the manufacturer/supplier despite reduction on rate of tax or benefit of Input Tax Credits can raise the prices based on commercial factors, as long as the same is not a pretense. During the hearing, Mr. Zoheb Hossain, learned counsel, conceded (as recorded earlier) that in some cases, commercial factors might necessitate an increase in price despite reduction in rate of tax or increase in availability of benefit of Input Tax Credits.

119. This Court is in agreement with the submission of learned Amicus Curiae that if there is any variation on account of other factors, such as any costs necessitating the setting off of such reduction of price, the same needs to be justified by the supplier. The inherent presumption that these must necessarily be a reduction in prices of the goods and services is a rebuttable presumption. It is clarified that if the supplier is to assert reasons for offsetting the reduction, it must establish the same on cogent basis and must not use it merely as a device to circumvent the statutory obligation of reducing the prices in a commensurate manner contemplated under Section 171 of the Act, 2017.

120. This Court is further of the view that the present batch of matters deals with amounts that the Revenue had foregone in favour of the consumers which however had been either wrongfully appropriated by the petitioners/suppliers and/or used in their business and/or used for cross-subsidisation and/or passed off as a special discount to the dealer or the consumer. Therefore, there cannot be any proprietary interest of the suppliers in such amount which the Government has foregone in favour of consumers by way of reduction in taxes and no legal or constitutional right can be asserted thereunder.

121. Clearly, Section 171 of the Act, 2017 has been incorporated with the intent of creating a framework that ensures that the benefit reaches the

ultimate consumer. There cannot be any room for allowing unjust retention of benefit of reduction in rate of tax or benefit of input tax credit with the manufacturer/supplier/distributor. The reliance placed by the petitioners on the judgment of ***CIT vs. B.C. Srinivasa Setty (1981) 2 SCC 460*** and ***CCE vs. Larsen & Toubro Ltd. (2016) 1 SCC 170***, is completely misconceived as both these judgments were passed specifically in the context of levy of taxes. As held hereinabove, Section 171 of the Act, 2017 does not levy any tax on supplies and hence these judgments do not apply to the present batch of matters. Consequently, the impugned provisions are not a price fixing mechanism and they do not violate either Article 19(1)(g) or Article 14 or Article 300A of the Constitution of India.

REFERENCE TO ANTI-PROFITEERING PROVISIONS OF AUSTRALIA AND MALAYSIA IS MISCONCEIVED

122. The reference to Anti-profiteering provisions under the Australian Trade Practices Act by the petitioners is misplaced as pointed out by the learned counsel for the Respondents and as according to the petitioner's own submissions, the Australian Act prohibits '*price exploitation*' in relation to the New Tax System i.e. that the Act by its nature regulates prices. This is different from Section 171 of the Act, 2017 which only requires the suppliers to pass on the benefit of tax reduction and Input Tax Credit to the recipients of the goods and services. The 'price' aspect comes into play in the context of Section 171 of the Act, 2017 only when it comes to the manner in which the principal obligation of passing on benefits as aforesaid, is to be carried out i.e., by way of commensurate reduction of prices. Consequently, in the case of Section 171, there is no intent of any overriding regulation on '*price exploitation*' like in the case of the Australian Trade Practices Act referred to by the petitioners.

123. Similarly, the reference made by the petitioners to the Malaysian Price Control and Anti-Profiteering Act, 2011 is also misplaced as the said Act, according to the petitioner's own submission, prohibits suppliers from '*making unreasonably high profit*'. By its very nature, the Malaysian Act controls pricing unlike Section 171 of the Act, 2017 which does not seek to regulate the pricing of the goods and services or the profits of the suppliers. Consequently, the reference to Anti-Profiteering provisions of Australia and Malaysia is misconceived.

NO FIXED/UNIFORM METHOD OR MATHEMATICAL FORMULA CAN BE LAID DOWN FOR DETERMINING PROFITEERING

124. This Court is of the view that no fixed/uniform method or mathematical formula can be laid down for determining profiteering as the facts of each case and each industry may be different. The determination of the profiteered amount has to be computed by taking into account the relevant and peculiar facts of each case. There is *'no one size that fits all'* formula or method that can be prescribed in the present batch of matters. Consequently, NAA has to determine the appropriate methodology on a case to case basis keeping in view the peculiar facts and circumstances of each case.

125. It is also well-established that where a power exists to prescribe a procedure and such power has not been exercised, the implementing authorities are at liberty to determine and adopt such procedure as they may deem fit subject to the same being fair and reasonable. In ***Dhanjibhai Ramjibhai vs. State of Gujarat (1985) 2 SCC 5,*** the Supreme Court has held, "…*Merely because procedural rules have not been framed does not imply a negation of the power. In the absence of such rules, it is sufficient that the power is exercised fairly and reasonably, having regard to the context in which the power has been granted.*". In ***Chairman & MD, BPL Ltd. vs. S.P. Gururaja and Ors., (2003) 8 SCC 567***, the Supreme Court has held, "....*Under the Act or the Regulations framed thereunder, no procedure for holding such consultations had been laid down. In that situation it was open to the competent authorities to evolve their own procedure. Such a procedure of taking a decision upon deliberations does not fall foul of Article 14 of the Constitution of India."*

126. Consequently, Rule 126 of the Rules, 2017 to the extent it grants flexibility to NAA to determine the methodology and procedure to decide whether reduction in rate of tax or benefit of Input Tax Credit has been passed on or not to the recipient is reasonable and legal. Moreover, as per Rule 126 NAA *'may determine'* the methodology and not *'prescribe'* it. The substantive provision i.e. Section 171 of the Act, 2017 itself provides sufficient guidance to NAA to determine the methodology on a case by case basis depending upon peculiar facts of each case and the nature of the industry and its peculiarities. Consequently, so long as the methodology determined by NAA is fair and reasonable, the petitioners cannot raise the objection that the specifics of the methodology adopted are not prescribed.

127. Since considerable emphasis was laid by learned counsel for the Petitioners on the methodology adopted by NAA to determine commensurate reduction qua real estate industry, this Court deems it appropriate to deal with the same at some length. With the introduction of the Goods and Services

Tax scheme/regime, the availability of Input Tax Credit against various goods and services used in construction has increased or Input Tax Credit was available against more goods and services then before this resulted in a decrease in the cost of the builders as they now had more Input Tax Credit available to be set off against Goods and Services Tax paid by them in the Goods and Services Tax regime as compared to before and the same was not required to be collected from the consumers. 128. There is no dispute with regard to the methodology to be adopted in the following four scenarios:-

a. If the flat was completely constructed in the pre-Goods and Services Tax period i.e. before 01st July, 2017 and if it was purchased by making upfront payment of the whole price in the pre-Goods and Services Tax period no benefit of Input Tax

Credit would be required to be passed on as the price will include the cost of taxes on which Input Tax Credit was not available in the pre-Goods and Services Tax period viz. Central Excise Duty, Entry Tax etc.

b. If the construction of the flat had started in the pre-Goods and Services Tax period and continued/completed in the post-Goods and Services Tax period and a buyer purchased the flat by making full upfront payment in the post-Goods and Services Tax period he is entitled to the benefit of Input Tax Credit on the material which has been purchased in respect of this flat during the post-Goods and Services Tax period and on which benefit of Input Tax Credit has been availed by the builder. The builder has to reduce the price commensurately and pass on the benefit.

c. If the construction of the flat is started in the pre-Goods and Services Tax period and its construction was continued in the post-Goods and Services Tax period and it was purchased by the consumer by paying the full amount of price upfront in the preGoods and Services Tax period, the buyer is entitled to claim benefit of Input Tax Credit on the taxes paid on the construction material purchased by the builder in the post-Goods and Services Tax period during which he has been given benefit of Input Tax Credit on the taxes on which Input Tax Credit was not available in the pre-Goods and Services Tax and cost of such taxes has been built in the price of the flat by the builder.

d. If the flat is constructed in the post-Goods and Services Tax period and it is purchased after construction being complete by making upfront payment of the full price, no benefit of Input Tax Credit would be available as the price of the flat would have been fixed after taking into account the Input Tax Credit which has become available to the builder

in the post-Goods and Services Tax period and which was not available to him in the pre-Goods and Services Tax.

129. However, this Court finds that the methodology adopted by NAA and DGAP to arrive at the profiteering amount of the real estate industry was generally based on the difference between the ratio of Input Tax Credit to turnover under the pre-Goods and Services and Tax and post- Goods and Services and Tax period. This Court is in agreement with the contention of the learned counsel for the petitioners representing the real estate companies that the methodology adopted by NAA is flawed as in the real estate sector, there is no direct correlation between the turnover and the Input Tax Credit availed for a particular period. The expenses in a real estate project are not uniform throughout the life cycle of the project and the eligibility of credit depends on the nature of the construction activity undertaken during the particular period. As it is an admitted position that neither the advances received nor the construction activity is uniform throughout the life cycle of the project, the accrual of Input Tax Credit is not related to the amount collected from the buyers. This Court is in agreement with learned counsel of the petitioners that one needs to calculate the total savings on account of introduction of Goods and Services and Tax for each project and then divide the same by total area to arrive at the per square feet benefit to be passed on to each flat buyer. This would ensure that flat-buyers with equal square feet area received equal benefit. The Court, while hearing the present batch of matters on merits, shall take the aforesaid direction/interpretation into account.

IT IS THE PREROGATIVE OF THE LEGISLATURE TO DECIDE HOW THE BENEFIT IS TO BE PASSED ON TO THE CONSUMERS

130. It is settled law that it is the prerogative of the Legislature to decide the manner as to how the reduction in rate of tax or the benefit of Input Tax Credit is to be passed on to the consumer. In ***Dr.Ashwani Kumar vs. Union of India,***

(2020) 13 SCC 585*,* the Supreme court has held as under:-

"11. ***The legislature as an elected and representative body enacts laws to give effect to and fulfil democratic aspirations of the people. The procedures applied are designed to give careful thought and consideration to wide and divergent interests, voices and all shades of opinion from different social and political groups. Legislature functions as a deliberative and representative body. It is directly accountable and answerable to the electorate and citizens of this country. This representativeness and principle of accountability is what gives legitimacy to the legislations and laws made by Parliament or the State Legislatures.*** *Article 245 of the Constitution*

empowers Parliament and the State Legislatures to enact laws for the whole or a part of the territory of India, and for the whole or a part of the State respectively, after due debate and discussion in Parliament/the State Assembly."
(emphasis supplied)

131. In the present instance, the legislative mandate is that reduction of the tax rate or the benefit of Input Tax Credit must not only be reflected in reduction of prices but it must also reach the recipient of the goods or services. Such a mandate cannot be tampered with by the supplier by substituting the benefit in the form of reduction of actual price with any other form such as increase in volume or weight or by supply of additional or free material or festival discount like '*Diwali Dhamaka*' or cross-subsidisation.

132. Further, the requirement that the benefit of the rate reduction and Input Tax Credit reach the final consumer by way of '*cash in hand*' through commensurate reduction in prices, cannot be said to be manifestly arbitrary. No fundamental or other rights of any of the petitioners are being affected in any manner by requiring that the benefit in reduction of tax rate or Input Tax Credits, be passed on to the recipients by way of commensurate reduction in prices.

133. This Court is in agreement with the submission of Mr. Zoheb Hossain, learned counsel for the Respondents, that the benefit of tax reduction has to be passed on at the level of each supply of SKU to each buyer and in case it is not passed on, the profiteered amount has to be calculated on each SKU.

134. The contention of the learned counsel for the Petitioners that it is legally impossible to pass on the benefits by reducing the price of goods in cases of low priced products is untenable in law. As pointed out by Mr.Zoheb Hossain, learned counsel for the Respondents, the provisions of the Legal Metrology (Packaged Commodities) Rules, 2011 are applicable. In cases for period prior to 31st December, 2017, the erstwhile Rule 2(m) of the Legal Metrology (Packaged Commodities) Rules, 2011 which provided detailed instructions for rounding off of the MRP would be applicable. Similarly, Rule 6(1)(e) of the above Rules as amended in 2017 with effect from 01st January, 2018 to 31st March, 2022 provides that the retail price of the package shall clearly indicate that it is the MRP inclusive of all taxes and the price in rupees and paise be rounded off to the nearest rupee or 50 paise would be applicable. Consequently, there would be no legal impossibility in reducing the MRP even in such cases. There is nothing inconsistent in Section 171 with such rounding off.

ACT 2017 RIGHTLY DOES NOT FIX A TIME PERIOD DURING WHICH PRICE-REDUCTION HAS TO BE OFFERED

135. This Court is in agreement with the submissions of the respondents and the learned Amicus Curiae that bearing in mind the very nature of the Act, 2017, it is not proper or feasible to contemplate any specific period of time for application of the reduced price, as the same has to take effect so long as the direct relation between the reduction of tax rate or the benefit of Input Tax Credits exists and there is no other factor effecting/countering the same. If, conceptually, the reduction of tax rate has taken place on a specified date and there are no justified variations in the cost price or other factors for offsetting such reduction in the prices for a particular period of time, clearly for that period a reduced price must govern the transaction. This Court is of the view that providing for a particular period of time for operation of the provisions would be not be in conformity with the scheme and intent of the Act, 2017 itself.

SECTION 64A OF SALE OF GOODS ACT IS NOT APPLICABLE TO THE OBLIGATION UNDER SECTION 171

136. This Court is in agreement with the submission of learned counsel for the Respondents that Section 64A of Sale of Goods Act, 1930 has no applicability to the obligation under Section 171 of the Act, 2017 as the former only confers a discretion on the buyer to reduce the contract price to the extent of reduction in taxes, whereas Section 171 imposes a positive obligation on the supplier to make a commensurate reduction in the price when the Government reduces the rate of tax. Therefore there is no inconsistency between the two laws.

137. Moreover, the CGST/SGST Acts, 2017 are independent Acts and there is no provision under these Acts that tax reduction ordered under these Acts would be subject to the provisions of Sale of Goods Act, 1930 or the Indian Contract Act, 1872. Tax reduction is given by sacrificing tax revenue and hence the Governments are legally competent to direct the suppliers to pass on the benefit of such tax reduction to the consumers after its notification. Any contract made in violation of public policy of passing on the benefit would be void. Consequently, all contracts (a) whether they are pending to be performed or (b) executed after tax reduction and/or (c) have already been concluded before tax reduction, have to implemented keeping in view the mandate enshrined in Section 171 of the Act, 2017.

A STATUTORY PROVISION CANNOT BE STRUCK DOWN ON THE GROUND OF POSSIBILITY OF ABUSE

138. During the course of hearing, learned counsel for the petitioners advanced a number of hypothetical situations to suggest that there is a possibility of abuse of Section 171 of the Act, 2017. However, it is settled law that Acts and their provisions are not to be declared unconstitutional on the fanciful theory that power would be exercised in an unrealistic fashion or in a vacuum or on the ground that there is an apprehension of misuse of statutory provision or possibility of abuse of power. It must be presumed, unless the contrary is proved, that administration and application of a particular law would be done *"not with an evil eye and unequal hand"*. Some of the relevant Supreme Court judgments are reproduced hereinbelow:-

A. In ***Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay & Ors., (1974) 2 SCC 402*** it has been held as under:-

"*15…..The statute itself in the two classes of cases before us clearly lays down the purpose behind them, that is that premises belonging to the Corporation and the Government should be subject to speedy procedure in the matter of evicting unauthorized persons occupying them. This is a sufficient guidance for the authorities on whom the power has been conferred. With such an indication clearly given in the statutes one expects the officers concerned to avail themselves of the procedures prescribed by the Acts and not resort to the dilatory procedure of the ordinary civil court. Even normally one cannot imagine an officer having the choice of two procedures, one which enables him to get possession of the property quickly and the other which would be a prolonged one, to resort to the latter.* ***Administrative officers, no less than the courts, do not function in a vacuum. It would be extremely unreal to hold that an administrative officer would in taking***
proceedings for eviction of unauthorised occupants of Government property or Municipal property resort to the procedure prescribed by the two Acts in one case and to the ordinary civil court in the other. The provisions of these two Acts cannot be struck down on the fanciful theory that power would be exercised in such an unrealistic fashion. In considering whether the officers would be discriminating between one set of persons and another, one has got to take into account normal human behaviour and not behaviour which is abnormal. It is not every fancied possibility of discrimination but the real risk of discrimination that we must take into account. This is not one of those cases where discrimination is writ large on the face of the statute. Discrimination may be possible but is very improbable. *And if there is discrimination in actual practice this Court is not powerless. Furthermore, the fact that the Legislature considered that the ordinary procedure is insufficient or ineffective in evicting unauthorised occupants of Government and Corporation property and provided a special speedy procedure therefore is a clear guidance for the authorities charged with the duty of evicting unauthorised occupants. We, therefore, find ourselves unable to agree with the majority in the Northern India Caterers case."*

(emphasis supplied)

B. In ***Collector of Customs v. Nathella Sampathu Chetty, 1962 SCC OnLine SC 30*** , the Supreme Court has held as under:-

"34….This Court has held in numerous rulings, to which it is unnecessary to refer, that ***the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void.***

***

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. *The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements. In saying this we are not to be understood as laying down that a law which might operate, harshly but still be constitutionally valid should be operated always with harshness or that reasonableness and justness ought not to guide the actual administration of such laws."*

(emphasis supplied)

C. In ***Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536***, a nine Judge Bench of the Supreme Court while considering the validity of provisions of the Central Excise and Customs Law (Amendment) Act, 1991 has held as under:-

*"88…..****It is equally well-settled that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding the provision procedurally or substantively unreasonable.*** *In Collector of Customs v. Nathella Sampathu Chetty [(1962) 3 SCR 786 : AIR 1962 SC 316] , this Court observed: "The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity." It was said in State of Rajasthan v. Union of India [(1977) 3 SCC 592 : (1978) 1 SCR 1] (SCR at p. 77), "it must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief". (Also see Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [1954*
SCR 1005 : AIR 1954 SC 282] (SCR at p. 1030)."

(emphasis supplied)

<u>TO NOT COMPARE TAXES LEVIED AFTER THE INTRODUCTION OF THE ACT, 2017 WITH A BASKET OF DISTINCT INDIRECT TAXES APPLICABLE BEFORE THE OPERATION OF THE ACT WOULD GO AGAINST THE INTENT AND OBJECTIVE OF ACT, 2017.</u>

139. Prior to coming into force of the Act, 2017, several taxes were levied on goods and services by the Central Government (such as Central Excise

tax, Service tax, Central Sales tax etc.) and by the State Government (such as Value Added tax, Luxury tax, Purchase tax etc.). There was multiplicity of taxes as they were levied on the same supply system. This had a cascading effect as there was no provision for set off. The Hon'ble Prime Minister at the launch of Goods and Services Tax stated "*If we take into consideration the 29 states, the 7 Union Territories, the 7 taxes of the Centre and the 8 taxes of the States, and several different taxes for different commodities, the number of taxes sum up to a figure of 500! Today all those taxes will be shred off to have ONE NATION, ONE TAX right from Ganganagar to Itanagar and from Leh to Lakshdweep*".

140. Additionally, a plethora of non-tariff barriers like octroi, entry tax, check posts etc. hindered free flow of trade throughout the country and this entailed a high compliance cost for taxpayers. The Act, 2017 has subsumed the earlier catena of indirect taxes (Central as well as State indirect taxes), inasmuch as, it levies a single tax on the supply of goods and services. Consequently, the submission of learned senior counsel for the Petitioner in ***W.P.(C) 1171/2020*** that Section 171(1) of the Act, 2017 does not contemplate a comparison of the taxes levied after the introduction of the Act, 2017 with a basket of distinct indirect taxes applicable on goods and services before the operation of the Act goes against the grain, intent and object of the Act, 2017.

THERE IS NO VESTED RIGHT OF APPEAL AND AN APPEAL IS A CREATURE OF THE STATUTE

141. As discussed earlier, Rule 129 of the Rules, 2017 provides for a comprehensive mechanism for initiation and conduct of proceedings relating to anti-profiteering. The conscious provisioning of different layers of examination which, in the first place, is purely fact-based clearly demonstrates that appropriate precautions and redressal measures are provided for in the Scheme of the Act, 2017 read with the Rules, 2017 in connection therewith on the subject of AntiProfiteering. Consequently, there is no basis for contending that unbrindled powers have been given to the Authority or that there is a lack of appropriate redressal mechanism under the Scheme.

142. In any event, it is well settled that there is no vested right of appeal and an appeal is a creature of the Statute. Right of appeal is neither a natural nor an inherent right vested in a party. It is a substantive statutory right regulated by the Statute creating it. To provide for an appeal or not under a Statute is a pure question of legislative policy (See: ***Kondiba Dagadu Kadam***

v. *Savitribai Sopan Gujar (1999) 3 SCC 722* and ***Kashmir Singh* v. *Harnam Singh (2008) 12 SCC***

796).

143. If Legislature chooses not to provide for a right to appeal against an order of the authority that itself cannot be a ground to declare an enactment as unconstitutional. This Court in ***Wing Commander Shyam Naithani vs. Union of India and Ors., W.P.(C) 6483/2021 & connected matters, 2022 SCC OnLine Del 769*** has held as under:

"40. ***However, this Court would like to clarify that a right to appeal is a creation of Statute and it cannot be claimed as a matter of right. The right to appeal has to exist. It cannot be created by acquiescence of the parties or by the order of the Court. It is neither a natural nor an inherent right attached to the litigant being a substantive, statutory right****. [See: United Commercial Bank Ltd. v. Their Workmen, AIR 1951 SC 230; Kondiba Dagdu Kodam v. Savitribai Sopan Gujar, AIR 1999 SC 2213; and UP Power Corporation Ltd. v. Virenddra Lal, (2013) 10 SCC 39].* ***Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature as conferring jurisdiction upon a Court or Authority, is a legislative function****…"*
(emphasis supplied)

144. Further, the decisions of NAA are subject to judicial review under Article 226 before the jurisdictional High Courts as is evident from the fact that several petitions have been filed before this Court challenging orders of the NAA. This shows that the affected parties are exercising their right to seek remedies under Article 226 against orders of NAA.

145. Consequently, a robust mechanism in conformity with the constitutional requirements is in place for dealing with grievances of breach of Section 171(1) of the Act, 2017 and hence, it cannot be said that there is no judicial oversight over the decisions of NAA [See: ***CCI v. SAIL*** (supra)***, Shiv Shakti Coop.***

Housing Society v. Swaraj Developers, (2003) 6 SCC 659].

THERE IS NO REQUIREMENT OF JUDICIAL MEMBER IN NAA

146. By its very nature, Section 171(1) of the Act, 2017 clearly lays down the express issues which need to be examined by the Authority and this examination is in the nature of a fact-finding exercise. Therefore, the mandate of the Authority is very specific in nature and is akin to a fact-finding exercise. This Court is of the opinion that NAA is primarily a fact-finding body which is required to investigate whether suppliers have passed on the benefit to their recipients by way of reduced prices as mandated by Section 171 of the Act, 2017. On examining the role and duties of NAA under Section 171(2) of the

Act, 2017 and Rule 127 of the Rules, 2017, it is apparent that NAA performs functions that are to be discharged by domain experts.

147. Even otherwise NAA has not assumed any jurisdiction which was hitherto being exercised by the High Court or any other judicial body, and so, the principle that there must be a judicial member in quasi-judicial entities as laid down in the decisions relied upon by the petitioners does not apply in the present batch of matters.

148. In the case of ***Namit Sharma vs. Union of India (2013) 1 SCC 745,*** the Supreme Court considered the question of the requirement of a judicial member for performing the functions and exercising the powers of the Chief Information Commissioner. The Supreme Court initially held that the Information Commission and the Central Information Commissioners perform judicial functions possessing the essential attributes and trappings of a court and hence, it must have judicial members. However, while deciding the review petition filed by the Union of India, the Supreme Court in its judgment reported as ***Union of India vs. Namit Sharma (2013) 10 SCC 359*** has held that *"the powers exercised by the Information Commissions under the Act were not earlier vested in the High Court or subordinate court or any other court and are not in any case judicial powers and therefore the legislature need not provide for appointment of judicial members in the Information Commission."*

149. Similarly, statutory bodies like TRAI, Medical Council of India, Institute of Chartered Accountant of India etc., perform quasi-judicial functions but do not have judicial members. Furthermore, Assessing Officers, CIT(Appeals) and the Dispute Resolution Panel under the Income Tax Act, 1961 all perform quasijudicial functions but there is no requirement that such members must possess either a law degree or have judicial experience. Consequently, this Court is of the view that there is no requirement for a judicial member in NAA.

150. While this Court is in agreement with the submission of the Petitioners that the provision of a second or casting vote to the Chairman in the event of a tie/equality of votes as was given in Rule 134(2) of the Rules, 2017 is impermissible, yet as the Respondents have stated that the said provision has never been used, this Court does not deem it necessary to delve into a detailed discussion of the same.

151. Additionally, the Petitioners have challenged the validity of the constitution of the NAA on account of absence of a gazette notification as allegedly required under Section 171(2) of the Act, 2017. This Court is of the opinion that this issue does not affect the constitutional validity of the

impugned section which is presently under consideration and so this issue is not being dealt with in the present judgment.

RULE 124 IS IN CONSONANCE WITH ARTICLE 50. THERE IS NO SCOPE FOR GOVERNMENTAL INTERFERENCE IN FUNCTIONS EXERCISED BY NAA

152. This Court is of the view that Rule 124 of the Rules, 2017 is in consonance with Article 50 of the Constitution, inasmuch as, selection to NAA is made on the recommendation by a Selection Committee constituted by the Goods and Services Tax Council which is a constitutional body. Similarly the services of the Chairperson and members of NAA can be terminated only with the approval of the Chairman of the Goods and Services Tax Council. Consequently, the members of NAA are free to carry out their function as they deem fit and there is no scope whatsoever for any Governmental interference in the functions exercised by NAA.

RULE 133 TO THE EXTENT IT PROVIDES FOR LEVY OF INTEREST AND PENALTY IS WITHIN THE RULE MAKING POWER OF THE CENTRAL GOVERNMENT

153. This Court is of the view that Section 171 of the Act, 2017 is broad enough to empower the Central Government to prescribe penalty and interest to ensure that the suppliers are deterred from pocketing the benefits meant for the consumers when taxes are foregone by the Government. Merely empowering NAA to direct returning of the amounts so pocketed by the supplier/registered person would not have a sufficient deterrent effect on deviant behavior unless interest and penalty are levied to prevent such actions from taking place in the first place. The width and amplitude of Section 171 by which the authority is empowered to ensure that reduction in tax rate or the Input Tax Credit availed results in commensurate reduction in the price of goods or services clearly encompasses within it the power to ensure that such conduct which leads to profiteering does not take place.

154. Section 164 of the Act, 2017 gives power to the Government to make rules for carrying out provisions of the Act and in particular to provide for penalty.

Section 164 of the Act, 2017 is reproduced hereinbelow:-

"**164. Power of Government to make rules**

(1) The Government may, on the recommendations of the Council, by notification, make rules for carrying out the provisions of this Act.

(2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.

(3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.

(4) Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees."

155. Accordingly, Rule 133(3)(b)&(d) of the Rules, 2017 which empower the authority to levy interest @ 18% from the date of collection of the higher amount till the date of the return of such amount as well as imposition of penalty are *intra vires* and within the Rule making power of the Central Government.

156. Moreover, as pointed out by Mr. Zoheb Hossain, the show cause notices initiating penalty proceedings in relation to violation of Section 171(1) prior to the coming into force of Section 171(3A), have been withdrawn by NAA and penalty proceedings in all such cases are not being pressed. Consequently, this issue has become infructuous.

GOODS AND SERVICES TAX COLLECTED ON THE ADDITIONAL REALIZATION HAS RIGHTLY BEEN INCLUDED IN THE PROFITEERED AMOUNT

157. Both the Central as well as the State Government had no intent of collecting additional Goods and Services Tax on the higher price as they had sacrificed their revenue in favour of the buyer. By compelling the buyers to pay the additional Goods and Services Tax on a higher price, the supplier has not only defeated the intent of the Governments but has also acted against the interest of the consumer and therefore, the Goods and Services Tax collected by him on the additional realization has rightly been included in the profiteered amount.

TIME LIMIT FOR FURNISHING OF REPORT BY DGAP IS DIRECTORY AND NOT MANDATORY

158. In some cases, the Petitioners have pointed out that the timelines as provided in the Rules, 2017 have not been followed. They further contended that as a result, the proceedings are vitiated. However, it is important to note that the Rules, 2017 do not provide any consequences in case the time limits provided thereunder lapse. As held earlier, the anti-profiteering provisions in the Act, 2017 and the Rules, 2017 are in the nature of a beneficial legislation as they promote consumer welfare. The Courts have consistently held that beneficial legislation must receive liberal construction that favors the consumer and promotes the intent and objective of the Act. That being the

scenario, it cannot be said that the proceedings as a whole abate on lapse of time limit of furnishing of report by DGAP. The Supreme Court in ***P.T. Rajan Vs. T.P.M. Sahir and Ors. (2003) 8 SCC 498*** has held that *"It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefore, the same would be directory and not mandatory."* and that "*a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused."* Consequently, the time limit provided for furnishing of report by DGAP is directory in nature and not mandatory.

EXPANSION OF INVESTIGATION BEYOND THE SCOPE OF THE COMPLAINT IS NOT ULTRA VIRES THE STATUTE

159. Section 171 of the Act, 2017 is widely worded and does not limit the scope of examination to only goods and services in respect of which a complaint is received. The scope of powers of the DGAP is provided for in Rule 129 of the Rules, 2017. From a reading of the said Rule especially the expression '*any supply of goods or services'* used in sub-rule (2) of Rule 129, it is apparent that the scope of the DGAP's powers is very wide and is not limited to the goods or services in relation to which a Complaint is received. The word *'any'* includes within its scope *'some'* as well as *'all'*.

160. In any event, the ignorance of the consumer or lack of information or surrounding complexity in the supply chain cannot be permitted to defeat the objective of a consumer welfare regulatory measure and it is in this light that the subject provision is required to be construed.

161. In the context of similar powers of investigation exercised by the Director General under the Competition Act, 2002, the Supreme Court in ***Excel Crop Care Ltd. vs. Competition Commission of India, (2017) 8 SCC 47,*** has held that the Director General would be well within its powers to investigate and report on matters not covered by the complaint or the reference order of the Commission, and an interpretation to the contrary would render the entire purpose of investigation nugatory. The High Court of Delhi in ***Cadila Healthcare Ltd. & Anr. vs. CCI & Ors., (2018) SCCOnline Del 11229,*** relying on the judgment of the Supreme Court in ***Excel Crop Care (***supra) has clarified in express terms that the scope of investigation by the Director General is not restricted to the matter stated in the Complaint and includes other allied as well as unenumerated matters. Consequently, the expansion of investigation or proceedings beyond the scope of the complaint is not *ultra vires* the statute.

ACKNOWLEDGMENT

162. Before parting with the present batch of matters, this Court places on record its appreciation for the assistance rendered by all the learned counsel, who appeared, in particular, Mr. Amar Dave, learned Amicus Curiae, Mr. V. Lakshmikumaran and Mr. Zoheb Hossain, Advocates as they filed not only multiple written submissions but also ensured that hearing in the present batch of matters (exceeding 100 cases) was conducted in an orderly and proper manner.

TO SUM UP

163. Keeping in view the aforesaid conclusions, the constitutional validity of Section 171 of Act, 2017 as well as Rules 122, 124, 126, 127, 129, 133 and 134 of the Rules, 2017 is upheld. This Court clarifies that it is possible that there may be cases of arbitrary exercise of power under the anti-profiteering mechanism by enlarging the scope of the proceedings beyond the jurisdiction or on account of not considering the genuine basis of variations in other factors such as cost escalations on account of which the reduction stands offset, skewed input credit situations etc. However, the remedy for the same is to set aside such orders on merits. What will be struck down in such cases will not be the provision itself which invests such power on the concerned authority but the erroneous application of the power.

164. List the matters before the Division Bench-I for appropriate directions on 8th February, 2024.