Increase in ITC availability or reduction in GST rate - Sec. 171 is of no avail - NAA orders are ultra vires

SEPTEMBER 21, 2020 Â

By R K Singh

1. **THE** National Anti-profiteering Authority (NAA) has been passing orders (like in the case of ***Aparna Constructions and Estates*** - **2020-TIOL-12-NAA-GST**) under s.171 of the CGST **Act, 2017** against assessees holding them guilty of profiteering on the ground that they did not commensurately reduce the prices of their goods/services w.e.f 1.7.2017 when the benefit of ITC w.e.f 1.7.2017 was more than the benefit of input credits available under the existing laws (before 1.7.2017) and/or when the rate of GST w.e.f 1.7.2017 was less than the aggregate rate of duties/taxes under the existing laws prior to 1.7.2017.

The purpose of this article is to show that section 171 ibid has no applicability in such cases and all such orders are simply ***ultra vires***.

2.S. 171 came into being on 1.7.2017 and there is nothing in its wording which suggests, expressly or by necessary implication, that it has retrospective applicability and as the following discussion will show, that does not really matter either. The said section is reproduced below:

171. (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.

3. Evidently, the said section speaks of 'reduction in rate of tax on supply' and 'the benefit of ITC'. ITC is defined in the Act ibid as under:

S.2 (62) "input tax" in relation to a registered person, means the central tax, state tax, integrated tax or union territory tax charged on supply of goods or services or both made to him and includes-

(a) the integrated goods and services tax charged on import of goods; (b) the tax payable under the provisions of sub-sections (3) and (4) of

section 9;

(c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;

(d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or

(e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,

but does not include the tax paid under the composition levy; Â

(63) "input tax credit" means the credit of input tax; Â

Likewise 'tax on supply of goods or services in the said section essentially refers to central tax, IGST, state tax or UT tax leviable under the respective CGST laws. In any case, it does not, indeed, cannot refer to any duties or taxes leviable prior to 1.7.2017 because 'tax on supply of goods or services' or 'input tax' did not exist prior to 1.7.2017.

4. Indisputably, central excise duty or service tax or VAT were totally and qualitatively different taxes leviable under different taxing statutes and on different taxable events and the taxable event for them was not "supply". Similarly input credits (like cenvat credit) available before 1.7.2017 comprised taxes which were different from the GSTs and were allowed under different statutes. Thus, the input credits (like Cenvat credit) available up to 30.6.2017 were entirely and qualitatively different from ITC. Prior to 1.7.2017, there was neither any 'tax on supply' (mentioned in s.171) nor was any benefit of ITC available. That being the case, it is preposterous to ask or even enquire (a) whether 'rate of tax on supply' leviable on any goods/services w.e.f 1.7.2017 is less or more that the rate of tax leviable on their supply before 1.7.2017, OR (b) whether the benefit of ITC available w.e.f 1.7.2017 is more or less than the ITC benefit available prior to 1.7.2017. To reiterate, it is so simply because, as stated earlier, 'tax on supply' and the ITC (mentioned in section 171 ibid) simply did not exist prior to 1.7.2017. Comparing rate of tax on supply with the aggregate rate of duties/taxes under the existing laws or comparing ITC with the input credits available under the existing laws will be like comparing human beings with chimpanzees on the ground that both have the same ancestry [as do the existing laws and the GST laws (in the Constitution of India)]. Therefore, any comparison as to whether there has been any reduction in the rate of tax on supply of any goods or services OR any increase in the ITC benefit can be made only for and during the period w.e.f 1.7.2017 onwards. Section 171 ibid has no eyes which can even peep into the period prior to 1.7.2017.

5. At this juncture, it may be pertinent to refer to Australian GST provision in this regard. The Australian laws disallow 'price exploitation during transition to the new tax system' and precisely define these terms. Such a wording would clearly enable the authorities to pass the orders (like the one referred to earlier) by comparing the rates of taxes and/or the input credit benefits available in the pre and post GST periods.

6. What has been stated above is too elementary to require trivial expository verbosity or an idle parade of familiar judgments. It shows, indeed proves, that under section 171 ibid, no profiteering can be alleged where the rate of tax leviable on supply of goods or services w.e.f 1.7.2017 was less than the aggregate rate of duties/taxes leviable under the existing laws or where the ITC benefit available w.e.f 1.7.2017 was more than the input credit benefit available under the existing laws before 1.7.2017.

7. In the light of the foregoing, there is no doubt that NAA has gravely erred in passing orders holding the assessees guilty of profiteering in such cases where rate of tax on supply of any goods or services w.e.f 1.7.2017 was less than the 'aggregate rate of duties/taxes leviable on them before 1.7.2017 under the existing laws OR where the benefit of ITC available w.e.f 1.7.2017 was more than the input credit benefit available prior to 1.7.2017 under the existing laws. Simply put, all such orders are clearly ***ultra vires***.

(The author is former Member (Technical) CESTAT and Sr Partner, TLC Legal. The views expressed are strictly personal.)