EVALUATING THE CONSTITUTIONALITY OF A DEFICIENT TRANSITION: THE ANTI-PROFITEERING LAW IN INDIA

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Abstract

The anti-profiteering mechanism was introduced with an aim to ensure that the benefit of transitioning from the VAT system of taxation to a much simpler Goods and Services Taxation system, reaches the aimed beneficiaries. The concept of anti-profiteering was introduced for the first time in India after taking inspiration from the countries with the existing GST system. Thereby, for the greater part, it is dependent on the legislature for guidance as to the procedure and powers. The anti-profiteering mechanism even though, introduced to benefit the consumers, presents an immaculate example of legislative negligence vide rules and regulations; bestowing power within the three-tier Anti-profiteering monitoring system. The constitutionality of the Section 171 CGST, 2017 and Rule 126, CGST Rules, 2017 has been challenged several times in the High Courts across the country, until the Supreme Court

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transferred all the petitions in front of the Delhi High Court in February, 2020. The present paper examines the vires of Anti-Profiteering laws, along with that of the National Anti-Profiteering Authority.

I. INTRODUCTION

The government introduced the Goods and Services Tax ("**GST**") regime in the year 2017, with an aim to simplify the Indirect Taxation system in India. Within the system of GST, the government also introduced Anti-Profiteering measures for the first time, upon the recommendation of the Select Committee. It was introduced to ensure that the consumer is benefitted from the reduction in the tax, as the new system of taxation is expected to eliminate the intermediate taxes. Thus, Anti-Profiteering measures were introduced as part of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as CGST Act, 2017) and Central Goods and Services Rules, 2017 (hereinafter referred to as CGST Rules, 2017).[1]

Under GST, the profiteering measures are monitored by a three-tier Anti-Profiteering mechanism. Section 171 of CGST Act, 2017 provides for the establishment of 'National Anti-Profiteering Authority ("**NAA**")' as the final authority to take action against profiteering.[2] The section and its analogous rules are often charted to be arbitrary and easy-handed, thus highlighting a fallacious aspect of law. It is also said to be propounding excessive delegation to the NAA by virtue of the

[1] Select Committee Report, *THE CONSTITUTION (ONE HUNDRED & TWENTY-SECOND AMENDMENT) BILL, 2014* (RS 2014) paras 3.32-3.34, <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Select%20Committee%20on%20the%20Constitution%20(One%20Hundred%20and%20Twenty%20Second%20Amendment)%20Bill,%202014/1.pdf>

[2] Central Goods and Services Tax Act 2017, § 171(2).

unclear mandate under Rule 126 of the CGST Rules, 2017. Lastly, the provision is said to be violative of Article 19(1)(g) of the Constitution, as it preludes and erases the right to earn profits and is heavy-handed and restrictive in its application.

The absence of any provisions for the appointment of judicial members in the authority and other concerns pertaining to Anti-profiteering has led to the filling of 23 writ petitions, challenging the constitutionality of NAA in High Courts of Delhi, Mumbai and Punjab & Haryana since its very promulgation.[3] The Supreme Court for uniformity in the position of law, vide its order on 19th February, 2020 has transferred all the petitions to the High Court of Delhi to adjudge upon the constitutional validity of Section 171 CGST, 2017 read with Rule 126, CGST Rules, 2017.[4]

As these judgments shall be decided and set precedents, there are a lot of points that need to be smoothened out. The Anti-profiteering provisions were brought in by studying the models of the same regime from other countries. Its intent is consumer-centric, wherein it wants the commensurate reduction in taxes by way of input tax credit ("**ITC**") to be passed down to the consumer. However, its implementation with a special focus to the procedure, methodology and organization of the pivotal authority has attracted lots of disparity.

This paper analyses the nature and constitutionality of the Antiprofiteering legislation, the rules thereunder, its backdrop and its mechanism of functioning. It studies in detail, the nature and constitutionality of the designated authority and its constitution. It concludes with suggestions and key adherences that must be rectified within an indirect tax regime that was structured to the benefit of the primary stakeholders but remains ensnared within its arbitrariness.

[3] The National Anti-Profiteering Authority v Hardcastle Restaurants Private Limited & Ors, [2020] SC, Transfer Petition (Civil) Nos 290-292 of 2020.
[4] Ibid.

II. THE FOREIGN REGIMES

The GST ruling was made in April 2015 for Malaysia. It is said to be introduced because of the observed inflation in the prices despite the benefits of the CGST rulings. Since then, however, the anti-profiteering rules are applicable over fewer goods, like food and beverages and household supplies. The rules that supplemented the law in Malaysia also supplemented the problems that arise out of profiteering and the detriment that the government is trying to avoid. In 2018, the GST regime was scraped off.[5]

A major point of learning from the Malaysian regime is that micro-level management and overregulation of the market, result in increasing the cost of compliance with laws and the growth is stifled. It was discovered that an aggressive assertion of laws relating to anti-profiteering becomes difficult to implement and follow.[6]

On the other hand, the Australian model is more similar to the measures that have been adopted in the Indian context. The law was adopted during the transition period that lasted for about three years. (July 1, 1999 to June 30, 2002).[7]

The Australian Competition and Consumer Commission was entrusted to look after the smooth and relevant functioning of the GST implementations. They also created price rules. ACCC 2000a and

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[5] 'Malaysia Scraps GST, Would It Really Impact Indian GST Regime?' (https://www.taxmann.com, 2018) <https://www.taxmann.com/blogpost/2000000388/malaysia-scraps-gst-would-it-really-impact-indian-gst-regime.aspx>

[6] Payaswini Upadhyaya, 'GST: How Australia And Malaysia Disciplined Profiteeringconduct' (BloombergQuint, 2017) <https://www.bloombergquint.com/gst/gst-how-australia-and-malaysia-disciplined-profiteering-conduct>

[7] Sthanu Nair, Leena Eapen, 'Price Monitoring and Control under GST' (Economical and Political Weekly, 2017) <https://www.epw.in/journal/2017/25-26/web-exclusives/price-monitoring-and-control-under-gst.html>

2000d read that the prices charged to the customers must not rise by more than 10% because the net cost of raw materials was not expecting a surge at the time of implementation of laws and since an input tax credit lease was given to the people.[8] However, the prices could still be regulated upon certain margin costs. It is also necessary to note that the ACCC took it upon themselves to educate businesses and their consumers, via various mechanisms, about the GST rule, almost twelve months before it was implemented.[9]

As per the FAQ on Anti-profiteering provisions by the Central Board of Indirect Taxes and Customs, the report released by the Comptroller and Auditor General of India in June 2010 was referred to. However, the report only discussed how the commensurate benefit arising from reduction in VAT was not transferred to the consumers within the first three months of its implementation. It has been stated that the background to the law was thus to remediate an issue prevalent within a former-tax regime, but has not supplemented with sufficient contemporary field study data, as was done in foreign jurisdictions when there was a marked increase in inflation after the implementation of GST laws.[10] The Australian and Malaysian models were keenly studied to draft the anti-profiteering laws in India. However, the Indian law on anti-profiteering with its skeletal provisions and rules thereunder, did not provide for a specific methodology or procedure for determining if a commensurate reduction has been endowed with the consumer; making it difficult to analyze or identify the factors taken into consideration while it was drafted.[11] Further the 'tight monitoring'

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[8] Vedant Agarwal, 'Anti-Profiteering Under GST: Analysis of Recent Decisions And Comparison With Other Jurisdictions' (TaxGuru, 2020) <https://taxguru.in/goods-and-service-tax/anti-profiteering-gst-analysis-decisions-comparison-jurisdictions.html>

[9] *Supra* note 7.

[10] Adithya Reddy, 'The anti-profiteering concept is flawed' (Hindu Business Line 2018) <https://www.thehindubusinessline.com/opinion/the-anti-profitering-concept-is-flawed/article22858653.ece#>

[11] Shubhang Setlur, 'Behind GST's Anti-Profiteering Provisions, a Legacy of Indian Socialism' (Thewire.in 2017) https://thewire.in/business/gsts-anti-profiteering-provisions-lndian-socialism

advocated by the report was not followed through, within the anti-profiteering legislation.

III. CONSTITUTIONALITY OF THE ANTIPROFITEERING LAW

The constitutionality of the statutory provision on Anti-profiteering has been challenged to be violative of Articles 14 and 19(1)(g). This core provision is said to be supplemented by Section 164 of the CGST Act, 2017. Section 164, CGST Act 2017 supplies to the relevant authorities the ungirded power to make rules, and apply them even retrospectively with regards to any provision in the former Act. Further, although the rules of the CGST Rules 2017 were added to reduce the arbitrary ambit of the law, it is severely defeated on various grounds of the Constitution.

Section 171, CGST Act 2017 is the only provision in the CGST Act that deals with anti-profiteering. Although it is supplemented by the rules, they lay down an indecisive power and duty over the authority.

Post amendment in 2019,[12] Rule 127 of the CGST Rules, 2017 read that the duty of the DGAP[13] shall include determination of whether there has been any viable and accountable reduction in the tax rate or whether a direct benefit of the availment of the input tax credit has been passed down to the recipient by a reduction in the prices, to identify a) if the same has not been complied with ; b) order a reduction in the price of the product or payment to the customer that is equal to the monetary benefit not justly received by them; and c) impose a penalty or even cancel the registration of the business. They have to present a

[12] Vishwasai Rajendra, 'Anti-Profiteering Measures Under GST - Constitutionality and Limitations | Gstsutra.Com' (Gstsutra.com, 2020) <http://gstsutra.com/experts/column?sid=683>

[13] 'Director General of Antiprofiteering'

performance report to the Council by the tenth day of the close of each quarter.

The question that arise thus, is, whether there is an excessive delegation of powers provided to the Council that is furthered by Section 164, CGST Act, 2017 as the provisions challenged are the emulate examples of delegated legislation. The scope of delegated legislation is discussed below.

A. Principle of Delegated Legislation

Salmond defined the delegated legislation as "*that which proceeds from any other authority other than the sovereign power and is therefore dependent for its continued existence and validity on some superior authority or power*".[14] Thus, in the ever-growing complex society, the legislators can delegate certain legislative powers to the extent that it supplements but not supplant the enabling Act.[15]

The delegate then, to supplement the Act passes such rules, regulations and orders that are necessary to implement the object and purpose of the Act. Often the legislators provide the legislative policy and leave it to the delegate to fill in the details. Such legislations are called '*Skeletal Legislations'.* In *Hamdard Dawakhan lal v. UOI,* skeletal legislations have been defined as the legislations empowering the executives to provide the regulations required to achieve the purpose of the enabling Act.[16]

Though the legislature cannot delegate all or auxiliary functions, the notion propounded in *Re Delhi Laws Act*, the apex court held that the legislature cannot delegate anything that has been not vested in it by the Constitution, and can only delegate the power to fill in the details,

[14] Salmond, *Jurisprudence* (12 edn. London, Sweet & Maxwell 1966).
[15] D.D. BASU, *Shorter Constitution of India* (15 edn. Lexis Nexis 2017).
[16] Hamdard Dawakhana (Wakf) Lal v Union of India, [1960] AIR SC 671.

in order to supplement the skeletal provisions of the Act.[17] Further, the court also observed that the legislature has to create a 'sphere' within which actions of the delegate can be held valid, so that it can freely legislate within this very sphere.

Transgression of this sphere at one's discretion would result in exercise of excessive delegation. The Apex court through a plethora of judgments has set out a test to determine whether the legislature has disseminated essential functions or not. In *Harishankar Bagla v. Madhya Pradesh*, essential legislative functions were depicted as "*the legislature must declare a policy of law and legal principles which are to control any given cases and must provide a standard to guide officials or the body in power to execute the law.*"[18] Lord Cardozo in the landmark case of *Panama Refining v. Ryan*[19] opined "*To uphold the delegation there is a need to discover in terms of the Act, a standard reasonably clear whereby discretion may be governed*." In conclusion, it is prescribed that a clear 'standard' and 'policy' should be laid down in the legislative Act to guide the delegated authority.

Even if the legislature is of the view that the provisions of the Act are clear cases of excessive legislation, the same shall not be repealed as the Act provides for an authority to oversee such legislation. Countering the above justification of excessive legislation Justice Khanna in *Gwalior Ryan Silk v. The Assistant Commissioner of Sales Tax*, observed "*The vice of such an enactment cannot, in our opinion, be ignored or lost sight of on the ground that if the Parliament does not approve the law made by the officer concerned, it can repeal the enactment by which that officer was authorised to make the law*".[20]

[17] In Re: The Delhi Laws Act, 1912, [1951] AIR SC 332.
[18] Harishankar Bagla v Madhya Pradesh, [1954] AIR SC 313.
[19] Panama Refining Co. v Ryan, [1935] 293 US 388, 434.
[20] Gwalior Ryan Silk v The Assistant. Commissioner of Sales Tax & Ors., [1947] AIR SCR 2 879.

The nine-judge bench in *Delhi Municipal Corporation v. Birla Cotton Spinning and Spinning Mills* held that only subordinate legislation necessary for the fulfilment of the objectives of the Act can be held valid. It added that the guidance offered by the legislature can only be ascertained upon an analysis of the statute in question.

In the case of *Consumer Action Group and Anr. v. State of Tamil Nadu*,[21] the Supreme Court analysed the preamble, background, sections, etc. of the Act to ascertain if the delegation was excessive.

B. Applying the Principles to Anti-Profiteering Measures

The Preamble of CGST Act 2017 reads as "*An Act to make a provision for levy and collection of tax on intra-state supply of goods or services or both by the Central Government and matters connected therewith or incidental thereto*".[22] Upon reading the preamble, the legislative policy can clearly be ascertained that the Act has been enacted to make provisions for levy and collection of tax; now to determine the objective of the Act, it is imperative to examine its background. The background of the Act can be ascertained via the Task Force Report on Implementation of the Fiscal Responsibility and Budget Management Act, 2003 by the Department of Economic Affairs.[23] Chapter 5 of the same reads how a tax regime must be streamlined via decisions by tax administrators and the mission of the administration is said to be that of collecting revenues for the Government in a legally defined taxation system in a manner that is effective, equitable and efficient.[24] The independence of such an administrator is vital.

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[21] Consumer Action Group and Anr. v State of Tamil Nadu, [2000] 7 SCC 425.
[22] The Central Goods and Services Tax Act 2017.
[23] Ministry of Finance, Government of India 2004, 'Chapter 5- Policy Proposals' <https://dea.gov.in/task-force-report-implementation-fiscal-responsibility-and-budget-management-act-2003>
[24] Adithya Reddy, 'Legality Of GST'S Anti-Profiteering Provision' (Livemint, 2018) <https://www.livemint.com/Opinion/IbZ1gNXgywVhtqpSvNGRzK/Legality-of-GSTs-antiprofiteering-provision.html>

The second report is the Implementation of Value Added Tax in India- Lesson for transition to Goods and Services Tax[25] that was created by the CAG, India. It details out the excise duties of the Union integrated with the service tax, and provides for a brief mechanism of the CGST Act as proposed by the task force.

The Government provided their rationale for introducing this mechanism in the CGST Act, 2017. The online pamphlet reads that in several other countries wherein analogous rules were implemented, the cost of products observed a rise, despite the aforementioned benefits. This clearly exhibited that the business would pocket the entire profit towards themselves, making it detrimental to the customers.

This so-called inflation of prices was observed in two other models, namely Australia and Malaysia, who responded to the same by introducing anti-profiteering laws; although, these laws are drastically different from the ones implemented in India.[26] The ones in Australia are more complex and minutely laid down, while the ones in Malaysia are resolutely clear by what they consider anti-profiteering. They determine the same by comparing the net profit margin of the business on the products, before and after the implementation of the GST tax regime.

Section 171 of the CGST Act, 2017[27] deals with the anti-profiteering measure of the Act. It comprises of three main provisions, a proviso and an explanation to the section. It mandates that the benefit of input tax credit reigned in must be depicted by a supplementary reduction of the prices of the product; empowers the Central government to either create a new authority or ordain the power to an existing authority to examine a complaint with regards to non-compliance with the

[25] 'Value Added Tax In India- Lesson For Transition To Goods And Services Tax' (CAG, India 2009) <https://cag.gov.in/sites/default/files/publication_files/SRA-value-added-tax.pdf>
[26] *Supra* note 7.
[27] Central Goods and Services Act 2017 § 171.

aforementioned section; and defines that the functions of the authority shall be as may be prescribed.

Section 171(3A) of the CGST Act, 2017 specifies that upon determination of profiteering by the agency empowered under subsection (2) of the Act, a penalty of about ten percent of the amount profiteered can be made due as penalty. The profiteering narrows down on the determination of '*Commensurate reduction of the prices*', which has not been specified by the government and has been left to the discretion of the Authority to adjudge the same. The section is further complemented by the Anti-Profiteering Rules that are furnished within Chapter XV of the CGST Rules, 2017.[28] They range from Rule 122 to 137. These rules specify the constitution of the authorities, screening committees, the duties, powers and procedures that the authority has to partake, the conduct of the authority, validation to the order and the compliance with the same. Rule 126 of the CGST Rules, 2017 is a supplement to Section 171 of the CGST Act, 2017. However, the section makes no cross-reference to the rules. The aforementioned rule designates the power to determine the methodology and procedure of profiteering investigation upon the NAA. The question that thus, stems out is whether there is an excessive and unfettered delegation of power to the NAA by virtue of this Rule.

There are certain functions of eminence that are termed as legislative policy or legislative function. The delegation of these functions results in a bestowment of excessive nature. Such duties cannot be delegated by the legislature. For the delegation of any legislative function, broad guidelines must always be issued, so as to guide the delegated authority.[29] The effective execution of law requires extensive and elaborate rules of procedure, that the authority must follow.[30] Further,

[28] Central Goods and Services Rules 2017.
[29] Lipika Vinjamuri, 'Does The National Anti-Profiteering Authority Suffer From The Vice Of Excessive Delegation?' <http://kluwertaxblog.com/2020/01/23/does-the-national-anti-profiteering-authority-suffer-from-the-vice-of-excessive-delegation/?print=print>
[30] Namit Sharma v UOI, [2013] 1 SCC 745.

the executive can only be given the task of regulation and implementation of the legislative and procedural mandate to upkeep the doctrine of separation of power. Thus, Rule 126, CGST Rules 2017 patently bestows an eminent legislative function upon the NAA. The rule clearly travels beyond the central legislation itself.

Additionally, its supplementary section is squarely missing any policy guidelines. They are even silent on the calculation of the factor of 'profiteering' amidst the circular for Procedure and Methodology on the NAA website, that claim to curb the arbitrary and discretionary power of the authority. It has been left upon the sole discretion of the executive, which has been operating on a myriad of stances, ever since.

It has also been observed that the Respondents have often contended that the formula determined to calculate profiteering by the NAA is neither prescribed by any authority nor has been established via the Methodology and Procedure, 2018 circular created by virtue of the powers vested by Rule 126.[31] Such contentions are often supported by precedents that highlight the unfettered power in the hands of NAA, as there are different determinants each time.

The excessive delegation, further, is extremely uncanny and arbitrary by virtue of there being extremely no intrinsic guidelines, streamlining the procedural and methodical functions of the authority. Thus, even though the circulars and the rules provided therein supplements the Act, it has been left upon the authority to exercise discretion and execute essential legislative functions.

C. Scope of Article 14

[31] Shri C. P. Rao v M/s Unicharm India Pvt. Ltd, 43/2019 (NAA).

In the case of *NAA v. Hardcastle Restaurants Pvt. Ltd. & Ors.*,[32] a writ was filed challenging the constitutional validity of Section 171, CGST Act, coupled with Rule 126 of the CGST Rules, 2017.[33]

The statute can further be investigated against the claim if Section 171 and the requisite Anti-profiteering rules are arbitrary in their mandate. In doing so, the statutory provision would have to be held up against Article 14 of the Indian Constitution.

The expression 'arbitrary' is defined as done in an unreasonable manner; fixed or done capriciously or at pleasure; without an adequate determining principle; not founded in the nature of things; non-rational; not done or acting according to reason or judgment, and; depending on the will alone. Article 14 strikes off arbitrariness within state action. The recent judgment[34] by the Supreme Court has refreshed the scope of the doctrine of arbitrariness, that was propounded in the *Royappa* case.[35] The reasonable differentia that is often considered to be the first limb of the Reasonable Classification is that a legislation "*should not be arbitrary, artificial or evasive*."

It is well established that no enactment can be struck down by merely implying that it is arbitrary or unreasonable; some other constitutional infirmity has to be found before invalidating an Act.[36] However, the arbitrariness test now enjoys the stature of a standalone test whilst testing the Constitutionality of primary or subordinate sections of a given law.[37] Thus, for an Act to be constitutional under the ambit of Section 14, it must be non-arbitrary as a primary requirement.

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[32] Ravi Charaya and Ors. V. Hardcastle Restaurants Pvt. Ltd, [2019] 71 GST 85.
[33] Prapti Raut, 'Hardcastle Restaurants - SC Transfers All Writ Petitions To Delhi HC Related To Anti Profiteering' (TaxGuru, 2020) <https://taxguru.in/goods-and-service-tax/hardcastle-restaurants-sc-transfers-all-writ-petitions-delhi-hc-related-anti-profiteering.html>
[34] Rajbala v State of Haryana [2016] 2 SCC
[35] E.P. Royappa v State of Tamil Nadu [1974]4 SCC 3
[36] A.P. v McDowell [1996] 3 SCC 709.
[37] A.D.M. Jabalpur v Shivkant Shukla [1976] 2 SCC 521

In a Supreme Court case, dissent of Bhagwati, J. read that- "*As a result of Maneka Gandhi judgment, Article 14 is a safeguard against State Action that suffers from the vice of arbitrariness. It was pointed out in the Maneka Gandhi*[38] *case that the doctrine of classification developed as a subsidiary rule for ascertaining whether the action of a State can be classified as arbitrary or not*."

Arbitrariness grew as a standalone yardstick test when propounded in the Royappa case, on the basis of application of the Wednesbury Test[39] and the test laid by Lord Diplock.[40] In a case,[41] Lord Diplock reiterated that any administrative action can be challenged on four grounds i.e., (1) Illegality (2) Irrationality (3) Procedural impropriety (4) Proportionality of delegation.

It can be patently observed that although Section 171(1) of the CGST Act, 2017 is clear on its policy implication, the commensurate reduction in prices has not been clearly defined. Unlike models adopted in other countries, there is no clear demarcation of how profiteering should be decided. The Anti-Profiteering Rules, 2017 does not lead to any clarifications on this point and the presence of Section 164, CGST Act 2017 furthers the non-determination of proportionate reduction of prices invariably.

The aforementioned rules are not even referenced by the main legislation. The determination of the commensurate reduction lies at the whim of the authority. In spite of the fact that the Indian model has been inspired from the Australian and Malaysian model of GST, the anti-profiteering laws did not adopt the same criterion for the determination of this supplementary benefit that needs to be passed

[38] Maneka Gandhi v Union of India [1978] 2 SCR 621.
[39] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
[40] Om Kumar v UOI [2001] 2 SCC 386
[41] Council of Civil Services Union v Minister of Civil Services [1984] 3 ALL ER 935 (HL)

down to the consumers. The present legislation is extremely vague in the sense of determination of folly.

Since the anti-profiteering laws revolve around the determination of whether the benefit has been passed down to the consumers or not, a lack of clarity in this regard coupled with the excessive delegation result in Section 171, CGST Act, 2017 not standing up to Article 14 of the Indian Constitution. Earlier the Act was also challenged for not having the provision of the penalty within the Act itself. However, post amendment in 2019, Section 171(3A) deems that a penalty of 10 percent shall be put through the parties that are found to engage in profiteering. The section also attempts to define profiteered, however is still not clear upon a concrete mode of ascertainment as the phrase "*commensurate reduction*" is still not defined.[42]

However, to its merit, the procedure that the DGAP has to adhere to is spelled out with clarity. The DGAP has the same power during the inquiry as provided to civil courts under the provision of the Code of Civil Procedure, 1908. The DGAP works in accordance with *the Procedure and Methodology* notification on their web-page in accordance with Rule 126 of the CGST Act, 2017.[43] But the method of calculation is not spelled out under any document or official notification.

The methodology and procedure are determined by the National Anti-Profiteering Authority, empowered by Rule 126 of the CGST Rules, 2017. This power, prima facie appears to be uncontrolled and an oppressive application of the law. The Central Board for Indirect Taxes has clarified that the procedure shall be ascertained on a case-to-case

[42] Sumit Jha, 'Anti-Profiteering Mechanism: Slew Of Stay Orders By High Courts Expose NAA Lacunae' (The Financial Express, 2019) <https://www.financialexpress.com/industry/anti-profiteering-mechanism-slew-of-stay-orders-by-high-courts-expose-naa-lacunae/1580706/>

[43] 'Procedure and Methodology' (Naa.gov.in, 2018) http://www.naa.gov.in/docs/procedure%20_methodology_18.pdf.

basis. This clearly leads to vesting an uncontrolled power to the authority. In the case of *Kunnathat Thathunni Moopil Nair*,[44] it was said that in absence of a principle to guide the authority, the law would stand violative of Article 14. There seems to be no clear projected principle that governs the determination of profiteering conveyed via the central legislation nor the supplementary rules.

In cases such as *State of Officer v. Cilantro Diners Pvt. Ltd*.[45] and *Kerala State Screening Committee on Anti-Profiteering v. M/s TTK Prestige Ltd*.[46] the NAA has convened that no reduction in prices shall be deemed to be considered profiteering and that every customer has the right to receive the benefit of endowed reduction in cost. In cases *like M/s. NP Foods*,[47] the NAA decreed that the commensurate reduction had not been passed to the customers on the basis of averaging the increase in the base price of all products together. In *M/s. Kunj Lab Marketing Pvt. Ltd.*,[48] it was convened that the benefit has to be passed down separately by virtue of each product and cannot be clubbed. This clearly concludes that Rule 126, CGST Rules, 2017 lays no clear directive and thus leads to arbitrariness in practice.

The absence of any provision to determine the 'Reduction' leaves it to the discretion of the executives alone as the anti-profiteering mechanism does not have any provision for the appointment of a judicial member. There is no ascertainment on how will the profiteering be determined if there is a commensurate reduction that is not equivalent to the benefit being garnered by the seller themselves, by way of the Input Tax Credit and the GST regime.[49] The section and

[44] Kunnathat Thathunni Moopil Nair v State of Kerala [1961] AIR SC 552.
[45] State of Officer v Cilantro Diners Pvt. Ltd., [2020] MANU NT 0023.
[46] Kerala State Screening Committee on Anti-Profiteering v M/s TTK Prestige Ltd [2019] 74 GST 456.
[47] Sh. Jijirushu N. Bhattacharya v M/s NP Foods (Franchisee M/s Subway India), 9/2018.
[48] Sh. Ankur Jain & Director General Anti Profiteering, Central Board of Indirect Taxes & Customs v M/s Kunj Lab Marketing Pvt. Ltd., [2018] 70 GST 486 (NAA).
[49] 'Writs pending before various HCs w.r.t constitutional validity of Anti-profiteering provision transferred to Delhi HC' 'Taxmann' (https://gst.taxmann.com/, 2020)

the rules thereunder, are overtly vague and contain ambiguity that has not been set aside, despite various judgments by the NAA.[50]

D. Scope of Article 19

In this regard, Section 171 must also be held against the threshold of Article 19(1)(g) of the Constitution of India. In cases like the *Shri C. P. Rao v. M/s Unicharm India Pvt. Ltd*.,[51] the constitutionality of Section 171, CGST Act, 2017 was challenged. Respondent contended that in the guise of ensuring commensurate reduction in prices but not following up with the criterion to determine it, the DGAP was trying to fix the price of products that curbs the right to earn profits. It can be said to be violative of Article 19(1)(g).

In the case of *Dharma Dutt v. UOI*,[52] it was held that Article 19(1)(g), provides us with a right to profession, trade, occupation or business. But these rights are in no way absolute or uncontrolled and each is liable to be curtailed by laws made by the State to the extent made in Clauses (2) to (6) of Article 19 of the Indian Constitution. Clauses (2) to (6) are different which indicates that the rights specified under Clause (1) have varying philosophies and dimensions, and thus cannot be adjudged to a common pedestal. Thus, it is understood that Article 19(6) gives the power of reasonable restriction to the Respondents. Further, in the case of *Bijoe Emmanuel v. State of Kerala*[53] it was reiterated that- only a guarantee sealed in law, under the contemplation of clause (2) to (6) of Article 19 can regulate the exercise of Article

https://gst.taxmann.com/topstories/101010000000193867/writs-pending-before-various-hcs-w-r-t-constitutional-validity-of-anti-profiteering-provision-transferred-to-delhi-hc.aspx.

[50] Adithya Reddy, 'Legality Of GST'S Anti-Profiteering Provision' (Livemint, 2018) <https://www.livemint.com/Opinion/IbZ1gNXgywVhtqpSvNGRzK/Legality-of-GSTs-antiprofiteering-provision.html>

[51] *Supra note*, 29.

[52] Dharma Dutt v UOI [2004] 1 SCC 712,738.

[53] Bijoe Emmanuel v State of Kerala [1986] 3 SCC.

19(1) from (a) to (e) and (g). A mere executive or departmental instruction shall not suffice.

The Anti-profiteering rules can also lay down reasonable restrictions upon the businesses. Rules are made under the Act, and they are to be of the same effect as if contained in the Act itself and are to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise exactly as if they were in the Act. Thus, a rule under a statute must be taken as a part and parcel of the statute itself. In the case of *Bishambhar Dayal Chandra Mohan v. UOI*[54] the judgment convened that, "The factors that should enter the judicial verdict are the underlying purposes of the restrictions imposed, the extent and urgency of the evils sought to be remedied thereby, the proportion of the imposition, the prevailing conditions at the time, and the duration of the restriction." The same has been reiterated in *Indian Express Newspapers v. UOI*[55] and *Krishnan Kakkanth v. State of Kerala*.[56]

A taxing statute is not *per se* regarded as a restriction on the freedom of Article 19(1)(g) even if it imposes hardships in an individual's case. One of the major points that Section 171, CGST Act, 2017 is contended upon is that the violation of Article 19(1)(g) occurs because of the price fixation that the Statute does. However, the freedom of business might be interfered by the State by imposing reasonable restrictions in order that the State might discharge its duties under the Directive Principles- Articles 38 and 39(b)[57] i.e., to control the distribution of material goods for the common good and ensure that the articles in question are made available to the public at the lowest rate permissible. Where the commodity is not so vital to human needs, a greater consideration of profit may be given to the company.

[54] Bishambhar Dayal Chandra Mohan v State of UP [1982] 1 SCC 39,62.
[55] Indian Express Newspapers v UOI [1985] 1 SCC 641,691.
[56] Krishnan Kakkanth v Govt of Kerala [1997] 9 SCC 495.
[57] ONGC v Assocn., N.G.C., [1990] SUPP. SCC 397.

Further, for taxing statutes, "*Tax laws impose taxes that is prima facie not a restriction. Mere excessiveness of the tax is not a ground for challenging it as a restriction on any right*." The same fact has been stated in *Nazeria Motor Service v. State of AP*,[58] where it says that mere reduction of profits does not render the Statute as unreasonable and violative.

The procedure of the calculation is not specified within the Act. It acts as a mode of contention while deciphering the question of legality. As there is an absence of worded law under the Act, as to the calculation, the NAA's response to the Respondent's claim in *Shri Pawan Sharma and Ors. v. M/s Sharma Trading Company*[59] was that the supplier needs to determine the amount by which the tax has been reduced and subtract the same from the existing product's MRP. Otherwise, a generalized understanding of the calculation cannot be ascertained across different CGST taxations and shall depend on the factual background of the case. The Authority has further already notified *"the Procedure and the Methodology"* through the notification dated March 28, 2018[60] under Rule 126 of the CGST Act, 2017, available on their website. Thus, the section cannot be fully challenged on the grounds of being violative of Article 19(1)(g).

In *Sh. Ravi Charaya & Ors. v. M/s Hardcastle Restaurants Ltd.*,[61] it was held that any reduction in the rate of the tax or the benefit received through ITC by a supplier should be passed down to the consumer. The supplier is not entitled to encroach upon the benefits. Since the aforementioned point is the basis of the law, it cannot be said to be fallacious in its functioning. The NAA has also not curbed the right of profit-making possessed by the businesses. The background of this legislation clarifies that the buyers and consumers must be at the

[58] Nazeria Motor Service v State of A.P. [1970] AIR SC 1864.
[59] Shri Pawan Sharma And Ors. v M/s Sharma Trading Company [2018] 70 GST 156 (NAA).
[60] *Supra note* 41.
[61] *Supra note* 30.

receiving end of the passed-down benefit that the GST regime ushers in. The NAA, through some of its decisions, has deemed that a reduction in the prices of products upon claiming input tax credit forms the primary determination of non-profiteering. In some cases, a legitimate increase in the base price was considered as a valid and pressing defense against not reducing the prices of products despite claiming ITC. Thus, the anti-profiteering law cannot be said to be violative of Article 19(1)(g) of the Constitution, even though it stands violative of Article 14 of the Constitution of India.

IV. EXAMINING THE VIRES OF THE AUTHORITY

Section 171 CGST, 2017 also provides for the establishment of the National Anti-Profiteering Authority. The organization and composition of the NAA i.e., pivotal in monitoring the anti-profiteering regime, is questionable on the aspect that whether it is in coherence with the law of the land,. We will now proceed to examine the vires of the NAA.

A. Nature of The Authority

National Anti-Profiteering Authority is a statutory authority that has been established by virtue of the enactment of the CGST Act, 2017. The nature of the authority determines the function to be executed by the members of the body; in turn, determining the required qualifications needed for the execution of those functions. Therefore, it is important to determine the nature of NAA as provided in Section 171 of CGST Act, 2017.

Statutory authorities majorly execute either purely administrative functions or quasi-judicial functions. Professor Wade defined quasi-judicial function as *'quasi-judicial function lying somewhere in between is an administrative function which the law requires to be exercised in some respects as if it were judicial. A quasi-judicial*

decision is, therefore, a decision which is subject to a certain measure of judicial procedure'[62] Further, the apex court has time and again followed the test given in the case of *Kihoto Hollohan v. Sri Zachillu,* to determine the nature of the functions exercised by an authority: "*There is lis- an affirmation by one party and denial by the other, the dispute involved decision on the rights and obligations of parties and the authority is called upon to decide it".*[63] It can be observed from the above scholarly definitions that the authorities which are entrusted the duty to decide disputes judicially are essentially Quasi-Judicial Authorities.

CGST Act, Section 171 of CGST Act, 2017 read with Chapter XV of GST Rules, 2017, both titled as 'Anti-Profiteering Measure', entails the structural mechanism and functions of the three-tier Anti-Profiteering Authorities. Section 171(2)[64] provides for the constitution of 'National Anti-Profiteering Authority (NAA)'. In consonance with the Act, the rules specify provisions regarding the composition of the authority inter alia, other functions imperative for its functioning.

In a case, the Supreme Court observed that the existence of *'lis inter parte'* indicates that any authority presiding upon the dispute has a duty to act judicially while adjudging the dispute between the two parties.[65] NAA, being empowered through the enactment of GST to decide upon the dispute regarding Anti-profiteering, incurred a duty to act judicially. NAA's duty to act judicially reflects the nature of disputes it is authorised to decide.

In *Lala Shri Bhagwan v. Ram Chand*, it was noted that the rights and obligations of parties are said to be affected if the actions of a body results in disadvantage for either of the parties.[66] Even if an authority

[62] H.W.R. WADE, *Administrative Law* (6TH edn, Oxford University Press 1994) 46-47.
[63] Kihoto Hollohan v Sri Zachillu, [1992] AIR SCC 651.
[64] *Supra* note 2.
[65] Bombay v Khushaldas Advani, [1950] AIR SCR 621.
[66] Lala Shri Bhagwan v Ram Chand, [1965] AIR SC 218.

is not called upon to decide upon a *lis* between two parties, but it results in affecting the rights or obligation of the parties, it shall be the duty of the authority to act judicially.[67]

Under GST rules, it is the duty of the authority to determine whether or not the benefit of reduction of tax or input credit has been passed on to the recipient.[68] It is also required to identify the person who has violated the Anti-profiteering measures.[69] The authority subsequently is duty bound to pass the following orders:

a) Reducing the prices.

b) Cancelling the registration under the Act of the person found violating anti-profiteering rules.

c) Returning to the person an amount equivalent to the amount not passed by way of commensurate reduction in prices. In doing so, it is at the liberty to impose interest of 18% on the amount as a penalty.

d) Imposing penalty in accordance with the Act.[70]

e) If the authority feels that there's a need for further investigation, it can, after noting the reasons in writing, refer the case to the DGAP.[71]

Passing of such orders by the authority results in detriment of either of the party, thereby requiring NAA to act judicially.

There is a specific mechanism of processing a complaint of profiteering provided by the statute. The trend in India has been to invoke Section 171 sparingly, in dominations of monopolistic or oligarchic market

[67] National Securities Depository Limited v Securities and Exchange Board of India, [2017] AIR SC 1714.
[68] Central Goods and Services Rule 2017, Rule 127 (i).
[69] Central Goods and Services Rule 2017, Rule 127 (ii).
[70] Central Goods and Services Rule 2017, Rule 127 (iii).
[71] Central Goods and Services Rule 2017, Rule 133 (4).

regimes. Any person who feels that a company is engaging in illegal profiteering can report the same to the relevant authority.

The tasks of the Anti-Profiteering Authorities are divided into the three stages; first, a State Screening committee shall, after being satisfied that the applications present a prima facie case of anti-profiteering forward it to the Standing Committee.[72] The Standing committee on anti-profiteering consists of officers of both the state and central government as specified by Rule 123, CGST Rules, 2017. It confirms the patent evidence of profiteering engaged.

If the standing committee garners a view, that there has been a contravention of Section 171, CGST Act, 2017, it shall forward the case to the Director General of Anti-Profiteering (DGAP).[73] They have the responsibility to ascertain and examine the practices of the business and find evidence to support causation. Both the Committees are required to complete the investigation within a duration of two months.[74] In the second stage, DGAP after investigating the case submits the assessment report to the NAA within three months of receipt of the case from the Committees.[75]

After receiving the assessment report from the DGAP, the anti-profiteering authority is authorised to decide upon the dispute as to whether or not Input Tax Credit or the benefit of reduced tax has been passed on to the recipient.[76] In doing so, the authority is empowered to summon the interested parties, issue a notice to the parties[77] and presume the methodology and the procedures it considers necessary to determine the dispute between the two parties.[78] These functions are adjudicatory in nature. All the powers, duties and authorities of all the

[72] Central Goods and Services Rule 2017, Rule 128 (2).
[73] Central Goods and Services Rule 2017, Rule 129 (1).
[74] Central Goods and Services Rule 2017, Rule 128 (1).
[75] Central Goods and Services Rule 2017, Rule 129 (6).
[76] Central Goods and Services Rule 2017, Rule 133 (1).
[77] Central Goods and Services Rule 2017, Rule 133 (4).
[78] Central Goods and Services Rule 2017, Rule 133 (2).

aforementioned agencies are spelled out via the CGST Rules of 2017. Thus, the decision of the NAA affects the rights and liabilities of the parties to the matter in front of the authority.

In light of the above analysis, it is evident that the NAA satisfies all the elements propounded by the Supreme Court to act judicially. Thus, in its capacity as a final authority of a three-tier Anti-profiteering system, it is a quasi-judicial body.

B. Is A Judicial Member Necessary for Performing Functions of a Quasi-Judicial Authority?

The Parliament, while exercising its power under Article 246A and 279A, has established the appellate tribunals, GST council and the anti-profiteering authorities.[79] The above articles inserted by the One hundred and One Constitutional Amendment Act, 2016 give the parliament and the state legislatures, the power to make laws regarding Goods and Services Tax. Thus, the parliament has legislative competence to enact CGST, 2017.

Indian courts, with regard to the tribunals established under Article 246 and Articles 323-A and 323-B, have time and again analysed the mandatory requirement of a judicial member in the tribunals. Although the provisions under the Article 246 and Articles 323-A and 323-B upon reading, seem to entail different constituents, the Apex Court has already held that the difference between the tribunals established under the Articles is merely of academic concern, as in *L Chandra Kumar case*,[80] the Articles 323A and 323B have been struck down to the extent that they bar the judicial review by the High Courts.[81]

[79] Revenue Bar Assn. v Union of India, [2019] SCC OnLine Mad 8910.
[80] L. Chandra Kumar v Union of India [1997] 3 SCC 261
[81] Union of India v R Gandhi, [2010] 6 S.C.R. 857.

In the case of *S Sampath Kumar v. UOI*,[82] it was held that if the eligibility criteria for members of the tribunal does not ensure that the members are capable enough to execute the judicial functions, then it would result in invalidating the same provisions. Similarly, in *R.K. Jain v. UOI*, the court observed that in the tribunals set-up under statues, the members are called upon to discharge judicial and quasi-judicial functions. Thereby, it is necessary that the adjudicators have legal training to give legal input sufficient weightage.[83]

Affirming the above position, the apex court in *R Gandhi v. UOI* observed that *'judicial members act as a bulwark against any apprehensions of bias and ensures the compliance of principle of natural justice.'*[84] In observing so, the court held that when any jurisdiction is shifted to the tribunals on the grounds of *'pendency and delay in courts'*[85], the tribunal should have judicial members of the capacity and the rank equivalent to the adjudicators of the court from which the jurisdiction was transferred to the tribunal.

The established position of law regarding the composition of the tribunals has been adopted by the apex court. As it has time and again held that the tribunals shall have at least one judicial member, the court has gone to the extent of pronouncing that under no circumstances judicial members shall be outnumbered by the technical members. Upholding so, the court observed that appointments contrary to its decision would result in encroaching upon the independence of the courts and would violate the doctrine of separation of power.[86]

Uniformity can be observed in the Court's view, although for the appointment of the judicial members in the quasi-judicial bodies, the

[82] S. P. Sampath Kumar v Union of India, [1987] 1 SCC 124.
[83] R.K. Jain v Union of India, [1993] (4) SCC 119.
[84] *Supra* note 79.
[85] *Supra* note 80.
[86] *Supra* note 81.

constitutional provisions for setting up of tribunals do not require mandatory appointment of a judicial member in the tribunal.

Recently, Bombay High Court in the case of *Neelkamal Realtors Suburbans Ltd. v. UOI* also took the aforementioned view, while upholding the constitutionality of RERA authority. It observed, that *'Article 323 does not mandate appointment of a judicial member and Article 323A provides that the parliament may constitute tribunals as per requirement in each case*'.[87] Thereby the decision whether or not a judicial member shall be appointed should be left to the wisdom of the Legislature.

In furtherance of the same, the court observed that if the authority hasn't been transferred any existing jurisdiction, it is not required to appoint a judicial member merely because the authority exercises quasi-judicial powers. Therefore, the legal principles given in R Gandhi v. UOI cannot be applicable to the RERA Authority because the tribunal in question in the *R Gandhi* case was transferred the jurisdiction of the High Court.

As a result, the legal principles established in the cases of *Sampath Kumar, L Chandra Kumar* and *R Gandhi,* are not general principles of law and cannot be applied as blanket principles.

NAA, analogous to RERA authority hasn't been transferred the functions of any existing jurisdiction. It does not replace High Court in the exercise of its powers and is rather under the judicial control of the High Courts, as the Act provides for an appeal to High Court whenever there's any *'substantial question of law'* involved.[88] The Act also does not restrict the judicial review of the orders passed by NAA, and the same can be challenged under Article 226 and Article 227.[89]

[87] Neelkamal Realtors v Union of India, [2017] SCC OnLine Bom 9302.
[88] Central Goods and Services Act 2017, § 118.
[89] Central Goods and Services Act 2017.

Further, in *R Gandhi v. UOI*, the court held that when the jurisdiction of courts is transferred on the ground of '*Delay and Pendency'* and not by the reason of adjudication of matter, it requires specialised technical expertise, and therefore, a judicial member must be appointed as a part of the composition of the tribunal.

This is not the case in the establishment of NAA, rather it was established on the recommendation of the Select Committee to curb profiteering after the promulgation of GST. As the Select Committee noted that the introduction of GST will eliminate the cascading effect of the tax and benefit the recipient. On the other hand, the committee cautioned the legislators that, to ensure that the benefits of GST are passed on to the consumers, it is necessary to monitor the profiteering. Thus, NAA was constituted with the sole purpose of curbing the profiteering measures and came into existence as a separate independent authority.

Rule 122 CGST, 2017 provides for the composition of NAA. It constitutes five members; one chairman and four technical members. Eligibility criteria set out for the Chairman is that he should at least hold or should've held a post equivalent to the rank of Secretary to the Government of India. Technical members are to be appointed by the GST Council, who should either have held the position of commissioners of sales tax or an equivalent post.[90]

Even though in the matters presented before the NAA, the government is either the Applicant or Respondent, NAA does not have a provision for the appointment of a judicial member as CGST Rules do not provide for the same. The authority is composed of government appointed highly ranked executives.

In this sense, the Anti-profiteering mechanism depicts the violation of the principle *nemo debet esse judex in causa propria sua*, as the

[90] Central Goods and Services Rule 2017, Rule 122.

government executives are appointed to adjudicate upon the matters where the government is one of the parties. Violation of this principle, according to Halsbury, "*precludes a justice from acting as a justice in a matter, who is interested in the matter of the dispute*".[91] The quasi-judicial bodies have the duty to act judicially and thus the same applies to NAA as well, requiring mandatory appointment of a judicial member.

The constitutionality of legislative provisions cannot be challenged for the violation of the basic structure of the Constitution. Traditionally, it can be challenged only on two grounds: legislative competence and violation of Part III of the Constitution.[92]

Article 14 of the Constitution guarantees the fundamental right of equality before the law and equal protection of laws. Right to equality entails the right to be adjudicated by an impartial and independent forum.[93] Evidently, the appointment of only technical members does not directly affect the fundamental rights granted by Article 14 but inevitably affects the access of the right forum for enforcement of such rights. Thus, the meaning of the word 'Law' used in Article 14 cannot be restricted to the principles employed to adjudge the matters before the court. In a broad sense, it also refers to the basic principles and fundamental doctrines from which these precepts are derived.[94]

Thus, the vires of a legislative Act can be challenged for the violation of separation of power and independence of the judiciary, if not for the violation of the basic structure of the Constitution.

C. Separation of Power and Independence of Judiciary

[91] Halsbury, *Halsbury's Law Of England* (4th edn. Lexis Nexis 2006).
[92] *Supra note* 28.
[93] *Supra note* 79.
[94] The State of West Bengal v Anwar Ali Sarkar, [1952] AIR SC 75.

Appointments of the executives also lead to violation of an essential feature of the Constitution i.e., 'Separation of Power'. The doctrine of separation of power find its origin from Article 50 of the Constitution which states that *'State shall take steps to separate the judiciary from the executive in the public services of the States.'*[95] Thus, even though the Constitution does not explicitly provide for the separation of power, the insertion of the above Article has been confirmed to assert that the framers of the Constitution intended for there to be judicial services free of executives.[96]

In the case of *Indira Gandhi v. Raj Narain*, the apex court discussing the intention of the framers of the Constitution stated that "*it is not the intention that the powers of the Judiciary should be passed to or be shared by the Executive or the Legislature*".[97] The court further held that the separation of power among the three organs of the government is the basic structure of the Constitution. Thus, any of the organs cannot be allowed to take over the functions of the other organ.

The absence of judicial members in the quasi-judicial bodies negate the public confidence in the judiciary. Basis of the justice system, *that justice is not only done but seemed to be done*[98] requires that the adjudicator possesses the judicial mind and is free of any extraordinary influence such as that of the government.

Non-appointment of the judicial officers not only leads to the assumption that the adjudicating body does not have the acumen required for ensuring the justice but it also indicates that no effective remedy can be procured from the mechanism as the interference of the government in the judicial services leads to the assumption that the adjudicating authority is compromised.[99]

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[95] Constitution of India, Art. 50.
[96] Chandra Mohan v State of UP, [1966] AIR SC 1987.
[97] Indira Gandhi v Raj Narain, [1975] Supp SCC 1.
[98] R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256.
[99] *Supra note* 95.

Violation of doctrine of separation of power subsequently results in threatening the independence of the judiciary, which is of a paramount and most fundamental value to the Constitution. The court in the case of *R Gandhi v. UOI* has already held that "*If impartiality is the soul of the Judiciary, Independence' is the lifeblood of Judiciary. Without independence, impartiality cannot thrive*". [100]

If the authority adjudging the matters will consists of the officials appointed by the government, wherein the government itself is one of the parties, the minds of the officials are bound to inspire biasness and partiality towards the government, violating the doctrine of separation of power and independence of judiciary. In *Namit Sharma*, the court held that "*The independence of judiciary stricto sensu applies to the Court system. Thus, by necessary implication, it would also apply to the tribunals*".[101] Thus, while creating adjudicating authorities akin to the courts, it becomes the duty of the government to ensure that the provisions enabling such authorities are in conformity with the basic constitutional principles of separation of power and independence of judiciary.[102]

Thus, even though the Constitution of India and the law laid down by the Supreme Court, does not require the appointment of a judicial member in the quasi-judicial bodies, not appointing the judicial members leads to dilution of the judiciary. Especially, in the matters of taxation where the body is to adjudge the matters of administrative interest, the presence of a judicial member should be made mandatory to uphold the fundamental values enshrined in the Constitution. Appointment of a judicial member also remains essential to ensure the regulated working of the institution.

[100] *Supra note* 79.
[101] *Supra note* 28.
[102] Pareena Swarup v UOI, [2008] 14 SCC 107.

V. CONCLUSION

In conclusion, Rule 126 of the CGST Rules, 2017 and Section 171, the CGST Act 2017 should lay extensively detailed guidelines to ensure that the investigative process is transparent and does not delegate excessively. The determination of guidelines and legislative policy is an extremely eminent function of the legislature and thus cannot be delegated. It should be taken up by the Parliament themselves. Further, the combination of the power under the authority via Section 164, CGST Act, 2017 and the arbitrariness surrounding the term *commensurate reduction in prices* does not set a definite picture of clarity and is violative of Article 14 of the Constitution.

The government should issue notifications and rules to supplement the commercially pertinent technicalities such as the mathematical formulae to determine the profiteering standards, market factors necessary to determine profiteering, the time period within which the benefit should reach to the consumer from the seller and lastly the aggravating and mitigating factors for the determination of the guilt. In doing so, the Indian anti-profiteering law should preferably seek inspiration from the Malaysian model of law and set up a clear demarcation of how the supplementary benefit passed onto the buyer, when the seller avails input tax credit shall be claimed.

In addition to the rules and regulations of the anti-profiteering authority, the composition of the NAA, a quasi-judicial body, also fails to inspire the confidence of the layman in its judgment owing to the absence of any judicial member in the authority. The parliament has left it to the judgment of the executives to adjudge the matters of taxation following an arbitrary and nascent law.

Although the anti-profiteering regime in India seeks inspiration from Malaysia and Australia, the statutory regulations in India seem to have been conceived with little care to secondary considerations. The law seems to presume that a seller does not have any further points to take

note of, except the tax rate and credit while fixing a price for the product he is marketing to the customer. No field study that relates reduction in indirect taxes to lower inflation was ever conducted before charting the laws. It has thus, invited challenges in the court of law, due to its unclear criterion of profiteering and procedure. In the present system of anti-profiteering, lack of judicial and legislative guidance has resulted in a crippled mechanism that is prone to biasness and can be struck down.