Legality of GST’s anti-profiteering provision

Of the many things that make this central government far from “minimum” in its pursuit of governance, the “anti-profiteering” mechanism contemplated under Section 171 of the Central Goods and Services Tax Act (CGST Act, 2017) has got to be the most statist. It is the first law in our constitutional history that allows the government to keep a tab on a businessman’s pricing decision irrespective of his intentions, the nature of the produce and market circumstances. There have been laws to regulate under-invoicing, pricing during emergencies, pricing of essential or special commodities, unfair and manipulative trade practices, etc. But Section 171 says that “any reduction in rate of tax...or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.”

The official rationale for such regulation as set out in an online government pamphlet is that “it has been the experience of many countries that when GST was introduced there has been a marked increase in...the prices of the commodities. This happened in spite of the availability of the tax credit right from the production stage to the final consumption stage which should have actually reduced the final prices. This was obviously happening because the supplier was not passing on the benefit to the consumer and thereby indulging in illegal profiteering.” This rationale is shaky because it presumes that a seller has nothing to consider except the tax rate and tax credit while deciding price, and that he possesses an innate concern (beyond economic considerations) for his customer’s pocket. There is no study that establishes a link between reduction in indirect taxes with lower inflation. Not surprisingly, only two (Malaysia and Australia) of the “many countries” that saw “marked increase in the inflation” after GST, responded with “anti-profiteering laws”. The Australian law is far more complex and refined than what is thought of under our GST. The Malaysian law also does not directly link changes in tax rates to profiteering. Instead, it prohibits “unreasonably high profit”, which is measured by comparing the “net profit margin” of commodities in previous periods.

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More shocking than the economics of it is the legal understanding that any seller who chooses to keep his prices high despite receiving tax benefits is “indulging in illegal profiteering”. It is certainly illegal to collect tax from a consumer in excess of what one owes to the state. But to say that you should not use tax-reduction to increase your profit margin is another thing altogether. Article 19(1)(g) of the Constitution guarantees every citizen the right to carry on any business. Our courts have defined business as “a course of dealings...with a profit motive, and not for sport or pleasure”. So, there is no freedom to do business without the motive to earn profit. However, during the heyday of Indian socialism (in 1974), a constitutional bench of the Supreme Court said that the right to do business under Article 19(1)(g) is sufficiently protected “if fair price is fixed leaving a reasonable margin of profit”. That was in the context of cotton, an essential commodity. The Constitution does not envisage any general limits on the right of a businessman to earn profits, except “reasonable restrictions” in public interest. Interestingly, some of the initial targets under the GST “anti-profiteering” mechanism include a McDonald’s franchisee, a Honda dealer and the retailer Lifestyle. Should the state really be worried about and waste resources on checking the prices of such businesses? Is there any public interest in keeping a McDonald’s burger cheap?

At the least, therefore, a businessman has the fundamental right to make a “reasonable margin of profit”. There can be several situations in which the GST “anti-profiteering” mechanism can fall foul of this fundamental right. For instance, if a loss-making businessman can alleviate his plight by increasing the net price of his produce to cover the reduction in rate of tax and keep the gross price the same, forcing him to reduce the price will violate his fundamental right to do business. It is absurd to call such a commercial decision “illegal profiteering”. In 2012, the Delhi high court summarized the law really well in the context of regulating natural gas prices: “Prices are generally

governed/regulated by market forces. Price fixation/regulation/control is essentially a clog on the freedom of trade and commerce conferred the status of a fundamental right. However, wherever the circumstances so justify, the same has been treated as a reasonable restriction.” Therefore, depending on circumstances, laws have always provided for regulating prices and other business practices. The GST “anti-profiteering” mechanism aims to regulate prices of all goods and services irrespective of circumstances. This makes the scheme unprecedented and quite clearly unconstitutional. It even contains stringent penalties. The government may believe that GST should lower inflation. If a policy doesn’t achieve intended results, they then cannot be brought about through penal laws.

In his *Principles Of Political Economy,* John Stuart Mill sums up the history of price-fixing saying, “governments have thought themselves qualified to regulate the condition better than the persons interested. There is scarcely any commodity which they have not at some place or time endeavored to make either dearer or cheaper than it would be if left to itself.” Section 171 of the CGST Act takes us back deep into this history of state-control. Our Constitution, however, is founded on different principles.

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