

**BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY UNDER THE
CENTRAL GOODS & SERVICES TAX ACT, 2017**

Case No.	9/2018
Date of Institution	28.06.2018
Date of Order	27.09.2018

In the matter of:

1. Sh. Jijrushu N. Bhattacharya, 13, Dream Castle Bungalow, Opp. Jakat Naka, Gotri, Vadodara, Gujarat-390021.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicant

Versus

M/s NP Foods (Franchisee M/s Subway India), Shop No. 24 & 25,
Darshnam Arise, Gotri, near Collabera, Opposite Gotri Jakat Naka,
Vadodara, Gujarat-390021

Respondent

Quorum:-

1. Sh. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Ms. R. Bhagyadevi, Technical Member

Present:

1. None for the Applicant No. 1.
2. Sh. Akshat Aggarwal Assistant Commissioner and Sh. Bhupender Goyal, Assistant Director (Costs) for the Applicant No. 2.
3. Sh. Smit P. Shah for the Respondent.

ORDER

1. The present Report dated 11.05.2018 has been received from the Director General of Safeguards (DGSG) now Director General Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case are that an application dated 01.01.2018 was filed by the Applicant No. 1 before the Standing Committee constituted under Rule 123 (1) of the

above Rules alleging that the Respondent has not passed on the benefit of reduction in the rate of GST in restaurant service, when he had purchased "6 Hara Bhara Kabab Sub" (here-in-after referred to as the product). It was also alleged that the Respondent had increased the base price of the product from Rs. 130/- to Rs. 145/- when the GST was reduced from 18% to 5%. Thus it was further alleged that the Respondent had indulged in profiteering in contravention of the provisions of Section 171 of CGST Act, 2017.

2. The above application was examined by the Standing Committee on Anti-Profitteering and was referred to the DGAP vide minutes of its meeting dated 24.01.2018 for detailed investigations under Rule 129 (1) of the CGST Rules, 2017.
3. The DGAP had called upon the Respondent to submit reply on the above stated matter and also asked him to suo moto determine the quantum of benefit which was not passed on after reduction in the rate of tax. The Respondent had submitted replies vide e-mails dated 09.03.2018, 17.03.2018, 06.04.2018 and 01.05.2018 and stated that the Government of India had disallowed Input Tax Credit (ITC) on the purchase of material used in the restaurant service w.e.f. 15.11.2017 and hence he had increased the base price of his products after the change in the GST rate from 18% with ITC to 5% without ITC. He had also submitted copies of the bills, audited balance sheet, GSTR-1 & GSTR-3b and sales register in support of his contention.
4. The DGAP has confirmed in his report that the rate of GST on the restaurant service had been reduced from 18% to 5% with the condition that ITC on the goods and services used in supplying the service will not be allowed vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 with effect from 15.11.2017. The DGAP has also stated that on scrutiny of the GSTR-1, GSTR-3b and the ITC Register submitted by the Respondent, it was observed that ITC amounting to Rs. 13,01,759/- was available to the Respondent during the period from July, 2017 to November, 2017 which came to approximately 11.80% of the taxable value of the service amounting to Rs. 1,10,29,612/- supplied during the same period but when the tax was reduced from 18% to 5%, the said ITC was not available to the Respondent. The DGAP has further stated that the analysis of the invoice-wise outward taxable supplies for the period w.e.f. 15.11.2017 to 28.02.2018 revealed that the Respondent had increased the base prices ranging from 6% to 17% of the different items supplied as a part of restaurant service to make good the loss of ITC post GST rate reduction. He has also submitted that the pre and post GST rate reduction prices of the items sold during the period between 15.11.2017 to 28.02.2018 were compared and after taking into account the entire quantity of such items sold during the said period, it was revealed that the Respondent had increased the average output taxable value (base price) by 12.14% to neutralize the denial of ITC of 11.80%. The DGAP has further submitted that the Respondent had sold 32 number of different items on 14.11.2017 in one of his outlets at Karelibaug at the increased base prices and collected Rs. 452/-, where he had actually charged 18%

GST on the said items. He has also contended that this was evidently done to compensate for the denial of ITC that was to take place one day later w.e.f. 15.11.2017. The DGAP has also intimated that the increase in the base prices of the products sold by the Respondent on 14.11.2017 on account of denial of ITC was unjust as the ITC was available to him on 14.11.2017 since the GST rate was reduced from 18% to 5% and the ITC was denied on the restaurant service supplied by the Respondent only w.e.f. 15.11.2017. He has further intimated that the Respondent had increased the base price to include the cost of input tax and also subjected the customers to GST at the higher rate of 18%, therefore, the unwarranted increase in base price and not passing on the benefit of ITC to the consumers amounted to profiteering by the Respondent. He has also contended that while the increase in the base price of 12.14% was not exactly equivalent to the denial of ITC to the extent of 11.80%, such increase in the base price was commensurate with the denial of ITC. He has further contended that in anticipation of reduction in the rate of GST and denial of ITC w.e.f. 15.11.2017 the Respondent had increased the base price of certain products and collected excess amount of Rs. 452/- on 14.11.2017 as a result of which consumers had to pay higher amount in the form of increased base price and 18% GST on such increased price. He had therefore, submitted that the provisions of Section 171 (1) of the CGST Act, 2017 had not been violated by the Respondent.

5. The above report was considered by the Authority in its sitting held on 15.05.2018 and it was decided to hear the Applicant on 29.05.2018 however, the Applicant did not appear during the course of the hearings. M/s Subway Systems India Private Limited the owners of the 'Subway' Brand which had appointed the Respondent as its franchisee were also associated during the hearings. S/Sh. Nihal Kothari and Mayank Jain Advocates who appeared on behalf of M/s Subway submitted that it worked on the franchisee based model, and no consideration was taken from the franchisee except the royalty on the net turnover. They also submitted that M/s Subway was not involved in fixing of the price of the products and it was solely the call of the franchisee to fix the prices of the products. They further submitted that no ITC was being passed on by M/s Subway as the franchisee was free to buy the raw material from the local sources. They also stated that only the ingredients and the products to be served were decided by M/s Subway.
6. The DGAP was also asked to file reply on the ITC aspect of the pre and post GST, embedded tax aspect of the pre GST era of which credit was not allowed and to extend the investigation to other outlets and products of M/s Subway vide letter dated 11.06.2018. The DGAP vide his reply dated 26 June 2018 has stated that the application was filed in relation to the restaurant service supplied on 4.12.2017 and the GST rate on restaurant service had been reduced from 18% (with ITC) to 5% (without ITC) w.e.f. 15.11.2017 and therefore the investigation could not be extended to the period before 15.11.2017 and the ITC involvement in the pre GST valuation had not been considered relevant. The DGAP has further stated that there were approx. 600 outlet of M/s Subway all over the country and

without separately investigating each of them, he could not offer any comments on the procedure followed by M/s Subway in case of all the products.

7. Mr. Smit P. Shah who appeared on behalf of the Respondent on 13th of August 2018, submitted that the amount of Rs. 452/- which was alleged to have been charged from the customers on 14.11.2018 in the DGAP's Report was due to the system error in the night of 14.11.2018 and the Respondent had no intention of overcharging. He also submitted that he had increased the rates due to denial of ITC and the Report had not alleged any profiteering on his behalf and hence the present proceedings should be dropped.
8. We have carefully heard both the parties and have also considered the material placed before us and following two points pertaining to the allegation of profiteering made against the Respondent need to be decided as per the provisions of Sec. 171 of the CGST Ac, 2017:-
 - i. Whether there was reduction in the rate of tax on the restaurant service after 14.11.2017 and whether the benefit as emanating from such reduced tax rate has not been passed to the Applicant No. 1 in terms of the commensurate reduction in the price of the product purchased by him?
 - ii. Whether profiteering of Rs. 452/- was made by the Respondent by selling 32 number of items on 14.11.2017 in Karelibaug outlet at increased base price?
9. It is apparent from the record that the GST on restaurant service has been reduced by the Central Government vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 from 18% to 5% and ITC has been disallowed. It is also revealed that the Applicant No. 1 in his application dated 01.01.2018 had stated that he had purchased Hara Bhara Kabab from the Respondent who had increased the base price of the product from Rs. 130/- to Rs. 145/- and had denied the benefit of rate reduction to him. He had also submitted copy of the tax invoice dated 04.12.2017 and the leaflet showing the price of the product applicable prior to 15.11.2017 in support of his claim. It is apparent from the facts of the case that the Respondent had increased the base price of his products to make good the loss which had occurred due to denial of ITC post GST rate reduction. It is further revealed that the Respondent had increased the average base price by 12.14% to neutralize the denial of ITC of 11.80% and such increase is commensurate with the increase in the cost of the product on account of denial of ITC. Therefore, the allegation of not passing on the benefit of rate reduction is not established against the Respondent. As far as the issue of profiteering of Rs. 452/- made on the supply of the products on 14.11.2017 is concerned the same can not be termed as profiteering in terms of section 171 of CGST Act, 2017 as there was no rate reduction on 14.11.2017 as the same had occurred w.e.f. 15.11.2017 only.
10. Based on the above facts it is clear that the Respondent has not contravened the provisions of Section 171 of the CGST Act, 2017 and hence there is no merit in the application filed by the Applicant No. 1 and the same is accordingly dismissed. A copy of this order be sent to both the

Applicants and the Respondent free of cost. File of the case be consigned after completion.

-Sd-

(B. N. Sharma)
Chairman

-Sd-

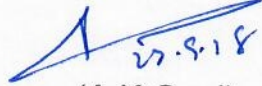
(J. C. Chauhan)
Technical Member



-Sd-

(R. Bhagyadevi)
Technical Member

Certified copy


27.9.18

(A.K.Goel)
Secretary NAA

F.No.22011/NAA/29/2018 / 644

Dated: 27.09.2018

Copy to:-

1. Sh. Jijrushu N. Bhattacharya, 13, Dream Castle Bungalow, Opp. Jakat Naka, Gotri, Vadodara, Gujarat-390021.
2. M/s NP Foods, Shop No. 24 & 25, Darshnam Arise, Gotri, near Collabera, Opposite Gotri Jakat Naka, Vadodara, Gujarat-390021
3. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001
4. NAA website.
5. Guard File.