

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


Case No. : 14/2018
Date of Institution : 20.08.2018
Date of Order : 16.11.2018

In the matter of:

1. Shri Ravi Charaya, ravi@xofootwear.com
2. Shri Chandranath Sarkar, sarkarcs10@gmail.com
3. Shri Shreepad Shende, sgshende@gmail.com
4. Shri Jayasankar Venkatramani, jay.jayashankar.v@gmail.com
5. 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.

Applicants

Versus

 M/s Hardcastle Restaurants Pvt. Ltd., 1001/1002, Tower 3, 10th Floor, Indiabulls Finance Centre, Senapati Bapat Marg, Elphinstone Road, Mumbai - 400013

Respondent

Quorum:-

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

Present:-

1. None for the Applicants No.1, 2, 3 and 4.
2. Sh. Akshat Aggarwal Assistant Commissioner and Sh. Bhupender Goyal Assistant Director (Costs) for the Applicant No. 5.
3. Sh. Suresh Lakshminarayan, Chief Finance Officer, Sh. Dinesh Agarwal, CA and Sh. Mayank Jain, Advocate from M/s Khaitan & Co. for the Respondent.

ORDER

1. This report dated 15.06.2018 has been received from the Applicant No. 5 i.e. the Director General of Safeguards (DGSG), now re-designated as Director General of Anti-Profiteering (hereinafter referred to as the DGAP) under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that the Applicants No. 1 & 2 through their emails both dated 23.11.2017 and Applicants No. 3 & 4 vide their emails dated 15.11.2017 and 17.11.2017 respectively had filed complaints alleging that though the rate of Goods and Services Tax (GST) on Restaurant Services had been

reduced from 18% to 5% w.e.f. 15.11.2017, the Respondent had increased the prices of the products which were being sold by him and had maintained the same price which he was charging before the above reduction. They had also claimed that the Respondent had indulged in profiteering in contravention of the provisions of Section 171 of the CGST Act, 2017 and hence appropriate action should be taken against him.

2. The above applications were examined by the Standing Committee on Anti-Profiteering and were referred to the DGAP vide the minutes of its meetings dated 29.11.2017 and 20.12.2017 for detailed investigation under Rule 129 (1) of the CGST Rules, 2017.
3. The DGAP had called upon the Respondent to submit reply on the allegation levelled by the Applicants No. 1 to 4 and also to suo moto determine the quantum of benefit which he had not passed on to the consumers during the period between 15.11.2017 to 31.01.2018. The above Applicants were given an opportunity to inspect the non-confidential evidences/reply furnished by the Respondent between 24.05.2018 to 25.05.2018. However, the Applicants did not avail of this opportunity.
4. The Respondent had submitted his reply on 05.01.2018 vide Annexure-11 and denied the allegations levelled against him and claimed that the benefit of reduction in the rate of tax had been neutralised due to withdrawal of Input Tax Credit (ITC) to him. The Respondent had furnished the required information/documents to the DGAP vide his letters dated 12.01.2018, 17.01.2018, 22.01.2018, 24.01.2018, 29.01.2018, 07.02.2018, 09.02.2018, 16.02.2018, 22.02.2018, 23.02.2018,



05.03.2018, 09.03.2018, 19.03.2018, 26.03.2018, 06.04.2018,
31.05.2018 and 01.06.2018.

5. The DGAP vide his Report has informed that the Respondent had made the following contentions before him:-

- a. That he was operating quick service restaurants under the brand name "McDonald's" in the Western and Southern regions of India and was registered as a supplier under the GST in 10 States. He had also stated that he was running three tiers of restaurants depending upon the locality, the targeted customers, local competition etc. and was selling the same items at different prices based on the tier of the restaurant.
- b. That the rate of GST on the Restaurant Services was reduced to 5% w.e.f. 15.11.2017 with the condition that the ITC on the goods or services used in supplying the restaurant services would not be available. He has further stated that as per Section 33 of the CGST Act, 2017 the amount of tax formed part of the price. He has also claimed that the price lists of the food and the beverages published by him for each tier of restaurants clearly show that prior to 15.11.2017, the GST was being charged @ 18% and w.e.f. 15.11.2017 it had been levied @ 5% on the taxable value and thus, the commensurate benefit arising out of the reduction in the rate of tax had been passed on to the customers.
- c. That the price revision made by him w.e.f. 15.11.2017 did not fall within the purview of Section 171 of the above Act as this provision applied in only those cases where the contract of supply/sale had been entered in to prior to the change in the rate

- of tax or ITC. He has also claimed that any such change did not amount to automatic change in the price unless it was agreed to by both the parties as per Section 64 A of the Sale of Goods Act, 1930. He has further claimed that any attempt to regulate the sale price of the products being sold by him would violate his right to carry on trade as per Article 19 (1) (g) of the Constitution and the provisions of Section 171 were not similar to the laws framed for controlling prices as per List III of Schedule VII of the Constitution.
- d. That the cost of food and beverages had gone up due to the abrupt denial of ITC which had constrained him to increase the base prices to negate this impact and such increase was also not commensurate with the increase in the costs. He has also contended that the cost of the restaurant services had gone up by at least 15%. He has further contended that he could not avail ITC worth Rs. 8.70 Crores for the months of July to October, 2017 and could avail it only after 15.11.2017. He has also submitted that the quantum of ITC not shown in the GSTR 3B would increase from Rs. 8.70 Crores to Rs. 9.33 Crores and would further increase by 50 Lakhs after all the inward supplies were accounted for which would prove that he had not profiteered. He has further contended that prices of some premium products had been reduced from 11% to 22%.
- e. That the rent for the restaurants in the shopping malls was charged on fixed or variable or semi-variable basis which was approximately 3.5% of the incremental turnover and was payable at the end of the year and since the bills for the same would be raised only at the year-end, he

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would not be eligible to claim ITC on such variable rent and he would suffer an estimated loss of Rs. 22.78 Lakhs.

- f. That for the computation of availability of ITC, additional ITC for the period from July, 2017 to 14.11.2017 should be a minimum of Rs. 10 Crores. The Respondent has also claimed that the transitional credit mentioned in TRAN-1 statement filed by him was not the correct indicator of the tax incurred as (i) credit of CENVAT was not available on the Central Excise Duty, (ii) his restaurants were operating under the Composition Scheme under which ITC on VAT was not allowed (iii) expenses on Petroleum were outside the GST and (iv) most of the inputs were taxable at higher rates. He has further claimed that he had reversed the ITC on the closing stock as on 14.11.2017 amounting to Rs. 4.18 Crores and hence he should be given deemed credit for the opening stock as on 01.07.2017 of Rs. 4.52 Crores.
6. The DGAP has stated in his report that the contention of the Respondent that provisions of Section 171 were not applicable in his case was not correct as they would be attracted as soon as there was reduction in the rate of tax or the benefit of ITC was available and they would not be dependent on whether the contract for supply was entered in to before such reduction or availability of ITC had come in to force and hence provisions of Section 64 A of the Sale of Goods Act, 1930 were not applicable. He has also stated that the argument of the Respondent that the provisions of Section 171 amounted to controlling the prices and thus infringed his right to trade under Article 19 (1) (g) of the Constitution was also not correct as this Section nowhere provided for control on the prices and it's mandate was limited to the extent of


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ensuring that the benefits of tax reduction and ITC were passed on to the consumers by way of commensurate reduction in the prices. The DGAP has further stated that the Central Govt. on the recommendation of the GST Council vide it's Notification No. 26/2017-Central Tax (Rate) dated 14.11.2017 had reduced the rate of tax on restaurant services from 18% to 5% w.e.f. 15.11.2017 with the condition that the benefit of ITC would not be available on this service.

7. The DGAP has also submitted that the Respondent was selling 1,844 products and after comparing the price lists published before and after 15.11.2017 when the rate of tax was reduced, which was indicated in Annexure-32, the Respondent had increased the base price in respect of 1,774 (96.20%) products. He has further submitted that although the Respondent had charged GST @ 5% on and after 15.11.2017 but due to increase in the base price the customers were forced to pay the same price which was being charged from them before 15.11.2017 whereas they should have been charged the lower price after commensurate reduction due to reduction in the rate of tax and hence they were denied the benefit which had become due to them.
8. The DGAP has made detailed calculation of profiteering vide Annexure-37 of his report. He has also compared the ITC which was available to the Respondent till 14.11.2017 with the outward taxable supplies made till the above date. He has calculated the ITC from the period from 01.07.2017 to 31.10.2017 as the details of the closing stock as on 14.11.2017 and the ITC on such stock were not available in the GSTR-3B return of November, 2017 filed by the Respondent. The DGAP has also intimated that date wise outward taxable turnover

was also not supplied by the Respondent up to 14.11.2017. The DGAP while determining the ITC as a ratio of the total taxable turnover of the Respondent has taken into account the ITC for the period from July, 2017 to October, 2017, as was shown in the GSTR-3B, which has been adjusted by adding the amount of ITC which was availed in the month of November, 2017 as per GSTR-3B return and by excluding the amount of tax which was paid on inter unit branch transfers as per sale registers and the input tax credit pertaining to the period before July 2017 which was availed during the period between July, 2017 to October, 2017 as per the GSTR-3B returns. The amount of ITC pertaining to the period before 01.07.2017 which was availed during July to October, 2017 was also excluded.

9. The DGAP has also mentioned that the Respondent had claimed that the ITC of Rs. 9.33 Crores approx. availed in November, 2017 and subsequently was on account of the invoices issued during the period of July, 2017 to October, 2017 and for ITC of Rs. 0.72 Core, the invoices were not in the possession of the Respondent. The DGAP has intimated that out of the above claim, ITC of Rs. 8.51 Crores pertaining to the invoices issued from July, 2017 to October, 2017 which was availed during November, 2017, had been duly considered on the basis of the details submitted by the Respondent. He has further intimated that the ITC amounting to Rs. 1.54 Crores, which had not been considered while calculating the ITC, was available to the Respondent till 31.10.2017, comprised of: (i) ITC of Rs. 0.82 Crore availed in December, 2017 and subsequently, (ii) estimated credit of Rs. 0.50 Crore, invoices of which were not received by the

Respondent and ITC was not availed in November, 2017 as per GSTR-3B return and (iii) Rs. 0.22 Crore on account of rent for which bills were to be raised in March, 2018.

10. The DGAP has also informed that on the scrutiny of the GSTR-1, GSTR-3B returns and the ITC registers produced by the Respondent it was found that the ITC amounting to Rs. 33.96 Crores was available to the Respondent during the period between July, 2017 to October, 2017 which was approximately 9.11% of the taxable value of service of Rs. 372.62 Crores supplied by the Respondent during the same period excluding the inter-unit branch transfers. The rate of tax on the restaurant services was reduced from 18% to 5% w.e.f. 15.11.2017 and the benefit of ITC was not available to the Respondent w.e.f. the above date. The DGAP has calculated the ratio of denial of ITC as under:-

| (Amount in Rs.) | | | | | |
|--|---------------------|---------------------|---------------------|---------------------|-----------------------|
| Particulars | Jul., 2017 | Aug., 2017 | Sept., 2017 | Oct., 2017 | Total |
| ITC Availed as per GSTR-3B (A) | 5,40,24,699 | 8,00,76,997 | 9,10,56,885 | 11,08,97,125 | 33,60,55,706 |
| Add: ITC of July, 2017 to October, 2017 availed in the month of November, 2017 GSTR-3B (Anex-34) (B) | 68,74,072 | 1,36,41,705 | 2,01,97,587 | 4,43,97,474 | 8,51,10,837 |
| Less: Tax on Inter unit branch transfers as per Sales register (C) | 1,59,87,269 | 2,12,74,094 | 1,77,50,160 | 1,80,18,920 | 7,30,30,443 |
| Less: Input Tax Credit pertaining to prior July, 2017 but availed in July, 2017 to October, 2017 GSTR-3B (Annex-35) (D) | 62,71,753 | 4,55,180 | 4,51,567 | 13,49,417 | 85,27,917 |
| Net Input Tax Credit available for the period July, 2017 to October, 2017 (E)= (A+B-C-D) | 3,86,39,749 | 7,19,89,428 | 9,30,52,745 | 13,59,26,262 | 33,96,08,183 |
| Total Outward Taxable Turnover as per GSTR-1 (F) | 1,03,58,60,891 | 1,07,44,33,448 | 99,87,33,437 | 1,10,98,64,117 | 4,21,88,91,893 |
| Less: Inter unit branch transfer included in B2BV sale as per Sale Register (G) | 11,85,53,210 | 12,96,09,631 | 11,85,07,995 | 12,60,15,548 | 49,26,86,384 |
| Net Outward Taxable Turnover for the period July, 2017 to October, 2017 (H)= (F-G) | 91,73,07,681 | 94,48,23,817 | 80,02,25,442 | 98,38,48,569 | 3,72,62,05,509 |
| Ratio of Denial of Input Tax Credit to Net Outward Taxable Turnover (I)= (E/H) | 4.21% | 7.62% | 10.57% | 13.82% | 9.11% |

11. On the basis of the analysis of the details of the item-wise outward taxable supplies made during the period between 15.11.2017 to 31.01.2018, the

DGAP had found that the Respondent had increased the base prices of the various items supplied by him to neutralise the effect of denial of ITC after the rate reduction. The DGAP had compared the pre and post GST rate reduction prices of the items sold during the period between 15.11.2017 to 31.01.2018 and after taking into account the entire quantity of the products sold during the above period, had found that the Respondent had increased the average output taxable value i.e. the base price by 10.45% to offset the denial of input tax credit of 9.11% as was evident from Annexure-36 of the report. Therefore, the DGAP had concluded that the Respondent had not passed on the benefit of reduction in the rate of tax from 18% to 5% as he had increased the base prices by more than 9.11% to 10.45% i.e. more than the denial of ITC in respect of 1,730 items out of total 1,844 items i.e. 93.82% of the total items supplied by him before and after 15.11.2017.

12. The DGAP has also stated that on the basis of the pre and post reduction in the GST rates, the impact of the denial of ITC and the details of the outward supplies made during the period between 15.11.2017 to January, 2018, as per the GSTR-1 or GSTR-3B returns of the Respondent, the amount of net higher sale realization due to increase in the base prices of the services, despite the reduction in the GST rate from 18% to 5%, with denial of ITC, the profiteered amount came to Rs. 7.49 Crores as per the following Table and therefore, the Respondent has contravened the provisions of Section 171 of the above Act:-

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| S. No. | State (Place of Supply) | Profiteering (In Rs.) |
|---------------|-------------------------|-----------------------|
| 1 | Andhra Pradesh | 8,36,602 |
| 2 | Chhattisgarh | 3,99,904 |
| 3 | Goa | 8,29,314 |
| 4 | Gujarat | 88,48,919 |
| 5 | Karnataka | 1,18,30,563 |
| 6 | Kerala | 13,34,341 |
| 7 | Madhya Pradesh | 9,68,540 |
| 8 | Maharashtra | 3,96,68,520 |
| 9 | Tamilnadu | 43,19,803 |
| 10 | Telangana | 58,91,280 |
| Total: | | 7,49,27,786 |

13. The above report was considered by the Authority in its sitting held on 05.07.2018 and it was decided to hear the interested parties by granting hearing on 24.07.2018 during which the Applicants No. 1 to 4 did not appear. The DGAP was represented by Sh. Akshat Aggarwal Assistant Commissioner and Sh. Bhupinder Goyal Assistant Director (Costs). Sh. Suresh Lakshminarayan, Chief Finance Officer, Sh. Dinesh Agarwal, CA and Sh. Mayank Jain, Advocate from M/s Khaitan & Co. appeared for the Respondent.

14. The Respondent has filed detailed written submissions on 24.07.2018, 09.08.2018, 16.08.2018 and 22.08.2018 and stated that the DGAP had grossly erred in applying the provisions of Section 171 of the CGST Act, 2017 which states as under:-

“Anti-Profiteering Measure

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.”

He has claimed that the DGAP has conceded in his Report that the Respondent had charged GST @ 5% to his consumers and therefore, commensurate benefit had been passed on to them. It has also been claimed by the Respondent that the DGAP had admitted that there was no incremental ITC available and therefore no benefit was to be passed on by the Respondent. He has further claimed that despite admission that Section 171 nowhere aimed at price regulation and it's purpose was only to ensure that benefit of reduction in the rate of tax or ITC was passed on to the recipients by way commensurate reduction in the prices, the DGAP had gone in to the computation of base price by invoking the marginal note, i.e. "Anti-Profiteering Measure" which was illegal. He has further claimed that as per the settled law pronounced on the interpretation of the statutes, marginal notes were considered as internal aid to construction and while construing such provisions, the first and the foremost rule was of literal construction and in case the provision was unambiguous and the legislative intent was clear, the other rules of construction were not be called into aid since they were to be called for aid only when the legislative intention was not clear. The Respondent has also cited the law settled in the cases of **Commissioner of income Tax v. Calcutta Knitwears (2014) 6 SCC 444**, **Union of India v. National Federation of the Blind (2013) 10 SCC 772**, **Commissioner of Income-Tax v. Ahmedbhai Umarbhai & Co. 1950 AIR 134**, **N. C. Dhoundial v. Union of India AIR 2004 SC 1272**, **Sarabjit Rick Singh v. Union of India 2008 (2) SCC 417** and **R. Krishnaiah v. State of Andhra Pradesh AIR 2005 AP 10** and argued that in view of the above cases, it was clear that the

marginal note could be used in the interpretation of statute only if literal construction of the statute was ambiguous or absurd and since the provisions of Section 171 were unambiguous and explicit hence the marginal note was irrelevant and therefore, any attempt to examine and assess the base price was beyond the scope of Section 171.

15. The Respondent has also claimed that the word "profit" in common parlance was understood as under:-

| MEANING | SOURCE |
|--|---|
| Advantage or gain in money or in money's worth | Prem & Saharay's Judicial Dictionary of Words and Phrases |
| The excess of revenues over expenditures in a business transaction | Black's Law Dictionary |
| The word profit connotes the idea of pecuniary gain | Ravanna Subanna vs G.S. Kaggeerappa (AIR 1954 SC 653) |
| The financial gain in a transaction or enterprise; the excess of returns over outlay | Shorter Oxford English Dictionary |

The Respondent has also contended that the DGAP had only considered the impact of ITC denial and had failed to consider other factors such as increase in the electricity bills, fuel costs, variable rent, royalty and commissions etc. He has further contended that as per WPI, prices of food articles had risen by 6.32% and that of fuel & power by 4.69% during the same period, however, only the impact of ITC was considered. The Respondent has also claimed that the increased input prices were considered as a mitigating factor in the order dated 4 May 2018 passed by this Authority in the case of **Kumar Gandharv v. KRBL Limited**, but in spite of furnishing evidence no other factor was taken in to consideration. He has further claimed that while determining cost of a product, tax was just one component and the other factors had been

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ignored and therefore, the entire exercise undertaken by the DGAP needed to be dismissed as the DGAP had lost sight of the true meaning of the word “profit”.

16. The Respondent has also pleaded that the DGAP had concluded that the turnover had increased by ₹ 24,81,33,857/- solely due to the increase in the base prices by 10.45%, which could not be taken as profit accruing to the Respondent as there was increase in the (a) Royalty, as the Respondent was paying royalty to M/s McDonald’s India Pvt. Ltd. which was 3.99% of the restaurant turnover and amounted to incremental royalty of ₹ 99,00,540/- on the incremental turnover attributed solely to the price increase during the year 2017-18 (b) Variable rent, which was 3.29% of the restaurant turnover, whereby he had paid an incremental rent of ₹ 81,63,604/- on the incremental turnover attributed solely to price increase during the above year and (c) Other variable expenses like payments made to various service providers and during the year 2017-18, such expenses were 0.96% of the restaurant turnover and he had paid incremental expenses of ₹ 23,82,085/- on the incremental turnover attributable solely to the price increase. He has further pleaded that on the incremental revenue of ₹ 24,81,33,857/-, he had incurred incremental cost of ₹ 2,21,33,540/-, hence the profit worked out to be 9.43% as against 10.45% computed by the DGAP as per the following table:-

| | DESCRIPTION | % | AMOUNT IN ₹ | AMOUNT IN ₹ |
|---|---|-------|---------------|--------------|
| A | Revenue for 15 November to 31 January 2018 on price before revision | | 237,46,84,157 | |
| B | Revenue for 15 November to 31 January 2018 on after price revision | | 262,28,18,014 | |
| C | Incremental revenue due to price revision [B – A] | | | 24,81,33,857 |
| D | incremental royalty due to price revision [3.99% x C] | 3.99% | 99,00,541 | |

| | | | | |
|----------------------------|---|-------|-----------|--------------|
| E | Incremental rent due to price revision [3.29% x C] | 3.29% | 81,63,604 | |
| F | Other expenses due to price revision [0.96% x C] | 0.96% | 23,82,085 | |
| G | Incremental tax cost [(D+E+F) x 18%] | | 36,80,321 | |
| H | Total incremental cost due to price revision [D+E+F+G] | 9.72% | | 204,46,230 |
| I | Net Incremental revenue due to price revision [C-H] | | | 22,40,07,306 |
| EFFECTIVE MARGIN [I] / [A] | | | | 9.43% |

17. The Respondent has also pleaded that the word “profiteering”, had been defined as under:-

| | | | |
|----|--------------|---|--|
| 1. | Profiteering | Any conduct or practice involving the acquisition of excessive profits | Mount vs Welsh |
| | | To seek or obtain excessive profits, one who is given to making excessive profits | Law Lexicon |
| | | The taking advantage of unusual or exceptional circumstances to make excessive profits | Black’s Law Dictionary |
| | | Make or seek to make an excessive profit | Shorter Oxford English Dictionary |
| | | Profiteering would mean taking advantage of unusual or exceptional circumstances to make excessive profits. | Islamic Academy of Education vs State of Karnataka |

The Respondent has further pleaded that he had not made excessive and/or unreasonable profit as he was hardly making a profit, as the tax incremental cost computed by the DGAP was 9.11% as against the incremental price margin of 9.43%. and hence he had benefited only by 0.32%. He has also averred that the increased tax cost warranted revision in the prices to offset the tax cost and in case he increased the prices by ₹100, he would only get ₹90.28 after paying out royalty, variable rent and the outside services and therefore, the prices must be at least increased by 10.09% [$9.11 \times 100 / 0.902$] and not 9.11% as had been calculated by the DGAP to recover the tax cost. He has further averred that the profiteering

had to be due to excessive profit which was not the case in the present proceedings as the increased realisation was extremely minuscule, and therefore, the inevitable conclusion was that he had passed on the commensurate benefits and he had not violated the provisions of Section 171 of the CGST Act, 2017.

18. The Respondent has also stated that the DGAP had found that the net increase in the cost due to denial of ITC was 9.11%, which was arrived at on the basis of the ITC availed during the months of July 2017 to October 2017. He has further stated that the quantum of ITC during the months of July and August was very low as compared to the ITC in the months of September and October due to the reason that he was carrying inventory upwards of Rs. 25 Crores on which no ITC had been claimed under the GST and since this inventory was procured under the VAT regime no credit was availed of/carried forward as he was availing the Composition, therefore, as all future procurements would suffer GST, for calculating the impact of the denial of GST, the months of July and August should not be considered. He has also submitted that the ITC availed of in the month of October 2017 was 13.82% and the ITC for the months of September and October 2017 was 12.28% and therefore the ITC for the month of October 2017 only or the average of September 2017 to October 2017 being 12.28% should be considered for evaluating impact on cost due to denial of ITC. The Respondent further submitted that he had provided complete details of the ITC which he had availed in the months of December 2017 till March 2018 for the supplies received during the period between July - October 2017 which worked out to be ₹ 1,15,88,010/- which had been disallowed by the DGAP causing huge

disadvantage to him. He has also claimed that the DGAP had disallowed ITC of ₹ 85,27,917/- pertaining to period prior to July 2017 but availed of during the period between July-October 2017 as the invoices were issued by the supplier late which must be given to him. He has further claimed that the GST liability on variable rent would be accounted for either on a monthly or yearly basis, although it was accruing daily which constituted 3.29% of the restaurant turnover which the Respondent would be denied.

19. The Respondent has also pleaded that during the period between July-October, 2017, he had made inter-unit branch transfers of ₹ 49,26,86,384/- on which GST of ₹ 7,30,30,443/- was paid which had been wrongly excluded while computing the ratio of ITC denial to taxable turnover being mere book entries as he had suffered incremental cost on the mark up price. He has further pleaded that he had availed of ITC of ₹ 6,46,90,974/- on the inward supplies of ₹ 47,15,04,275/- which were used to make outward inter-unit branch transfers valued at ₹ 50,90,43,209/- on which GST of ₹ 7,03,22,927/- was paid and thus, he had paid additional GST of ₹ 56,31,954/- on inward supplies which had been denied to him by the DGAP. He has also alleged that the period of investigation had been arbitrarily taken from 1 July 2017 to 31 October 2017 On the ground that the break-up of the closing stock of inputs and the ITC on the closing stock as on 14 November 2017 was not available in the GSTR-3B of November 2017 and the date wise outward taxable turnover for the month of November 2017 was not provided by the Respondent to compute the taxable turnover for the period between 1 November 2017 – 14 November 2017. The Respondent has claimed that he had supplied the ITC Register w.e.f. 01.07.2017 to 30.11.2017 on 19.01.2018 and

22.03.2018, the Stock Statement as on 30.06.2017 and 14.11.2017 on 09.03.2018 and the details of the Stock Keeping Unit (SKU) wise sales w.e.f. 01.11.2017 to 14.11.2017 and 15.11.2017 to 30.11.2017 on 10.04.2018 and hence the allegation of not providing these details was incorrect. He has further claimed that perusal of Annexure 36 (Columns G & H and J & K) and Annexure 37 (Columns I & J and L & M) of the Report framed by the DGAP provided SKU wise turnover in terms of units and price for the period between 01-14 November and for the period of 15-30 November 2017 and hence the above allegation was wrong. He has also asserted that if the period of investigation was considered as 01 July 2017 to 14 November 2017, the tax cost resulting from denial of ITC would jump to 10.29% or in the bare minimum to 10.06% which can prove that he had not profited.

20. The Respondent has also submitted that in determining the price the historical data as is available at the time of decision making is used to estimate the likely cost of sales. He has further submitted that there was an abrupt change in the tax regime on 14 November 2017 whereby the Government had denied the benefit of ITC to the restaurant services which had resulted in significant increase in the cost which needed immediate price revision. He has also stressed that the methodology adopted by the DGAP has left significant amount of tax unaccounted for therefore the correct tax cost analysis due to ITC denial could be made only on the basis of the audited financials which have been taken in to account by the Respondent for the year 2016-17 to forecast incremental tax cost as per the following table:-

| Particulars | | |
|---|---------|--------------|
| Increase in price post 14-Nov-17 as per DGA | 10.45% | 10.45% |
| Increase in recovered price due to increase in sales prices | 9.43% | 9.43% |
| Impact due to denial of ITC | 12.24% | 10.1%~10.3 |
| Net marginal Gain/(Loss) | (2.81%) | (0.67~0.87%) |

21. He has also argued that the calculation of the profiteered amount of Rs. 7.49 Crores was not correct as the DGAP has ignored the reduction in the price made by him which had led to reduction in the profiteered amount and also due to the reason that the DGAP had calculated the profiteered amount @ 105%, i.e. base price + 5% GST when the 5% GST had already been deposited in the Government account and not retained by him and hence, no profiteering could be alleged. He has also admitted that on the basis the above submissions, the amount of alleged profiteering stood reduced to Rs. 3,17,03,988/-.

22. The Respondent has also contended that the relevant provisions of the CGST Act, 2017 or the CGST Rules, 2017 did not prescribe the methodology to be followed by the registered suppliers in order to comply with the anti-profiteering requirements. He has further contended that Rule 126 of the above Rules authorised this Authority to determine the methodology and procedure to decide whether the reduction in the rate of tax or the benefit of input tax credit had been passed on by the registered person to the recipient by way of commensurate reduction in prices, however, no such methodology had been notified by it till date. He has also pleaded that Section 171 and Rule 122-137 being part of a taxing statute, could not be enforced in

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the absence of machinery provisions for computation of the profiteered amount as per the law settled in the cases of **CIT v. B. C. Srinivasa Shetty (1981) 2 SCC 460** and **Commissioner of Central Excise v. Larsen & Toubro Ltd. (2016) 1 SCC 170**. He has further pleaded that the above Act did not provide for a mechanism of computation or any guidelines and had left framing of methodology and computation to the Authority which was illegal as it was settled that legislature could not delegate it's authority under a statute without appropriate guidelines as per the law pronounced in the case of **Indian Aluminium Co. Ltd. and Anr. v. The State of Bihar and Ors. 1994 (1) PLJR** as the anti-profiteering provisions placed an unbridled discretion in the hands of the Authority and hence the present proceedings were not maintainable.

23. The Respondent has also stated that it was not clear whether the price alteration was required to be done at the entity level, State level, locational level, product level, category level or SKU level, each of which would bring about a different result in the pricing. There was also no indication whether a "commensurate" change in pricing would be assessed as a trend or in percentage terms. He has further stated that there was no recognition of various non-GST factors like market conditions, demand and supply, rising/ falling input costs, each of which might independently warrant a reduction or increase in prices and how in respect of common goods or services which would be procured and used across the business e.g. fuel, security and audit services, such costs would be apportioned to the various segments of the business.

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24. The Respondent has also submitted that the Authority must provide appropriate machinery for recovery of the amount of ITC of ₹ 22 Lakhs pertaining to the period between 1 July 2017-14 November 2017 which could not be availed due to change in the tax regime. He has further submitted that section 16 of the CGST Act provided for availment of the ITC up to a period of one year and hence he was entitled to claim the above ITC. He has also stated that the receipt of the goods and services had to be determined under the provisions of Section 12 and 13 of the CGST Act, 2017 as per which earlier of the date of issue of the invoice or the date of the receipt of payment was to be considered as time of supply and since the Respondent had claimed credit of ITC in respect of all such invoices which were dated on or before 14 November 2017 but accounted in the books of account on or after 14 November 2017, he should be allowed to avail the same. He has further stated that he was barred from taking benefit of ITC on inward supplies received after 14 November 2017 as per Section 12 and 13 of the CGST Act, 2017 which could not be construed as curtailing his vested right of availing the ITC for the inward supplies received on or before 14 November 2017. He has also cited the cases of (i) **Eicher Motors Ltd. v. Union of India 1999 (1) SCR 295** (ii) **Samtel India Ltd. v. Commissioner of Central Excise (2003) 11 SCC 324** and (iii) **Binani Cement Ltd v. Commissioner of Central Excise 2002 (143) E.L.T. 577 (Tri. - Del.)** in his support.

25. The Respondent has also alleged that the DGAP had claimed that since the gross price has remained identical for the period up to 14 November 2017 and w.e.f. 15 November 2018 therefore, he had

resorted to profiteering however, It was an undisputed fact that the Respondent had revised his base price both upward as well downward due to denial of ITC therefore, the gross price charged had remained static. He has also claimed that in the tax law it was settled that a literal meaning was to be adopted as opposed to any other construction thereof as had been held in the cases of **Commissioner of Income Tax v. Vadilal Vallubhai (1972) 86 ITR 2 (SC)** and **State of Punjab v. Gurdial Singh AIR 1980 SC 319**. The Respondent has also alleged that the *dictum* to increase the base price only by 9.11% was nothing but a direct restriction on the prices of the services offered by the Respondent.

26. The Respondent has also claimed that prior to 15 November 2017, the input tax paid on inward supplies other than those listed under Section 17(5) of the CGST Act, 2017 was not cost and therefore, it was not factored in the price however after 15 November 2017, the input tax paid had become a cost which needed to be factored in the price. He has further claimed that the transitional credit of Rs. 5,18,17,311/- was also required to be included in the month of July 2017 as per the comments dated 09 August 2018 of the DGAP for working out the ratio of ITC versus the taxable turnover which would then be 10.50% and hence he cannot be held to have profiteered.

27. The Respondent has also submitted that the DGAP had claimed that as per Section 171 determination of profiteering was required to be done in absolute terms, then the entire investigation was vitiated as it had been done on aggregate or consolidated data and the DGAP should have determined each and every factor against each and every product for

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determining profiteering. The respondent has also calculated the ratio of denial of ITC as under:-

| Particulars | Jul-17 | Aug-2017 | Sept-2017 | Oct-17 | 1-14 Nov-17 | Total |
|---|----------------|----------------|--------------|----------------|--------------|----------------|
| ITC availed as per GSTR-3B (A) | 5,40,24,699 | 8,00,76,997 | 9,17,54,635 | 11,08,97,125 | 5,77,33,663 | 39,44,87,119 |
| Add: ITC of July, 2017 to October, 2017 availed in the month of November, 2017 GSTR-3B (Annex-34) (B) | 68,74,072 | 1,36,41,705 | 2,01,97,587 | 4,43,97,474 | | 8,51,10,838 |
| Add: ITC of July 2017 to 14 November 2017 availed in the month of December 2017 | 2,37,237 | 7,08,187 | 9,47,249 | 22,49,103 | 1,14,39,498 | 1,55,81,273 |
| Add: ITC of July 2017 to 14 November 2017 availed in the month of January 2018 | 4,55,861 | 5,73,870 | 10,57,272 | 19,62,917 | 35,77,711 | 76,27,630 |
| Add: ITC of July 2017 to 14 November 2017 availed in the month of February 2018 | 1,95,426 | 1,43,501 | 2,72,150 | 3,50,443 | 6,91,633 | 16,53,153 |
| Add: ITC of July 2017 to 14 November 2017 availed in the month of March 2018 | 6,73,269 | 4,75,593 | 8,51,747 | 4,34,186 | 5,87,834 | 30,22,630 |
| Less: Tax on inter unit branch transfer as per Sales register (C) | 1,59,87,269 | 2,12,74,094 | 1,77,50,160 | 1,80,18,920 | 1,33,68,224 | 8,63,98,667 |
| Add: Incremental tax cost on inter-unit branch transfers | 9,22,289 | 7,45,701 | 9,05,270 | 25,73,392 | 4,85,302 | 56,31,954 |
| Net input tax credit available for the period July, 2017 to October, 2017 (E)= (A+B-C-D) | 4,73,95,583 | 7,50,91,460 | 9,82,35,750 | 14,48,45,720 | 6,11,47,417 | 42,67,15,930 |
| Total outward Turnover as per GSTR-1 (F) | 1,03,58,60,891 | 1,07,44,33,448 | 99,87,33,437 | 1,10,98,64,117 | 50,77,76,041 | 4,72,66,67,934 |
| Less: Inter unit branch transfer included in B2B Sale as per Sale register (G) | 11,85,53,210 | 12,96,09,631 | 11,85,07,995 | 12,60,15,548 | 7,75,04,820 | 57,01,91,204 |
| Net outward Taxable Turnover for the period July, 2017 to October, 2017 (H) = (F-G) | 91,73,07,681 | 94,48,23,817 | 88,02,25,442 | 98,38,48,569 | 43,02,71,220 | 4,15,64,76,729 |
| Ratio of Denial (in % terms) of Input tax credit to Net Outward Taxable Turnover (I) = (E/H) | 5.17 | 7.95 | 11.16 | 14.72 | 14.21 | 10.27 |

He has also claimed that the net effect of the denial of ITC was 10.27% to 12.24% whereas the net incremental revenue was only 9.43% and hence there was no profiteering.

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28. The DGAP in his replies dated 08.08.2018 and 20.08.2018 filed in response to the submissions made by the Respondent has stated that Section 171 required passing on of the benefit of reduction in the rate of GST by way of a commensurate reduction in the price and in this case the price was not reduced. He has also stated that he had not examined the cost component included in the base price and hence there was no interference with the right of the Respondent to fix prices of his products and freely carry on his trade. He has further stated that he had only added the quantum of denial of ITC to the pre rate reduction price. He has also submitted that Respondent had carried forward Transitional Credit of Rs. 5.18 Crore on 1st July, 2017 for the stock held on 30.06.2017 and also ITC of Rs. 4.61 Crore availed in the months of Sep. and Oct. 2017 pertained to the period prior to the month in which the credit was availed. He had also calculated ratio of denial of Input Tax Credit to the net outward taxable turnover which came to be 9.81% considering only the months of September-October, 2017. The DGAP has further submitted that the ITC in respect of the inter-unit branch transfers was not considered because the output tax liability on outward taxable turnover had also been excluded from the period between 1-14 November, 2017. He has also claimed that the Respondent had submitted SKU wise summary of supplies and not B2C invoices for outward taxable supplies and random check of the invoices revealed that in some cases, ITC was availed by him without being in possession of the invoices on the date of availing of ITC which was in contravention of the provisions of Section 16 (2) (a) of the CGST Act, 2017 and thus was not allowed. The DGAP has also claimed that he was justified in applying the anti-profiteering provisions at the product/SKU

level, in the absence of invoice-wise outward taxable supplies data as the Respondent had failed to provide the same.

29. The DGAP has also contended that Para-13 on page 6 of the Report explained the rationale for rejecting the Respondent's contention that mere charging of the reduced GST rate demonstrated the absence of profiteering as Section 171 required the passing on a benefit of reduction in the GST rates by way of a commensurate reduction in prices and in this case the price was not so reduced. He has further contended that Section 171 required that any reduction in the rate of the tax or the benefit of ITC which had accrued to a supplier must be passed on to the consumers as both are the concessions given by the Government and the suppliers were not entitled to appropriate them and in case the consumers were not identifiable, the amount so collected by the suppliers was required to be deposited in the Consumer Welfare Fund (CWF). He has also argued that commensurate reduction could obviously only be in absolute terms, so that the final price payable by a consumer got reduced. He has further argued that Section 171 did not provide a supplier any other means of passing on the benefit of ITC or reduction in rate of tax to the consumer. He has also pleaded that the increase in the cost of inputs including royalty, variable rent and other expenses was a factor in the determination of the price but it was independent of the output GST rate and hence it could not be claimed that the elements of cost unrelated to GST were affected by the change in the output GST rate and therefore, the increase in the cost of inputs as claimed by the Respondent had not been considered.

30. The DGAP has also submitted that full ITC was allowed after implementation of the GST w.e.f. 01.07.2017 on the purchase of Inputs,

Input Services and Capital Goods which the Respondent had availed. He has further submitted that the Respondent had informed that he carried the same level of inventory on 30th June 2017 & on 31st October 2017 and therefore, for computing the ratio of denial of ITC to the taxable turnover, the ITC for the period from July, 2017 to October, 2017, as furnished by him in the GSTR-3B had been considered by adding the amount of ITC pertaining to the period from July, 2017 to October, 2017 but availed in the month of November, 2017 as per the GSTR-3B return and excluding the amount of tax paid on inter-unit branch transfer as per sales register and the ITC pertaining to the period before July, 2017 which was availed during the period of July, 2017 to October, 2017 as per GSTR-3B returns. He has also stated that Section 16 (2) the CGST Act, 2017 prescribed certain conditions for entitlement for availing ITC and w.e.f. 15.11.2017, the Respondent was not allowed to avail ITC in terms of Notification No. 46/2017- Central Tax (Rates) dated 14.11.2017, therefore, he was not eligible to take benefit of ITC w.e.f. 15.11.2017 on the strength of invoices received after 15.11.2017. The DGAP has also claimed that the ITC of Rs. 85,27,917 was not disallowed but was not considered while computing the ratio of denial of ITC to net turnover as this credit pertained to the period prior to implementation of GST which had no bearing on the supplies made during the period from July, 2017 to October, 2017. He has further stated that as the Respondent had received the tax invoices after 15.11.2017 hence he was not eligible to avail the ITC in terms of the Notification dated 14.11.2017, therefore the same could not be considered for computation of denial of Input Tax Credit to net turnover ratio. The DGAP has also maintained that as the Respondent had already availed ITC on the original

purchase of inputs, the same had been considered in the computation of denial of ITC to net turnover. He has further maintained that the output tax liability on inter-unit branch transfer turnover had been excluded from the ITC on the one hand and the inter-unit branch transfer turnover has been excluded from the outward taxable turnover on the other hand which neutralised the impact of branch transfer transactions on the computation. He has also informed that there was reversal of ITC on the closing stock of inputs and capital goods as on 14.11.2017 made by the Respondent which was not available in the GST-3B of November, 2017. The DGAP has also alleged that the Respondent had submitted details of SKU wise summary sales for the period between 1-14 November, 2017 but had not submitted invoice wise B2C outward taxable supplies pertaining to this period, therefore, net taxable turnover could not be computed on the basis of summary sales. The DGAP has also alleged that during random check of the invoices on which ITC was availed in November, 2017, the credit was taken by the Respondent without being in possession of these invoices on the date of availing ITC, in contravention of the provisions of Section 16 (2) (a) of the CGST Act, 2017 and therefore, the ITC pertaining to the invoices issued on or after 1st November 2017 and availed during 1-14 November 2017 had been left out. He has also intimated that the net turnover for the above period had also been left out and therefore, this had no bearing on computation of denial of ITC ratio to the turnover during the period from 1st July 2017 to 31st October 2017. The DGAP has also claimed that the law did not provide a supplier any flexibility to suo moto decide on any other modality to pass on the benefit of ITC or reduction in rate of tax to the recipients except by commensurate reduction in the price and hence

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computation of the marginal gain/loss as per the financial statements could not be considered in view of the statutory provisions. He has further claimed that a supplier did not have discretion to pass on the benefit of input tax credit or reduction in the rate of tax on one product, by reducing the price of another product. He has also contended that price included both basic price and also the tax charged on it and therefore, any excess amount collected from the recipients amounted to profiteering which must be returned to the recipients or deposited in the CWF.

31. We have carefully considered the material placed on the record and have also heard both the parties and it is revealed that the Central Govt. vide its Notification No. 26/2017-Central Tax (Rate) dated 14.11.2017 had reduced the rate of GST being charged on the Restaurant Services from 18% to 5% w.e.f. 15.11.2017 with the stipulation that the suppliers of these services would not be able to obtain benefit of ITC from the above date.
32. It is also revealed from the perusal of Section 171 quoted above that (i) any reduction in the rate of tax on any supply of goods or services or (ii) the benefit of ITC shall be passed on to the recipient by way of (iii) commensurate reduction in prices. Since there has been reduction in the rate of tax in respect of the above services as per the Notification dated 14.11.2017 the benefit of reduction was required to be passed on to the consumers. Similarly the benefit of ITC availed by the supplier was also to be passed on to the recipients. Mere charging of GST @ 5% w.e.f. 15.11.2017 does not amount to passing on the benefit of the above reduction as has been claimed by the Respondent. The Respondent had also claimed benefit of ITC as per TRAN-1 statement as well as per his GST-3B returns filed for the period between 01.07.2017 to 14.11.2017

which was also required to be passed on to the consumers. Perusal of the Report filed by the DGAP nowhere shows that he had gone in to computation of the base price fixed by the Respondent as he has neither sought details of the cost of the inputs used by the Respondent nor of his profit margins and therefore, the allegation of computation of base price by the DGAP made by the Respondent is completely wrong. The DGAP has only tried to investigate whether the benefits of reduction in the rate of tax and the ITC have been passed on to the customers by the Respondent or not as per the provisions of Section 171 or not. It is absolutely clear even from a cursory perusal of the provisions of Section 171 that they are completely unambiguous and clear and hence there is hardly any scope for misinterpretation of the marginal note mentioned as 'Anti-Profiteering Measures' and there is no justification in construing the same in the manner which has been suggested by the Respondent. Therefore, it is respectfully submitted that the law settled in the cases of **Commissioner of income Tax v. Calcutta Knitwears (2014) 6 SCC 444**, **Union of India v. National Federation of the Blind (2013) 10 SCC 772**, **Commissioner of Income-Tax v. Ahmedbhai Umarbhai & Co. 1950 AIR 134**, **N. C. Dhoundial v. Union of India AIR 2004 SC 1272**, **Sarabjit Rick Singh v. Union of India 2008 (2) SCC 417** and **R. Krishnaiah v. State of Andhra Pradesh AIR 2005 AP 10** is not applicable in the facts of the present case as no strict interpretation of the provisions of Section 171 is required as they are simple and clear, their meaning and message is absolutely unambiguous and hence no weightage is required to be given to the marginal note. The intent of legislature shows that it proposes to hold the suppliers accountable for passing on both the above benefits as they have

been given out of the public exchequer and any breach of the same will fall foul of the above Section.

33. The Respondent has also claimed that the provisions of Section 171 were applicable only in the case of the contracts of sale which had been entered in to prior to the change in the rate of tax or grant of benefit of ITC and both the parties had agreed to such change as per the provisions of Section 64 A of the Sale of Goods Act, 1930. Perusal of the above Section shows that it's provisions are not applicable in view of the specific provisions of Section 171 which stipulate that both the benefits have to be passed on as and when they are given to the customers by the Government out of its own revenue which has nothing to do with the contract between the two parties. Therefore, the contention of the Respondent made in this regard is frivolous. It is also clear from the provisions of Section 171 that it has given mandate only to ensure that the benefits of rate reduction and ITC are passed on to the consumers and it has no provisions for interference in the process of price fixing as has been alleged by the Respondent and hence there is no question of violation of the right of the Respondent granted under Article 19 (1) (g) nor of the laws framed for regulation of prices as per List III of Schedule VII of the Constitution. Both the claims made by the Respondent in this regard are farfetched and untenable in view of the specific provisions of Section 171.

34. It is also clear from the definition of 'profit' given by the Respondent in his submissions that it is the advantage or gain derived in a legal business transaction but the same cannot be considered as profit if it is illegally derived by appropriating the benefits which are granted by the Government from the public funds to the consumers. The contention of the Respondent

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that the increase in the prices of food article, electricity, fuel, variable rent, royalty and commissions etc. was not considered by the DGAP while calculating the profiteered amount is untenable because the DGAP has mandate to only examine whether the benefit of tax reduction or ITC has been passed on or not. The order passed in the Case of **Kumar Gandharv v. KRBL Ltd.** on 04.05.2018 by this Authority pertains to Basmati in the case of which the GST was increased from 0% to 5% and hence there has been no reduction in the rate of tax and therefore, the provisions of Section 171 were not attracted as is the case in respect of the Respondent.

35. The Respondent has wrongly claimed that the DGAP had assessed that the Respondent had made a profit of Rs. 24,81,33,857/- due to the average increase in the base price by 10.45%. The claim made by the Respondent is incorrect as the DGAP has taken the above amount as additional sale realisation made by the Respondent on account of the increase in the prices and not the profiteered amount as this amount has been assessed to be Rs. 7,49,27,786/- only as per Annexure-37 of the Report submitted by the DGAP. Since the above amount of Rs. 24,81,33,857/- has not been taken as profiteering by the DGAP there is hardly any question of considering the costs incurred by the Respondent on royalty, variable rent or other variable expenses. The Respondent is trying to confuse the issue by comparing the incremental revenue earned by him with the amount of profiteering. Since he has earned incremental revenue he should also have made arrangements for meeting the above expenses from the revenue earned by him.

36. The Respondent has also tried to define 'profiteering' as a conduct or practice for making excessive profits. The present conduct of the

Respondent squarely falls in the definitions mentioned by the Respondent himself as he had not only realised his usual margin of profit which he was charging but had also pocketed the amount which he was bound to pass on to his customers due to reduction in the rate of tax and benefit of ITC. The Respondent must remember that the benefit of reduction in the rate of tax as well as the benefit of ITC have been given by the Central as well as the State Government by sacrificing their own revenue in favour of the general public and the Respondent has no right to appropriate them. The Respondent has himself admitted that the DGAP had calculated the ratio of denial of ITC to total taxable turnover as 9.11% whereas it was 9.43% as per his own assessment and hence he had profited by 0.32% which demolishes his entire defence of having not profited. The amount of profiteering assessed by the DGAP cannot be described as miniscule as it has been earned by fleecing millions of customers.

37. It is also apparent from the record that the DGAP has calculated the ratio of ITC to the total taxable turnover pertaining to the period between July, 2017 to October, 2017 as 9.11% on the basis of the GSTR-3B returns filed by the Respondent. However, he has claimed that the above ratio should have been calculated on the basis of the ITC availed by him either in the month of October, 2017 or during the months of September and October, 2017 as the ratio would be 13.82% or 12.82% respectively which would show that he had not profited. The Respondent has not given any reason to explain why the above months should be picked up selectively. The only reason for the above contention appears to be that the Respondent wants to hide the fact that he had increased his prices more than the denial of benefit of ITC. The Respondent cannot claim ITC after

the Notification issued on 14.11.2017 for the supplies made during the months of July to October, 2017 during the months of December 2017 to March 2018 and hence the DGAP has rightly denied him the benefit of ITC of Rs. 1,15,88,010/-. He has further rightly denied him the benefit of ITC of Rs. 85,27,917/- as the tax invoices in respect of the supplies made during the period of July to October, 2017 were received by the Respondent late. The Respondent must have been prudent enough to make necessary provisions for payment of rent to avoid loss of ITC which he had failed to do.

38. It is also revealed from the Report of the DGAP that the output tax liability on inter-unit branch transfer turnover had been excluded from the ITC on the one hand and the inter-unit branch transfer turnover has been excluded from the outward taxable turnover on the other hand which had neutralised the impact of branch transfer transactions on the computation of ratio of ITC to total taxable turnover and hence amounts of Rs. 49,26,86,384/- and Rs. 47,15,04,275/- had rightly not been included in the calculation. Perusal of the Annexure-36 and 37 attached with the Report show that they have been framed by taking in to account the information pertaining to the period between 01.11.2017 to 30.11.2017 and hence the contention of the Respondent that all the information required by the DGAP had been supplied is correct although this information was not mentioned in the GST-3B by him. Since the calculation of profiteering has been made after duly considering the above period there is no ground to claim that the ratio of denial of ITC would jump to 10.29% or 10.06%.

39. The Respondent has also claimed that due to sudden denial of the ITC the prices were required to be revised as there was significant change in the

costs, which could only be done on the basis of the audited financial statements. This contention is absolutely wrong as the Respondent had overnight increased the prices w.e.f. 15.11.2017 the day from which the rate of tax was reduced. Further, the increase was exactly equal to the amount by which the tax had been reduced and the same MRP which was being charged on 14.11.2017 was also charged on 15.11.2017. Perusal of the tax invoice dated 07.11.2017 enclosed with the complaint shows that the Respondent had charged Rs. 120.34/- as base price for one piece of Regular Mccafe Latte and Rs. 21.66/- as 18% CGST+SGST and thus an amount of Rs. 142/- was charged for the above item. Vide invoice dated 15.11.2017 the base price was increased by Rs. 14.90/- to Rs.135.24/- and Rs. 6.76/- were charged as CGST+SGST @ 5% and the above product was supplied at the same MRP of Rs. 142/-. Therefore, it is clear that the base price was increased by 12.38% which is more than the ratio of denial of ITC of 9.11%. The Respondent had not only compelled his customers to pay extra base price of Rs. 3.94/- per item and he had also forced them to pay extra GST of Rs. 0.20/- and thus the benefit of Rs. 4.14/- per piece had been denied to the customers. Had the Respondent not increased the price of the above product the same would have been supplied at the MRP of Rs. 137.86/- only and the customer would have got the benefit of Rs. 4.14/- in the MRP. Perusal of Annexure-32 further proves that the Respondent had arbitrarily increased his prices without taking into account the audited financial statements and they were increased solely with the malafide intention of appropriating the benefit which was to be passed on to the general public. The Respondent has himself admitted that he had made net marginal gain of 2.81% and the total profiteering was to the tune

of Rs. 3,17,03,988/-. After this admission the Respondent can hardly claim that the price increase was based on the audited statements.

40. The Respondent has also claimed that no methodology has been prescribed under the CGST Act or the Rules which can be followed by the suppliers in order to comply with the anti-profiteering measures and this Authority had also not notified such methodology under Rule 126 of the CGST Rules, 2017. In this connection it would be pertinent to mention that this Authority in exercise of the powers conferred on it under Rule 126 of the above Rules has already promulgated the "Methodology and Procedure" vide its Notification dated 28.03.2017 which has been prominently displayed on its website. It is regrettable that the Respondent is raising this issue without consulting the website. The Respondent has also claimed that the provisions of Section 171 and Rules 122-137 could not be enforced in the absence of machinery provisions which also proves that the Respondent has not read the above provisions carefully. As discussed above the provisions of Section 171 and the above Rules are very clear and unambiguous under which a comprehensive machinery comprising of the State specific Screening Committees, Standing Committee, Directorate General of Anti-Profiteering and Commissioners of Central GST and State Tax have been constituted/established under the above provisions to take cognizance of the complaints made on profiteering, their investigation and for enforcement of the orders passed by this Authority. The law settled in the cases of **CIT v. B. C. Srinivasa Shetty (1981) 2 SCC 460** and **Commissioner of Central Excise v. Larsen & Toubro Ltd. (2016) 1 SCC 170** is not applicable as specific and adequate anti-profiteering machinery has been provided under the above

Act and the Rules to enforce the above provisions. The averment of the Respondent regarding excessive delegation to the Authority for framing methodology is also not tenable as the delegation has been done in exercise of the powers conferred under Section 164 of the Act on the recommendation of the GST Council which is a body established under the Constitution. It is humbly submitted that the judgement passed in the case of **Indian Aluminium Co. Ltd. and Anr. v. The State of Bihar and Ors. 1994 (1) PLJR** is not being followed as the delegation has been made in accordance with the provisions of the CGST Act, 2017. It would also be appropriate to mention here that the computation of the profiteered amount under Section 171 has to be done on the basis of the facts of each case and hence no general methodology and procedure can be prescribed for the same. Moreover, the word used in Rule 126 is to 'determine' and not to 'prescribe' the methodology and procedure. The basic aim is to ensure that both the benefits of reduction in the rate of tax and the ITC are passed on to the consumers by commensurate reduction in the prices. During the hearing the Respondent was repeatedly asked to put forth his own methodology and procedure in case he was not satisfied with the course of action adopted by the DGAP while assessing his liability for profiteering but the Respondent has failed to do so and therefore, all the objections raised by him in this behalf are frivolous and cannot be accepted.

41. The Respondent has also pleaded that he was not aware at what level the price was to be reduced. In this connection the provisions of Section 171 are very clear which state that both the benefits have to be given in the case of every supply. Therefore, the benefit is required to be passed on at the product level as the recipient would be different in each supply of the

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product. Every consumer is entitled to receive the above benefits and no one can be denied these benefits on the ground that they shall be passed on at the entity level, State level, locational level or the SKU level. The Respondent has no discretion to deny these benefits on any ground or to grant them on the basis of his own convenience. There is also no problem in settling the issue of commensurate reduction which can be calculated after taking in to account the reduction in the rate of tax or grant of benefit of ITC both of which can be easily determined in the absolute figures and hence there should be no difficulty in reducing the prices commensurately, therefore, there is no question of it's assessment as a trend or in percentage terms. The provisions of Section 171 are only concerned about passing on the above two benefits and have no connection with the fixing of the price of the product and hence the issues of market conditions, demand and supply and rising/falling input costs are not required to be taken in to account while determining the amount of profiteering. The Respondent cannot raise these issues by arbitrarily raising his prices on the intervening night of 14/15th November, 2017 by 10.45% on an average on the eve of the reduction in the rate of tax. He could have very well raised his prices on the basis of the above factors anytime between 01.04.2017 to 14.11.2017 which he had not done.

42. The Respondent has also suggested that this Authority should provide for appropriate machinery for recovery of ITC of Rs. 22 Lakhs which he could not avail. In this connection it is made clear that the Authority is not the appropriate forum before which such issue can be raised. The Respondent can always approach the competent forum to redress his grievance of denial of ITC as per the provisions of Section 12, 13 and 16 of the above

Act. He may also cite the judgements rendered in the cases of (i) **Eicher Motors Ltd. v. Union of India 1999 (1) SCR 295** (ii) **Samtel India Ltd. v. Commissioner of Central Excise (2003) 11 SCC 324** and (iii) **Binani Cement Ltd v. Commissioner of Central Excise 2002 (143) E.L.T. 577 (Tri. - Del.)** before such forum.

43. After the perusal of Annexure-32 it is established beyond any doubt that the Respondent had increased the base prices on the intervening night of 14/15th November, 2017 by an average of 10.45% in respect of 1,730 products out of the 1,844 products which comes to about 93.82% which clearly shows that he had deliberately in conscious disregard of the provisions of Section 171 of the above Act had resorted to profiteering as he had no ground whatsoever to increase his prices on the eve of tax reduction. The cases of **Commissioner of Income Tax v. Vadilal Vallubhai (1972) 86 ITR 2 (SC)** and **State of Punjab v. Gurdial Singh AIR 1980 SC 319** are of no help to him as the same are not relevant in the facts of the present case. The allegation of the Respondent that he had been directed to increase his prices by 9.11% only amounted to restriction on his right to fix the prices is misplaced as no such direction has been passed by the DGAP as the Respondent has himself revised the prices and while doing so he has deliberately pocketed the benefits which he was required to pass on to his customers in addition to his regular margins which being in contravention of the provisions of Section 171 of the above Act is liable to the consequences prescribed under Rule 133 of the above Rules.

44. The Respondent has also claimed that after 15.11.2017 the input tax paid by him had become a cost which needed to be factored in the price. This

contention of the Respondent is frivolous as he had no details of the input tax available to him on 15.11.2017 when he had increased the prices. The Respondent has been duly given the benefit of transitional credit and therefore, he should not have any grievance on this account.

45. The claim of the Respondent that the calculation of profiteering has been done on aggregate or consolidated data and not in the absolute terms is wrong as this calculation has been done through a very comprehensive exercise carried out by the DGAP as has been shown in Annexures-32 to 37, the veracity of which cannot be challenged. The amount of Profiteering has been meticulously assessed on each and every product by the DGAP and therefore, the same can be fully relied upon. The calculation of ratio of denial of ITC has been worked out as 10.27% by the Respondent in the Table submitted by him, however, the same cannot be accepted as it includes the ITC to which the Respondent was not entitled and also the inter unit branch transfers which have not been taken in to account by the DGAP.

46. In view of the above discussion the quantum of denial of benefit due to the reduction in the rate of tax and the benefit of ITC availed by the Respondent which was required to be passed on to the customers or the amount of profiteering done by the Respondent is determined as Rs. 7,49,27,786/- as per the details mentioned in para 12 supra under the provisions of Rule 133 (1) of the CGST Rules, 2017 as the Respondent has failed to pass on both the above benefits to his customers. The above amount is inclusive of the extra GST which the Respondent had forced the customers to pay due to wrong increase in his basic prices otherwise the prices to be paid by them should have further got reduced by the amount of

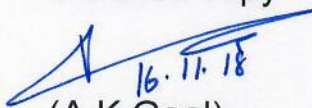
the GST illegally charged from them. Depositing of the extra GST in the Govt. account can not absolve the Respondent of the allegation that he had compelled them to pay more price than what they should have paid and hence it amounts to denial of benefit under Section 171 of the above Act.

47. Accordingly, the Respondent is directed to reduce his prices by way of commensurate reduction keeping in view the reduced rate of tax and the benefit of ITC which has been availed by him as per Rule 133 (3) (a). Since the complainants are not identifiable in this case the Respondent is further directed to deposit the above amount as per the provisions of Rule 133 (3) (c) in the ratio of 50:50 in the Central or the State CWFs of all the 10 States mentioned in para 12 above, along with the interest @ 18% till the same is deposited, within a period of 3 months. The concerned Central and State GST Commissioners are directed to ensure that the amount due is got deposited from the Respondent along with interest and in case the same is not deposited necessary steps shall be taken by them to get it recovered from the Respondent as per the provisions of the CGST/SGST Acts under the supervision of the DGAP. They are further directed to submit report in compliance of this order within a period of 4 months. Since the present investigation is only up to 31.01.2018 the DGAP is directed to investigate the quantum of denial of both the above benefits till the Respondent reduces/had reduced his prices commensurately and submit his Report.

48. As per the above narration of the facts it is clear that the Respondent has resorted to profiteering by charging more price than that he could have charged by issuing incorrect tax invoices. He has further acted in conscious disregard of the obligation which was cast upon him by the law

by issuing incorrect invoices in which the base prices were deliberately enhanced exactly equal to the amount of reduced tax and benefit of ITC and thus he had denied the benefit of ITC and reduction in the rate of tax granted vide Notification dated 14.11.2017 to his customers. Accordingly he has committed an offence under Section 122 (1) (i) of the CGST Act, 2017. Therefore, a show cause notice may be issued to the Respondent to explain why penalty under the provisions of the above Section should not be imposed on him.

49. A copy of this order may be supplied to all the Applicants, the Respondent and the concerned Central and the State GST Commissioners free of cost. The file of the case be consigned after completion.

Certified copy

16.11.18
(A.K. Goel)
Secretary NAA



Sd/-
(B. N. Sharma)
Chairman
Sd/-
(J. C. Chauhan)
Technical Member
Sd/-
(R. Bhagyadevi)
Technical Member
Sd/-
(Amand Shah)
Technical Member

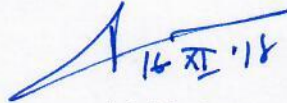
F.No.22011/NAA/42/2018/890-918

Dated: 16.09.2018

Copy to:-

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2. Shri Chandranath Sarkar, sarkarcs10@gmail.com
3. Shri Shreepad Shende, sgshende@gmail.com
4. Shri Jayasankar Venkatramani, jay.jayashankar.v@gmail.com
5. M/s Hardcastle Restaurants Pvt. Ltd., 1001/1002, Tower 3, 10th Floor, Indiabulls Finance Centre, Senapati Bapat Marg, Elphinstone Road, Mumbai - 400013
6. Director General Anti-Profitteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001
7. Chief Commissioner, CGST Hyderabad Zone, Andhra Pradesh (Telangana Jurisdiction)

8. Chief Commissioner, CGST Bhopal Zone, Bhopal (Chhattisgarh State and Madhya Pradesh Jurisdiction)
9. Chief Commissioner, CGST Mumbai Zone, Nagpur Zone, Pune Zone, (Goa and Maharashtra Jurisdiction)
10. Chief Commissioner, CGST Ahmedabad Zone and Vadodra Zone, (Gujarat Jurisdiction)
11. Chief Commissioner, CGST Banguluru Zone, (Karnataka Jurisdiction)
12. Chief Commissioner, CGST Cochine Zone(Kerala Jurisdiction)
13. Chief Commissioner, CGST Chennai Zone (Tamilnadu Jurisdiction)
14. Chief Commissioner, CGST Vishakhapatnam Zone (Andhra Pradesh Jurisdiction)
15. Commissioner Commercial Tax, Andhra Pradesh, Chattisgarh, Madhya Pradesh, Goa, Maharashtra, Gujarat, Karnataka, Kerala, Tamilnadu, Telangana.
16. NAA website.
17. Guard File


(A.K.Goel)
Secretary NAA

