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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 2347/2019**

JUBILANT FOODWORKS LTD. & ANR.

..... Petitioners

Through: Mr.Mukul Rohatgi, Sr.Advocate with
Mr.V.Lakshmi Kumaran, Mr.Rachit
Jain, Mr.Karan Sachdev,
Mr.Yogendra Aldak & Ms.Devanshi
Singh, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr.Farman Ali with Mr.Akash
Mohan & Mr.Aman Malik,
Advocates for R1/UOI.
Mr.Amit Bansal, Sr.Standing Counsel
with Mr.Aman Rewaria, Advocate for
R2 & R3.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

ORDER

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13.03.2019

CM APPL. 10979/2019 (Exemption)

1. Allowed, subject to all just exceptions.

W.P.(C) 2347/2019 & CM APPL. 10978/2019 (Stay)

2. Notice. Mr. Farman Ali, Advocate, accepts notice for Respondent
No.1/UOI. Mr. Amit Bansal, Advocate, accepts notice for Respondent Nos.2
& 3. Notice be served on Respondent No.4 through e-mail.

3. The challenge *inter alia* in the present petition is not only to an order dated 31st January 2019 passed by the National Anti-Profiteering Authority ('NAPA') (Respondent No.2) but also to the statutory provisions under which the said authority is exercising its powers i.e. Section 171 of the Central Goods and Services Tax Act, 2017 ('CGST Act') and Chapter XV of the CGST Rules and in particular Rules 126, 127 and 133 as being violative of Articles 14 and 19 of the Constitution of India.

4. The challenge is also to an impugned notice dated 4th February 2019 issued to the Petitioner No.1 by the Director General of Anti-Profiteering (Respondent No.3) proposing penal action against the Petitioners consequent upon the order dated 31st January 2019 of the NAPA.

5. This Court has heard the submissions of Mr. Mukul Rohatgi, learned Senior Counsel for the Petitioners, Mr. Farman Ali, learned counsel for the Respondent No.1 and Mr. Amit Bansal, Sr. Standing Counsel for Respondent Nos.2 and 3.

6. The Court has been informed that there are other petitions already pending in this Court which raise a similar challenge to the constitutional validity of the above provisions apart from challenging the orders of the NAPA. One such petition is WP(C) 378 of 2019 (*Hindustan Unilever Ltd. v. Union of India*) in which an order was passed by Division Bench of this Court on 16th January 2019 including an interim direction regarding deposit of part of the amount required to be paid under the orders of the NAPA.

7. As far as the present case is concerned the Petitioner No.1 which is operating restaurants under the name and style of 'Dominos Pizza' has been held by the NAPA by the impugned order dated 31st January 2019 as having resorted to "profiteering by charging more price than what he could have charged by issuing wrong tax invoices."

8. One of the principal grounds of challenge concerns the constitution of the NAPA itself. Under Rule 122 (a) of the CGST Rules the NAPA consists of a Chairman who holds or has held a post equivalent in rank to the Secretary of Government of India. Under Rule 122 (b) the 4 technical members are those who are or have been Commissioners of State Tax or Central Tax for at least one year or have held an equivalent post under the existing law. The Chairman and Members of the NAPA are to be nominated by the GST Council. In other words, there is no judicial member in the NAPA. It is further pointed out that under the CGST Rules there is no provision for constitution of an appellate authority to review the orders passed by the NAPA.

9. Another feature of the functioning of the NAPA is that under Rule 126 it is the NAPA which determines the 'methodology and procedure' for determining as to whether the reduction in the rate of tax on the supply of goods and services on benefit of Input Tax Credit ('ITC') has been passed on by the registered person to recipient by way of 'commensurate reduction in prices'. In other words it is the NAPA who determines what can amount to profiteering in a given situation. It is further pointed out that it is the NAPA which issues notice to the suspected profiteer and it is the NAPA

which adjudicates the said notice without any provisions for an appeal. It is contended that is contrary to the settled legal position regarding the constitution and functioning of quasi judicial authorities and tribunals as explained by the Supreme Court in *Union of India v. Madras Bar Association 2010 (11) SCC 1*.

10. As far as the facts of the present case are concerned, one grievance is that although the Petitioners deal in as many as 393 products, and even according to the NAPA they are compliant in regard to the price of many of such products, the NAPA has been selective in drawing an adverse conclusion in respect of the price charged for a few of the products. It is submitted that if the pricing of all the products is considered cumulatively, and not individually as done by the NAPA, then the Petitioners would not fall foul of the law. It is further submitted by Mr. Mukul Rohatgi, learned Senior counsel for the Petitioners, that in law there is no restriction on what price the Petitioner No.1 can charge for its product. Therefore, it is open to Petitioner No.1, notwithstanding the reduction in the rate of tax after 15 November 2017 to raise the base price of the product so that the ultimate price payable by the customer inclusive of tax remains what it was prior to 15 November 2017. Mr. Rohatgi points out that simultaneously with the reduction of tax the ITC was taken away and this is an additional factor that has to be considered while determining whether the Petitioner could be held to be a 'profiteer' from the reduction of rate of tax.

11. The Court is of the view that the Petitioners have made out a prima facie case and that at this stage the balance of convenience is also in their favour

for an interim order being passed in the manner indicated hereafter.

12. Under the impugned order of the NAPA, the Petitioners are required to deposit an amount of Rs.41,42,97,629.35 with the Central and State Consumer Welfare Funds ('CWFs') in a 50:50 ratio. It is accordingly directed that subject to the Petitioners depositing the sum of Rs.20 crores with the Central CWF within a period of four weeks from today, there shall be a stay of the impugned order dated 31st January 2019 of the NAPA as well as stay of further proceedings pursuant to the impugned notice dated 4th February 2019 issued by the Respondent No.2.

13. Reply be filed to the writ petition and application for stay within six weeks. Rejoinder thereto, if any, be filed before the next date.

14. List on 22nd August 2019.

16. Order '*dasti*'.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 13, 2019/ tr