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

Case No.	70/2019
Date of Institution	12.06.2018
Date of Order	10.12.2019

In the matter of:

Director General of 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 Nestle India Ltd., Nestle House, Jacaranda Marg, M. Block, DLF City, Phase-II, Gurugram-122002, Haryana.

Respondent

Quorum:-

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

Present:-

1. Ms. Gayatri, Deputy Commissioner, for the DGAP.

3. Sh. B. Murli, Legal Head, Sh. Ashish Aggarwal, Business Controller, Sh. Manish Mudgal, Sales Controller and Sh. Gaurav Khanna, Authorised Representative for the Respondent.

Order

1. The present Report dated 08.10.2018 and the supplementary Reports dated 16.01.2019, 01.02.2019, 15.03.2019, 08.05.2019 and 12.06.2019 have been received from the above Applicant (here-in-after referred to as the 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 vide his letter dated 02.04.2018 the Respondent had admitted that he had set aside an amount of Rs. 12.6 Crore on account of profiteering in respect of the rate reductions which had been notified w.e.f 15.11.2017 and accordingly, Office Memorandum (OM) F. No. D-22011/NAA/17/2018/1039-41 dated 10.04.2018 was issued by the Secretary of this Authority advising the Respondent to provisionally deposit the quantified profiteered amount set aside by him on account of the reduction in the GST rates w.e.f. 15.11.2017, into the Consumer Welfare Fund (CWF). Vide the above OM, the DGAP (erstwhile Director General of Safeguards) was also directed to conduct an investigation to determine the actual amount of benefit of reduction in the GST rates which was not passed on by the Respondent to the recipients.

2. The DGAP had called upon the Respondent vide his Notice dated 26.04.2018 issued under Rule 129 (3) of the above Rules, to determine and furnish requisite supporting documents to confirm the actual amount of the benefit of reduction in the GST rates that had not been passed on by him to the recipients. The period covered by the current investigation in respect of the items impacted by the reduction in the GST rates w.e.f. 15.11.2017 and 25.01.2018, is from 15.11.2017 to 30.06.2018.

3. The Respondent, vide his letter dated 02.04.2018 had informed that wherever it was practical, he had passed on the benefit of GST rate reduction to the recipients by way of discounts on the stocks of the impacted products held by them as on 15.11.2017; that he had reminded each Distributor of his obligation to pass on the benefit to their recipients; that he had passed on the commensurate GST benefit at an aggregate product HSN category level; and that where it was not practical to pass on the GST rate reduction benefit on the existing stocks and till the availability of new stocks, he had set aside the money to be passed on to consumers and he needed guidance on how to do so as well as how to adjust the expenses incurred on the changeover. The Respondent vide his letter dated 18.05.2018 addressed to the DGAP had also stated that the total amount of the benefit of reduction in the GST rate w.e.f. 15.11.2017, was Rs. 13.8 Crore for the period from November, 2017 to March, 2018 and he had incurred expenses of Rs. 3.9 Crore to give effect to passing on the GST rate reduction benefits expeditiously and these expenses were required to be adjusted against the amount set aside. He had further

stated that in respect of the benefit of reduction in the GST rate on the Boiled Sugar Confectionary w.e.f. 25.01.2018, the information/documents relating to the specific products would be submitted in due course. The DGAP has also stated in his above Report that the Respondent vide his letters dated 08.06.2018 and 20.06.2018 had submitted the details of the outward taxable supplies for the impacted items or the Stock Keeping Units (SKUs) and GSTR-3B Returns for the period from November, 2017 to March, 2018. Thereafter, vide letters dated 26.06.2018 and 07.09.2018 the Respondent has submitted the following information/documents:-

(a) GSTR-1 Returns for the period from November, 2017 to March, 2018.
(b) Invoice-wise break up of outward supplies, as downloaded from GSTN.
(c) 5 sample invoices for each month from November, 2017 to March, 2018.
(d) Total No. of SKUs manufactured.
(e) Total No. and list of SKUs impacted by GST rate reductions w.e.f. 15.11.2017 and 25.01.2018 alongwith the quantum of benefit passed on.
(f) GSTIN-wise details of outward taxable supplies for the period from November, 2017 to June, 2018.

4. The DGAP has also stated in his above Report that the Respondent, vide his letters dated 09.07.2018 and 21.08.2018 had informed that he had deposited the amount set aside of Rs. 15,32,86,055/- in two instalments of Rs. 13,80,54,526/- and Rs. 1,52,31,529/- for the period from 15.11.2017 to 31.03.2018 and Rs. 1,25,46,668/- for the period from 01.04.2018 to 30.06.2018, in terms of aforementioned OM dated

10.04.2018 in the CWF. The Respondent vide his letter dated 19.09.2018 had also submitted the evidence with regard to the expenses incurred on passing on the GST rate reduction benefits, such as, expenses on obsolete packing material, expenses on manufacture and development of new packaging material and expenses on advertisements in the newspapers etc. for creating public awareness about the change in the GST rates. The Respondent vide his e-mails dated 26.09.2018, 27.09.2018, 28.09.2018 and 29.09.2018 had also submitted the data regarding pre-GST rate reductions selling prices of some of the SKUs which were not available in the sales data submitted by him.

5. The DGAP has also submitted that the Central Government, on the recommendation of the GST Council, had reduced the GST rates on several products supplied by the Respondent from 28% to 18% and from 18% to 12%, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 with effect from 15.11.2017 and again from 18% to 12%, vide Notification No. 06/2018-Central Tax (Rate) dated 25.01.2018 with effect from 25.01.2018. He has further submitted that the Respondent had admitted that the above reductions in the rates of tax were applicable on the products supplied by him and thus, it could be concluded that the GST rates were indeed reduced in the manner stated above. He has also contended that unlike the situation where a Respondent contested the allegation of profiteering by not passing on the benefit of reduction in the GST rate(s) to the recipients, in the present case, even before such an allegation was levelled or Notice of investigation of profiteering was issued, the Respondent has suo moto

deposited the above amount with the Government. He has further contended that this voluntary disclosure was supported by various documents including the Respondent's first communication dated 02.04.2018 to this Authority. The DGAP has also claimed that while the Respondent's proactive approach was appreciable, it was also an admission of profiteering that brought into play Section 171 of the Central Goods and Services Tax Act, 2017 which governed the Anti-Profiteering provisions under the GST and it was also required to ascertain that the above disclosure made by the Respondent was complete in every respect.

6. The DGAP has also argued that a plain reading of Section 171 of CGST Act, 2017 made it abundantly clear that in the event of a benefit arising from a reduction in the rate of tax, as has happened in the present case, there must be a commensurate reduction in the prices of the goods or services in absolute terms meaning thereby that it was only when the recipient has to pay a lower price on the goods or services post reduction in the GST rates it could be conclude that the benefit has been passed on to the recipient. He has further argued that Section 171 (1) did not provide a supplier of the goods and services any other means of passing on the benefit of reduction in the rate(s) of tax or benefit of Input Tax Credit (ITC) which implied that there was no discretion available to a supplier to suo moto decide on any other method of passing on such benefit to the recipients. He has also contended that applying the above parameters to the present case, it was established that the Respondent had not passed on the benefit that has accrued to him on account of the reduction in GST

rates by way of a commensurate reduction in the prices of the goods being supplied by him. The DGAP has also pleaded that the Respondent's contention that the benefit of the GST rate reduction was passed on by way of giving discounts on the relevant products was not correct as the sample invoices submitted by him did not mention that the discounts were given due to the GST rate reductions, however, on the other hand, these invoices revealed that the discounts offered were in accordance with the general discount pattern which was being followed by the Respondent in the course of his business. The DGAP has also averred that since the pattern of discounts offered in the pre and post-GST rate reduction periods was the same, the discounts offered post-GST rate reduction were a continuation of the earlier discounts and hence, they could not be attributed to the GST rate reduction. The DGAP has also intimated that the Respondent has also submitted that there were practical difficulties in passing on the benefit on certain packs by lowering the Maximum Retail Prices (MRPs) due to unavailability of coins i.e. price point products and the taste parameters and therefore, the benefit was passed on at an aggregate product HSN level. The DGAP has also alleged that the outward sale data submitted by the Respondent has revealed that the base prices of all the 374 SKUs were not maintained post the GST rate reduction and instead, they were increased and thus, there was no reduction in the cum-tax selling price commensurate with the reduction in the GST rate, which evidenced profiteering by the Respondent. The DGAP has also stated that the Respondent has claimed that for the price point products,

where the MRPs were not changed, another method of passing on the benefit of reduction in the GST rates was adopted by him by increasing the quantity of the products. However, the DGAP has maintained that Section 171 of the Central Goods and Services Tax Act, 2017 did not provide for any other means of passing on the benefit of reduction in the rate of tax or the benefit of ITC other than by way of commensurate reduction in the prices and hence the Respondent's claim on this account was not acceptable.

7. He has further stated that the Respondent had himself tried to determine the benefit of tax reduction by setting off the cost of obsolete packing material, expenses incurred on manufacture and development of new packaging material and expenses on advertisements in newspapers etc. for creating public awareness about the change in the GST rates. However, the DGAP has argued that the law provided legal remedy to the Respondent which was to fix new MRPs by way of additional stickers or stamping or online printing as per the letter No. WM-10(31)/2017, dated 16.11.2017, issued by the Ministry of Consumer Affairs, Food and Public Distribution. He has further argued that there was no provision in the Central Goods and Services Tax Act, 2017 to permit the cost of packing material to be adjusted against the amount of reduction in the prices due to lower GST rates and therefore, the above deduction claimed by the Respondent on these grounds were not admissible.

8. The DGAP has also submitted that based on the details of the outward taxable supplies other than zero rated, nil rated and exempted supplies made during the period from 15.11.2017 to

30.06.2018, as submitted by the Respondent it was apparent that the impacted SKUs were supplied by the Respondent through different channels, i.e. (a) Canteen Stores Department (CSD); (b) Para-Military Force Canteens and other Government outlets and (c) Distributors and Modern Trade. He has further submitted that the base prices of the SKUs varied across the different channels and also varied within the same channel e.g. prior to the GST rate reduction w.e.f. 15.11.2017, the base prices at which the Respondent was selling "Nescafe Classic Jar 24x50g PR Dbl Maggi In" to the CSD ranged between Rs. 1,803.70 to Rs. 2,716.12, to Para-military Force Canteens and other Government outlets at the base price of Rs. 2,455.22 and to Distributors and Modern Trade at the base prices ranging between Rs. 2,414.40 to Rs. 2,656.30. Therefore, the DGAP has stated that the average base prices of supplies to each of the aforementioned three channels have been considered separately for calculation of the base prices during the pre-rate reduction period.

9. He has further stated that based on the pre and the post-reduction GST rates and the details of the outward taxable supplies for the period from 15.11.2017 to 30.06.2018, a total of 374 SKUs were impacted by the GST rate reductions w.e.f. 15.11.2017 and 25.01.2018, out of which 325 SKUs were impacted by the GST rate reductions w.e.f. 15.11.2017 and 49 SKUs were impacted by the GST rate reduction w.e.f. 25.01.2018. The DGAP has further stated that the Respondent has resorted to profiteering by increasing the pre-GST rate reduction base prices of 325 SKUs (for rate reductions w.e.f. 15.11.2017) and 49 SKUs (for rate reduction w.e.f. 25.01.2018). He

has also claimed that the amount of net higher sales realization due to increase in the base prices of the products consequent to the reductions in the GST rates, either from 28% to 18% or from 18% to 12% or in other words, the amount of profiteering came to Rs. 96,55,64,581/- for the SKUs impacted by GST rate reductions w.e.f. 15.11.2017 as per Annex-14 and Rs. 4,42,38,515/- for SKUs impacted by the GST rate reduction w.e.f. 25.01.2018 as per Annex-15. He has also claimed that the Respondent has deposited an amount of Rs. 16,58,32,723/- in the CWF. The DGAP has also contended that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling prices or by way of not reducing the selling prices of the products commensurately, despite reductions in the GST rates from 28% to 18% or from 18% to 12% w.e.f. 15.11.2017 and from 18% to 12% w.e.f. 25.01.2018, stood confirmed against the Respondent and the amount of profiteering by the Respondent was Rs. 100,98,03,096/- [Rs. 96,55,64,581/- (+) Rs. 4,42,38,515/-]. He has also intimated that the place of supply-wise (State or Union Territory) break-up of the above profiteered amount was furnished in Annexure-16 of the Report.

10. The above Report was considered by this Authority and vide Notice dated 16.10.2018 the Respondent was asked to reply why the above Report furnished by the DGAP under Section 171 of the CGST Act, 2017 should not be accepted and his liability for profiteering should not be fixed. He was also directed to explain why penal provisions under Section 29, 122-127 of the above Act read with Rule 21 and

133 of the CGST Rules, 2017 should also not be invoked against him. It was also decided to hear the DGAP and the Respondent on 31.10.2018 which was adjourned to 26.11.2018 on the Respondent's request. During the course of the hearings the DGAP was represented by Ms. Gayatri, Deputy Commissioner and Sh. B. Murli, Legal Head, Sh. Ashish Aggarwal, Business Controller, Sh. Manish Mudgal, Sales Controller and Sh. Gaurav Khanna, Authorised Representatives were present for the Respondent. Further hearings were held on 12.12.2018, 20.12.2018, 10.01.2019 (adjourned), 03.04.2019 (adjourned), 12.04.2019, 02.05.2019, 07.05.2019, 28.05.2019, 14.06.2019 (adjourned), 28.06.2019 (adjourned) and 01.07.2019.

11. The Respondent has filed the following replies during the course of the proceedings:-

(i) Filed preliminary reply dated 07.12.2018 along with 18 Exhibits.

(ii) Furnished additional documents on 20.12.2018 requesting to treat them as confidential in accordance with Rule 130 of the CGST Rules, 2017.

(iii) Rejoinder dated 12.04. 2019 to the replies filed by the DGAP dated 01.02.2019 and 15.03.2019.

(iv) Reply dated 02.05.2019 furnishing confidential information in accordance with Rule 130 of the GST Rules.

(v) Reply dated 07.05.2019 with details of the reply dated 02.052019.

(vi) Reply dated 28.06.2019 consolidating all the factual and legal submissions.

12. The Respondent in his above submissions has stated that he was a subsidiary of Nestle Group, Switzerland and was a listed company with 37.26% public shareholding comprising of 90,000 shareholders and was present in India for over 100 years and followed ethical practices being a law-abiding Company.

13. That the Respondent was engaged in the manufacture and sale of various food products including coffee, noodles, chocolates and confectionary etc., under the brand names, like NESCAFE, MAGGI and KITKAT etc.

14. That the Respondent sells his products mainly through his distributors and also makes sales to the CSD, Government outlets and Modern Trade etc.

15. That in respect of some of the products being supplied by the Respondent, the rate of GST was reduced from 28% to 18% and from 18% to 12% w.e.f. 15.11.2017 and in respect of certain other products it was reduced from 18% to 12% w.e.f. 25.01.2018.

16. That there were total of 370 SKUs of different products which were impacted by the rate reductions w.e.f. 15.11.2017 and 39 SKUs which were affected by the rate reduction w.e.f. 25.01.2018, the benefit of which was passed on consistent with the law as these reductions were with immediate effect. The Respondent taking note of the Government's intent had adopted the following approach to pass on the GST rate reduction benefit to his recipients as well as to the end-customers keeping in view the functioning of the goods manufacturing industry.

(a) The first preference was to pass on the benefit by way of reduction in the MRPs through which most of the benefit has been passed on by reduction in the MRPs.

(b) For Price Point products, where the MRPs were not changed, benefit was passed on by increasing the quantity of the products.

(c) Where there were operational and/or legal constraints to pass on the benefit on account of issues of coinage, taste preferences or manufacturing constraints, additional benefit was passed on other packs/ SKUs in the same product category and if there were manufacturing constraints additional benefit was passed on other packs/ SKUs in the same product category.

17. That to ensure that the benefit of rate reduction was passed on, computation for passing on the benefit of rate reduction was done at the aggregate product category level. Communication was also sent to all the distributors reminding them of their obligation to pass on the benefit to their recipient i.e. retailers. In addition, advertisements on GST benefits being passed on select products indicating the reduced MRPs of the products were also published in the national and regional newspapers. The benefit to be passed on, was determined for each product category based on the sales contribution of the SKUs in that product category with due consideration to the lower priced SKUs. The sale contribution of the SKUs in the product category impacted by the GST rate changes with effect from 15.11.2017 was determined by aggregating the actual sales of the SKUs from January 2017 to September 2017 with the planned sales from October 2017 to December 2017, with annualized impact of

price changes and new products. For GST rate change with effect from 25.01.2018 actual sales of SKUs in boiled sugar confectionary for the financial year January 2017 to December 2017 were taken with annualized impact of price changes and new products. Applying the above methodology for the period from 15.11.2017 to 30.06.2018 for the products impacted by the GST rate changes w.e.f. 15.11.2017 and for the period from 25.01.2018 to 30.06.2018 for the products impacted by the GST rate change w.e.f. 25.01.2018, the benefit on account of rate reduction to be passed on was estimated at around Rs. 204 Crores whereas the actual aggregate benefit passed on was higher at around Rs. 209 Crore, comprising of benefit passed through MRP reductions and/or more quantity of Rs. 192 Crore and suo moto deposit of Rs. 16.58 Crore. The period from 15.11.2017 to 30.06.2018 has been taken to correspond to the period used in the Report and was without prejudice to the Respondent's contention that the period of the Report should correspond to the period for which the provisional deposit has been made. The Respondent being a law-abiding corporate had on his own 'set aside' the amount to be passed on to the recipients where ever it was not practical to pass on the GST benefit on the existing stocks till the availability of the new stocks. The 'set aside' amount was neither considered as sales nor as profit and was kept as current liability to be passed on to consumers at the same product category level. The Respondent has on 23.02.2018 and 26.03.201 met this Authority and explained the manner in which he has passed on the GST benefits, pursuant which he has submitted letter dated 02.04.2018 setting out:-

(a) In detail the methodology followed by him for passing on the commensurate benefits due to reduction in the GST rates to the recipients;

(b) The methodology followed by him for calculation of the quantum to be set aside where it was not practical to pass the GST benefit on the existing stocks till the availability of new stocks;

(c) Sought guidance on the passing on of the benefits for the amount set aside of Rs. 12.6 Crore as on 31.12.2017 and for adjusting expenses directly incurred on the changeover.

18. That in response to the letter dated 2nd April 2018, the Respondent had received letter dated 10.04.2018 from this Authority advising him to provisionally deposit the amount of Rs.12.6 Crore in the CWF to be constituted under Section 57 of the CGST Act, 2017. The Respondent was also directed to furnish the necessary documents/evidences to the DGAP so that the investigation could be conducted to determine the actual amount of benefit that has not been passed on. The Respondent vide his letter dated 02.04.2018 had sought clarification to make the provisional deposit and adjustment of the expenses incurred and requested the DGAP to intimate the schedule for furnishing the information. Surprisingly, the Respondent, had received a Notice dated 26.04.2018 issued by the DGAP for initiation of investigation under Rule 129 of the CGST Rules, 2017 vide which he was directed to determine the total actual amount of the benefit with effect from 15.11.2017 that has not been passed on to the consumers with the necessary documents/evidences. Thereafter, the Respondent

has provided the details sought by the DGAP through various communications.

However, the Report was silent about his letter dated 11.09.2018 in which the methodology adopted by the Respondent to pass on the benefits from GST rate reductions, determination of the actual amount of benefit not passed on as per the methodology and the calculations to demonstrate that there has been no profiteering by the Respondent and other points were mentioned. The Respondent had received communication dated 06.06.2018 from this Authority on the constitution of the CWF and thereafter, he had suo moto deposited the amount set aside in the above Fund in 2 tranches as follows:-

(i) 1st Tranche on 06.07.2018 aggregating Rs. 15,32,86,055/-, comprising a sum of Rs. 13,80,54,526/- that was set aside till 31.01.2018 with respect to the GST rate changes effective from 15.11.2017 and a sum of Rs. 1,52,31,529/- set aside till 31.03.2018 with respect to rate changes effective from 25.01.2018 and

(ii) 2nd Tranche on 21st August, 2018 of Rs. 1,25,46,668/- set aside for the period from April-June 2018 with respect to the rate change effective from 25.01.2018.

19. Thar the DGAP vide his Report dated 08.10.2018 has concluded that the allegation of profiteering by way of either increasing the base prices or by maintaining the same selling prices and by not reducing the selling prices of the products commensurately, despite a reduction in the GST rates stood confirmed against the Respondent to the tune of Rs. 100,98,03,096/-.

20. That the Respondent has complied with the provisions of Section 171 of the CGST Act and hence no cause for initiating proceedings against him existed. The Respondent has suo moto started complying with the above provisions even without any communication from this Authority. The Respondent vide his letter dated 2nd April 2018 had disclosed the methodology adopted by him for complying with the above provisions and the OM dated 10.04.2018 for investigation by the DGAP to determine the actual amount of benefit which had not been passed on was based on the methodology mentioned in the letter dated 2nd April 2018, which was implicitly accepted by this Authority. The Respondent had taken all steps to pass on the benefit of rate reductions with the intention that there was need to pass on the same on immediate basis and there was extremely short time to prepare for the passing of the benefit.

21. That this Authority in some of its reported Orders, has held the view that the computation of the profiteering amount under Section 171 has to be done on the basis of the facts of each case and hence no general methodology can be prescribed and the DGAP in his reply dated 01.02.2019, in Para E has also followed the above principle therefore, the quantum of profiteering has to be arrived at on a case to case basis, by adopting suitable method based on the facts of each case. Thus, in the light of the DGAP's above reply the methodology adopted by the Respondent needed to be accepted and on this very ground the present proceedings needed to be dropped. While complying with the provisions of Section 171, the Respondent

has followed the methodology which was based on the facts and operational and legal constraints applicable to the Respondent.

22. That the rate reductions announced with effect from 15.11.2017 and 25.01.2018 were with immediate effect and the Respondent had taken immediate steps to pass on the benefit after taking in to account the operational, manufacturing and legal constraints and with an intent to ensure that there was no disruption in the supply of his products to the consumers. In respect of the Price Point Products which play a critical role in the Fast Moving Consumer Goods (FMCG) sector the price points were in the multiples of Rs. 5/- like MRPs of Rs. 5/-, Rs. 10/-, Rs. 15/-, Rs. 20, Rs. 25/- and the price points below Rs. 5/- were Rs. 1/- and Rs. 2/-corresponding to the available coinage. For products sold at the price points, the business option available was to pass on the benefit through extra quantity and reduction of MRPs was not an option as consumer demand was based on the price point and the consumer over years was used to the price points.

23. That the packaged food products have MRPs, which were in multiples of Re. 1/- however, coinage below 25 paise has been scrapped by the Reserve Bank of India and even 50 paise coinage was practically not available in the trade. The MRPs of the products in the market were in the multiples of Re. 1/- such as 1, 2, 5 and 10 etc. The products did not have MRPs with coinage such as Rs. 1.84, Rs. 4.50, Rs. 4.75 and Rs. 9.25 etc. and in case the GST benefit involving coinage was passed on, it was unlikely to reach the end consumer as normal unit of retail trade was Re. 1/-. In case of the

MAGGI Noodles pack bearing MRP of Rs. 5/- per pack, to pass GST benefit the MRP would have to be reduced to Rs. 4.75 and in the absence of 25 paise tender, reducing MRP to Rs. 4.75 was not a feasible option.

24. That the cash transactions predominate and the E-Commerce in the FMCG market was less than 1% of the total sales. Respondent has also annexed a report published in The Economic Times on 19.04.2018 which stated that around 90% of everyday grocery consumption continued to rely on cash.

25. That in respect of the single serve packs, more quantity was not a viable option as it would change the taste parameter and could result in consumer rejecting the product pack. In the case of NESCAFE SUNRISE a single serve sachet of 2.2 Gms. bearing MRP of Rs. 2/- in addition to the limitation of coinage of 15 paise, the taste of coffee cup would change in case more quantity was given.

26. That for the products with manufacturing constraints that option had to be used which facilitated passing of the benefit expeditiously like in the case of KITKAT manufacturing involved the length of wafer and the use of mould for size of the product. The quantum of benefit by way of extra quantity was determined by the size the mould could accommodate. For KITKAT 12.8 Gms. pack with MRP of Rs. 10/- mould could accommodate 13.2 Gms. and was used to expeditiously and efficiently pass on the benefit in cost effective manner. For changing the wafer length which was needed to maintain the product balance at the higher grammage a new mould was required which would take 6 to 9 months as per the statement of Mr. Jagdeep Singh

Marahar, Factory Manager, at one of Respondent's factory located at Ponda, Goa where KITKAT was manufactured.

27. That the packaged food products were part of the FMCG industry which were mainly sold to the Distributors from whom they would reach the retailers directly or through some other intermediary. The Respondent has over 1,700 Distributors across the country and the products were sold in over 35 lakh retail outlets and an estimated 70 Crore packs of various food products of the Respondent were sold every month.

28. That effective from 01.01.2018, Rule 6 (1) (e) of the Legal Metrology (Packaged Commodities) Rules, 2011 reads as follows:-

"(e) The retail sale price of the package shall clearly indicate that it is the maximum retail price inclusive of all taxes and the price in rupees and paise be rounded off to the nearest rupee or 50 paise"

Till 01.01.2018, the definition of 'retail sale price' under Rule 2 (m) was as under:

"(m) 'retail sale price' means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and the price shall be printed on the package in the manner given below :

'Maximum or Max. retail price Rs. ...../ ₹.....inclusive of all taxes or in the form MRP Rs. ...../ ₹.....incl. of all taxes after taking into account the fraction of less than fifty paise to be rounded off to the

preceding rupee and fraction of above 50 paise and upto 95 paise to the rounded off to fifty paise".

Therefore, Under the above Rule the retail sale price (MRP) of a packaged commodity could only be in Rupees or in fraction of 50 paise and any package having MRP which has in fractions such as 15 paise, 25 paise or 60 paise etc. would be violation of the above Rules.

29. The Respondent was under bonafide belief that the intent of the GST law was that the benefit should be passed on immediately to the recipients. There being no provision under the GST law, which provided that the supplier could deposit the benefit of rate reduction in the CWF, the benefit that could not be passed, the Respondent in compliance with the provisions of Section 171, had passed additional benefits on other packs/ SKUs in the same product category following the methodology as set out herein.

30. The Respondent has also quoted Rule 133 of the CGST Rules, 2017, which states as under:-

Rule 133. Order of the Authority:-

(1) ...

(2). ...

(3) Where the Authority determines that a registered person has not passed on the benefit of reduction in rate of tax on the supply of goods or services or the benefit of ITC to the recipient by way of commensurate reduction in prices, the Authority may order -

(a) ...;

(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent from the date of collection of higher amount till the date of return of such amount or recovery of the amount including interest not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in section 57;

(c) ...; and

(d) ...

(4)..."

That pursuant to the direction of this Authority vide OM dated 10.04.2018 the Respondent had made provisional deposit of the amount set aside where it was not practical to pass the on benefit on the existing stocks till arrival of the new stocks with GST benefit after constitution of the CWF.

31. The first preference of the Respondent was to pass on the benefit of rate reduction by reduction in prices of the goods to the recipients in the invoices itself with consequent reduction in the MRPs. Majority of the benefit of rate reduction has been passed by the Respondent following this methodology by decreasing the prices to the recipients accordingly, the benefit of Rs. 192 Crore has been passed by way of reduction in the MRPs e.g. in the case of NESCAFE 25 gm. Jar bearing MRP of Rs. 80/- per pack, the MRP was reduced to Rs. 70/-.

32. That in respect of Price Points products the business option available to the Respondent was to pass on the benefit through extra quantity. Reducing MRPs for price point products was not an option as the consumer demand was based on the price point and the consumer over years was used to the price point. When extra quantity was given on a pack on the same MRP, it resulted in price reduction per unit measure of that product pack. In respect of MUNCH pack sold at price point MRP of Rs. 5/- with 10.1 Gms. before the rate reduction the benefit would be around 49.5 paise per Gram of the product. To pass GST benefit quantity of the product pack with MRP of Rs. 5/- was increased from 10.1 Gms. to 11.1 Gms. which translated into benefit of 49.5 paise having been passed on to the consumer (1 Gm. additional quantity x 49.5 paise per Gram rate = 49.5 paise benefit passed i.e. 9.9% of the original price). The approach of the DGAP for arriving at the profiteering by comparing the rate per case of the pre and the post SKUs without taking in to account the two different weight's was not correct e.g. 10.1 Gm. MUNCH going up to 11.1 Gm. post GST rate reduction. The extra quantity passed was not temporary and the adjustment of the quantity was the norm followed by industry for price point packs, even prior to the passing of the GST benefit. He has also provided details of the additional quantity to corroborate his point.

33. That the packaged food products have MRPs, which were in the multiples of Re. 1/- while the coinage below 25 paise has been scrapped by the Reserve Bank of India and even the 50 paise coinage was not practically relevant in the trade. Cash Transactions

predominate and the E-commerce in FMCG market in India was less than 1% of total the sales as per the *A C Nielsen Retail Audit 2018* and the report published in the Economic Times on 19.04.2019 which stated that around 90% of everyday grocery consumption continued to rely on cash. Where it was not practical to pass on the benefits at SKU (Stock Keeping Unit) level, additional benefits were passed through other packs at the same product category level so that the commensurate benefit accruing was fully passed on each product category and there was no retention of benefit by the Respondent. The Respondent had passed higher proportion of additional benefits through the lower priced SKUs e.g. in the case of the MAGGI Noodles pack having MRP of Rs. 5/-, to pass on the GST benefit, the MRP was required to be reduced to Rs. 4.75. In the absence of 25 paise tender, it was the bona fide understanding of Respondent that the same had to be passed through additional benefits in other SKU(s). As the law did not have the provision to deposit the amount of benefit in the CWF including the timeline as to how long the deposit was to be made he had passed additional benefit on the MAGGI Noodles pack having MRP of Rs. 12/- which was reduced to Rs. 11/- as the MRP was required to be reduced to Rs.11.39 only. At the product category level of Instant Noodles and Pasta (HSN Code 1902) against GST benefit of 5.08%, benefit sought to be passed was around 5.17%. In respect of KITKAT manufacture which involved the length of the wafer and the use of mould for size of the product, the quantum of benefit by way of extra quantity was determined by the size the mould could accommodate. For KITKAT 12.8 Gms. pack

with MRP of Rs. 10/- mould could accommodate 13.2 Gms. and was used to pass on the benefit. However in respect of KITKAT pack bearing price point MRP of Rs. 5/- having 7 Gms. quantity, the quantity was increased to 8.6 Gms., whereas to pass on the GST benefit quantity would have been 7.5 Gms. At the product category level of Wafers containing Chocolate (HSN Code 1905) against GST benefit of 7.81%, benefit passed was around 7.83%.

34. That in the case of few SKUs relating to the product category of Instant Coffee, the benefit accruing due to the rate reduction with effect from 15.11.2017 was offset by the increase in the incidence of tax when GST was introduced on 01.07.2017 and hence the benefit was not passed on. He has also submitted the list of such products impacted by the rate reduction with effect from 15.11.2017 where no commensurate benefit was to be passed as the benefit was offset by the increase in the tax earlier.

35. That the benefit to be passed on was determined by the Respondent at the time when the rate reductions were announced, which was with immediate effect. The benefit to be passed, was determined for each product category based on the sale contribution of the SKUs in that product category with due consideration to the lower priced SKUs. The sales contribution of the SKUs in the product category impacted by the GST rate changes with effect from 15.11.2017 was determined by aggregating the actual sales of the SKUs from January 2017 to September 2017 with the planned sales from October 2017 to December 2017, with annualized impact of price changes and new products. For GST rate change with effect from 25.01.2018 actual sales

of SKUs in Boiled Sugar Confectionary for the financial year January 2017 to December 2017 were taken, with annualized impact of price changes and new products. The Respondent has done whatever was reasonably possible to pass on the benefit and has not retained the benefits. It was settled that the law could not force a person to do a thing which was impossible as was enshrined in the legal maxim *"Lex Non Cogit Ad Impossibilia"*.

36. The Respondent has also submitted break-up of the amount of Rs. 192 Crore, pursuant to the methodology followed by the Respondent and as an explanation to Exhibit-5 and the Details of category (HSN) wise balancing at SKU level bearing Sl. No. 3, with his submissions dated 20.12.2018. The Respondent vide Exhibit - 5 annexed to the submissions dated 20.12.2019 has also furnished the details of the benefit passed by way of price reduction and grammage increase Vide Exhibit - 24 annexed to the reply dated 02.05.2019 which incorporated the break-up of the benefit passed which was higher/ lower as compared to the tax rate benefit for the SKUs listed in the Details of the category (HSN) wise balancing at SKU level bearing Sl. No. 3 in the additional documents submitted on 20.12.2018.

37. That the Respondent has also submitted the details of the benefit passed by him through price reduction and grammage vide Exhibit-24 and the details of the break-up of benefit passed higher/ lower as compared to the tax rate benefit for SKUs in each product category (HSN) vide Exhibit-25. The Respondent also clarified that the total number of SKUs impacted with both the rate reductions was 409. He has also claimed that the SKUs where benefit less than the GST rate

reduction has been passed, was due to operational and legal constraints, however, higher benefit was passed on SKUs across product categories as an integral part of methodology followed by the Respondent so that the benefit to be passed for each product category was commensurate to the benefit.

38. The Respondent has also referred to the supplementary Report dated 07.05.2019 filed by the DGAP and stated that the DGAP's above Report has not addressed the issue of benefit of Rs. 192 Crore passed on by the Respondent based on the methodology followed by him and hence, the methodology followed by him and the benefit passed on, has attained finality and should form the basis to determine if there has been profiteering. He has also referred to the supplementary Report dated 11.06.2019 furnished by the DGAP and stated that the DGAP has again not addressed the issue of benefit of Rs. 192 Crore passed by the Respondent based on the methodology followed by him and hence, the above amount has attained finality. The Respondent has also contended that the DGAP has also not raised any objection against the estimated quantum of Rs. 204 Crore of the amount of benefit of to be passed on and the actual benefit passed of Rs. 209 Crore and therefore, the above amount should be considered the final amount of benefit to be passed on.

39. That the Respondent has adopted such a methodology that there was non-retention of the benefit by the Respondent and it was duly passed on to the recipients. SKUs where the Respondent has passed benefit by way of extra grammage or no benefit has been passed or proportionate benefit has not been passed, was due to operational

reasons such as prevalent practices, practicality and legal reasons. He has also given the details of the key SKUs where no benefit or proportionate benefit could not be passed with the reasons, none of which related to the lack of intent by the Respondent:-

Pack	Grammage		MRP/Price		Benefit Passed (%)	Reasons why no benefit passed / proportionate benefit not passed
	Before	After	Before	After		
MAGGI Noodles Masala 35 gms	35	35	5	5	0	i. Coinage below 25 paise has been scrapped by Reserve Bank of India and even 50 paise coinage is practically not available in the trade
						ii. Cash transactions predominate and consumer comfort with suitable coinage is critical
						iii. Understanding that under GST law benefit to be passed expeditiously and no retention of benefit;
						iv. Higher benefit passed in other SKUs within the same category, so that the benefits have been passed at product category level. Higher benefit has been passed on lower price SKUs;
						v. No objection of Authority to letter dated 2nd April, 2018 where this pack is mentioned as *Example 1*;
						vi. MRP of Rs.4.75 (to pass benefit) not permitted under Legal Metrology Rules.
KIT KAT Rs. 10	12.8	13.2	10	10	3.12	i. Manufacturing Constraints and 6-9 months time for action;
						ii. Understanding that under GST law benefit to be passed expeditiously and no retention of benefit;
						iii. Higher benefit passed in other SKUs within the same category, so that the benefits have been passed at product category level. Higher benefit has been passed on lower price SKUs;
						iv. No objection of Authority to letter dated 2nd April, 2018 where this pack is mentioned as *Example 4*.

NESACAFE SUNRISE Rs. 2 (70/30 Recipe)	2.2	2.2	2	2	0	i. Coinage below 25 paise has been scrapped by Reserve Bank of India and even 50 paise coinage is practically not available in the trade
						ii. For single serve packs, more quantity is not a viable option as it would change the taste parameter and could result in consumer rejecting the product pack;
						iii. Cash transactions predominate and consumer comfort with suitable coinage is critical
						iii. Understanding that under GST law benefit to be passed expeditiously and no retention of benefit;
						iv. Higher benefit passed in other SKUs within the same category, so that the benefits have been passed at product category level.
						v. No objection of Authority to letter dated 2nd April, 2018 where this pack is mentioned as *Example 2*;
						vi. MRP of Rs.1.84 (to pass benefit) not permitted under Legal Metrology Rules.

40. That the number of SKUs across the product categories on which higher benefit has been passed and the quantum of additional benefit passed, would clearly demonstrate the purpose of higher benefit being passed only to offset the SKUs where it was not practical to pass any/ proportionate benefit. The Respondent had explained to this Authority the methodology followed by him vide his letter dated 02.04.2018 which was duly considered by it and vide its letter dated dated 10.04.2018 no objection was raised on the methodology followed and the Respondent was directed to provisionally deposit the amount set aside in the CWF and hence, implicitly the methodology of the Respondent was accepted by this Authority. In case this Authority had raised objection on the methodology the Respondent would have had opportunity to modify it in the future as per the directions of this Authority.

41. That the Respondent had met this Authority on 23.02.2018 and 26.03.2018 to discuss the manner in which the Respondent has passed the GST benefit on products where reduction in the GST rate was announced on 15.11.2017. Thereupon, the Respondent vide his letter dated 02.04.2018 had recorded his discussions by stating that he has passed the commensurate GST benefit at an aggregate product HSN category level and there were practical difficulties in passing on the GST benefit on certain packs for the reasons such as availability of coins and taste parameters e.g. in the case of MAGGI Noodles Masala pack bearing MRP of Rs. 5/-, to pass on the GST benefit, the MRP would have to be reduced to Rs. 4.75. In the absence of 25 paise tender reducing the MRP by Rs. 4. 75 was not a feasible option. In the case of NESCAFE Classic single serve sachet of 1.5 Grams bearing MRP of Rs. 2/-, in addition to the limitation of coinage, the taste of coffee cup would change in case more quantity was given. However, benefits have been passed on the other packs compensating for the packs as given above, ensuring that the commensurate GST benefit was passed at product HSN category level. In respect of MAGGI Noodles Masala pack bearing MRP of Rs. 12/-, the MRP has been reduced to Rs. 11/- while to pass on the GST benefit MRP would have been Rs.11.39. For NESCAFE Classic 25 grams bearing MRP of Rs. 80/-, the MRP has been reduced to Rs. 70/- while to pass GST benefit MRP would have been Rs. 73.75. The GST benefit which could not be passed on, has been 'set aside' and not accounted as sales or profit. It was kept as current liability to be passed on to consumers. An amount of Rs.12.6 Crore has been set aside on the following product categories:-

Category of products	HSNCode	Amount set aside (Rupees in Crores)
Chocolate products	18.06	0.7
Instant Noodles and Pasta	19.02	3.3
Wafer containing chocolate	19.05	6.0
Instant Coffee products	21.01	1.1
Curry Paste, Mixed Condiments and Seasoning	21.03	1.5

42. That within each product category, for each Stock Keeping Unit (SKU) where it was not practical to pass on the benefit for reasons such as coinage, the quantum to be set aside has been calculated exactly in the same manner as was used for passing on benefit on 'New Stocks'.

43. That on the stocks available as on 15.11.2017 and stocks produced after that date having MRP/quantity fixed as on 15.11.2017 (i.e. till the New Stocks were available), the amount equivalent to the benefit to be passed on, has been kept aside and not reckoned in sales or in profit e.g. on MUNCH Rs. 5/- MRP pack, benefit passed by increasing the quantity from 10.1 Gm. to 11.1 Gm. translated to 9.9% benefit passed on. Accordingly, 9.9% of the Respondent's net realization from the sale of old stocks of MUNCH with quantity of 10.1 Gm. has been set aside.

44. That the amount accumulated on that product category net of compliance costs outlined below, would be passed on as benefit on the SKUs in the particular product category.

45. That the amount has been set aside during the quarter w.e.f. 01.01.2018 to 31.03.2018, for some product categories where the rate changes were effective from 15.11.2017 and for product category of Boiled Sugar Confectionary (HSN Code 17.04) where rate change was effective from 25.01.2018, the amount set aside during the quarter will be finalized and subjected to a limited review by statutory auditors.

46. That the Respondent was in the process of detailing the steps to pass on the 'set aside benefit' at the same product category level to the consumers but after his meeting on 23.02.2018 with the Authority, the same was put on hold, pending conclusions to our discussions.

47. That in response to his letter dated 02.04.2018 the Respondent has received OM dated 10.04.2018 from this Authority provisionally to (i) deposit the amount set aside of Rs. 12.6 crore as on 31.12.2017 in the CWF and (ii) to furnish the necessary documents/ evidences to the DGAP so that investigation could be conducted expeditiously to determine the actual amount of benefit due to reduction in the GST rate w.e.f. 15.11.2017 that has not been passed on.

48. That the above directions given by this Authority made specific mention of the Respondent's letter dated 02.04.2018, therefore all the disclosures/ submissions made by the Respondent in his letter dated 02.04.2018 including the methodology followed by the Respondent to pass on the GST benefit have been considered by this Authority.

Where it was not practical to pass on the GST benefit the Respondent has set aside the moneys to be passed on following the methodology to pass the benefit on "New Stocks". This methodology has been used to quantify the amount set aside at product category level aggregating to Rs. 12.6 Crore as on 31.12.2017. The direction of this Authority vide OM dated 10.04.2018 to the DGAP to determine the actual amount of benefit w.e.f. 15.11.2017 that has not been passed on, was with reference to the amount set aside that has to be determined on the basis of the methodology set out vide Respondent's letter dated 02.04.2018. In the absence of any objection by this Authority on the methodology followed by the Respondent, he was under bonafide belief that the methodology followed by him as mentioned in his letter dated 02.04.2018 was in compliance with the law.

49. That as per the directions of this Authority given vide OM dated 10.04.2019 the DGAP was required to investigate only the quantification of the amount set aside for the GST rate reductions effective from 15.11.2017 for the period till January, 2018 and for the rate reduction effective from 25.01.2018 for which the amount was set aside, till June, 2018.

50. That for the GST rate reductions effective 15.11.2017, the investigation beyond January, 2018 was beyond the direction of this Authority. In the event this Authority has a different view, the Respondent seeks finding of the Authority on the period up to which the investigation can be undertaken by the DGAP.

51. That the investigation done by the DGAP was in pursuant to the direction of this Authority relating to the provisional deposit of the amount set aside and to determine the actual amount of benefit of reduction that has not been passed on and hence, the methodology disclosed by the Respondent to the Authority has to be followed by the DGAP in determining the actual amount of benefit and therefore, the DGAP could not have invoked Section 129 of the CGST Act for investigation.

52. That the impugned investigation and Report of the DGAP has gone much beyond the terms of investigation as was directed by this Authority and has questioned the methodology followed by the Respondent even in respect of those cases which have been implicitly accepted by this Authority. The investigation was to be conducted only in respect of the products for which the amount was set aside and for the period from the date of rate change till the date amounts were set aside following the methodology implicitly accepted by the Authority. Accordingly, for the products where the amounts were set aside, the investigation for the rate changes with effect from 15.11.2017 should be for the period from 15.11.2017 to 31.01.2018 and for the rate change with effect from 25.01.2018 it should be for the period from 25.01.2018 to 30.06.2018. Thus, the impugned Report and investigation was entirely beyond the scope of reference ordered by this Authority and also not in compliance with Section 129 of the CGST Act.

53. That the DGAP has submitted the above Report based on his own understanding of the data furnished by the Respondent and without

seeking any explanation from the Respondent which apart from factual inaccuracies, was also sketchy and bereft of details and reasons.

54. That the impugned Report despite specifically pointing out that this Authority has passed directions for provisional deposit of amount set aside and investigation to verify the same, as per the modalities disclosed in the letter dated 02.04.2018, the DGAP has not followed the methodology adopted by the Respondent by ignoring the directions of this Authority.

55. That the DGAP has applied wrong interpretation of Section 171 of the CGST Act by stating that the benefit to be extended to the consumer on account of reduction in the rate of tax has to be in absolute terms and there were no other means of passing the same as has been adopted by the Respondent.

56. That the disallowance of passing of the benefit by extra quantity and passing of the benefit at product category HSN level were without basis and beyond scope of the directions of this Authority. In calculating the benefit passed on account of extra quantity, the unit of measurement has to be converted into the weight of underlying products, before and after the rate reduction benefit was passed on. The emphasis of Section 171 was on non-retention of the benefit by the registered person and passing it on to the recipient and not the mode of such passing on. The DGAP has taken a literal meaning and rejected all other modes of passing of such benefit.

57. That the Respondent has pointed out wrong inclusion of the products/ SKUs not impacted by the rate reduction notified w.e.f.

15.11.2017 or 25.01.2018 amounting to Rs. 10.9 Crore as per Exhibit-14 attached to his reply dated 07.12.2018. He has also furnished list of products/ SKUs impacted by the rate reduction of 25.01.2018 which have been wrongly considered in the calculation of rate reduction of 15.11.2017 amounting to Rs. 30 Lakh as per Exhibit-15 attached to his reply dated 07.12.2018. The DGAP has also wrongly included the GST in his calculations estimated to be Rs. 11.9 Crore. Therefore, after adjusting the amount of suo moto deposit of Rs. 16.58 Crore and the amounts mentioned above the balance profiteering alleged as per the impugned Report was estimated to be Rs. 61.3 Crore due to ignoring of passing of the benefit by (a) more grammage (extra quantity), (b) passing of the benefit at the product category HSN level, (c) by applying wrong base price and by (d) ignoring the expenses incurred on changeover of Rs. 3.2 Crore.

58. That from the DGAP's Reports dated 01.02.2019 and 15.03.2019 it appeared that only the errors in respect of profiteering amounting to Rs. 10.6 Crore and Rs. 30 Lakh mentioned above have been re-examined and accepted by the DGAP which has resulted in reduction of alleged profiteering to Rs. 89.73 Crore. The other errors have not been examined by the DGAP and the same should be considered by this Authority.

59. That the DGAP has not considered the benefit passed by way of more grammage (extra quantity) at the SKU level amounting to Rs. 14.86 Crore and he has wrongly included the GST element in the calculation estimated to be Rs. 9.75 Crore (Tax component in total

profiteering amount of Rs. 11.9 Crore less tax component pertaining to grammage benefit) and after adjusting the amount of suo moto deposit of Rs. 16.58 Crore and the amounts wrongly included, the balance profiteering was on account of the SKUs considered in the impugned Report, where the methodology for passing on the benefit was ignored during the calculation. He has also submitted his comments vide Exhibit-29 on Annexure-14 and Annexure-15 of the impugned Report and also attached Exhibit-30 which showed State wise break up of the suo moto deposit of the amount in the CWF aggregating to Rs. 16,58,32,723/-.

60. That the benefit amounting to Rs. 14,86,43,439/- has been passed by the Respondent by way of grammage increase (extra quantity) which excluded the excess benefit passed in SKUs in order to pass the overall benefit at the product category level. He has also furnished the details of estimated benefit passed in Exhibit-31, how the above grammage benefit has been calculated. The Respondent has further annexed the State wise (GSTN wise) summary of the aforesaid amount as Exhibit-32 and submit State wise (GSNT wise) details separately in a pen drive.

61. That for comparing the prices after GST rate reductions the GST has been included in the calculations which has inflated the profiteered amount. The impugned Reports of the DGAP have not denied this error therefore, the same was required to be corrected.

62. That Respondent's invoicing to his recipients post reduction in the GST rates indicated the benefit passed on the relevant product as a discount on the invoice bearing Code Z368 which was necessitated

due to the operational issues like IT systems and stationery etc. Copies of sample invoices were annexed as Exhibit-6 to reply dated 07.12.2018. Where the discount on invoice was on account of the GST rate reduction, code Z368 has been indicated. The general discounts for the SKUs impacted by the rate reduction would not bear code Z368.

63. That in para 21 of the Report of the DGAP it has been observed that for the purpose of calculating the alleged profiteering, the average base prices of supplies to each of the channels of suppliers has been considered separately during the pre-rate reduction period which was incorrect as the profiteering has to be examined only on a comparison of the actual sale prices of the product to the recipient for the pre-rate reduction period and the post rate reduction period and there was no legal basis for adopting the average base prices. Further, it was also not clear from the Report as to what was the methodology adopted to arrive at the average base prices and to which period the base prices pertained. The method adopted by the DGAP by taking the average base prices pre rate reduction has resulted in an incongruent situation where for the very same SKU of the product, for some supplies the Report has shown no profiteering and for some other supplies, the same was showing profiteering. The wrong base prices were on two accounts :-

a. <u>Calculation Error:</u>

There were calculation errors in the base prices taken by DGAP in his workings. Some of the examples of calculation errors were annexed as Exhibit – 22 to his reply dated 12.04.2019.

b. Incongruent average base price:

The method adopted by the DGAP in taking the average base prices pre rate reduction has resulted in an anomaly where for the very same SKU of the product, the report was showing no profiteering and for some other supplies, it was showing profiteering which has been explained in Exhibit-17 attached to the reply dated 07.12.2018. Further, discounts and commissions to the customers / recipients impacted the net realization which has resulted in profiteering in DGAP's Report.

64. That the Respondent vide his letter dated 27.09.2018 and e-mail dated 29.09.2018 addressed to the DGAP, pursuant to his queries made vide emails dated 20.09.2018 and 28.09.2018, has pointed out that the comparison of realization varies from customer to customer due to the reason that differential discounts were applicable to different customers. The Respondent has also pointed out that the correct way was to consider percentage of the benefit to be passed on, for the particular SKU on the realization to assess the GST benefit passed.

65. That the Respondent has passed on the additional benefits by additional grammage/ additional reduction in MRPs on SKUs in the same product category level so that commensurate benefit was

passed at product category level. The Respondent has also provided break-up of the amount of Rs. 192 Crore, being the benefit passed by him pursuant to the methodology followed by the Respondent vide Exhibit-5 and the details of category (HSN) wise balancing at SKU level on 20.12.2018. Exhibit-23 which incorporated the benefit passed by way of price reduction and grammage increase and Exhibit-24 which incorporated the break-up of the benefit passed higher/ lower as compared to the tax rate benefit were required to be read in conjunction.

66. That the SKUs on which the Respondent has passed benefit by way of extra grammage or no benefit has been passed/ proportionate benefit has not been passed, was due to business operations/reasons such as prevalent trade practices and practicality. Where it was not practical to pass any/proportionate benefit on any SKU, additional benefit was passed on in other packs/ SKUs in the same product category. For price point products the benefit has been passed by way of extra grammage, also a prevalent industry practice, as changing MRP was not a business option for price point products. Where it was not practical to pass benefit on any pack/ Stock Keeping Unit (SKU) of a product for issues such as coinage, taste preference or manufacturing constraints, higher benefit was passed on other packs/ SKUs in the same product category. Higher benefit passed on SKUs across product categories, was an integral part of the methodology followed by the Respondent, so that the benefit to be passed for each product category, was commensurate to the benefit accruing. Additional benefit has not been passed for

business promotion reasons, it was only to comply with Section 171 of the CGST Act. The benefit to be passed was determined by the Respondent at the time when the rate reduction was announced, which was with immediate effect.

67. That the Respondent has also submitted the details of the benefit passed through price reductions and grammage increase per SKU wise vide Exhibit-25 on 07.05.2019 which has to be read in conjunction with the methodology adopted by the Respondent.

68. That the DGAP has repeatedly refused to furnish his comments on the submissions filed by the Respondent as was evident from his communication dated 11.06.2019 due to which the entire proceedings should be quashed.

69. That the 'commensurate' benefit to be passed has to be determined by offsetting any cost incurred by the manufacturer/ supplier, therefore, the commensurate benefit could not always be determined in absolute terms and a methodology was therefore necessary to take into account different scenarios. Malaysia has enacted the Price Control and Anti-Profiteering Act, 2011 and the Price Control and Anti-Profiteering (Mechanism To Determine Unreasonably High Profits for Goods) (Net Profit Margin) Act, 2014 which has defined profiteering as "making unreasonably high profits". Section 15 of the above Act provided that the following factors have to be taken into consideration in formulating mechanism for determining profiteering:-

(a) any tax imposition;

(b) the supplier's cost;

(c) any cost incurred in the course or furtherance of business (c) supply and demand conditions;

(d) the conditions and circumstances of geographical or product market; or

(e) any other relevant matters in relation to the prices of goods or charges for services

70. That this Authority has itself taken into consideration the increase in the cost of raw materials for calculation of the quantum of benefit which could be passed on to the consumer in its Order dated 04.05.2018 passed in the matter of ***Kumar Gandharv v. KRBL Limited*, Case No. 3/2018**. However, the DGAP has not taken the said factor into account in his Report while disallowing the costs incurred on passing on the benefit. Para 20 of the DGAP's Report stated that there was no provision in the Act to allow the cost of packing material to be adjusted against the reduction in prices on account of lower GST rates. The Respondent has also written off the existing packing material with old declarations and given advertisements in the newspapers to create awareness about reduction in the GST rate benefit and has also provided the list of the packing material written off and the invoices of expenses incurred to publish advertisements therefore, the DGAP should have considered setting off Rs. 3.2 Crore on account of the above expenses.

71. That the provisions of the CGST Act and the Rules made thereunder pertaining to anti-profiteering were violative of Article 19 (1) (g) of the Constitution of India :

i. Rule 126, 127 and 133 of the CGST Rules suffered from the vice of excessive delegation.

ii. Restrictions on prices tantamounted to 'price control' or 'price regulation' which was contrary to the freedom of trade and business granted under Article 19 (1) (g) of the Constitution of India.

iii. In the absence of a judicial member, the constitution of the Authority was improper.

72. That the present proceedings were ex-facie without jurisdiction and also contrary to the relevant statutory provisions. As per the provisions of Rule 128 of the CGST Rules, 2017 receipt of a written application in the prescribed manner from an interested party or from a Commissioner or from any other person was the starting point for initiating proceedings under the above Rule. However, in the present case, no such application either in the prescribed form or in any other manner has been made either to the Screening Committee or the Standing Committee alleging profiteering against the Respondent. Thus, the entire proceedings initiated against the Respondent were without jurisdiction and liable to be quashed.

73. That as per Rules 128 and 129 of the above Rules the prescribed procedure was required to be followed both by the DGAP as well as this Authority. However, in this case there has been no prima facie satisfaction either of the Screening committee or the Standing Committee that the Respondent has not passed on the benefit of rate reduction and hence, there has been no recommendation by the Standing Committee to the DGAP to conduct detailed investigation.

In fact, there was no collection of evidence by the DGAP to even conduct the investigation, thus, none of the statutory requirements for even initiating the investigation by the DGAP in the present case, have been followed.

74. That in the present case, the trigger point for the DGAP to initiate investigation against the Respondent was the OM dated 10.04.2018 issued by this Authority which was also evident from the Notice dates 26.04.2018 issued by the DGAP. It appeared that this Authority has proceeded on the ground that it has powers and jurisdiction to initiate or order investigation against any person suo moto i.e. on its own motion, however, this assumption of jurisdiction was legally untenable. This Authority and the DGAP being creatures of the statute viz. the CGST Act, 2017, were bound by the statutory provisions of the above Act and could not act either beyond or contrary to the provisions. The above Act did not confer any power either on this Authority or the DGAP to initiate investigation against the Respondent on their own motion i.e. suo moto. When there was no conferment of suo moto power on this Authority to initiate proceedings on its own motion notice issued by the DGAP was without jurisdiction and consequently, the impugned Notice issued by this Authority has no legal sanctity.

75. That the Respondent had sought advice/ legal clarify from this Authority which was administering the anti-profiteering provisions but he has been asked to be investigated without a legally sustainable basis. As submitted above in the absence of guidelines on the methodology to pass on the benefit, the Respondent had presented

his methodology to this Authority and sought advice on the modality to pass on the benefit to the consumers for the amount set aside on existing stocks where it was not practical to pass on the same and this Authority vide OM dated 10.04. 2018 had directed provisional deposit of the amount set aside in the CWF and implicitly accepted the methodology of the Respondent to pass on the benefit. Therefore, the entire proceedings are vitiated in law being without jurisdiction.

76. That this very Authority which has asked the DGAP to initiate the investigation against the Respondent was to decide the correctness or otherwise of the Report furnished by the DGAP and therefore, it was acting as a (1) complainant and (2) as an Authority to recommend initiation of investigation and (3) to decide whether the complaint and the impugned Report based on such investigation was correct or not. Therefore, the present proceedings were not maintainable as this Authority could not Act as a judge in its own case.

77. That the present proceedings have been initiated in violation of the principles of natural justice as show cause notice has not been issued to the Respondent proposing the action to be taken against him by this Authority. Rule 133 of the CGST Rules, 2017 *inter alia* provided that this Authority should pass an order within a period of 3 months from the date of the receipt of the Report from the DGAP and in case this Authority determined that a registered person has not passed on the benefit it may order the following:-

(a) reduction in prices;

(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest;

(c) the deposit of an amount equivalent to Consolidated Fund of India where the eligible person does not claim return of the amount or is not identifiable;

(d) imposition of penalty as specified under the CGST Act; and

(e) cancellation of registration under the CGST Act.

78. That on the basis of the aforementioned powers of this Authority, it can be said that this Authority under Section 171 of the above Act would determine the rights and liabilities of the registered person with civil and/or penal consequences. However, Rule 133 did not provide for issuance of a show cause notice to the alleged violator therefore, Rule 133 of the CGST Rules to that extent was violative of the principles of natural justice.

79. That a show cause notice forms the base of the principles of natural justice, *audi alteram partem*. In this regard, reliance was placed on the case of ***Canara Bank and Others v. Debasis Das and Others (2003) 4 SCC 557***, where the Hon'ble Supreme Court held that a notice should apprise the party of the case it has to meet. The extract of the relevant portion of the judgment was reproduced as under:-

"15. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case

he has to meet. Time given for the purpose should be adequate enough so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice.

16. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

80. That similar observation was made by the Hon'ble Supreme Court in the case of ***Uma Nath Pandey and others v. State of UP (2009) 12 SCC 40***. The Respondent has also placed reliance on the case of ***Collector of Central Excise v. ITC Ltd. 1994 (71) ELT 324,*** wherein the Hon'ble Supreme Court has observed that where an assessee was made responsible for higher duty, it must be given an opportunity of meeting the grounds. The extract of the relevant portion of the judgment was mentioned below:-

"4. Before the first respondent is made liable for higher or enhanced duty, it must be told on what grounds it is sought to be made liable for additional duty and it must be given an opportunity of meeting

those grounds. This is the minimum requirement of the principle of natural justice which must be read into sub-rule (5) of Rule 9B, wherever called for."

81. That in the case of ***Vasta Bio-Tech Pvt. Ltd. v. Assistant Commr. 2018 (360) ELT 234,*** the Hon'ble Madras High Court has held that if a statute was silent about opportunity being granted to the assessee to put forth his case, then principles of natural justice have to be read in the statute. The extract of the relevant portion of the judgment was as under:-

"5. ..and if the statute is silent, then, principles of natural justice has to be read into the statute, so that the assessee has reasonable opportunity to put forth his case."

82. The Respondent has also cited the case of ***Dharampal Satyapal Ltd. v. Dy. Commissioner of Central Excise 2015 (320) ELT 3,*** where the Hon'ble Supreme Court has observed that applicability of principles of natural justice was not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there was any such statutory provision or not. In the case of ***Anrak Aluminium Ltd. v. Commissioner*** **2017 (4) G.S.T.L. 248,** the Hon'ble Tribunal has held that the department could not proceed to recover the interest under Section 87 without issuing a show cause notice and determination of the amount due

and payable by the assessee as provided under sub-section (1) of Section 73 of the Finance Act, 1994.

83. That vide its Notice dated dated 16.10.2018 this Authority has considered the Report of the DGAP as a show cause notice, which was not correct. The Authority should have issued a show cause notice before examining the alleged profiteering which should have contained the following:-

i. description of the goods and services in respect of which the proceedings have been initiated;
ii. reasons on the basis of which profiteering has been alleged;
iii. issues proposed to be examined by this Authority; and
iv. action proposed to be taken by this Authority against the Respondent

84. That unless the aforementioned information was made available to the Respondent, he could not defend his case and except for providing a copy of the Report of the DGAP, the Respondent has not been served with any notice/communication regarding the issues to be examined and actions to be taken against the Respondent. In view of the above, even if the CGST Act or the Rules did not provide for issuance of a show cause notice before initiating proceedings under Section 171, this Authority should have issued a show cause notice to the Respondent in terms of principles of natural justice and since the show cause notice has not been issued the present proceedings were bad in law.

85. That the CGST Act read with the CGST Rules did not provide the procedure and the mechanism for determination and calculation of profiteering, in the absence of which the calculation and methodology used in the impugned Report was arbitrary. Rule 126 of the CGST Rules contained provisions to determine the methodology and procedure, however, till date above Rule has not prescribed any procedure/ methodology/ formula/ modalities for determining/ calculating 'profiteering'. The 'Procedure and Methodology' issued on 19.07.2018 by this Authority only provided the procedure pertaining to the investigation and hearing. However, no method/formula has been notified/prescribed pertaining to the calculation of profiteering amount. There was no provision as to how the profiteering due to change in the rate of tax should be computed and whether such computation must be done invoice-wise, product-wise, business vertical-wise or entity-wise, etc. Thus, in the absence of the same, there was lack of transparency as the results could vary from case to case resulting in arbitrariness and violation of Article 14 of the Constitution of India.

86. That in other countries like Malaysia the Government has introduced the 'Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014, which provided for the mechanism to calculate whether any company has profiteered on account of GST or not. The anti-profiteering measures in Australia revolved around the 'Net Dollar Margin Rule' serving as the fundamental principle for its guidelines. These regulations have been set as barometers for calculating profiteering.

87. That in the case of ***Commissioner of Income Tax Bangalore*** v. ***B. C. Srinivasa Setty (1981) 2 SCC 460***, the Hon'ble Supreme Court has held that charging section was not attracted where corresponding computation provision was inapplicable. In this regard, reliance was also placed on the case of ***Eternit Everest Ltd.*** v. ***Union of India 1997 (89) E.L.T. 28 (Mad.)***, where the Hon'ble Madras High Court has held that in the absence of machinery provisions pertaining to determination and adjudication upon a claim or objection, the statutory provision would not be applicable. It is also submitted that the Hon'ble Supreme Court in the cases of **Commissioner Central Excise and Customs Kerala v. Larsen and Toubro Limited (2016) 1 SCC 170** has held that where there was no machinery for assessment, the law being vague, it would not be open to the assessing authority to arbitrarily assess to tax the subject. It was further held that where the statute provided no procedural machinery for assessment or levy of tax or where it was confiscatory, the Court would be justified to strike it down as unconstitutional. The judgment also referred to a long line of decisions where it has been held that imposition of tax in the absence of prescribed machinery and prescribed procedure would partake the character of a purely administrative affair and can be challenged as contravening Article 19 (1) (f) of the Constitution of India. On the same analogy the determination of quantum of profiteering imposing a liability on the Respondent has to be based on a prescribed machinery and prescribed procedure in the absence of which Section 171 of the CGST Act has to be held to be

constitutionally invalid. In the absence of prescribed method/formula/guidelines for calculation of profiteering, following a method on case-to-case basis was arbitrary and thus, the impugned Report of the DGAP was liable to be rejected. Rule 126 of the CGST Rules delegated the power to this Authority to determine the methodology as to whether the reduction in the rate of tax has been passed on to the recipient by way of commensurate reduction in prices or not. However, the sub-delegate ought not be given uncanalised and unguided legislative power. In the present case the Respondent has disclosed the methodology to this Authority which the DGAP was required to follow. It is submitted that in the present case the Respondent has passed on the benefit of reduction in the rate of tax by way of commensurate reduction in prices as he deemed fit in the absence of any methodology and hence, the impugned proceedings and the Report was liable to be set aside.

88. That the alleged profiteering, if any, should be computed at the entity level and not on item (SKU) level. The interpretation given to Section 171 and rules made thereunder by the DGAP without considering the 'marginal notes' appended to Section 171 and heading of Chapter XV of CGST Rules, was a legally untenable interpretation. The text of Section 171 did not use the term 'profiteering'. It is mentioned in the marginal notes to Section 171 and in the heading of Chapter XV of CGST Rules only. In order to understand the scope of Section 171, it was pertinent to understand the meaning of the term 'profiteering' which has been used in the marginal notes.

89. That It was a settled principle of law that marginal notes could be used as an internal aid for interpretation to address any ambiguity in the provision. In this regard, reliance was placed on the case of ***Indian Aluminium Company v. Kerala State Electricity Board (1975) 2 SCC 414,*** wherein the Hon'ble Supreme Court has held that the marginal notes could be relied upon to show what the section was dealing with. In another case of ***Union of India v. Harbhajan Singh Dhillon (1971) 2 SCC 779,*** the Hon'ble Supreme Court has observed that marginal notes could serve as guidance when there was ambiguity or doubt about the true meaning of the provisions. Similar observations were made by the Hon'ble Supreme Court in the case of ***S. P. Gupta v. Union of India AIR 1982 SC 149.***

90. That "Profiteering' has not been defined in CGST Act or the Rules therefore, reference to common parlance meaning of the term 'profiteering' must be made. Definitions of the term "Profiteer/Profiteering' from various dictionaries was provided below for quick reference:-

a) The Chambers Dictionary, Allied Chambers (India) Ltd., New Delhi:

Profiteer is a person who takes advantage of an emergency to make exorbitant profits.

b) The Collins Cobuild English Dictionary for Advanced Learners-Harper Collins Publication:

Profiteering involves making large profits by charging high prices for goods that are hard to sell.

c) **Oxford English Reference Dictionary-Oxford University Press**:

Profiteering means to make or seek to make excessive profits, esp. illegally or in black market conditions.

91. That on the basis of the aforementioned definitions, only where an entity made exorbitant or large profits in an unlawful manner, it could be referred to be a Profiteer. The combined reading of the marginal notes, notes to clauses of the foregoing provisions and language thereof, showed that a registered person should pass on the benefit of reduction in the rate of tax or ITC to the recipient by way of 'commensurate' reduction in prices. Thus, the Section and the Rules keep the registered person on one hand and the recipient on the another and then to find out whether the benefit has been passed on by 'commensurate' reduction in price.

92. That it was necessary to find out interpretation of the term 'commensurate' appearing in Section 171 and Rule 127 and if Section 171 (1) was read without the word commensurate it would read as under:-

(1) Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of (...) reduction in prices.

93. That therefore, it was clear that the reduction in the rate of tax should be passed on to the recipient by reduction in prices which

must be exact/equal to the reduction in the tax rate or benefit of ITC, however, the Legislature, has qualified the word reduction by using the word 'commensurate' which in this context would mean 'appropriate', 'adequate' or 'proportionate'. The Respondent has also cited the following dictionary meanings of the word 'commensurate':-

Random House Compact Unabridged Dictionary, Special Second Edition:

Having the same measure; of equal extent or duration. 2. Corresponding in amount, magnitude or degree...3. Proportionate, adequate. 4. Having a common measure

The New International Webster's Comprehensive Dictionary of the English Language, Deluxe Encyclopaedic Edition:

Commensurable 2. In proper proportion; proportionate. 3. Sufficient for the purpose or occasion. 4. Adequate; of equal extent

The Compact Edition of the Oxford English Dictionary:

Having the same measure; of equal extent, duration or magnitude; 2. Of corresponding extent, magnitude, or degree; proportionate, adequate 3. Corresponding in nature; belonging to the same sphere or realm of things. 4. Characterized by a common measure

10th Ed., The Concise Oxford Dictionary:

"corresponding in size or degree; in proportion"

Chambers 21st Century Dictionary:

"1. in equal proportion to something, appropriate to it

2. Equal in extent, quantity, etc. to something"

94. That in view of the above definitions, the word commensurate would mean appropriate, adequate or proportionate. Therefore, to determine 'commensurate' benefit to be given to the recipient, reduction in price must necessarily be considered when a registered person was considered as an entity and a 'recipient' as a group. Profiteering would always relate to the entity or registered person as a whole and not to some truncated transactions. The entire supply of goods impacted by the rate change, undertaken by the registered person must be considered and then on comparison of reduction in the tax rate, it was to be determined whether profiteering has been done by such registered person as an entity.

95. That the DGAP has incorrectly applied a methodology similar to the 'zeroing methodology' which was used by the anti-dumping authorities in certain countries like European Union (EU). According to the said methodology, while calculating the dumping margin only those SKUs were considered which were being dumped and those SKUs which were not being dumped were not considered. The Government of India had taken a stand against such methodology at the WTO and argued that while determining the dumping margin, all SKUs should be taken into consideration rather than only those which show positive dumping. In this regard, the Respondent has drawn attention to ***Report No. WT/DS141/AB/R dated 1.3.2001 of the Appellate Body, WTO regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India*** in which the Indian exporters faced an anti-dumping action by the EU as the exporters

were exporting different variety of bed linen to the EU. In some cases, the exporters were exporting at positive dumping margins, wherein in many cases there was negative dumping margin, i.e., the export price was more than the normal value at which goods were sold in India. The European Commission applied their usual practice of not netting off the positive and negative dumping margins. In fact, they applied 'zero' (0) for negative dumping margins and cumulated only positive dumping margins and thereby arrived at higher dumping margins for Indian exporters. Government of India objected to this approach of European Commission and the matter was taken to the Dispute Settlement Body of the World Trade Organisation (WTO) which held in favour of Government of India. In an appeal filed by the EU before the Appellate Body, the Appellate Body held that the practice of not netting off of positive dumping margins and negative dumping margins was not correct. Thus, the Government of India succeeded before the WTO Appellate Body that positive and negative dumping margins must be taken together and therefore got lower dumping margins for Indian exporters. European Commission accepted the decision and revised dumping margins not only for bed linens cases but also for all other cases against India.

96. That the position taken by the Government of India before the WTO was binding on the DGAP in calculating the alleged 'profiteering' and therefore, this Authority should follow the above stand taken by the Government of India and allow 'netting off' in determining whether the Respondent has passed the benefit or not.

97. That as per the provisions of Section 171 of the CGST Act the benefit could be ascertained product category wise, service category wise or entity however, the above Section or the rules or the procedure laid down by this Authority was silent on this aspect of calculation/computation in the absence of which the Respondent had no option but to apply best judgment keeping in view the business operations and the industry requirement, to pass on the benefit when the rate changes were effected. Due to absence of any methodology for computing profiteering, the registered persons were also following different methods for passing on the benefit of reduction in the tax rate or benefit of ITC to the recipients as per their own understanding.

98. That in the absence of any framework or guidelines laid down by Section 171 or Rules made thereunder, different approaches may be followed by the DGAP and such unfettered discretion would lead to uncertainty and arbitrariness on case to case basis. The methodology followed by the Respondent was reasonable bearing in mind the circumstances and the priority which required to pass on the benefit to the consumers expeditiously and efficiently. In the absence of any methodology prescribed under the law, the DGAP should have only seen if the methodology adopted by the Respondent, has resulted in any profiteering at the entity level. The DGAP having totally ignored the method followed by the Respondent to pass benefit, the impugned Report was not maintainable in the eyes of law.

99. That in case this Authority confirmed the allegation of profiteering and proposed to invoke penal provisions, the Respondent should be given an opportunity to show cause against invocation of the penal provision.

100. That the above submissions of the Respondent were sent to the DGAP for furnishing Report and the DGAP vide his Report dated 01.02.2019 has submitted reply to the Respondent's contentions and stated that the present investigation has been launched by him on the basis of the OM F. No. D-22011/NAA/17/2018/1039-41 dated 10.04.2018, issued by this Authority to determine the actual amount of benefit of reduction in the GST rates not passed on by the Respondent to the recipients on perusal of which he had found that there was prima facie evidence to suggest that the Respondent had not passed on the benefit of reduction in the rate of tax on the supply of goods by way of commensurate reduction in prices and hence he had issued a Notice under Rule 129 of the Central Goods and Services Tax Rules, 2017 on 26.04.2018, to conduct a detailed investigation. Subsequently a Report dated 08.10.2018 was furnished to this Authority under Rule 129 (6) of the Central Goods and Services Tax Rules, 2017. Since the Respondent had himself admitted 'Profiteering' in his letter addressed to the Authority he was justified in conducting a detailed investigation based on the aforesaid OM. The Report dated 08.10.2018 submitted by him had been prepared on the basis of the data submitted by the Respondent which incorporated the details taken into account and the logic behind the quantification of profiteering. The Respondent's

submission that products/SKUs not impacted by the rate reduction w.e.f. 15.11.2017 or 25.01.2018, had been wrongly included (involving amount of Rs. 10.9 Crores), was examined and finally a fresh Report in this regard was furnished on 15.03.2019. His above Report has stated that the investigation revealed that there had been profiteering by the Respondent and hence, the quantum of profiteering had been determined.

101. That the DGAP has also submitted that as per Rule 126 of the CGST Rules, 2017, this Authority has been empowered to determine the methodology and procedure for determination as to whether the reduction in the rate of tax or the benefit of ITC had been passed on by the registered person to the recipients by way of commensurate reduction in prices. The above Rule did not stipulate that this Authority shall prescribe the methodology to quantify the amount of profiteering. Thus, the quantum of profiteering had to be arrived at on a case to case basis, by adopting suitable method based on the nature and facts of each case and no uniform methodology could be prescribed for determination of the quantum of benefit to be passed on. In Rule 126, the word used was 'determine' and not 'prescribe'.

102. That the DGAP has also stated that on receipt of the OM dated 10.04.2018, he had issued a Notice under Rule 129 of the Central Goods and Services Tax Rules, 2017 and as required under Rule 133 (2) of the Central Goods and Services Tax Rules, 2017, this Authority had also granted hearing to the Respondent. Neither Section 171 of the Central Goods and Services Tax Act, 2017 nor Chapter XV (Rule 133) of the Central Goods and Services Tax

Rules, 2017, had any statutory provision requiring this Authority to issue a show cause notice before issuing the order. His Report had followed appropriate and suitable method to determine profiteering and it was part of the Report.

103. The DGAP vide his supplementary Report dated 15.03.2019 has submitted that he had conducted investigation and sent his report on 08.10.2018, wherein the profiteering amount was arrived at on the basis of the monthly sales data provided by the Respondent for the period from 15.11.2017 to 30.06.2018 however, while calculating the quantum of profiteering, impact of GST rate reduction w.e.f. 15.11.2017 was taken into account including on the products which the Respondent had contended were not impacted by the rate reduction. He has also furnished revised figure of profiteering in respect of Annexure-14 which was Rs. 85,30,77,868 instead of Rs. 96,55,64,579/- and he has also submitted revised Annexure-14 and Annexure-16 in this regard.

104. We have carefully heard the Applicant, the Respondent and have also perused the record placed on the file and it is revealed that the Respondent has filed the following replies during the course of the present proceedings:-

(i) Preliminary reply dated 07.12.2018 along with 18 Exhibits.

(ii) Furnished additional documents on 20.12.2018.

(iii) Filed Rejoinder dated 12.04.2019 to the Reports filed by the DGAP on 01.02.2019 and 15.03.2019.

(iv) Reply dated 02.05.2019 furnishing confidential information.

(v) Reply dated 07.05.2019 with details of the reply dated 02.05.2019.

(vi) Reply dated 28.06.2019 consolidating all the factual and legal submissions.

105. It is also revealed that the Respondent is a subsidiary of Nestle Group, Switzerland and is a public shareholding company comprising of 90,000 shareholders. The Respondent is engaged in the manufacture and sale of various food products including coffee, noodles, chocolates and confectionary etc., under the brand names NESCAFE, MAGGI and KITKAT etc. The Respondent sells his products mainly through his distributors and also makes sales to the CSD, Government outlets and the Modern Trade etc.

106. It is further revealed that the Central and the State Governments vide Notification No. 41/2017 Central Tax (Rate) dated 14.11.2017 had reduced the rates of GST from 28% to 18% and from 18% to 12% w.e.f. 15.11.2017 and vide Notification No. 06/2018 Central Tax (Rate) dated 25.01.2018 had reduced the rate of the above tax from 18% to 12% w.e.f. 25.01.2018.

107. It is also apparent from the record that a total number of 370 SKUs being manufactured and sold by the Respondent were impacted by the rate reduction w.e.f. 15.11.2017 and 39 SKUs of the Respondent were affected by the rate reduction w.e.f. 25.01.2018 (Total SKus 409). As per the provisions of Section171 (1) of the CGST Act, 2017 the Respondent was required to pass on the benefit of both the above rate reductions on all the impacted SKUs.

108. The Respondent has claimed that he has passed on the above benefit by way of reduction in the MRPs, by increasing the quantity of the products and by additional benefit on the other packs/ SKUs in the same or the other product category and computation for passing on the benefit of rate reduction was done at the aggregate product category level. In this connection the Respondent has claimed that vide their similar letters dated 20.11.2017 (Exhibit-2 Colly) written by the AVP (East, West, North & South) to the distributors they had conveyed as under:-

"You must have noticed that on our invoicing post announcement of reduction in GST rates, we have discounted the relevant SKUs/products to pass on the benefit of GST rate reduction and have charged on the invoice the reduced GST rate/s. The discounts will continue to appear on invoices till such time stocks with either lower MRP or higher weight are available for which the company has already commenced preparation. The level of discount/benefit at each SKU/ product has been worked out keeping the general trade practices at the last point of sale, availability of coins especially of smaller denomination and ensuring that benefits at an aggregate level of all SKUs/ products are passed on to the consumers."

109. It is apparent from the above letters that the Respondent instead of commensurately reducing the MRPs of his impacted SKUs as per the provisions of Section 171 (1) of the CGST Act, 2017 had claimed to have given discounts on them to pass on the benefit of

rate reductions. However, the investigation carried out by the DGAP has found that the above claim of the Respondent was not correct as the sample invoices submitted by him did not mention that the discounts were given due to the GST rate reductions. On the other hand, these invoices revealed that the discounts offered were in accordance with the general discount pattern which was being followed by the Respondent in the course of his business. He had also found that the pattern of discounts offered in the pre and post-GST rate reduction periods was the same and the discounts offered post-GST rate reductions were a continuation of the earlier discounts. The tax invoices attached by the Respondent with his submissions dated 07.12.2018 also do not disclose that the Respondent had given discounts to his customers on account of benefit of tax reductions. Therefore, the above discounts cannot not be construed to have been given due to the GST rate reductions and hence, the above claim of the Respondent cannot be accepted.

110. It is also clear from the perusal of his submission dated 07.12.2018 that the Respondent has claimed to have passed on the above benefit at the aggregate level of the SKUs or at the product level whereas he was required to pass it on every SKU so that the benefit could reach every buyer of that SKU. Passing on of the benefit to another customer at the expense of the customer who was legally entitled to receive it or complete denial of the above benefit to such customer amounts to violation of the provisions of Section 171 (1) of the above Act as well as Article 14 of the Constitution as the intent of the above provision is to pass on the benefit to every

customer on his every purchase of a SKU. The Respondent has no discretion to pass on the benefit as per his own preferences and he is bound to pass on the benefit uniformly and equitably on all the impacted SKUs. Hence, the above methodology adopted by the Respondent to pass on the benefit is illegal and hence the same cannot be accepted.

111. It is also apparent that as a manufacture the Respondent is also legally responsible for fixing the MRPs as per the provisions of Rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011 mentioned supra. However, he has not re-fixed the MRPs after rate reductions. He was also required to stamp or re-sticker or reprint the MRPs on all the impacted SKUs as per the letter issued by the Ministry of Consumer Affairs, Food and Public Distribution, Govt. of India, dated: 16.11.2017 which states as under:-

"WM-10(31)/2017

Government of India

Ministry of Consumer Affairs, Food and Public Distribution

Department of Consumer Affairs

Legal Metrology Division

Krishi Bhawan, New Delhi

Dated: 16.11.2017

To,

The Controller of Legal Metrology,

All States/ UTS

Subject: Labelling of MRP of pre-packaged commodities due to reduction in GST-reg.

Reference is invited to this office letter No. WM-10(31)/2017 dated 29.9.2017 regarding declaration of MRP on unsold stock of pre-packaged commodities manufactured/packed/ Imported prior to 1st July, 2017. Subsequent to that, Government has reduced the rates of GST on certain specified items. Consequent upon that, permission is hereby granted under sub-rule (3) of rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011, to affix an additional sticker or stamping or online printing for declaring the reduced MRP on the pre-packaged commodity. In this case also, the earlier Labelling/ Sticker of MRP will continue to be visible.

2. Further, this relaxation will also be applicable in the case of unsold stocks manufactured/packed imported after 1st July, 2017 where the MRP would reduce due to reduction in the rate of GST post 1st July, 2017.

3. This order would be applicable upto 31st December, 2017

Yours faithfully

(B. N. Dixit)
Director of Legal Metrology
Tel: 01123389489 / Fax.-011-23385322
Email: dirwm-ca@nic.in

Copy to: All Industries/ Industry Associations/ Stake Holders

However, the Respondent had not complied with the above direction and had continued to sell his impacted SKUs at the pre-reduction MRPs. The Respondent had simply transferred his legal obligation to his distributors who had no power to re-fix the MRPs and stamp/re-sticker/print them on the impacted SKUs. Since, the MRPs were not reduced and affixed on the above SKUs by the Respondent there is no likelihood of their being sold to the consumers at the commensurate reduced rates keeping in view the above rate reductions. Accordingly, the Respondent has acted in contravention of the provisions of Section 171 (1) of the above Act.

112. The Respondent has also claimed to have passed on the benefit at the product category level based on the sales contribution of the SKUs in that product category with due consideration to the lower priced SKUs. Accordingly, vide Exhibit-3 of his submissions dated 07.12.2018 he has calculated that overall benefit of 5.08% was requited to be passed on 8 product categories which were impacted by the tax reductions whereas he had passed 5.78% benefit. Vide Exhibit-4 and 5 the Respondent has claimed that he had passed benefit of Rs. 204 Crore at the product category level against the benefit of Rs. 192 Crore and in case the set aside amount of Rs. 16.6 Crore was also included the total amount passed was Rs. 209 Crore. However, the above claim of the Respondent is not correct as the benefit was to be passed on each SKU and not at the product category level. Passing on of the benefit at the product category level implies that the benefit has either not been passed on some SKUs

which formed part of that product category or has been passed more than what could have been passed on some SKUs e.g. the Respondent had not passed any benefit of tax reduction on the SKU of MAGGI which forms part of the product category of Instant Noodles and Pasta, having MRP of Rs. 5/-, whereas he has claimed to have passed more benefit on the SKU of MAGGI which was being sold at the MRP of Rs. 12/- by reducing its price to Rs. 11/-. By no stretch of imagination denial of benefit of tax reduction to a customer who had purchased SKU of MAGGI having MRP of Rs. 5/- can be justified by the Respondent by claiming that he has passed on the benefit on that SKU of MAGGI which was being sold at MRP of Rs. 12/-. Such arbitrary, inequitable and illegal passing of the benefit cannot be accepted as it violates the provisions of the above Section as well as Article 14 of the Constitution.

113. The Respondent has also developed and applied his own methodology to compute the above benefit based on the sales contribution of all the SKUs in that product category with consideration of lower priced SKUs. The financial year adopted by the Respondent starts from January and ends in December. For calculation of the benefit due to the rate reductions which had occurred on 15.11.2017 the Respondent has taken the actual sales of all the SKUs of that product category from January 2017 to September 2017 which were compared with the planned sales from October 2017 to December 2017 with annualized impact of price changes and new products and percentage benefit was worked out as has been shown in Exhibit-3. Similar methodology was adopted

by the Respondent for the rate reductions effective from 25.01.2018. It is apparent from the above that the methodology adopted by the Respondent was based on a number of parameters which had no impact on the benefit which was to be passed on due to rate reductions. No justification has been given why the actual sales from January to September 2017 should be compared with the planned sales of October to December 2017 with annualized impact of price changes and new products by taking in to account the sales contribution of all the SKUs in that product category with consideration of lower priced SKUs. There is also no justification why the sales which have taken place from January 2107 to June 2017 should be taken in to account when the GST has been implemented w.e.f. 01.07.2017. The Respondent has also not furnished the actual mathematical calculations which he has adopted while computing the benefit of tax reductions to prove his above methodology. The most simple and appropriate methodology required to be adopted by the Respondent was to calculate the new MRP for each SKU as per the tax reductions and to charge it accordingly. Therefore, the above methodology adopted by the Respondent is illogical, arbitrary and illegal and hence the same cannot be approved and held to be correct. Accordingly, the claim of the Respondent that he had passed on benefit of Rs. 209 Crore as against the benefit of Rs. 204 Crore as has been shown in Exhibits-4 & 5 is fallacious and hence the same cannot be accepted.

114. The Respondent has further claimed that he has computed the benefit from 15.11.2017 to 30.06.2018 to correspond with the period

taken by the DGAP whereas it should have been taken from 15.11.2017 to 31.01.2018 in respect of the rate reductions which have been notified on 14.11.2017 and from 25.01.2018 to 30.06.2018 for the tax reduction which was notified on 25.01.2018. The above contention of the Respondent is illogical as the benefit has to be calculated till it is not passed on. It is apparent from the record and perusal of Annexure-14 & 15 attached with the Report dated 08.10.2018 that the Respondent has not given benefit of tax reductions till 30.06.2018 due to which the profiteered amount has been computed by the DGAP upto the above date. It is also on record that the Respondent has not only continued to charge the same MRPs which he was charging before the tax reductions but has also increased them post the above rate reductions. The Respondent has also not produced any evidence to prove from which date the benefit was passed on by him. Therefore, the period taken by the DGAP from 15.11.2017 to 30.06.2018 is correct and hence, the same cannot be restricted to the period which has been mentioned by the Respondent due his mere assertion.

115. The Respondent has also contended that he had met this Authority on 23.02.2018 and 26.03.2018 and explained the manner in which he has passed on the GST benefit pursuant to which he had submitted the letter dated 02.04.2018 (Exhibit-6). In this connection it would be relevant to mention that the Respondent had not met this Authority voluntarily. He was requested by this Authority to intimate how he had passed on the benefit of tax reductions as he happened to be one of the biggest manufacturers selling his products to Crores

of customers who were entitled to receive the benefit of tax reductions. It would also be pertinent to mention here that during the above meetings the Respondent had vehemently maintained that he had passed on the full benefit of tax reductions and at no stage he had disclosed that he had set aside an amount of Rs. 12.6 Crore on account of benefit which could not be passed on. He had also not sought guidance how to pass on the above benefit or adjust the expenses incurred on passing on of the benefit. The letter dated 02.04.2018 written by the Respondent was definitely an afterthought when the Respondent had realised that he had not passed on the benefit of tax reductions which he was legally bound to pass on and therefore, he had computed an amount of Rs. 12.6 Crore for the period from 15.11.2017 to 31.12.2017 and claimed it to have been set aside for passing it on the SKUs pertaining to the same product category in future. The above claim of the Respondent was incorrect as the set aside amount pertained to those customers who had already purchased the SKUs sold by the Respondent and hence it was not possible to pass the benefit to them and it could also not have been passed to the future customers as it did not pertain to them. Moreover, the Respondent had also proposed to pass more benefit than what was required to be passed on the SKUs belonging to the same product category, which he could not have done legally. Perusal of the above letter also shows that the Respondent had claimed to have passed on the above benefit by giving discounts to his distributors. However, as mentioned supra the Respondent had not given any discount on account of tax reductions. Charging of the

reduced rates of GST also does not amount to passing on the benefit as the Respondent was legally bound to charge the reduced rates of tax once they had been notified. He has also claimed that he had written letters to his distributors to pass on the benefit however, it is not understood how the distributors or the ultimate consumer would have got the benefit of tax reductions unless the MRPs were reduced and displayed on each SKU as has been mentioned above which could have been done by the Respondent only and not his distributors. The Respondent has himself admitted that he had no control on his retailers and hence his claim that the benefit has been passed on to the ultimate consumer is not correct. The retailer could also not have passed the benefit unless the MRPs were reduced and re-stickered by the Respondent keeping in view the rate reductions. Any advertisement given by the Respondent could not have resulted in passing on of the benefit unless the MRPs were re-fixed by the Respondent. The Respondent could also not have passed the benefit on one SKU in lieu of the benefit to be passed on the other SKU at the product category level as the benefit was to be passed on each SKU and not as per the convenience of the Respondent. Vide para 4.1 of the above letter the Respondent has claimed that the amount set aside would be passed on to the customers in future. However, the above benefit was required to be passed on to those customers only who had made purchases between the period of 15.11.2017 to 31.12.2017 and the Respondent could not have passed it on the purchases made after 31.12.2017. Hence, the above claim of the Respondent is incorrect. Therefore, the amount of Rs. 12.6 Crore set

aside by the Respondent has been arbitrarily calculated following a methodology which has already been held to be illogical, arbitrary and illegal and hence the above amount cannot be taken to have been correctly calculated and set aside. The Respondent had also not decided the amount to be set aside in respect of the Boiled Sugar Confectionery till 02.04.2018 although the rate of tax was reduced on 25.01.2018. The Respondent has also contended that he had spent an amount of Rs. 3.9 Crore on the unusable packing material, development of new cylinder for new packaging and advertisements which should be adjusted against the set aside amount. However, as has been submitted by the DGAP in para 20 of his Report dated 08.10.2018 the above expenses cannot be adjusted against the amount of benefit to reduce the entitlement of the consumers as he could have used the packaging material by fixing fresh stickers in terms of the letter dated 16.11.2017 supra. The expenditure incurred on the new printing cylinder and the advertisements can also not be adjusted against the above benefit as there is no such provisions in the CGST Act, 2017. The tax invoices enclosed by the Respondent with the above Exhibit also do not disclose that the benefit of tax reductions has been passed on as no comparison can be done on the basis of these invoices between the prices which were prevalent pre-GST rate reductions and post-GST rate reductions. Therefore, all the above contentions of the Respondent are incorrect and hence, they cannot be accepted.

116. This Authority on receipt of the letter dated 02.04.2018 of the Respondent vide its OM dated 10.04.2018 (Exhibit-7 Colly) had

advised the Respondent to provisionally deposit the amount of Rs. 12.6 Crore in the CWF to be constituted under Section 57 of the CGST Act, 2017. The above OM reads as under:-

"National Anti-profiteering Authority

Department of Revenue, Ministry of Finance,

Tower-I, 6th Floor, Jeevan Bharti Building,

Connaught Place, New Delhi

F.No. D-22011/NAA/17/2018/

Date: 10.04.2018

OFFICE MEMORANDUM

Sub: Deposit of the suo moto profiteering amount by M/s Nestle India Limited in the Consumer Welfare Fund -Reg.

With reference to M/s Nestle India Limited's (M/s Nestle) letter dated 02.04.2018, addressed to the Chairman, National Anti-profiteering Authority (NAA), I have been directed by the Chairman, NAA to advise M/s Nestle to provisionally deposit the amount set aside of Rs. 12.6 crore as on 31.12.2017, in the Consumer Welfare Fund to be constituted under Section 57 of the Central Goods and Services Tax Act, 2017. M/s Nestle are also directed to furnish the necessary documents/evidences to the Directorate General of Safeguards, so that the Investigation can be conducted expeditiously to determine

the actual amount of benefit of reduction in GST rate w.e.f. 15.11.2017 that has not been passed on.

(Samanjasa Das)

Secretary, NAA

10.4.2018

To.

M/s. Nestle India Limited,

Nestle House, Jacaranda Marg,

'M' Black, DLF City, Phase-I.

Gurugram - 122002, Haryana

Copy to:

1. Chairman, NAA for information.
2. Director General of Safeguards for information and necessary action"

117. The Respondent was also directed to furnish the necessary documents/evidences to the DGAP (then Director General of Safeguards) so that the investigation could be conducted to determine the actual amount of benefit that has not been passed on by the Respondent. The above OM was sent to the Respondent due to the fact that the Respondent had conceded in his letter dated 02.04.2018 that he could not pass on the benefit of tax reductions amounting to Rs. 12.6 Crore which amounted to admission of profiteering as per the provisions of Section 171 of the above Act. As this amount could not have been passed on to those customers who

had already bought the goods from the Respondent between the period from 15.11.2017 to 31.12.2017 and who were legally entitled to claim the above benefit and were also not identifiable hence the Respondent was asked to deposit the above amount in the CWF as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017. It was also necessary to find out whether the above amount computed by the Respondent as benefit of tax reductions was correct or not and therefore, the Respondent was directed to furnish the necessary documents/evidences to the DGAP who was empowered to investigate as per the provisions of Rule 129 (2) of the above Rules whether the above benefit has been passed on by the Respondent or not.

118. The Respondent has further contended that vide his letter dated 20.04.2018 (Exhibit-7) he had sought clarification and guidance to make the provisional deposit and adjustment of the expenses incurred from this Authority. In this connection it would be relevant to mention that the duties of this Authority have been clearly explained vide Rule 127 of the CGST Rules, 2017, according to which this Authority is neither a consultative nor an advisory body and hence there was no question of advising the Respondent on the issues raised by the Respondent in his above letter.

119. The Respondent has also stated that he had received a Notice dated 26.04.2018 (Exhibit-8) issued by the DGAP for initiation of investigation under Rule 129 of the CGST Rules, 2017 vide which he was directed to determine the total actual amount of the benefit with effect from 15.11.2017 that has not been passed on to the consumers

with the necessary documents/evidences. The above Notice was issued by the DGAP in terms of Rule 129 (3) of the above Rules and hence the same has been issued to the Respondent correctly as the Respondent had himself admitted to have resorted to profiteering. The Respondent has further stated that the DGAP had not taken cognizance of his letter dated 11.09.2018 (Exhibit-9) in which the methodology adopted by the Respondent to pass on the benefits of GST rate reductions, determination of the actual amount of benefit not passed on and the calculations to demonstrate that there has been no profiteering by the Respondent and other points were mentioned. However, perusal of the Report dated 08.10.2018 shows that all the issues raised by the Respondent in his above letter have been duly dealt with by the DGAP. The methodology and the basis of the computations has also been explained by the DGAP in the above Report and the details of the calculations of the profiteered amount in respect of both the tax reductions have been given in Annexure-14 and 15 of his above Report. The mathematical methodology adopted by the DGAP to calculate the profiteered amount is also logical and in consonance with the provisions of Section 171 (1) of the above Act. The DGAP was also not bound to follow the methodology adopted by the Respondent which has already been held to be incorrect. Hence, the above claims of the Respondent are incorrect.

120. The Respondent has also submitted that he had received communication dated 06.06.2018 (Exhibit-10) from this Authority on the constitution of the CWF and thereafter, he had suo moto

deposited the amount set aside in the above Fund in 2 tranches as follows:-

(i) 1st Tranche on 06.07.2018 aggregating to Rs. 15,32,86,055/- comprising a sum of Rs. 13,80,54,526/- that was set aside till 31.01.2018 with respect to the GST rate changes effective from 15.11.2017 and a sum of Rs. 1,52,31,529/- set aside till 31.03.2018 with respect to rate changes effective from 25.01.2018 and

(ii) 2nd Tranche on 21st August, 2018 of Rs. 1,25,46,668/- set aside for the period from April-June 2018 with respect to the rate change effective from 25.01.2018. (Total Amount Rs. 15,32,86,055/- + Rs. 1,25,46,668/- = Rs. 16,58,32,723/-).

In this connection it would be appropriate to mention that the above amount was not deposited by the Respondent suo moto but deposited on the specific direction of this Authority given vide OM dated 10.04.2018 as the Respondent had no intention to deposit the same in the CWF and wanted to pass it on to those customers who were legally not entitled to receive it, as is clear from his letter dated 02.04.2018 (Exhibit-6) mentioned above. The above amount was also computed as an afterthought as has been discussed in para supra. The seriousness of the Respondent to pass on the benefit can be gauzed from the fact the Respondent had not computed the benefit for the quarter 01.04.2018 to 30.06.2018 till 21.08.2018 when it was finally deposited in respect of the rate reduction which had occurred

on 25.01.2018 as is clear from his letters dated 06.07.2018 and 21.08.2018 (Exhibit-10 Colly).

121. It is also apparent from the record that the DGAP vide his Report dated 08.10.2018 has concluded that the allegation of profiteering by way of either increasing the base prices or by maintaining the same selling prices and by not reducing the selling prices of the products commensurately, despite a reduction in the GST rates stood confirmed against the Respondent to the tune of Rs. 100,98,03,096/- which shows that the Respondent has not reduced his prices as he was required to do and hence he had resorted to profiteering.

122. The Respondent has also submitted that vide his letter dated 02.04.2018 he had disclosed the methodology adopted by him for complying with the provisions of Section 171 (1) which was implicitly accepted by this Authority vide its OM dated 10.04.2018. The above claim of the Respondent is completely incorrect as it was nowhere mentioned in the above OM which has been reproduced above that the methodology mentioned in the letter dated 02.04.2018 has been accepted by this Authority. The Respondent cannot give such interpretation to the above OM of this Authority on his own to derive undue advantage. Had it been so this Authority would not have asked the DGAP to launch investigation to confirm whether the Respondent has passed on the actual amount of benefit of tax reduction or not.

123. The Respondent has further submitted that this Authority in some of its reported Orders has held that the computation of the profiteered amount has to be done on the basis of the facts of each case and no general methodology could be prescribed and the DGAP in his reply

dated 01.02.2019, in Para E has also followed the above principle therefore, the methodology adopted by the Respondent needed to be accepted. The above contention is not tenable as the Respondent has computed the amount of profiteering at the product category level whereas it was to be calculated at the level of each SKU so that the benefit was passed on to each buyer. He has also passed the above benefit in the case of some SKUs whereas he has not passed it on in respect of other SKUs. He has also adopted that methodology to compute the benefit of rate reductions which has been found to be illogical, arbitrary and illegal as has been mentioned supra and hence, the same cannot be accepted.

124. The Respondent has also argued that in respect of the price point products the points were in the multiples of Rs. 5/- like MRPs of Rs. 5/-, Rs. 10/-, Rs. 15/-, Rs. 20, Rs. 25/- and the price points below Rs. 5/- were Rs. 1/- and Rs. 2/- corresponding to the available coinage. For products sold at the price points, the option available was to pass on the benefit through extra quantity and reduction of MRP was not an option. In this connection it would be pertinent to mention that the Respondent had neither reduced the price point prices nor he had increased the quantity during the period of investigation as is clear from the perusal of Annexure-14 and 15 of the Report dated 08.10.2018. It is also clear from the example of MAGGI pack having MRP of Rs. 5/- in respect of which the rate of tax was reduced from 18% to 12% that the Respondent had neither reduced the MRP nor increased the quantity and had continued to deny the benefit of tax reduction to millions of customers. Similar is the case in respect of

the NESCAFE Classic single serve pack having MRP of Rs. 2. Hence, the above claim of the Respondent is not tenable.

125. The Respondent has further argued that the packaged food products have MRPs, which were in multiples of Re. 1/- however, coinage below 25 paise has been scrapped and 50 paise coinage was not available. The MRPs were in the multiples of Rs. 1/- such as 1, 2, 5 and 10 etc. and the products did not have MRPs with coinage such as Rs. 1.84, Rs. 4.50, Rs. 4.75 and Rs. 9.25 etc. and in case the GST benefit involving coinage was passed on, it was unlikely to reach the end consumer. He has also cited the case of MAGGI Noodles pack bearing MRP of Rs. 5/- per pack and claimed that to pass on the benefit the MRP was required to be reduced to Rs. 4.75 and in the absence of 25 paise tender, reducing MRP to Rs. 4.75 was not a feasible option. The above argument of the Respondent is not justified as it was for the customer to provide the required amount of price and not for the Respondent to draw any adverse inference on behalf of the customer. Moreover, the customer could have paid the above amount through e-payment platforms. It would also be relevant to mention here that the above pack is purchased by the most vulnerable section of society who have been denied the benefit of tax reduction due to arbitrariness exercised by the Respondent. The above strategy adopted by the Respondent appears to be based on his intention to enrich himself at the expense of the customers. His claim that the cash transactions predominate and the E-Commerce was less than 1% of the total FMCG sales as per the report published in The Economic Times on 19.04.2018 (Exhibit-12) cannot snatch the

benefit which was due to the general public. The above claim of the Respondent is also against the public policy which aims at encouraging online payments. Moreover, the above article emphasizes the issue of cash crunch in the FMCG sector which could be covered by online payments. Hence, the claim made by the Respondent on the basis of the above article is diametrically opposite to what has been written in it. Therefore, the above contentions of the Respondent are not tenable.

126. The Respondent has also averred that in respect of the single serve packs, more quantity was not a viable option as it would change the taste parameter. He has also cited the case of NESCAFE SUNRISE which is a single serve sachet of 2.2 Gms. bearing MRP of Rs. 2/-. However, the above claim of the Respondent is not based on any established or un-rebuttable evidence as a customer might use two sachets or use even half a sachet in one serve and may also purchase more than one sachet at a time. Moreover, the increase in the quantity would have been miniscule which would not have much difference to the taste. Further, in case the Respondent was not able to increase the quantity he should have reduced the price commensurate to rate reduction. Therefore, the above claim of the Respondent is farfetched and is incorrect.

127. The Respondent has also contended that in the case of KITKAT the manufacturing involved the length of wafer and the use of mould for size of the product and for changing the wafer length a new mould was required which would take 6 to 9 months as per the statement of Mr. Jagdeep Singh Marahar, Factory Manager as per

the Exhibit-21 of the rejoinder dated 12.04.2019 filed by the Respondent. Perusal of the above Exhibit shows that the Respondent under the garb of changing of the mould has not passed on the benefit of tax reduction. As there is no evidence of his having changed the mould on record it appears that the Respondent has not passed on the benefit yet.

128. The Respondent has also placed reliance on Rule 6 (1) (e) and (m) of the Legal Metrology (Packaged Commodities) Rules, 2011 as it was existing on 01.01.2018 and contended that the retail sale price (MRP) of a packaged commodity could only be in Rupees or in fraction of 50 paise and any package having MRP which has fractions such as 15 paise, 25 paise or 60 paise etc. would be violation of the above Rules. In this connection it would be relevant to mention that the Respondent has to act in consonance with the above Rules and in case MRP of any of his products is fixed in the fractions he has to round off the same. Therefore, the above contention of the Respondent is wrong as he cannot act in contravention of the law.

129. The Respondent has further contended that the benefit was to be passed on immediately and the Respondent could not deposit it in the CWF. However, it is apparent from the perusal of Annexure-14 and 15 of the Report dated 08.10.2018 that the Respondent has not passed on the benefit till 30.06.2018 even after a lapse of a period of more than 6 months therefore, he has not passed on the benefit immediately. Rule 133 (3) (c) of the CGST Rules, 2017 which the Respondent has himself quoted, clearly states that the benefit has to be deposited in the CWF in case the recipient was not identifiable.

Since, the ultimate recipient was the ordinary consumer and not the distributor or the retailer, who had been denied the benefit of rate reductions by the Respondent and who was not identifiable, the above benefit was required to be deposited in the CWF. Moreover, the benefit could also not have been passed on to those customers who had already purchased the goods manufactured by the Respondent before the Respondent had claimed to have reduced his rates and therefore, also the above amount was required to be deposited in the CWF.

130. The Respondent has also stated that the first preference of the Respondent was to pass on the benefit by reduction in prices in the invoices itself by reduction in the MRPs and accordingly, he has passed on benefit of Rs. 192 Crore. However, as has been discussed above there is no evidence that the Respondent has reduced his prices commensurate with the tax reductions as is clear from the perusal of Annure-14 and 15 of the Report of DGAP till 30.06.2018 and has even increased the same in respect of a number of products. The above amount of Rs. 192 Crore has also been wrongly calculated by the Respondent by applying arbitrary methodology and hence the above claim made by the Respondent is incorrect.

131. The Respondent has also stated that where it was not practical to pass on the benefit at SKU level, additional benefits were passed through other SKUs at the same product category level. The Respondent has also quoted that in the case of the MAGGI Noodles pack having MRP of Rs. 5/-, the MRP was required to be reduced to Rs. 4.75 and due to the absence of 25 paise tender, he had passed

additional benefit on the MAGGI Noodles pack having MRP of Rs. 12/- which was reduced to Rs. 11/- although the MRP was required to be reduced to Rs.11.39 only. The above claim of the Respondent is wholly illegal and unreasonable as he was bound to pass on the above benefit to the buyer who had purchased or wanted to purchase the SKU having MRP of Rs. 5/- and he could not have passed the benefit to another buyer who had purchased the pack having MRP of Rs. 12/-. As per the provisions of Section 171 (1) of the CGST Act, 2017 the benefit has to be passed on to each customer on every supply and the Respondent could not have denied the benefit to an eligible customer arbitrarily as per his own convenience as he was bound to take note that the Central and the State Governments have given the above benefit by sacrificing their own revenue in the interest of the general public and the Respondent has no right to deny it to a particular customer at the expense of another customer when the above benefit is not being paid out of his own account. The above action of the respondent amounts to violation of Article 14 of the Constitution as it denies equal treatment to a customer in comparison to another customer as well as provisions of Section 171 (1) of the CGST Act, 2017.

132. The Respondent has further stated that in the case of 6 SKUs (Exhibit-13 of his submissions dated 07.12.2018) relating to the product category of Instant Coffee, the benefit accruing due to the rate reduction with effect from 15.11.2017 was offset by the increase in the incidence of tax when GST was introduced on 01.07.2017 and hence the benefit was not passed on. The above ground cited by the

Respondent is untenable due to the reason that the Respondent was legally required to pass on the benefit of tax reduction notified w.e.f. 15.11.2017 and he had no reason to not pass it on the above ground. The Respondent had taken a conscious business call to not increase his rates w.e.f. 01.07.2017 when the GST had come in to force but he could not force his choice on the customers to deny them benefit of tax reduction. The above act of the Respondent amounts to violation of the provisions of Section 171 (1) of the CGST Act, 2017.

133. The Respondent has also submitted that the benefit to be passed was determined for each product category based on the sales contribution of the SKUs in that product category with due consideration to the lower priced SKUs. As discussed above the above methodology adopted by the Respondent was completely illogical, arbitrary and against the provisions of Section 171 (1) of the above Act which required the Respondent to pass on the benefit on each SKU so that it could reach every buyer. There was no necessity of determining the sale contribution of the SKUs in the product category by aggregating the actual sales of the SKUs with their planned sales with annualized impact of price changes and new products. The above methodology is also illegal as it denies passing of the above benefit to every recipient without discrimination and hence the same cannot be accepted. In case the Respondent was not able to pass on the benefit immediately or any other ground he could have deposited the same in the CWF. The Respondent was not being asked to perform the impossible and hence the legal maxim *"lex non cogit ad impossibilia"* does not apply in his case.

134. The Respondent has also submitted break-up of the amount of Rs. 192 Crore vide revised Exhibit-5 attached to his submissions dated 20.12.2018. Perusal of the above Exhibit shows that the benefit was calculated for each product category based on the sales contribution of the SKUs in that product category with due consideration to the lower priced SKUs. As discussed in para supra the above methodology adopted by the Respondent runs contrary to the provisions of Section 171 (1) of the above Act and hence the above amount cannot be taken as the amount of benefit passed on. Similarly the amounts of Rs. 16.6 Crore and Rs. 209 Crore which have been claimed to have been set aside and passed on as benefit in the above Exhibit cannot be construed to have been correctly computed and passed on as the methodology adopted to compute them is inherently flawed.

135. The Respondent has further submitted that where it was not possible to pass on the benefit by price reductions he has passed it by commensurately increasing the grammage or quantity of the SKU. The first such claim was made by the Respondent vide Exhibit-5 attached to his submissions dated 07.12.2018 in which the amount passed as grammage benefit was included in the amount of Rs. 209 Crore which was claimed to have been passed on by the Respondent as overall tax benefit. However, details of the amount of grammage benefit given and the amount passed were not explained in the above Exhibit. The names of the SKUs on which the above benefit was passed were also not mentioned by the Respondent in his above submissions. He had also not mentioned the amount of benefit which

was required to be passed on these SKUs and the amount of quantity which was increased by him in respect of each SKU to pass on the above benefit. Therefore, there was no ground to consider his above contention.

136. The next claim was made by the Respondent vide pages 2-32 of his submissions dated 20.12.2018 attached with Exhibit-5 in which the details of the grammage benefit were given in respect of the 27 SKUs (Column B of the Chart) including 23 SKUs which were impacted by rate reductions which had come in to force w.e.f. 15.11.2017 and 4 SKUs which were impacted by the rate reduction of 25.01.2017. The dates from which the grammage benefit was to be given have been mentioned in Column C. The dates from which the grammage benefit was passed on were also mentioned in Column D of the above Chart. Perusal of the dates mentioned in the above Column shows that the grammage was increased in the months of November, December 2017 and January 2018 however, no credible evidence like production logs or tax invoices were submitted by the Respondent to justify that the grammage had been increased from the above dates and hence the above dates cannot be relied upon.

137. The percentage of extra grammage which was required to be passed on as per the claim of the Respondent has been mentioned in Column E of the above Chart submitted on 20.12.2018 (page 2-3). However, the computation of above grammage has been done by the Respondent by applying the methodology which has already been held to be incorrect and illegal and hence the above computation of grammage made by the Respondent cannot be held to be correct. It

is also apparent from the perusal of the details of the extra grammage given by the Respondent that it has been calculated as 7.8% in respect of the first 20 SKUs and 5.1% in respect of rest 7 SKUs which is again incorrect as the grammage cannot be the same in respect of all these SKUs as it will vary on account of the amount of the benefit to be passed on which would further depend on the price of the SKU and hence it cannot be same in respect of all the SKUs as their prices are not similar. Further, the percentage shown against SKU No. 1 to 20 is 7.8% which exactly coincides with the percentage of 7.8% which has been computed by the Respondent in respect of product categories of 'Chocolate Products' and 'Instant Coffee Products' as has been mentioned in Exhibit-5 of the submissions dated 20.12.2018, to which product categories these SKUs belong. The extra benefit of 5.1% shown in respect of the SKUs mentioned at Sr. No. 21 to 27 is equal to the percentage of 5.1% which has been computed for the product category of 'Instant Noodles & Pasta' as per Exhibit-5, to which these SKUs pertain. Therefore, there is no doubt that the percentage benefit of grammage has been computed at the product category level whereas it was to be calculated at the SKU level. Therefore, the benefit of grammage computed by the Respondent in Column E of the Chart prepared by the Respondent is incorrect and hence it cannot be allowed.

138. The Respondent has also given details of the extra grammage actually passed on in respect of the above 27 SKUs vide Column F of the above Chart. Perusal of this Column shows that different percentages have been mentioned in this Column which are either

higher or lower than the percentages shown in Column E which shows that the Respondent has not passed on benefit of 7.8% or 5.1% in the case of even a single SKU. Therefore, it is established that the commensurate reduction has not been passed on by the Respondent against each SKU and he has tried to set off the higher benefit with the lower benefit which is wrong and illegal as per the provisions of Section 171 (1) of the above Act. Accordingly, the claim of the Respondent made in Column G of the Chart that commensurate benefit has been passed is misleading and incorrect.

139. The Respondent has also attached photographs of the SKUs as Annexure-1 to 27 with his submissions dated 20.12.2018 (pages 4 to 32), as has been mentioned in Column H of the above Chart claiming that the grammage has been increased. Perusal of these photographs shows that the grammage pre and post passing on of the rate reduction benefit has been highlighted in them but nowhere the dates from which the grammage was increased have been shown in them. The date pre tax reduction has been claimed as 15 Nov. 2017 and the date from which the grammage benefit was passed has been shown as 05 Jan 2018 in Annexure-3 but in Column D of the above Chart the date of passing on of the above benefit has been shown as 16 Jan 2018 which casts serious doubts on the veracity of the claim made by the Respondent. Since, there is no corroborative evidence except for the mere assertion of the Respondent the above claim of the Respondent that the grammage benefit was passed cannot be admitted.

140. The Respondent in Column No. I of the above Chart has shown the taxable turnover as Rs. 218.7 Crore, vide Column No. J the set aside and deposited amount as Rs. 13.2 Crore and the benefit passed on through invoices as Rs. 2.6 Crore as per Column K. However, as has been discussed above the benefit has been computed at the product category level and not at the SKU level and hence, the same cannot to taken to be correct.

141. The Respondent has also given the details of the grammage benefit in respect of all the 7 product categories vide pages 33 to 36 attached with his above submissions dated 20.12.2018 and also sales contribution and GST benefit passed on in respect of Wafer containing Chocolate, Noodles & Pasta and Seasoning product categories. However, as has been explained supra all these computations have been made at the product category level and not at the level of each SKU and hence the above calculations cannot be considered on account of passing on of the benefit in terms of Section 171 (1) of the above Act.

142. The next grammage benefit claim was made by the Respondent vide Exhibits-23 of his submissions dated 02.05.2019. Vide this Exhibit the Respondent has claimed that he has passed on benefit of 54 Crore by increasing the grammage or quantity by Rs. 5.5 Crore in respect of the Chocolate product category, by Rs. 3.1 Crore in respect of Instant Noodles & Pasta Category, by Rs. 33.2 Crore for the Wafer containing Chocolate category, by 4.3 Crore in respect of Instant Coffee product category, by Rs. 6.7 Crore for the Curry Paste, Mixed Condiments & Seasoning Category and by Rs.

1.2 Crore for the Sugar Boiled Confectionary (Total Rs. 54 Crore). However, the above claim of the Respondent is not correct as the benefit was to be passed on at the SKU level and not at the level of product category and hence the above claim of the Respondent cannot be accepted.

143. Vide Exhibit-24 attached to his submissions dated 02.05.2019 the Respondent has given the details of the grammage benefit computed by him as per Exhibit-23 as well as the benefit passed on corresponding with the period of Report of the DGAP w.e.f. 15.11.2017 to 30.06.2018. Perusal of the Exhibit-24 shows that no grammage benefit has been passed in respect of the categories of Sweetened Condensed Milk (page 5) and Nutrition Supplement (page 7) coinciding with the period of the Report of the DGAP whereas grammage benefit has been passed in respect of the categories of Noodles & Pasta, Wafers containing Chocolate, Instant Coffee, Seasoning and Boiled Sugar Confectionary (pages 6, 8, 9, 10, 11 and 12). However, it has been admitted by the Respondent in the remarks that the grammage benefit has been computed on the product category level and in case the benefit could not be passed in respect of some SKUs higher benefit was passed on the other SKUs. It is apparent from the above that the grammage benefit has not been passed at the SKU level and hence the above computations of the Respondent are incorrect and hence they cannot be accepted.

144. The Respondent Vide Exhibit-25 attached with his submissions dated 07.05.2019 has again claimed that he has passed grammage benefit in respect of 77 SKUs the names of which have been

mentioned in Column No. B of the above Exhibit coinciding with the period w.e.f. 01.11.2017 to 30.06.2018 i.e. the period taken by the DGAP during the investigation. The total amount of benefit passed by way of increase in the grammage has been mentioned in Column F as Rs. 53,98,75,272/- for all the eight product categories. Higher benefit than the rate reduction has been claimed to have been passed on in respect of 34 SKUs as has been mentioned in Column G. Less than the required benefit passed has been shown in Column No. H of the above Exhibit in respect of 31 SKUs. It is clear from the above details that the grammage benefit has again been computed at the product category level and not at the SKU level and hence the same has not been passed uniformly on all the SKUs which is not in consonance with the provisions of Section 171 (1) of the CGST Act, 2017. It will also be relevant to mention here that the benefit is required to be passed on to every consumer on each SKU and a customer cannot be compelled to buy all the SKUs in a particular product category in order to get the benefit of tax reduction. Therefore, the above claim of the Respondent cannot be accepted.

145. During his last submissions filed on 28.06.2019 the Respondent vide Exhibit-29 has claimed the grammage benefit as Rs. 14,86,43,439/- in Column D. However, no details of the SKUs have given in the above Exhibit showing the amount of grammage and the amount passed on each SKU. Vide Exhibit-31 he has given two examples of calculation of the grammage benefit claimed in respect of MUNCH Maha 32 (24X11.1 g) 10% and KIT KAT 2F Mini (36X13.2 g) 3%. In respect of Munch Maha mentioned above the profiteering

computed by the DGAP has been shown as Rs. 4.2 Crore by the Respondent whereas as per the Annexure-14 of the DGAP Report dated 08.10.2018 the profiteered amount has been shown as Rs. 4,16,63,810/-. In respect of KIT KAT mentioned above the profiteering computed by the DGAP has been mentioned as Rs. 0.6 Crore whereas as per Annexure-14 of the Report the profiteered amount comes to Rs. 86,54,924/-. Since, the details of the grammage benefit passed on each SKU have not been explained in the above Exhibit and the amount claimed to have been passed on account of the grammage benefit has been computed on the product category level and not at the SKU level and there is also no corroborative and irrebuttable evidence produced by the Respondent, hence the above amount cannot be allowed to have been passed on account of the benefit of tax reductions.

146. Although the DGAP in his Report dated 08.10.2018 has pointed that the provisions of Section 171 (1) of the CGST Act, 2017 require that the benefit of tax reduction can be passed on only by commensurate reduction in the prices and by no other method, however, this Authority with an intention to ensure that the benefit of tax reductions has been passed on by the Respondent and has not been pocketed by him, had allowed him to produce necessary evidence to support his claim of passing on of the benefit by commensurate grammage increase or increase in the quantity. However, inspite of the adequate opportunity, as has been discussed above, the Respondent has failed to establish that he has passed on the benefit of tax reductions by increase in the grammage or quantity as per the provisions of Section

171 (1) of the CGST Act, 2017 and hence the same cannot be allowed.

147. The Respondent has also referred to the supplementary Reports dated 07.05.2019 and 11.06.2018 filed by the DGAP and stated that the DGAP's above Reports have not addressed the issue of benefit of Rs. 192 Crore passed on by the Respondent based on the methodology followed by him and hence, the methodology followed by him and the benefit passed on has attained finality and should form the basis to determine if there has been profiteering. However, perusal of the above Reports shows that the DGAP has computed the benefit of tax reduction which has not been passed on or the amount of profiteering done by the Respondent as per the provisions of Section 171 (1) of the above Act on each SKU. He was not required to compute the benefit as per the mathematical methodology adopted by the Respondent which was wrong and illogical and hence the amount of Rs. 192 Crore claimed to have been passed on by the Respondent and the methodology adopted by the Respondent to compute it cannot be taken to have attained finality on the mere assertion of the Respondent.

148. The Respondent has also contended that the DGAP has also not raised any objection against the estimated amount of Rs. 204 Crore the benefit of which has been passed on and the actual benefit passed of Rs. 209 Crore and therefore, the above amounts should be considered as final. The above contention of the Respondent is far-fetched as the DGAP was not required to compute the benefit as per the methodology employed by the Respondent as it was arbitrary and

illegal. It is also clear from his Report date 08.10.2019 that the DGAP has used a mathematical methodology which vastly differs from the methodology used by the Respondent, which is also more logical and in consonance with the provisions of Section 171 (1) of the above Act. Since, the DGAP has not used the methodology adopted by the Respondent it amounts to raising objections against the methodology used by the Respondent. Hence, both the above amounts cannot be taken to be correct and final as per the wishes of the Respondent as the mathematical methodology adopted by the Respondent to compute the above amounts was flawed.

149. The Respondent has further contended that he has adopted such a methodology that the benefit was duly passed on to the recipients and the SKUs where the benefit has been passed by extra grammage or no benefit has been passed or proportionate benefit has not been passed, was due to prevalent practices, practicalities and legal reasons. He has also given the details of the key SKUs viz. MAGGI Noodles Masala 35 Gms., KIT KAT Rs. 10/- and NESACAFE SUNRISE Rs. 2/- (70/30 Recipe) SKUs and cited the reasons how the commensurate benefit could not be passed and how it was passed on other SKUs. The issues pertaining to these SKUs have already been discussed above and the reasons given by the Respondent have not been found to be justified and correct and hence the methodology adopted by the Respondent to pass on the above benefit cannot be accepted.

150. The Respondent has also submitted that on a number of SKUs across the product categories he has passed higher benefit to offset

the SKUs where it was not practical to pass any/ proportionate benefit and he had explained the methodology followed by him vide his letter dated 02.04.2018 to this Authority which was duly considered by it and accepted vide its OM dated 10.04.2018. In this connection it would be appropriate to state that the methodology mentioned by the Respondent runs contrary to the provisions of Section 171 (1) of the above Act which required the Respondent to pass on the benefit on each SKU whereas the Respondent has not passed on the same on each SKU and instead has passed it on as per his own convenience which amounts to contravention of the above Section as well as Article 14 of the Constitution. The Authority at no stage had accepted the above methodology vide OM dated 10.04.2018 and had asked the DGAP to conduct investigation to determine the actual amount of benefit which had not been passed on by the Respondent and it has been established through the investigation conducted by the DGAP that the Respondent has profiteered more amount than what he has set aside. In case this Authority had accepted the methodology adopted by the Respondent it would not have asked the DGAP to conduct further investigation. Hence, the claim made by the Respondent in this regard is incorrect.

151. The Respondent has further submitted that he had met the Authority on 23.02.2018 and 26.03.2018 to discuss the manner in which the Respondent had passed on the benefit and vide his letter dated 02.04.2018 had recorded his above discussions by stating that he had passed the commensurate benefit at an aggregate product category level as there were practical difficulties in passing on the

benefit and set aside an amount of Rs. 12.6 Crore on the Chocolate products, Instant Noodles and Pasta, Wafer containing Chocolate, Instant Coffee products and Curry Paste, Mixed Condiments and Seasoning products for passing on the benefit on other products. As already mentioned supra the Respondent had not met this Authority on his own as he was asked by this Authority to intimate how he had passed on the benefit of both the rate reductions. The Respondent had persistently claimed during these meetings that he had passed on the full benefit and had at no stage admitted that there were practical difficulties in passing on the benefit and hence, he has set aside an amount of Rs. 12.6 Crore on account of the benefit which he could not pass. The above admission of the Respondent was an afterthought as he had realised during the discussions that he had not passed on the benefit and hence he had set aside the above amount to justify what he had wrongly claimed. The Respondent had also not volunteered to deposit the above amount in the CWF inspite of the fact that he could not have passed the above amount to the customers who had already bought his goods at the higher prices as he had denied them the benefit. These customers were also not identifiable. The Respondent wanted to pass on the above amount in future which he could not have legally done. The above actions of the Respondent show that he had no sincere intention of passing on the above benefit and the claims made by him in this regard are wrong and untenabale.

152. The Respondent has also stated that within each product category for each Stock Keeping Unit (SKU) where it was not practical to pass

on the benefit for reasons such as coinage, the quantum to be set aside has been calculated exactly in the same manner as was used for passing on benefit on 'New Stocks'. As already mentioned supra the Respondent could not have refused to pass on the benefit due to coinage issues as he was legally bound to pass on the same as it was for the customers and not for him to pay the price. He was also bound to the follow the Legal Metrology (Packaged Commodities) Rules, 2011 while rounding off the MRPs of his products. Hence, the above argument of the Respondent is illegal and incorrect.

153. He has further stated that on the stocks available as on 15.11.2017 and the stocks produced after that date having MRP/quantity fixed as on 15.11.2017 till the new stocks were available, the amount equivalent to the benefit to be passed on, has been kept aside and the amount accumulated on that product category net of compliance costs would be passed on as benefit on the SKUs in that particular product category level. As already discussed above the Respondent was legally bound to re-fix the MRPs of his products w.e.f. 15.11.2017 and 25.01.2018 respectively to pass on the benefit of tax reductions and should have stamped/re-stickered/printed them as per the provisions of the letter dated 16.11.2017 mentioned above. Since, the Respondent has not complied with the directions given in the above letter hence he has acted in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 as well as the Legal Metrology Act, 2009. He could also not have passed the benefit on another SKUs in the same product category as he was required to pass it on each impacted SKU so that the benefit could reach the buyer who

had purchased that particular SKU. The Respondent was also not entitled to adjust the cost incurred by him on the redundant packaging material as he could have used it by stamping or affixing stickers. He was also not entitled to adjust the amount spent by him on the purchase of the new cylinder for printing or the amount spent on issuing the advertisements as the above costs could not be adjusted against the tax reduction benefit which was only to be passed on to the customers as per the provisions of Section 171 (1) of the above Act. Therefore, the above pleadings of the Respondent cannot be accepted.

154. The Respondent has also contended that he was in the process of passing on the 'set aside benefit' at the same product category level but after his meeting with this Authority on 23.02.2018, the same was put on hold pending discussions. In this connection it is made absolutely clear that the Respondent had never admitted during the above meeting that he had set aside the above amount as his repeated stand was that he has passed on the full benefit and nothing remained to be passed on. Moreover, the Respondent could not have passed on the above amount to those customers who had already purchased his goods and to whom he had denied the benefit. Hence, the above contention of the Respondent is bereft of logic and hence, it cannot be accepted.

155. He has further contended that as per the directions of this Authority given vide OM dated 10.04.2019 the DGAP was required to investigate only the quantification of the amount set aside for the GST rate reductions effective from 15.11.2017 till January, 2018 and for

the rate reduction effective from 25.01.2018 till June, 2018 and any investigation carried beyond the above periods was beyond the above directions. In this regard it would be appropriate to mention that this Authority had not given any direction to the DGAP vide the above OM to restrict the period of investigation upto the above periods. As per the provisions of Section 171 (1) of the above Act, the DGAP was required to carry out his investigation till the date upto which the benefit was not passed on by the Respondent. The DGAP can still investigate the Respondent in case he has not passed on the benefit beyond 30.06.2018. Since, the veracity of the set aside amount was required to be established it was incumbent on the DGAP to investigate what was the actual amount which the Respondent had not passed. Hence, the above contention of the Respondent is incorrect.

156. He has also claimed that the investigation done by the DGAP was in pursuant to the direction of this Authority relating to the provisional deposit of the amount set aside and to determine the actual amount of benefit of reduction that had not been passed on and hence, the methodology disclosed by the Respondent to this Authority had to be followed by the DGAP and the DGAP could not have invoked Section 129 of the CGST Act for investigation. In this connection it would be relevant to mention that there was no direction to the DGAP given by this Authority that he should limit his investigation to the deposit of the set aside amount. As is evident from the perusal of the Reports furnished by the DGAP the amount set aside by the Respondent has been wrongly calculated. The direction given was to compute the

actual amount of benefit which had not been passed on by the Respondent. Therefore, the DGAP was required to compute the above benefit by adopting reasonable and logical mathematical methodology which he has done by comparing the pre and post reduction prices of each SKU. The DGAP was not bound to follow the wrong methodology adopted by the Respondent as it was arbitrary and illegal. He was required to carry out the investigation as per the provisions of Rule 129 of the above Rules which he has done in the present case.

157. The Respondent has further claimed that the DGAP has submitted the Report dated 08.10.2018 based on his own understanding without seeking any explanation from the Respondent. The above claim of the Respondent is wrong as the DGAP had sought repeated explanations and also obtained data from the Respondent vide Annexure-6 and various e-mails which was furnished by the Respondent vide Annexures-5, 8, 9, 10, 11 and 12 attached with the Report dated 08.10.2018. The DGAP was not bound to interpret the data supplied by the Respondent as per the wishes of the Respondent and hence the above arguments advanced by the Respondent are irrelevant.

158. He has also submitted that the impugned Report despite specifically pointing out that this Authority had passed directions for provisional deposit of the amount set aside and investigation to verify the same, as per the modality disclosed in letter dated 02.04.2018, the DGAP has not followed the methodology adopted by the Respondent by ignoring the directions of this Authority. The above claim of the

Respondent is not correct as no direction was passed to restrict the investigation to the set aside amount and the methodology adopted by the Respondent as per OM dated 10.04.2018 and hence the above claims of the Respondent are not tenable.

159. The Respondent has further submitted that the DGAP has applied wrong interpretation of Section 171 of the CGST Act by stating that the benefit to be extended to the consumer on account of reduction in the rate of tax has to be in absolute terms and there were no other means of passing the same. The above interpretation of the DGAP is correct as per the plain reading of the provisions of the above Section and hence, the claim of the Respondent made in this regard is not correct.

160. The Respondent has also pleaded that disallowance of passing of the benefit by extra quantity and passing of the benefit at product category level was without basis and beyond the scope of the direction of this Authority. As has been discussed above no direction was passed by the Authority to consider the extra quantity as well as the passing on the benefit at the product level as they did not fall within the purview of Section 171 (1) of the above Act and hence the above argument of the Respondent is not correct.

161. The Respondent has also pointed out wrong inclusion of 109 SKUs not impacted by the rate reductions notified on 15.11.2107 or 25.01.2018 amounting to Rs. 10.9 Crore as per Exhibit-14 attached to his reply dated 07.12.2018. He has also furnished list of 13 SKUs impacted by the rate reduction notified on 25.01.2018 which have been wrongly considered in the calculation of rate reductions notified

on 15.11.2017 amounting to Rs. 30 Lakh as per Exhibit-15 attached to his reply dated 07.12.2018. In this connection it would be relevant to mention that the DGAP has re-computed the amount of the benefit and excluded the amount which he had computed on the non-impacted products and has also reduced the amount of benefit on those SKUs which were included in the tax reductions effective from 15.11.2017 although rate was reduced on them on 25.11.2018. The above claims made by the Respondent have been admitted by the DGAP vide his supplementary Report dated 15.03.2019 and he has revised the contents of Annexure-14 and 16 of his Report dated 08.10.2018 and intimated that the profiteering amount was Rs. 85,30,77,868/- instead of Rs. 96,55,64,579/- in respect of the rate reductions which were notified w.e.f. 15.11.2017. However, he has not revised the Annexure-15 pertaining to the rate reduction effected on 25.01.2018 as no correction was required to be made in it. Accordingly, he has revised the total profiteering amount as Rs. 89,73,16,384/- instead of the original amount of Rs. 100,98,03,096/- reducing the profiteering amount by Rs. 11,25,06,712/-. He has also revised the State wise profiteering vide Annexure-16 of his Report dated 15.03.2019. Therefore, the above contention of the Respondent stands admitted by the DGAP.

162. He has also claimed that the DGAP has wrongly included the GST amounting to Rs. 9,75,18,342/- (Annexure-29 attached to his submissions dated 28.06.2019) in his calculations of the profiteered amount which he had already deposited with the Government. However, as far as the issue of including the GST charged by the

Respondent in the profiteered amount is concerned the DGAP has correctly included it in the profiteered amount as the Respondent has not only charged additional price from his customers which they were legally not bound to pay as they were entitled to the benefit of tax reductions but he has also forced them to pay additional GST on this illegally charged price which they should not have paid. Had he not charged extra GST the customers would have paid less price and thus got the benefit of tax reductions. The Central as well as the State Governments had sacrificed their own tax revenue to benefit the consumers by these tax reductions which the Respondent had denied them and thus, defeated the very aim of passing on the benefit of tax reductions. Therefore, the illegally charged additional GST has been rightly included in the profiteered amount by the DGAP.

163. He has also submitted that after adjusting the amount of Rs. 16.58 Crore and the amounts mentioned above the balance alleged profiteered amount was Rs. 61.3 Crore due to ignoring of passing on of the benefit by (a) more grammage (b) passing of the benefit at the product category level, (c) by applying wrong base price and by (d) ignoring the expenses incurred on changeover of Rs. 3.2 Crore. As has been discussed above the profiteered amount has been re-computed by the DGAP as Rs. 89,73,16,384/- which is correct. All the claims made by the Respondent vide Sr. No. (a) to (d) have been carefully considered by us and found to be untenable as has been explained above and hence they cannot be accepted.

164. The Respondent has further submitted that the DGAP's Reports dated 01.02.2019 and 15.03.2019 had considered only the errors in

respect of profiteered amount of Rs. 10.6 Crore and Rs. 30 Lakh and the other errors have not been examined by the DGAP and the same should be considered by this Authority. Perusal of the above supplementary Reports of the DGAP and the errors claimed to have been made by the DGAP shows that all such errors have been duly considered by the DGAP and he has already revised the profiteered amount and therefore, nothing more is to be considered by this Authority.

165. The Respondent has also averred that the DGAP has not considered the benefit passed on by way of more grammage (extra quantity) at the SKU level amounting to Rs. 14.86 Crore and he has wrongly included the GST estimated to be Rs. 9.75 Crore and after adjusting the amount of suo moto deposit of Rs. 16.58 Crore and the amounts wrongly included, the balance profiteering was on account of the SKUs considered in the impugned Report, where the methodology for passing on the benefit was ignored during the calculation. He has also submitted his comments vide Exhibit-29 on Annexure-14 and Annexure-15 of the impugned Report and also attached Exhibit-30 which showed State wise break up of the suo moto deposit of the amount in the CWF aggregating to Rs. 16,58,32,723/-. As already discussed above the above amounts were wrongly computed, the GST was wrongly charged and the set aside amount was incorrectly computed and hence the above contentions of the Respondent cannot be accepted.

166. The Respondent has also claimed that his invoices post reduction in the GST rate indicated the benefit passed on the relevant product as

a discount bearing Code Z368 and sample invoices were annexed as Exhibit-6 to his reply dated 07.12.2018. He has further claimed that where the discount was on account of the GST rate reduction, code Z368 has been indicated. As has been discussed above the Respondent was required to pass on the benefit by reducing his MRP in respect of each SKU sold by him and not by offering discounts at the product level. Moreover, the Respondent had also not passed on the benefit of tax reductions by way of discounts as is evident from the Report dated 08.10.2019 of the DGAP. Therefore, the above claims of the Respondent cannot be accepted.

167. The Respondent has also contended that in para 21 of his Report the DGAP has observed that for calculating profiteering, the average base prices of supplies made to each channel of suppliers has been considered separately during the pre rate reduction period which was incorrect as the profiteering has to be examined only on a comparison of the actual sale prices of the products charged to the recipients for the pre rate reduction period and for the post rate reduction period. The above contention of the Respondent is fallacious as there was no other method of comparing the pre-reduction prices with the post reduction pieces to arrive at the amount of benefit or the profiteered amount since the prices charged by the Respondent were different for all the three channels through which the Respondent was supplying his products. The DGAP has computed the pre rate reduction average prices from 01.11.2017 to 14.11.2017 in respect of the rate reductions which had occurred on 15.11.2017 and w.e.f. 01.01.2018 to 24.01.2017 for the rate reduction

which had been effected from 25.01.2017. Both these periods have been considered by the DGAP as they give accurate measure of the pre-rate reduction prices and it is also not possible to compare the pre and post rate reduction actual prices as it is not probable that a customer who had purchased the goods in the pre rate reduction period may have bought them in the post reduction period or vice versa. Since, post-rate reduction the benefit was required to be passed to each customer the computations were required to be made on each outward taxable supply based on actual prices charged for each SKU so that the benefit could be computed in respect of the each customer. Hence, the DGAP has adopted a very practical mathematical methodology while computing the profiteered amount which cannot be rejected on the mere contrary claim made by the Respondent.

168. The Respondent has further contended that the methodology adopted to arrive at the average base prices and to which period the base prices pertained was not disclosed by the DGAP. However, perusal of paras 21 and 22 of his Report dated 08.10.2018 shows that the DGAP has calculated the average price of each SKU which was impacted by the above two rate reductions in respect of all the three channels viz. CSD, Para-Military Force Canteens and Distributors/ Modern Trade and compared it with the price of each SKU which he had charged on all the taxable supplies of that SKU made by the Respondent from 15.11.2017 to 30.06.2018 and arrived at the amount of profiteering in case there was no reduction in the price of the SKU keeping in view the reduction due to change in the

tax rates. The period which has been considered by the DGAP while calculating the average base prices has been mentioned in Annexure-14 and 15 submitted by the DGAP in his Report dated 08.10.2018. Hence, the allegation levelled by the Respondent on this ground in not tenable.

169. The Respondent has also submitted that there were calculation errors in the base prices taken by DGAP in his workings as has been mentioned by him vide Exhibit–22 attached to his reply dated 12.04.2019. Perusal of Annexure-22 shows that all these errors have been taken in to account by the DGAP in his supplementary Report dated 15.03.2019 and hence the objection of the Respondent made on this ground stands removed.

170. The Respondent has also stated that the method adopted by the DGAP by taking average base prices pre rate reduction has resulted in an anomaly where for the very same SKU the report was showing no profiteering and for some other supplies, it was showing profiteering. This objection has been explained in Exhibit-17 attached by the Respondent with his reply dated 07.12.2018. Perusal of the above Exhibit shows that the DGAP has computed the profiteered amount by taking the average price pre GST whereas the Respondent has taken the actual price pre GST and hence there is bound to be difference in the amount of profiteering. Therefore, the above claim of the Respondent is not correct.

171. That the Respondent has further stated that vide his letter dated 27.09.2018 and e-mail dated 29.09.2018 he had pointed out that the comparison of realization varied from customer to customer due to

differential discounts offered to different customers and hence, the correct method would be to consider percentage of the benefit to be passed on for a particular SKU on the realization to assess the GST benefit passed. The above argument of the Respondent is untenable because of the reason that the benefit cannot be computed as percentage of the realization as the same is required to be computed on each SKU by comparing the pre and post tax reduction prices.

172. The Respondent has also pointed out that he has submitted the details of the benefit passed through price reduction and grammage increase per SKU wise vide Exhibit-25 with his submissions dated 07.05.2019 which has to be read in conjunction with the methodology adopted by the Respondent. Perusal of the above Exhibit shows that it gives details of the benefit passed on as per the methodology adopted by the Respondent which has already been held to be wrong as has been mentioned above and hence, the above claim of the Respondent cannot be accepted.

173. The Respondent has further pointed out that in Malaysia the Price Control and Anti-Profiteering Act, 2011 and the Price Control and Anti-Profiteering (Mechanism To Determine Unreasonably High Profits for Goods) (Net Profit Margin) Act, 2014 which has defined profiteering as "making unreasonably high profits", have been enacted and such Acts should also be implemented in India to determine the "commensurate reduction." In this regard it would be appropriate to mention that both the above Acts have been repealed by Malaysia as they were not found to be working properly. Moreover, these Acts were promulgated to control prices after introduction of

GST in the above Country whereas no provision for controlling prices has been made in the CGST Act, 2017. This Authority has also not been mandated to work as a price controller or regulator and it is only empowered to ensure that the benefits of tax reduction and ITC are passed to the consumers as per the specific provisions of Section 171 (1) of the CGST Act, 2017. The above claim of the Respondent runs contrary to the argument of the Respondent which claims that no fetters can be placed on his power to fix prices of his products in violation of the provisions of Article 19 (1) (g) of the Constitution.

174. The Respondent has also cited the Order dated 04.05.2018 passed by this Authority in the matter of ***Kumar Gandharv v. KRBL Limited*** **Case No. 3/2018** and claimed that the increase in the cost of raw materials had been taken into consideration for calculation of the quantum of benefit which should also be taken in to account in his case. However, perusal of the above Order shows that in the above case the rate of tax had increased and not reduced and since, there was no reduction, the provisions of Section 171 were not applicable in the above case. However, in the present case the rates of tax have been reduced and therefore, the above Order does not help the Respondent.

175. The Respondent has also argued that Rule 126, 127 and 133 of the CGST Rules, 2017 suffered from the vice of excessive delegation and hence they were violative of the Constitution. In this connection it would be relevant to mention that Rule 126 empowers this Authority to frame "Methodology & Procedure" to regulate its proceedings. This power is available to all the judicial, quasi-judicial and statutory

bodies e.g. the GST Tribunal has such power under Section 111 (1) of the CGST Act, 2017 and the Competition Commission has this provision under the Competition Act, 2002. Therefore, no special concession has been conferred on this Authority. The provisions of Rule 127 outline the duties assigned to this Authority in the absence of which the objective of this Authority cannot be defined. Similarly Rule 133 prescribes the method to determine the benefit of tax reduction and ITC and the reliefs which this Authority can grant to a recipient who has been denied these benefits. Both these Rules are similar to the Rules which govern the duties and powers of other authorities and hence they do not confer any special powers on this Authority. All the above Rules have been framed under Section 164 of the CGST Act, 2017 which has approval of the Parliament. They have further been notified by the Central Government on the recommendation of the GST Council which is a body established under 101st Amendment of the Constitution and has representation of all the States, Union Territories and the Central Government. Hence, the above Rules have been framed after thorough scrutiny and consultation at several levels and hence to claim that the above Rules amount to excessive delegation would be completely wrong and fallacious.

176. The Respondent has also argued that the Anti-Profiteering measure amount to restrictions on fixing prices and hence they tantamount to 'price control' or 'price regulation' which was contrary to the freedom of trade and business granted under Article 19 (1) (g) of the Constitution of India. As submitted above there is no provision in the

CGST Act, 2017 which provides for price regulation nor this Authority is a price regulator. The only objective of Section 171 of the above Act is to ensure that both the benefits of tax reduction and ITC are passed on to the recipients by the suppliers as they are given by the Central and State Governments by sacrificing their own revenue. Hence, the Anti-Profiteering measures cannot the construed to be violative of the above Article of the Constitution as the Respondent is fully entitled to fix his prices and carry out his trade without any control being exercised under the above measures. It is rather the Respondent who is advocating the enactment of the price control Acts in line with the Acts framed by the Malaysian and the Australian Government. Hence, the above contentions of the Respondent are not maintainable.

177. That the Respondent has further argued that in the absence of a judicial member, the constitution of the Authority was improper. In this regard it is mentioned that there is no judicial member in all such Authorities viz. the Authorities on Advance Rulings on the GST or Income Tax and the TRAI etc. All the proceedings are conducted by this Authority by applying the principles of natural justice and all its orders are detailed, reasoned and speaking and they are also subject to judicial review. The Parliament, the State Legislatures, the GST Council as well as the Central and the State Governments in their wisdom have not thought it fit to provide a judicial member in this Authority. However, absence of judicial member does not cause any prejudice to the Respondent.

178. The Respondent has also contended that as per the provisions of Rule 128 of the CGST Rules, 2017 receipt of a written application in the prescribed manner from an interested party or from a Commissioner or from any other person was mandatory. In this regard it would be appropriate to mention that in the present case the Respondent had himself vide his letter dated 02.04.2018 admitted that he had resorted to profiteering of Rs. 12.6 Crore which amounted to violation of the provisions of Section 171 (1) of the above Act and hence no formal application was required to be filed either before the Screening Committee or before the Standing Committee.

179. He has further contended that as per the provisions of Rule 128 and 129 of the above Rules the prescribed procedure was required to be followed. As mentioned above once the Respondent had himself admitted profiteering no application was required to be filed and prima facie satisfaction of the Screening or Standing Committee was also not required as per Rule 128. The DGAP has conducted the investigation in the present case as per the provisions of Rule 129 and hence no allegation can be made in this regard.

180. The Respondent has also alleged that the trigger point for the DGAP to initiate investigation was the OM dated 10.04.2018 issued by this Authority vide which this Authority has proceeded on the ground that it has powers and jurisdiction to order investigation against any person suo moto however, this assumption of jurisdiction by this Authority was legally untenable. In this connection it would be pertinent to mention that once the Respondent had voluntarily admitted commission of offence of profiteering which he had

communicated to this Authority vide his letter dated 02.04.2018, it was bound to order investigation as per paras 9 and 12 of the Methodology & Procedure notified by it on 28.03.2018 under Rule 126 of the above Rules, which read as under:-

"(9). The Authority may inquire into any alleged contravention of the provisions of section 171 of the Central Goods & Services Tax Act, 2017 on its own motion or on receipt of information from any interested party as defined in the Rule 137 (c), person, body, association or on a reference having been made to it by the Central Government or the State Government.

(12) On receipt of the information as mentioned in Para 9 above, in case the Authority is of the opinion that there exists a prima facie case it shall direct the Director General of Anti-profiteering to cause an investigation to be made in a fixed time frame and submit report."

181. Accordingly, this Authority was competent to suo moto order investigation against the Respondent once information of profiteering has been received by it, as per the above provisions. Therefore, no illegality has been done on this ground as the investigation has been ordered as per the provisions of the statute and hence the investigation carried out by the DGAP is also legal and within jurisdiction. It is also stated here that the Respondent had himself subjected him to the jurisdiction of this Authority vide his letter dated 02.04.2018 and hence he cannot resile from his earlier stand.

182. He has also claimed that he had sought advice / clarity from this Authority and also furnished his methodology which was accepted by this Authority and hence he could not have been investigated. As

mentioned supra this Authority is not an advisory body nor it has accepted the methodology adopted by the Respondent to compute the profiteered amount and hence the above claims of the Respondent cannot be accepted.

183. The Respondent has also alleged that this Authority was acting both as a complainant as well as the judge which was illegal. In this regard it would be appropriate to mention that power to order suo moto investigations is generally and widely available to all the judicial and quasi-judicial bodies which does not make them interested parties as the cognizance is taken by them after independent investigation by another agency which has been done in the present case and hence the above allegation of the Respondent is not correct.

184. The Respondent has further alleged that the present proceedings have been initiated in violation of the principles of natural justice as show cause notice has not been issued to the Respondent proposing action against him under Rule 133 of the above Rules. In this regard it is mentioned that a notice dated 16.10.2018 was duly issued to the Respondent listing the allegations and the action proposed to be taken against him. A copy of the Report dated 08.10.2018 furnished by the DGAP and all the Annexures attached with the above Report which detailed the mathematical methodology employed by the DGAP to compute the profiteered amount were also supplied to the Respondent. The above material was more than sufficient for preparing defence by the Respondent. The above notice had also clearly mentioned the penal provisions which were proposed to be invoked against the Respondent. He was also asked to put in

appearance and file his submissions. The Respondent was also heard in detail on 26.11.2018, 12.12.2018, 20.12.2018, 12.04.2019, 02.05.2019, 07.05.2019, 28.05.2019 and 01.07.2019 excluding the dates on which he had sought adjournments. He had also filed detailed written submissions on 07.12.2018, 20.12.2018, 12.04.2019, 02.05.2019, 07.05.2019 and 28.06.2019. Therefore, the allegations of violation of the principles of natural justice and non service of notice are frivolous and not tenable.

185. The Respondent has also claimed that a show cause notice formed the base of the principle of *audi alteram partem* as was settled in the case of ***Canara Bank and others v. Debasis Das and Others (2003) 4 SCC 557***. In this connection it is mentioned that a notice was duly served on the Respondent and he was also given full opportunity to defend himself before this Authority and hence, the above principle has not been violated. Similarly, the law propounded in the cases of ***Uma Nath Pandey and Others v. State of UP (2009) 12 SCC 40, Collector of Central Excise v. ITC Ltd. 1994 (71) ELT 324, Vasta Bio-Tech Pvt. Ltd. v. Assistant Commr. 2018 (360) ELT 234, Dharampal Satyapal Ltd. v. Dy. Commissioner of Central Excise 2015 (320) ELT 3*** and ***Anrak Aluminium Ltd. v. Commissioner*** **2017 (4) G.S.T.L. 248,** does not help the Respondent as this Authority has fully complied with the principles of natural justice.

186. The Respondent has also contended that this Authority has considered the Report of the DGAP as a show cause notice, which was not correct as it was bound to serve a detailed notice to him so

that he could defend himself. In this regard it is mentioned that the Report dated 08.10.2018 was carefully considered by this Authority in its sitting held on 16.10.2018 and accordingly, the show cause notice dated 16.10.2018 was issued to the Respondent and he was also been given more than sufficient opportunity to defend himself which he has done by filing several submissions and has also been supplied with all the required information and hence the above claim of the Respondent is incorrect.

187. The Respondent has also stated that no methodology and mechanism has been provided in the above Act or the Rules for determination and calculation of profiteering in the absence of which the calculation and methodology used in the impugned Report was arbitrary as the 'Procedure and Methodology' issued on 19.07.2018 by this Authority only provided the procedure pertaining to the investigation and hearing. In this connection it would be pertinent to mention that the methodology to determine profiteering has already been provided in Section 171 of the above which reads as under:-

"1)Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.

2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether ITCs availed by any registered person or the reduction in the tax rate have actually resulted in a

commensurate reduction in the price of the goods or services or both supplied by him.

188. Therefore, it is clear from the above Section that the benefit of rate reduction has to be passed on by a registered person to the recipient on every supply of goods and services by commensurate reduction in the prices and in case it is not passed on the supplier shall be acting in contravention of the above provision. This Authority has been duly constituted under Section 171 (2) of the above Act and in exercise of the powers conferred on it under Rule 126 of the CGST Rules, 2017 it has notified the 'Procedure & Methodology' for determination of the profiteered amount vide its Notification dated 28.03.2018 and not on 19.07.2018 as has been claimed by the Respondent. However, the mathematical methodology for determination of the profiteered amount has to be applied on case to case basis depending on the facts of each case and no fixed formula can be set for calculating the same as the facts of each case are different. The mathematical methodology applied in the case where the rate of tax has been reduced and ITC disallowed cannot be applied in the case where the rate of tax has been reduced and ITC allowed. Similarly, the mathematical methodology applied in the case of Fast Moving Consumer Goods (FMCGs) like the present case of the Respondent cannot be applied in the case of construction services. Even the methodology applied in two cases of construction service may vary on account of the period taken for execution of the project, the area sold and the turnover realised. Similarly, the mathematical methodology applied in two cases of FMCGs may differ on account of

quantum of goods and services and the period during which the benefit of tax reduction was not passed. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering. It would be further relevant to mention that the power under Rule 126 has been granted to this Authority by the Central Government as per the provisions of Section 164 of the above Act which has approval of the Parliament. Rule 126 has further been framed on the recommendation of the GST Council which is a constitutional body created under the Constitution (One Hundred and First Amendment) Act, 2016. Therefore, the above power has both legislative sanction as well as incorporation in the CGST Act, 2017 and the CGST Rules, 2017. The delegation provided to this Authority under the above Section and Rule is clear, precise, unambiguous and necessary and is well within the provisions of the Constitution and therefore, it has been rightly conferred on this Authority. Hence, the objections raised by the Respondent in this regard are frivolous and without legal force.

189. It will also be appropriate here to mention that as per the provisions of Section 171 (2) of the above Act and the Rules framed under it, the Central Government has been empowered to constitute an Authority "to examine whether ITCs availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of goods or services or both supplied by him." In exercise of the above power the Central Govt. has constituted this

Authority vide Office Order No. 343/2017 dated 28th November, 2017 to ensure that both the above benefits are passed on to the customers. Vide Rule 123 of the above Rules it has also been provided to constitute the Standing Committee and the State level Screening Committees to prima facie establish the veracity of the complaints made against non-passing of the above benefits. Under Rule 129 a full-fledged investigating machinery has been provided by creating the office of DGAP to enquire in to the complaints made under the Anti-Profiteering measures. Under Rule 136 of the above Rules this Authority has been empowered to get its orders implemented through any field office of the State tax, the Central tax or the Union Territory Tax. Since appropriate and adequate machinery has been provided to implement the Anti-Profiteering measures provided under the above Act and the Rules, the claim of the Respondent that adequate machinery has not been provided to implement the Anti-Profiteering measures is not correct. It will also be worthwhile to mention here that the above Section does not impose any tax on the suppliers and hence no charge is created under the above provision and hence it is not similar to the provisions of the tax laws which create charge. therefore, the above contention of the Respondent is untenable.

190. As submitted above the provisions of the Malaysia 'Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014, cannot be applied in this Country as they provide for price control. The anti-profiteering measures adopted in Australia mention the 'Net Dollar Margin Rule'

which also provides for regulation of prices which is not the intent of the CGST Act, 2017. There is also an adequate mechanism to enforce the Anti-Profiteering measures in the Act and hence the above contentions of the Respondent are frivolous.

191. The Respondent has also relied upon the cases of ***Commissioner of Income Tax Bangalore*** v. ***B. C. Srinivasa Setty (1981) 2 SCC 460***, ***Eternit Everest Ltd.*** v. ***Union of India 1997 (89) E.L.T. 28 (Mad.)*** and **Commissioner Central Excise and Customs Kerala v. Larsen and Toubro Limited (2016) 1 SCC 170** in his support but since appropriate methodology and mechanism exists for implementing the above provisions and no tax has been imposed under the above Section hence, it is respectfully submitted that the above cases are not being relied upon.

192. He has also submitted that the profiteering should be computed at the entity level and not on item (SKU) level. The above contention is incorrect as the Respondent appears to be labouring under the wrong impression that the benefit is to be passed by taking him as the main focus of Section 171 of the above Act whereas it is not so as the main and only focus of the above provision is the customer who is entitled to receive benefit of tax reduction on each purchase of a SKU by commensurate reduction in its price. Therefore, the above benefit is required to calculated and passed on to each customer on each SKU and not at the entity level. In case the benefit of tax reduction is not passed to every buyer it will be against the provisions of the above Section as well as Article 14 of the Constitution.

193. The Respondent has further submitted that the interpretation given to Section 171 and rules without considering the 'marginal notes' appended to Section 171 and heading of Chapter XV of CGST Rules, was a legally untenable interpretation as the term 'profiteering' was not used in it. On this account it would be appropriate to mention that the provisions of Section 171 are abundantly clear, complete and concise in this regard and hence there is no ambiguity in their interpretation and therefore, the marginal notes attached to the above Section and the Rules are not required to be considered while interpreting them. Accordingly, the cases of ***Indian Aluminium Company v. Kerala State Electricity Board (1975) 2 SCC 414, Union of India v. Harbhajan Singh Dhillon (1971) 2 SCC 779*** and ***S. P. Gupta v. Union of India AIR 1982 SC 149*** do not support the cause of the Respondent.

194. The Respondent has also claimed that "Profiteering' has not been defined in the CGST Act or the Rules therefore, he has cited the definitions of "Profiteer/Profiteering' from **The Chambers Dictionary, Allied Chambers (India) Ltd., New Delhi**, **The Collins Cobuild English Dictionary for Advanced Learners-Harper Collins Publication** and **Oxford English Reference Dictionary-Oxford University Press** to support his argument. However, it would be worthwhile to mention here that the word "profiteered" has been duly defined in the Explanation attached to Section 171 of the above Act as under:-

"Explanation : For the purposes of this section, the expression "profiteered" shall mean the amount determined on account of not

passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of ITC to the recipient by way of commensurate reduction in the price of the goods or services or both."

195. Based on the above Explanation there is no doubt on the definition of profiteering which has been duly incorporated in the CGST Act, 2017 and hence the above contention of the Respondent is incorrect and the interpretation given by the Respondent is wrong.

196. He has further claimed that the term 'commensurate' appearing in Rule 127 and Section 171 (1) means 'appropriate', 'adequate' or 'proportionate'. The Respondent has also cited the dictionary meanings of the word 'commensurate' from the ***Random House Compact Unabridged Dictionary, Special Second Edition, The New International Webster's Comprehensive Dictionary of the English Language, Deluxe Encyclopaedic Edition, The Compact Edition of the Oxford English Dictionary,*** **10th Ed.,** ***The Concise Oxford Dictionary*** and ***Chambers 21st Century Dictionary*** to support his above contention. However, as has been discussed above the word 'commensurate' has been adequately defined in Section 171 (1) of the above Act as well as in Rule 127 and 133 of the CGST Rules and hence there is no ambiguity in its intent and the same cannot be construed to be applicable at the level of entity or registered person as it has to be applied by taking in to account supply made to each customer and on each SKU. Therefore, the contention of the Respondent made on this ground is not correct.

197. He has also submitted that that the DGAP has incorrectly applied 'zeroing methodology' which was used by the anti-dumping authorities in certain countries which was opposed by the Government of India before the WTO and vide ***Report No. WT/DS141/AB/R dated 1.3.2001 of the Appellate Body, WTO regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India*** the stand of the Indian Government was accepted and it was held that the practice of 'netting off' should be applied and hence the above methodology was binding on the DGAP while calculating 'profiteering'. The above contention of the Respondent is not correct as no netting off can be applied in the cases of profiteering as the benefit has to be passed on to each customer which has to be computed on each SKU. Netting off implies that the amount of benefit not passed on certain SKUs will be subtracted from the amount of benefit passed on other SKUs and the resultant amount shall be determined as the profiteered amount. If this methodology is applied the Respondent shall be entitled to subtract the amount of benefit which he has not passed on MAGGI pack having MRP of Rs. 5/- from the amount of benefit which he has claimed to have passed on the pack having MRP of Rs. 12/-, which will result in complete denial of benefit to the customer who has purchased the pack having MRP of Rs. 5/-. Hence, this methodology of 'netting off' cannot be applied in the case of FMCGs as the customers have to be considered as individual beneficiaries and they cannot be netted off. This Authority has also clarified in its various orders that the benefit cannot be computed at the product, service or

the entity level as the benefit has to be passed on each supply of goods and services. Hence, the above contentions of the Respondent are not correct as the Respondent cannot apply the above methodology of netting off as has been approved in the above Report of the WTO as it would result in denial of benefit to certain customers which would amount to violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution.

198. He has further submitted that in the absence of any framework or guidelines different approaches may be followed by the DGAP and such unfettered discretion would lead to uncertainty and arbitrariness on case to case basis. The above argument of the Respondent is incorrect as the mathematical methodology adopted by the DGAP in this case is in consonance with the provisions of Section 171 and Rule 127 and 133 of the above Act whereas the methodology adopted by the Respondent is illogical, arbitrary and illegal which has resulted in unfairness and inequality while passing on the benefit of tax reductions. As mentioned above the mathematical methodology applied in one case cannot be applied in another case as no two cases have the same facts. However, every mathematical methodology adopted by the DGAP is subject to scrutiny by this Authority as well as the higher judicial forums and hence there is hardly any scope for arbitrariness.

199. The Respondent has also stated that in case the allegation of profiteering was confirmed and it was proposed to invoke penal provision he should be given opportunity to show cause against

invocation of the penal provisions. The above contention of the Respondent would be duly taken in to account.

200. Based on the above facts the profiteered amount is determined as Rs. 89,73,16,384/- as per the provisions of Rule 133 (1) of the above Rules as has been computed vide revised Annexure-16 of the supplementary Report dated 15.03.2019. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. The Respondent is also directed to deposit an amount of Rs. 73,14,83,660/- (Rs. 89,73,16,383 - Rs. 16,58,32,723) as he has already deposited an amount of Rs. 16,58,32,723/- in the CWF of the Central and the concerned State Government, as the recipients are not identifiable, as per the provisions of Rule 133 (3) (c) of the above Rules alongwith 18% interest payable from the dates from which both the above amounts were realised by the Respondent from his recipients till the date of their deposit as per the revised Annexure-16 attached with the Report dated 15.03.2019. The above amount of Rs. 73,14,83,660/- shall be deposited within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned Commissioner CGST/SCST. The State/Union Territory wise amount of benefit to be deposited in the CWF is as under out of which the amount of Rs. 16,58,32,723/- shall be appropriately adjusted in respect of each State and the Central Government:-

	Annexure-16 (Revised)			
S. No.	State	Annex-14	Annex-15	Total
1	Andaman & Nicobar Islands	1585549.665	135583.6	1826776.51
2	Andhra Pradesh	18317915.28	2747327	26375714.5
3	Arunachal Pradesh	1368850.509	53501.58	1655540.09
4	Assam	24386709.02	852400.8	29901227.3
5	Bihar	31370216.35	930626.2	37024406.7
6	Chandigarh	2596457.442	40902.35	2913581.13
7	Chhattisgarh	17983763.27	114245.7	19183118.6
8	Delhi	32407126.76	312867.5	38132954.2
9	Goa	6697019.396	115909.9	7445587.77
10	Gujarat	43134078.85	586578.8	46103759.6
11	Haryana	19143358.11	463103.8	21606066.6
12	Himachal Pradesh	9311844.424	630989.2	10417494.7
13	Jammu & Kashmir	11953563	746947.2	13596344.2
14	Jharkhand	15761649.93	435590.4	18648959.2
15	Karnataka	59591269.55	3995634	71206705.3
16	Kerala	29246507.97	7614755	41069709.1
17	Madhya Pradesh	41189189.55	323456.7	43406953.5
18	Maharashtra	112663539.1	1105219	123172739
19	Manipur	4091614.572	152766.7	4794613.83
20	Meghalaya	2730628.152	123914.6	3478847.14
21	Mizoram	897177.5401	63146.12	1191564.28
22	Nagaland	1540176.895	30029.66	1896991.54
23	Orissa	23554287.11	671752	30964742.3
24	Pondicherry	2059026.941	152109.7	2304093.08
25	Punjab	22649224.31	1183239	26320972.8
26	Rajasthan	27059626.44	300284.2	29451931.2
27	Sikkim	527895.8273	12532.3	605638.75
28	Tamilnadu	111075163.6	14964313	134691718
29	Telengana	25015237.18	2018939	33825793.7
30	Tripura	4602223.46	278735.9	5913664.92
31	Uttar Pradesh	74781066.35	646110.2	82924936.3
32	Uttrakhand	8943110.779	146513.7	9789512.99
33	West Bengal	64842800.71	2288491	87960436.2
Total		**853077868**	**44238516**	**897316384**

201. It is evident from the above narration of facts that the Respondent has denied the benefit of tax reduction to the customers in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus profiteered as per the explanation attached to Section 171 of the above Act. Therefore, he is liable for imposition of penalty under Section 171 (3A) of the CGST Act, 2017. Therefore, a show cause notice be issued to him directing him to explain why the penalty prescribed under the above sub-Section should not be

imposed on him. Accordingly, the notice dated 16.10.2019 vide which it was proposed to impose penalty on the Respondent under Section 29 and 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is hereby withdrawn to that extent.

202. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by this Authority is deposited in the CWFs of the Central and the State Governments as per the details given above. A report in compliance of this order shall be submitted to this Authority by the concerned Commissioner within a period of 4 months from the date of receipt of this order.

203. A copy each of this order be supplied to the Applicants, the Respondent and all the concerned Commissioners CGST /SGST for necessary action. File be consigned after completion.

Sd/-
(B. N. Sharma)
Chairman

Sd/-
(J. C. Chauhan)
Member(Technical)

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy

(A. K. Goel)
NAA, Secretary

National Anti-profiteering Authority
NAA
Dept. of Revenue
Ministry of Finance
Govt. of India
राष्ट्रीय मुनाफाखोरी-रोधी प्राधिकरण

F. No. 22011/NAA/97/Nestle/2019/7013-7062 Date: 10.12.2019

Copy to:-

1. M/s Nestle India Ltd, Nestle House, Jacaranda Marg, M. Block, DLF City Phase-II, Gurugram, Haryana.
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.
3. Commissioner of commercial Taxes, office of the chief Commissioner of state Tax, eedupugallu, krishna district, andhra pradesh.
4. Commissioner of commercial Taxes, Department of Tax & Excise, kar bhawan, itanagar, arunachal pradesh - 791 111
5. Commissioner of commercial Taxes, office of the Commissioner of Taxes, Government of Assam, kar bhawan, ganeshpuri, dispur, Guwahati - 781 006.
6. Commissioner of commercial Taxes, additional Commissioner (GST), commercial Tax Department, ground floor, vikas bhawan, baily road, patna – 800 001
7. Commissioner of commercial Taxes, commercial Tax, SGST Department, behind raj bhawan, civil lines, Raipur - 492 001
8. Commissioner of commercial Taxes, office of Commissioner of commercial Tax, vikrikar bhavan, old high court building, panji, Goa- 403 001
9. Commissioner of commercial Taxes, c-5, Rajya kar bhavan, near times of India, ashram road, Ahmedabad.
10. Commissioner of commercial Taxes, vanijya bhavan, plot no. 1-3, sector-5, panchkula. Pin - 134 151.
11. Commissioner of commercial Taxes, Excise & Taxation Commissioner, Government of Himachal Pradesh, b-30, sda complex, kasumpati, Shimla.
12. Commissioner of commercial Taxes, Excise & Taxation complex, rail head Jammu.
13. Commissioner of commercial Taxes, commercial Taxes Department, project bhawan, dhurva, Ranchi- 834 004.
14. Commissioner of commercial Taxes, vanijya therige karyalaya, 1st main road, Gandhinagar, Bangalore- 560 009
15. Commissioner of commercial Taxes, Government secretariat, Thiruvananthapuram -695001.
16. Commissioner of commercial Taxes, Moti Bangla compound, m.g. Road, Indore

17. Commissioner of commercial Taxes, GST bhavan, mazgaon, Mumbai- 400 010
18. Commissioner of commercial Taxes, Department of Taxes, old Guwahati high court complex, north aoc, imphal west, Manipur - 795 001.
19. Commissioner of commercial Taxes, office of the Commissioner, GST & cx Commissionerate, morellow compound, m.g.road, shillong- 793001.
20. Commissioner of commercial Taxes, office of the Commissioner of state Tax, new secretariat complex, aizawl – 796005.
21. Commissioner of commercial Taxes, office of the Commissioner of state Taxes, dimapur, nagaland - 797112.
22. Commissioner of commercial Taxes, office of the Commissioner of state Tax, banijyakar bhawan, old secretariat compound, cuttack - 753 001.
23. Commissioner of commercial Taxes, office of Excise and Taxation Commissioner, bhupindra road, patiala- 147 001
24. Commissioner of commercial Taxes, kar bhavan, ambedkar circle, jaipur, rajasthan - 302 005.
25. Commissioner of commercial Taxes, sitco building, block-d, above a.g. Office, gangtok, east, sikkim - 737 101.
26. Commissioner of commercial Taxes, papjm building, greams road, chennai – 600 006.
27. Commissioner of commercial Taxes, o/o the Commissioner of state Tax, ct complex, nampally station road, hyderabad - 500 001.
28. Commissioner of commercial Taxes, office of the Commissioner of Taxes & Excise, head of the Department, revisional authority, p.n. Complex, gurkhabasti, agartala - 799 006.
29. Commissioner of commercial Taxes, office of the Commissioner, commercial Tax, u.p. Commercial Tax head office vibhuti khand, gomti nagar, lucknow (u.p)
30. Commissioner of commercial Taxes, state Tax Department, head office uttarakhand, ring road, near pulia no. 6, natthanpur, dehradun.
31. Commissioner of commercial Taxes, 14, beliaghata road, kolkata - 700 015.
32. Commissioner of commercial Taxes, deptt of trade & Taxes, vyapar bhavan, ip estate, new delhi-2 pin: 110 002
33. Commissioner of commercial Taxes, first floor, 100 feet road, ellapillaichavady, pondicherry - 605 005.
34. Chief Commissioner of central Goods & Services Tax, Bhopal zone 48, administrative area, arera hills, hoshangabad road, Bhopal M.P. 462 011

35. Chief Commissioner of central Goods & service Tax c.r.building rajaswa vihar, bhubaneswar-751007
36. Chief Commissioner of central Goods & service Tax Chandigarh zone C.R. Building, plot no.19a, sector17c, chandigarh-160017
37. Chief Commissioner central Goods & service Tax , cochin zone C.R.building, i.s.press road, Ernakulum cochin682018
38. Chief Commissioner of central Goods & Services Tax Delhi zone C.R. Building, I.P. Estate, new delhi110 109
39. Chief Commissioner of central Goods & service Tax, Hyderabad zone GST bhavan, I.B.stadium road, basheer bagh, Hyderabad 500 004
40. Chief Commissioner of central Goods & Services Tax Jaipur zone, new central revenue building, statue circle, Jaipur 302 005
41. Chief Commissioner of central Goods & Services Tax, Meerut zone opp. Ccs university,mangal pandey nagar, meerut-250 004.
42. Chief Commissioner of central Goods & Services Tax, Mumbai zone GST building, 115 m.k. Road, opp. Churchagate station, mumbai-400020
43. Chief Commissioner of central Goods & Services Tax, Telangkhedi road, civil lines, Nagpur 440001
44. Chief Commissioner of central Goods & Services Tax Panchkula sco 407408, sector-8, Panchkula
45. Chief Commissioner of central Goods & Services Tax, Pune zone GST bhawan ice house, 41a, sasoon road, opp. Wadia college, pune411001
46. Chief Commissioner of central Goods & Services Tax, (Ranchi zone) 1st floor, C.R. Building, (annex) veer chand patel path Patna, 800001
47. Chief Commissioner of central Goods & Services Tax, Shillong zone north eastern, 3rtd floor, crescens building, MG Road, shillong-793 001
48. Chief Commissioner of central Goods & Services Tax, Vadodara zone 2nd floor, central Excise building, race course circle, Vadodara 390 007
49. Chief Commissioner of central Goods & Services Tax Visakhapatnam zone GST Bhavan, port area, visakhapatnam530 035.
50. NAA website/Guard file.