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

Case No.	41/2020
Date of Institution	31.12.2019
Date of Order	16.07.2020

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 Gaurav Sharma Food Industries, F-188 B, Jata Shankar Apartment, Bagadia Bhawan, Subhas Marg, C-scheme, Jaipur-302001.

Respondent

Quorum:-

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

Present:-

1. None for the Applicant.
2. Sh. Vishal Khandelwal and Sh. Amit Kumar, Authorized Representatives for the Respondent.

ORDER

1. The present Report dated 31.12.2019 has been furnished by the Director General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received by the DGAP from the Standing Committee on Anti-Profiteering on 01.07.2019 recommending a detailed investigation in respect of an application, originally examined by the Rajasthan State Screening Committee on Anti-profiteering under Rule 128 (2) of the CGST Rules 2017, alleging profiteering in respect of restaurant service supplied by the Respondent (Franchisee of M/s Subway Systems India Pvt. Ltd.). In the application, it was alleged that despite reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017, the Respondent had not passed on the commensurate benefit of tax reduction as he had increased the base prices of his products. Statement dated 07.02.2019 of Sh. Gaurav Sharma, Proprietor of the Respondent along with estimated cost of goods supplied by him was also enclosed with

the recommendations of the Standing Committee. On receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 (3) was issued on 12.07.2017 by the DGAP, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in the GST rate w.e.f. 15.11.2017, had not been passed on to his recipients by way of commensurate reduction in prices and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents. The Respondent was also allowed to inspect the relied upon non-confidential evidence/information which formed the basis of the investigation between 18.07.2019 and 22.07.2019, which was however not availed of by the Respondent.

2. The DGAP has reported that the period covered by the current investigation was from 15.11.2017 to 30.06.2019.

3. The DGAP has also reported that in response to the notice dated 12.07.2019 and subsequent reminders, the Respondent has submitted his replies vide his letters/e-mails dated 23.07.2019, 17.09.2019, 23.09.2019, 25.09.2019, 04.10.2019, 29.11.2019, 11.12.2019, 21.12.2019 and 26.12.2019 whereby the Respondent has submitted:-

a) That he had increased the base prices of his menu items by 6.8% (average) after 15.11.2017 due to increase in the cost of various items like vegetables etc.

b) That as per Notification No. 46/2017- Central Tax (rate) dated 14.11.2017, no ITC was available and hence he had increased the base prices of his products after the change in the GST rate from 18% with ITC to 5% without ITC.

c) That as per ITC working during the period from July 2017 to 14.11.2017, ITC amounting Rs 2,89,196/- was available which came to approximately 8.80%. Hence, the base prices had been increased to neutralize the denial of ITC.

d) That since 15.11.2017, he had opted the 5% Composition Scheme with no benefit of setting off input credit on the purchases. Accordingly, the benefit of pricing on his popular items has been passed on by him to the extent which could cover the loss from the withdrawal of setting off of ITC received before 15.11.2017.

4. Vide the aforementioned e-mails/letters, the Respondent has also submitted the following documents/information:-

(a) Copy of GSTIN Registration.

(b) Copies of GSTR-1 and GSTR-3B Returns for the period from July 2017 to June 2019.

(c) Copy of GSTR-9 Returns for the financial year 2017-2018.

(d) Sales details for the period from August 2017 to June 2019.

(e) Price Lists of products (pre and post 15.11.2017).

(f) Sample invoices issued during the pre and post 15.11.2017.

(g) ITC Ledger from July 2017 to November 2017.

5. The DGAP has further reported that in terms of Rule 130 of the CGST Rules 2017, the Respondent had been informed by him vide notice dated 12.07.2019 that if any information/documents provided by him were confidential, a non-confidential summary of such information/documents could be furnished by him. However, the Respondent did not classify any of the information/documents provided by him as confidential, in terms of Rule 130 of the Rules ibid.

6. The DGAP has also stated that based on a careful examination of the case record, including the reference received from the Standing Committee on Anti-Profiteering, various replies of the Respondent and the documents/evidence placed on record, it emerged that the main issues for determination were whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

7. The DGAP has further stated that the GST rate on the restaurant service had been reduced from 18% to 5% w.e.f. 15.11.2017 along with the condition that no ITC on the goods and services

used in supplying the service would be available to the Respondent vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017. Since it was a case of reduction in the rate of tax, it was important to examine the provisions of Section 171 (1) of the CGST Act, 2017, to ascertain whether the present case was a case of profiteering or not. Section 171 (1) reads as "*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.*" Thus, the legal requirement of the above provision was abundantly clear that in the event of the benefit of ITC or reduction in the rate of tax, there must be commensurate reduction in the prices of the goods or services being supplied by a registered person, the final prices being charged on each supply must be reduced commensurately with the extent of benefit and there was no other legally tenable mode of passing on such benefits to the recipients/consumers.

8. The DGAP has also submitted that the assessment of the impact of denial of ITC, which was an uncontested fact, required determination of the ITC in respect of "restaurant service", as a percentage of the taxable turnover from the outward supply of "products", during the pre-rate reduction period. For instance, if the ITC in respect of restaurant service was 10% of the taxable turnover of a registered person till 14.11.2017 (which became unavailable to him w.e.f. 15.11.2017) and if the increase in the base prices w.e.f. 15.11.2017 was less than 10%, then this would

not be a case of profiteering. However, if the increase in the base prices w.e.f. 15.11.2017, was by a margin of 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Therefore, this exercise to work out the ITC in respect of restaurant service as a percentage of the taxable turnover from the products supplied during the pre-GST rate reduction period had to be carried out, though by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. The DGAP has claimed to have done this because there was no reversal of ITC on the closing stock of inputs/input services and capital goods as on 14.11.2017 by the Respondent, which was required under the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the CGST Rules, 2017.

9. The DGAP in his Report has also intimated that the ratio of ITC to the Net Taxable Turnover has been taken as the basis for determining the impact of denial of ITC that was available till 31.10.2017. The DGAP has found that the ITC amounting to Rs. 2,48,994/- was available during the period from July 2017 to October 2017 which worked out to be 8.72% of Net Taxable Turnover of the Respondent from the restaurant service supplies amounting to Rs. 28,54,334/- during the same period. Further, with effect from 15.11.2017, the rate of tax on restaurant service was reduced from 18% to 5% and no ITC was available to the Respondent. A summary of the computation of the ratio of ITC to

the taxable turnover as furnished by the DGAP is given in Table-A below:-

Table-A **(Amount in Rs.)**

Particulars	Jul-2017	Aug-2017	Sept.-2017	Oct.-2017	Total
ITC Availed as per GSTR-3B (A)*	43,170	48,675	81,471	75,678	2,48,994
Total Outward Taxable Turnover as per GSTR-3B (B)					7,30,558
Ratio of Input Tax Credit to Net Taxable Turnover (C=A/B*100)					**8.72%**

10. The DGAP has further intimated that the analysis of the details of the item-wise outward taxable supplies made during the post-rate reduction period from 15.11.2017 to 31.06.2019 revealed that the base prices of the different items supplied by the Respondent had been increased by the Respondent, presumably, to offset denial of ITC. The pre and post rate reduction prices of the items sold by the Respondent during the period from 01.07.2017 to 14.11.2017 (Pre-GST rate reduction) and from 15.11.2017 to 30.06.2019 (Post-GST rate reduction) were compared and it was revealed that the Respondent had increased the base prices of the products supplied by him by more than what was required to offset the impact of denial of ITC during the same period and hence, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on by the Respondent to his customers/recipients. The DGAP has also found that there was no profiteering in respect of the remaining items on which there was either no increase in base

prices or the increase in the base prices was less or equal to the denial of ITC or these were new products launched post rate reduction. Further, the Respondent vide submissions dated 11.12.2019 had stated that those products having none or zero value were provided to the customers as free of cost and that no charge had been taken on those items.

11. The DGAP has also stated that after establishing the fact of profiteering, the next step was to quantify the same and only those items, where the increase in the base prices was more than what was required to offset the impact of denial of ITC, were considered and the calculation of the profiteered amount was carried out following the above principle. The DGAP has illustrated by an example, as per invoice No. 1/A-24358 dated 22.11.2017, in the case of item "6" Veggie Delite Sub", the extent of profiteering as per the procedure mentioned in Table-B below:-

Table–B **(Amount in Rs.)**

Name of the product (A)	6" Veggie Delite Sub
Total Quantity sold during 1st Nov, 2017 to 14th Nov, 2017 (B)	232
Sum of taxable Value during 1st Nov, 2017 to 14th Nov, 2017 (C)	27840
Average base price during 1st Nov, 2017 to 14th Nov, 2017 (D=C/B)	120.00
Base price with denial of input tax credit @ 8.72% (E=D+D *8.72%)	130.19
GST @ 5% (F=E*5%)	6.51
Total price to be charged(G=E+F)	136.70
Selling price per unit as per invoice no. 1/A24358 dated 22.11.2017 (H)	140
Total profiteering (I=H-G)	3.3 (140-136.70)

12. The DGAP has further stated that based on the aforesaid pre and post rate reduction prices of the products; the impact of denial of ITC and the details of outward supplies (other than zero-rated, nil rated and exempted supplies) during the period from 15.11.2017 to 30.06.2019, the amount of net higher sale realization due to increase in the base prices of the service supplied, after netting off the impact of denial of ITC or in other words, the profiteered amount worked out to be Rs. 7,53,854/- including the GST on the base profiteered amount for the period of investigation which was detailed in Annexure-13 of his Report. It has also been stated by the DGAP that the service had been supplied by the Respondent in the State of Rajasthan only.

13. The DGAP has also claimed 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 the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent and the extent of profiteering was Rs. 7,53,854/- (inclusive of GST). Thus the provisions of Section 171 (1) of the CGST Act, 2017 had been contravened by the Respondent in the present case.

14. The above Report of the DGAP was considered by this Authority and it was decided to hear the parties on 17.01.2019. A Notice dated 06.01.2020 was also issued to the Respondent asking him to explain why the Report dated 31.12.2019 furnished by the

DGAP should not be accepted and his liability for violating the provisions of Section 171 of the above Act should not be fixed. Sh. Vishal Khandelwal and Sh. Amit Kumar, Authorized Representatives, represented the Respondent while none appeared on behalf of the Applicant.

15. The Respondent vide his written submissions dated 13.02.2020 has made the following submissions:-

a. **Profiteering should be calculated up to the price revision after post GST rate reduction considering that after Gst rate reduction any change of price due to the business reasons only:-** That the DGAP has calculated the profiteered amount of Rs. 7,53,854/- starting from 15.11.2017 till June, 2019 for 20 months and failed to appreciate that the GST rate had been reduced in the month of November 2017. The DGAP has considered all the price revisions made after 15.11.2017 as part of the profiteered amount and has completely ignored that the Respondent has right to increase his prices on account of various reasons other than tax which were also required to be considered for fixing the product prices.

b. That the alleged profiteered amount has substantiality increased as compared to the total turnover during the period from February 2019 to June 2019 because in the month of February 2019, there was revision in the product prices to meet out the general inflation and other expenses. Before

February 2019, the profiteered percentage was 2.05% of the turnover, however, during the months starting from February 2019 to June 2019, the profiteered percentage was 6.07% of the turnover i.e. there was almost three times increase in the profiteered percentage as compared to the other periods. He has also submitted month wise comparison chart as under:-

Month wise Comparison Chart

Profiteering Analysis month-wise							
Month	Total Profiteering Amount	Total Turnover	% of Profiteering amount verus Total Turnover	Month	Total Profiteering Amount	Total Turnover	% of Profiteering amount verus Total Turnover
Nov'17	15,759.71	439,760.29	3.58%	Sept'18	24,764.02	1,144,460.87	2.16%
Dec'17	29,097.63	802,486.14	3.63%	Oct'18	28,539.48	1,169,603.99	2.44%
Jan'18	33,053.92	939,050.12	3.52%	Nov'18	26,113.11	1,059,538.11	2.46%
Feb'18	30,856.50	963,288.18	3.20%	Dec'18	30,602.91	1,119,405.14	2.73%
Mar'18	30,276.74	1,104,222.22	2.74%	Jan'19	31,367.62	1,153,624.27	2.72%
Apr-18	24,319.30	1,003,807.77	2.42%	Feb'19	50,127.19	1,190,661.25	4.21%
May'18	22,813.73	1,095,853.55	2.08%	Mar'19	73,800.89	1,141,225.14	6.47%
June'18	23,368.35	1,180,227.17	1.98%	Apr'19	79,816.33	1,154,848.52	6.91%
July'18	27,716.87	1,117,425.06	2.48%	May'19	74,381.46	1,126,637.44	6.60%
Aug'18	27,090.32	1,114,046.35	2.43%	Jun'19	69,988.34	1,131,809.89	6.18%
Total	264,353.06	9,760,166.85			489,501.35	11,391,814.62	

c. That Right to trade was a fundamental right guaranteed under Article 19 (1) (g) of the Constitution of India and the right to trade included the right to determine prices which could not be taken away without any explicit authority under the law. The base sale price of the complained product was not controlled under any legislation or the Essential Commodities Act or the CGST Act and the Rules. Therefore, this form of price control was a violation of Article 19 (1) (g) of the Constitution of India.

d. That after the GST rate reduction notification there was no such change in the taxation regime for restaurant service. However, the DGAP has completely ignored the fact that he has fundamental right to increase prices of his products. He had increased the prices of the products after substantial time approx. 15 months from the date of rate reduction to meet out general inflation and other business related expenditure. The DGAP has been working like a price controlling authority and there were no guidelines in the statute itself that prescribed the mechanism to be followed by the business for revision of the prices and up to what period prices of products should not be increased. Therefore the profiteered amount should not be calculated on the increased prices of the products if prices had been increased by him after considerable time gap, considering the legal and settled fact that fixation of prices was fundamental right of the business and there were no rules/regulations prescribed under the law for increasing the product prices after the rate reduction.

e. **Incorrect base price considered for some of the SOTD offering (Sub of the day Schemes 7 Product):-** That Sub of the Day (SOTD) was one of his popular selling products across India and the price of the products under SOTD offering was fixed and remained fixed until there was price revision in the SOTD offer. The SOTD offer price was Rest. 110/- till 14.11.2017 i.e. the day before the change in GST rate from

18% to 5%. The DGAP has considered the base price of the 7 SOTD items as Rs. 105/- instead of Rs. 110/- which was applicable immediately before change in the GST rate. The price of Rs 105/- has been considered on the basis of sales made during the period of August 2017. The average price of these items has been calculated by the DGAP based on the sales in the month of August 2017, where the DGAP could not find the sales of these SOTD items during the period from 01.11.2017 to 14.11.2017. Instead of taking a uniform period for all the products in the pre-GST rate reduction period, the DGAP has taken different periods for different products without providing any reasonable or justifiable explanation and has ignored the fact that price had been revised before change in the rate. Therefore, for calculating the profiteered amount list price as on 15.11.2017 should be considered instead of calculating average price based on the sales in the month of August 2017. The Respondent has submitted the summary of the base prices of the SOTD products as under:-

Summary of Incorrect Base Price taken for SOTD Products-7 Products (In Rs.)

SL	Item Name	Base Price (DGAP)	Month of Base Price taken by DGAP	Correct Base Price applicable on 14th Nov 2017	Sum of Total Profiteering (DGAP Working) A	Sum of Revised Profiteering after correct Base Price –B	Difference (A-B)
1	SOTD 6in Aloo Patty or	105	Aug'17	110	9871	-1098	-10969
2	SOTD 6in Chatpata or Ck	105	Aug'17	110	1530	-170	1,700
3	SOTD 6in Ckn Slice or M	105	Aug'17	110	1397	-155	1,552
4	SOTD 6in Ckn Tik or Cor	105	Aug'17	110	1777	-197	1,974
5	SOTD 6in Corn & Peas or	105	Aug'17	110	15388	4450	10,938

6	SOTD 6in Hara Bhara or	105	Aug'17	110	1813	-201	2,014
7	SOTD 6in Veg Shami or C	105	Aug'17	110	1890	-210	2,100
					33,666	2415	31,247

f. **Increase in royalty expense paid to Subway India Private Limited @1.77% should be considered in calculation of base price after rate reduction:-** That As per the franchise agreement, the Respondent was under legal obligation to pay 8% on the net sales towards royalty and 4.5% towards advertisement charges to M/s Subway Systems India Private Limited (SSIPL). The royalty and tax Invoices had been issued by M/s SSIPL after charging GST @12% on royalty amount and @18% on the advertisement expenses. The basis of calculation of the royalty and advertisement charges was net taxable sales. Post 14.11.2017 i.e. after the rate reduction, his cost of royalty has increased by 1.769%. Calculation of increase in the royalty has been furnished by the Respondent in the below mentioned Table:-

(Amount in Rs.)

Particulars	Before 15.11.2017 (A)	Post 15.11.2017 (B)	Impact (A-B)%
Basic Price – **Sample for illustration**	100	112.38	
Add: - GST@18%-before 14th Nov Add: - GST@5% Post 14th Nov	18	5.63	
Total Invoice Value	118	118	
Royalty Expenses @8% on Net Sale	8	8.99	

Add: - GST@12% on Royalty charged by Subway India	0.96	1.079	
Advertisement Expenses@4.5% on Net Sale	4.5	5.06	
Add: - GST@18% on Advertisement charged by Subway India	0.81	0.91	
Total Invoice Value including GST	**14.27**	**16.039**	**1.769%**

g. That the DGAP while calculating the profiteering amount, has considered the base prices of the products without considering the increase in the royalty expenses which was directly calculated on the basis of net sales. This did not come under the purview of ITC loss. Due to this increase in royalty expenses, impact on profiteered amount was Rs. 2,66,199/- and it should be reduced while calculating profiteered amount.

h. The Respondent has also relied upon the decision of this Authority given in the case of ***Kumar Gandhrav v. KRBL Limited*** (Case Number 03/2018 dated 04.05.2018) wherein increase in the purchase price/cost of goods has been accepted by this Authority while determining the profiteered amount. He has also reproduced the relevant Para 7 of the above said Order as under:-

"It is also revealed from the perusal of the tax Invoices submitted by the Respondent that there was an increase in the purchase price of paddy in the year 2017 as compared to its price during the year 2016 which constitutes major part of the cost of the above product.....

Therefore, due to the imposition of the GST on the above products as well as the increase in the purchase price of the paddy there does not appear to be denial of benefit of ITC as has been alleged by the applicant as there has been no net benefit of ITC available to the Respondent which could be passed on the consumers."

The Respondent has also furnished month wise impact of royalty amount as per the Table given below:-

Impact due to Royalty Expenses			**(Amount in Rs.)**
Month	**Total Profiteering Amount (DGAP Working)**	**Revised Profiteering after royalty expenses adjustment**	**Difference due to Royalty Expenses adjustment**
Nov'17	15,712.25	8,528.72	7,183.53
Dec'17	29,012.79	15,744.12	13,268.67
Jan'18	32,994.24	17,860.42	15,133.82
Feb'18	30,848.62	16,270.71	14,577.91
Mar'18	30,241.74	15,677.71	14,564.03
Apr'18	24,306.29	12,595.46	11,710.83
May'18	22,813.73	11,659.36	11,154.37
Jun'18	23,368.35	11,866.26	11,502.09
Jul'18	27,716.87	13,993.46	13,723.40
Aug'18	27,050.87	13,586.28	13,464.59
Sept'18	24,757.34	12,576.24	12,181.10
Oct'18	28,523.73	14,471.98	14,051.74
Nov'18	26,071.64	13,211.15	12,860.49
Dec'18	30,602.91	16,442.72	14,160.19
Jan'19	31,367.62	16,549.95	14,817.67
Feb'19	50,127.19	38,762.58	11,364.61
Mar'19	73,793.02	58,463.08	15,329.94
Apr'19	79,816.33	63,869.73	15,946.60
May'19	74,381.46	59,295.10	15,086.36
June'19	69,988.34	55,870.31	14,118.03
	753,495.32	**487,295.34**	**266,199.97**

i. **Increase in delivery expense paid to Online E-Commerce Platforms should be considered in calculation of base price after rate reduction:-** That the online aggregators have given a large customer base to the restaurants over and above the already existing dining-out facility. Considering the above benefit the Respondent had started working with the aggregators like Swiggy and Uber Eats etc. from February 2018 onwards and under the service agreements with the aggregators he was paying 13-15% service fee for delivery of the products to them. The Respondent's online sales as compared to his total sales were around 62% due to change in the business model. Without online delivery facility there was minimal chance of getting the orders from the customers. During the subject period, the Respondent had paid Rs. 17,16,774/- as delivery fee. Therefore, delivery fee inclusive of GST needed to be considered while calculating the profiteering amount.

j. **5% additional GST amount added on profiteered amount should be removed:-** That the GST of 5% which has been paid to the Government was based on the base price charged to the customers. Since, according to the DGAP the base price should have been reduced accordingly, the GST amount payable should also be less than as compared to the actual GST amount collected from the customers. However, the GST amount collected on the increased base prices from the customers has been already deposited with the Government of India along with monthly tax

liability. Therefore, the addition of 5% GST amount was required to be removed and the profiteered amount should be recovered from the Governments. The profiteered amount should also be reduced by Rs. 35,880/-.

k. **Impact on the Profiteered amount due to reduction in Base price of the products post GST rate should be considered:-** 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). The Government of India had taken a stand against such methodology at the World Trade Organisation (WTO) and argued that while determining the dumping margins, all Stock Keeping Units (SKUs) should be taken in to consideration rather than only those which showed positive dumping. In the Report WT/DS141/AB/R dated 01.03.2001 of the Appellate Body of the WTO regarding Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India in which Indian exporters faced an anti-dumping action by the EU as the exporters were exporting different varieties of Bed Linen to the EU, the Government of India had objected to this approach of the European Commission and the matter was taken to the Dispute Settlement Body of the WTO which held in favour of Government of India. In the appeal filed by the EU before the Appellate Body, the Appellate Body held that the practice of not netting off positive dumping margins and negative dumping margins was not correct. In the present case, the Respondent on few products had not only

passed the benefit by reduction in the tax rate but had also reduced the basic prices further and incurred substantial losses. The DGAP while calculating the profiteered amount had not considered the prices of products which had been reduced by him and considered the impact on the profiteered amount as zero instead of negative value. However, the column named "Difference in Value %" in the DGAP working file (File name "Total" in Annexure-13 of DGAP Report) clearly showed the negative % for the impacted line items. The total amount of these impacted negative line items was Rs. 2,34,510/- which has been incurred by the Respondent on account of reduction in the prices of the products after rate reduction which has not been considered by DGAP while calculating profiteered amount and therefore, the profiteered amount should be reduced further by Rs. 2,34,510/-. The Respondent has furnished the details of the items in respect of which the base prices have been reduced post 14.11.2017 in the Table given below:-

Impact on Profiteered amount due to reduction in prices **(Amount in Rs.)**

Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per our Calculation	Difference	Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per our Calculation	Difference	Total Impact
Nov'17	0.00	(2,479.98)	2,479.98	Sept'18	0.00	-11,535.43	11,535.43	14,015.41
Dec'17	0.00	(3,438.80)	3,438.80	Oct'18	0.00	-8,530.72	8,530.72	11,969.52
Jan'18	0.00	(3,780.46)	3,780.46	Nov'18	0.00	-19,315.51	19,315.51	23,095.97
Feb'18	0.00	(7,040.39)	7,040.39	Dec'18	0.00	-6,829.82	6,829.82	13,870.21
Mar'18	0.00	(13,551.68)	13,551.68	Jan'19	0.00	-8,524.70	8,524.70	22,076.38
Apr-18	0.00	(16,991.57)	16,991.57	Feb'19	0.00	-22,670.77	22,670.77	39,662.35
May'18	0.00	(25,335.33)	25,335.33	Mar'19	0.00	-6,903.91	6,903.91	32,239.23

June'18	0.00	(28,744.75)	28,744.75	Apr'19	0.00	-5,962.37	5,962.37	34,707.12
July'18	0.00	(15,429.97)	15,429.97	May'19	0.00	-5,709.48	5,709.48	21,139.45
Aug'18	0.00	(15,713.32)	15,713.32	Jun'19	0.00	-6,021.17	6,021.17	21,734.49
Total	0.00	(132,506.26)	132,506.26		0.00	-102,003.88	102,003.88	234,510.14

l. **MRP based product where denial of ITC is much higher in comparison with average ITC:-** That he was selling few MRP based products like soft drinks and the GST rate applicable on some of these products was 28% plus 12% Cess. After 14.11.2017, the cost of goods sold had increased because ITC on 28% GST and 12% Cess was not available to him which had been charged by the vendor at the time of purchase. Therefore, the MRP based products where tax incidence had increased due to denial to ITC needed to be removed from the profiteered amount.

m. **Considerable approach should be adopted and request to drop the proceedings:-** That as per DGAP's Report, the percentage of profiteered amount vis a vis net sales turnover was 3.56% and the DGAP has considered this impact only on the SKUs on which there was a positive impact on profiteering amount. The other benefits to the customers, reductions in the SKU rates, discounts and increase in the royalty expense were not account for. For the period from February 2019 to June 2019, the profiteered amount calculated by the DGAP was approx. 6% of net sales turnover, which was much over the average of 3.56%, calculated by the DGAP. This was primarily due to the fact that the Respondent had increased his prices during the month of

January/February 2019 to account for several other business factors. These factors had not been considered by the DGAP in his calculations and accordingly, profiteering was calculated on the increased base prices for the period from January 2019 to June 2019 period. This reiterated the fact that the period for calculation of profiteered amount should be considered for a reasonable length of time. On 31st March 2018 the Respondent's gross profit ratio was 7.26% but, in the year ending 31st March 2019, his gross profit had been reduced from 7.26% to 6.67% as well as the total sales. Therefore, there was no profit due to change in the rate reduction of GST. If the calculation period was considered upto March 2018, the profiteered amount would be reduced from Rs. 7,53,854/- to Rs. 1,39,044/-.

n. That the Respondent was not holding inventory for more than one week due to perishable nature of the items. One of his main raw materials was vegetables and prices of these kept changing on day to day basis. Various factors like competition pricing, wastages, slow and fast moving items, long term strategies for market penetration, profit margin for sustaining in the market, life cycle of the product, economic and social conditions, cost of the products and capital expenditure, inflation in man power cost, general year on year inflation etc. played an important role at the time of fixing the price of the products.

o. That various petitions were pending in the High Courts in which the petitioners had raised important issue regarding constitutional

validity of the anti-profiteering provisions along with computation method/procedures adopted by this Authority for calculating profiteering amount. These included ***WP (C) 378 of 2019 (Hindustan Unilever Ltd. v. Union of India), WP (C) 2347 of 2019 (Jubilant Food works Ltd. v. Union of India) and WP (C) 4213/2019 (Abbott Healthcare v. Union of India)***. Hence, the proceeding should be stayed till the time the issue of constitutional validity and computation methodology was settled by the courts.

16. Supplementary Report was sought from the DGAP on the above submissions of the Respondent. In response, the DGAP vide his Report dated 09.03.2020 has furnished the following reply:-

a. Para 1:- That after examining the reference, the Standing Committee on Anti-profiteering had decided to refer the matter to the DGAP for a detailed investigation which was received in his office on 01.07.2019. Accordingly, a notice under Rule 129 of the CGST Rules, 2017 was issued on 12.07.2019. Based on the facts and circumstances of the case, the investigation was carried out covering the period from 15.11.2017 to 30.06.2019 which was a reasonable period of time. Further, the legislative intent behind Section 171 of the CGST Act, 2017 was to pass on the benefit of tax rate reduction by way of commensurate reduction in prices. In other words, every recipient of goods or services has to get

the due benefit from the supplier. Every supplier in the supply chain was legally required to pass on the benefit of tax rate reduction by maintaining the base price and charging GST at the reduced rate on such base price. Every supplier of goods and services was free to increase the price of his supply depending upon the various components affecting the cost of production/supply. But under the provisions of the Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with reduction in the rate of tax, the cum-tax selling price would remain unchanged. Therefore, there wasn't any violation of Article 19 (1) (g) of the Constitution of India as the DGAP has not attempted to examine or question the base prices as Section 171 did not mandate control over the prices of the goods or services as they were to be determined by the supplier. Section 171 only mandated that any reduction in the rate of tax or the benefit of ITC which accrued to a supplier must be passed on to the consumers as both were the concessions given by the Government and the suppliers were not entitled to appropriate them. Such benefits must go to the consumers and in case they were not identifiable, the amount so collected by the suppliers was required to be deposited in the Consumer Welfare Fund (CWF). The DGAP's investigation has not examined the cost component included in the base price. It has only added the denial of ITC

to the pre rate reduction base price. Hence, Section 171 of the CGST Act, 2017 was neither controlling the prices nor was violative of Article 19 (1) (g) of the Constitution of India.

b. Para 2:- That the contention made by the Respondent was not correct as he had not submitted any documentary evidence to substantiate his claim with regard to price of SOTD having been fixed at Rs.110/- till 14.11.2017. Further, to arrive at the base price of the products before rate reduction, sales during the period from 01.11.2017 to 14.11.2017 had been considered. If sale of any particular product/item was not found during this period then, in that case, the sales of that particular product/item during previous months i.e. from August 2017 to October 2017 had been considered to arrive at the base price of the that product/item. Since the sales of these 7 SOTD items were not found during the period from 01.11.2017 to 14.11.2017, therefore, the sale of these items during the month of August 2017 had been considered and during August 2017, the basic sale price of these 7 SOTD items was arrived at as Rs. 105/- as per the sales data submitted by the Respondent.

c. Para 3:- That as per the franchise agreement, the royalty expenses and advertisement charges were fixed at certain percentage of the net sales. These expenses were being paid by the Respondent before the rate reduction and the same were being paid by him after rate reduction also. Hence there

appeared to be no increase in the expenses as there was no increase in the percentage which was fixed as per the franchise agreement. Moreover, in respect of GST paid by the Respondent on these expenses, he was availing ITC of the same before rate reduction but after rate reduction, the Respondent could not avail the ITC of the same in terms of Notification No. 46/2017 -Central Tax (Rate) dated 14.11.2017. Therefore, this impact of denial of ITC has duly been considered and accordingly ratio of ITC to Net Outward Taxable Turnover was calculated and the Respondent could have increased the base prices by that extent during the post GST rate reduction period i.e. from 15.11.2017 onwards, in order to negate the impact of ITC denial. Therefore, the benefit of ITC loss has been given to the Respondent. Further, the case of M/s KRBL was different as the pre-GST rate of tax was nil and for the first time tax rate of 5% was imposed on the impugned product.

d. Para 4:- That during the investigation, the Respondent has not made any such submissions. Therefore in the absence of any documentary evidence, the claim of the Respondent was not acceptable at this point of time.

e. Para 5:- That the price included both the basic price and the tax charged on it. Therefore, any excess amount collected from the recipients, even in the form of tax, must be returned to the recipients. In case, the recipients were not identifiable,

the said amount was required to be deposited in the CWF. By increasing the base price, the Respondent has forced his customers/recipients to pay extra tax which they were not liable to pay. Therefore, it was clear that the amount of extra tax (GST) on the increased base prices was an amount paid by the customers/recipients which they were not supposed to pay. If any supplier has charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively deposited in the CWF, regardless of whether such extra tax collected from the recipient has been deposited in the Government account or not. Besides, any extra tax returned to the recipients by the supplier by issuing credit notes could be declared in the Returns filed by such supplier and his tax liability would stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, the option was always open to the Respondent to return the tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent.

f. Para 6:- That the contention of the Respondent that impact on the profiteered amount due to reduction in the base prices of the products post GST rate reduction should be considered, was incorrect. Section 171 of the CGST Act, 2017 which governed the anti-profiteering provisions under GST, required that in the event of a benefit of ITC or

reduction in rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously be in terms of money only, so that the final price payable by a consumer got reduced. The statute did not force the supplier to reduce the prices more than the actual required commensurate reduction. There could be many marketing strategies or other promotional schemes which might compel the Respondent to reduce the prices of products more than the actual requirement. The Respondent was always at liberty to reduce the prices of his products up to any extent and bear the loss but this loss could not be appropriated with the due benefit of rate reduction available to the recipients or customers of the other products where the prices were not reduced commensurately by the Respondent. Hence, profiteering under the provisions of Section 171 of the CGST Act, 2017 was to be quantified at the products where prices were not reduced commensurately.

g. Para 7:- That the MRP was the maximum price at which goods could be sold in retail. The value of transaction between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the MRP. Therefore, regardless of whether MRP was marked on the product or not, the pre and post-tax rate reduction transaction values were compared to determine profiteering. There was no significance of MRP in establishing profiteering. The total

impact of ITC denial which included the loss of ITC in respect of MRP goods also, has been duly considered and accordingly ratio of ITC to Net Outward Taxable Turnover has been calculated for the pre rate reduction period and hence the claim of the Respondent has no significance at this point of time.

17. The Respondent, vide his submissions dated 01.06.2020 sent through e-mail dated 10.06.2020, has filed his contentions against the above Supplementary Report of the DGAP. Upon perusal of the submissions dated 01.06.2020 made by the Respondent, it is observed that he has reiterated the issues mentioned in his earlier submissions dated 13.02.2020. In addition to the submissions dated 13.02.2020, the Respondent has made the following additional submissions:-

a. That he did not agree with the reply of the DGAP mentioned in Para 2 of his submissions dated 09.03.2020. He has stated that he has submitted the pre and post GST rate reduction product wise Price Lists. Further, this fact could also be verified from the sales register in which subject product has been sold at Rs. 110/- under SOTD Scheme.

b. That he did not agree with the reply of the DGAP made in Para 4 of his clarifications as during the investigation he did not know about the method and procedures of DGAP for calculating profiteering amount. The Respondent had

submitted all the information/details which had been asked by the DGAP. The DGAP had never asked such kind of information's/details from the Respondent. After submitting all the required information/details to the DGAP, the Respondent had received the DGAP's Report through this Authority and came to know about the methodology and procedures to compute the profiteering amount. Therefore, in his first written submission to this Authority on 13.02.2020, he had highlighted the same with all requisite details and documentary evidence for kind consideration.

18. We have carefully considered the all the Reports furnished by the DGAP, the submissions made by the Respondent and the other material placed on record. On examining the various submissions we find that the following issues need to be addressed:-

    a. Whether the Respondent has passed on the commensurate benefit of reduction in the rate of tax to his customers?
    b. Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 committed by the Respondent?

19. It is observed from the record that the Respondent is running a restaurant as franchisee of M/s Subway India Private Limited in Jaipur (Rajasthan) and is supplying various food products to the customers. It is also revealed from the plain reading of Section 171

(1) of the CGST Act, 2017 that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the record that there has been a reduction in the rate of tax from 18% to 5% w.e.f. 15.11.2017, on the restaurant service being supplied by the Respondent, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 without benefit of ITC. Therefore, the Respondent is liable to pass on the benefit of tax reduction to his customers in terms of Section 171 (1) of the above Act. It is also apparent that the DGAP has carried out the present investigation w.e.f. 15.11.2017 to 30.06.2019.

20. It is also evident that the Respondent has been supplying different items during the period from 15.11.2017 to 30.06.2019 to his customers. Upon comparing the average selling prices as per the details submitted by the Respondent for the period from 01.08.2017 to 14.11.2017 and the actual selling prices post rate reduction w.e.f. 15.11.2017 to 30.06.2017 it has been found that the GST rate of 5% has been charged by the Respondent w.e.f. 15.11.2017 however the base prices of some of the products have been increased more than their commensurate prices w.e.f. 15.11.2017 which established that because of the increase in the base prices the cum-tax price paid by the consumers was not reduced commensurately, inspite of the reduction in the GST rate.

21. While comparing the average pre rate reduction base prices with the post rate reduction actual base prices the DGAP has duly taken in to account the impact of denial of ITC in respect of the "restaurant service" being supplied by the Respondent as a percentage of the taxable turnover from the outward supply of the products made during the pre-GST rate reduction period by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. This has been done because there was no reversal of ITC on the closing stock of inputs/input services and capital goods as on 14.11.2017 made by the Respondent as per the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the above Rules. Accordingly, the ratio of ITC to the net taxable turnover has been taken for determining the impact of denial of ITC which was available to the Respondent till 31.10.2017. As per the record ITC amounting to Rs. 2,48,994/- was available to the Respondent during the period from July, 2017 to October, 2017 which was approximately 8.72% of the net taxable turnover of the restaurant service amounting to Rs. 28,54,334/- supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent.

22. It is further revealed from the analysis of the details of item-wise outward taxable supplies made during the period from 15.11.2017 to 31.06.2019 that the Respondent had increased the base prices of his products/items supplied as a part of restaurant service to

make up for the denial of ITC post GST rate reduction. The pre and post GST rate reduction prices of the items sold during the period from 01.08.2017 to 14.11.2017 (Pre-GST rate reduction) and 15.11.2017 to 30.06.2019 (Post-GST rate reduction) have been compared and it has been found that the Respondent has increased the base prices by more than 8.72% i.e. by more than what was required to offset the impact of denial of ITC in respect of the products/items sold during the above period. Thus, it is apparent that the Respondent has resorted to profiteering as the commensurate benefit of reduction in the rate of tax from 18% to 5% has not been passed on by him. However, there was no profiteering in respect of the remaining items on which there was either no increase in the base prices or the increase in base prices was less or equal to the denial of ITC or these were new products launched post-GST rate reduction.

23. On the basis of the aforesaid pre and post reduction GST rates, the impact of denial of ITC and the details of outward supplies (other than zero rated, nil rated and exempted supplies) during the period from 15.11.2017 to 30.06.2019, the amount of net higher sale realization due to increase in the base prices of the products, despite the reduction in the GST rate from 18% to 5% with denial of ITC or the profiteered amount has come to **Rs. 7,53,854/-** including the GST on the base profiteered amount. The details of the computation have been given by the DGAP in **Annexure-13** of his Report. .

24. The DGAP for computation of the profiteered amount has compared the average base prices of the products which were being charged by the Respondent during the pre rate reduction period with the actual post rate reduction base prices of these products. It was not possible to compare the actual base prices prevalent during the pre and the post GST rate reduction periods due to the reasons that the Respondent was (i) selling his products at different rates to different customers based on the various factors such as sales, inventory position, competitor's strategy, market penetration and customer loyalty (ii) the same customer may not have purchased the same product during the pre and the post rate reduction periods and (iii) a customer may have purchased a particular product during the pre rate reduction period and may not have purchased it in the post rate reduction period or vice versa and (iv) the average base prices computed for a period of 14 days w.e.f. 01.11.2017 to 14.11.2017 or for the previous months provide highly representative and justifiable comparable average base prices. On the basis of the average pre rate reduction base price the commensurate base price has been computed by adding denial of ITC of 8.72% and compared with the invoice wise actual base price of the product as has been illustrated in Table-B supra. However, the average pre rate reduction base price was required to be compared with the actual post rate reduction base price as the benefit is required to be passed on each product to each customer. In case average to

average base price is compared for both the periods, the customers who have purchased a particular product on the base price which is more than the commensurate base price, would not get the benefit of tax reduction. Such a comparison would be against the provisions of Section 171 as well as Article 14 of the Constitution which require that each customer has to be passed on the benefit of tax reduction on each purchase made by him. The above methodology employed by the DGAP for computing the profiteered amount appears to be correct, reasonable, justifiable and in consonance with the provisions of Section 171 of the CGST Act, 2017 and has been successively approved by this Authority in the cases of tax reduction and hence the same can be relied upon.

25. The Respondent has vehemently argued that the DGAP has considered all the price revisions made by him after 15.11.2017 as a part of profiteered amount and has ignored the fact that a businessman has right to increase his prices on account of various reasons other than tax. It is pertinent to mention here that the scope of profiteering, as per Section 171 of the CGST Act, 2017, is confined to the question of whether the benefit accruing on account of rate reduction has been passed on to the recipients or not. It is apparent from the above narration of facts that the Respondent could have raised his pre rate reduction prices by 8.72% to offset the impact of denial of ITC but it has been found that he had increased them more than the above permissible limit as is clear from the perusal of Annexure-13 of the Report. Therefore, the

Respondent has failed to pass on the benefit of tax reduction. The Respondent has not produced any evidence during the course of the investigation to the effect that the price rise effected by him was commensurate with the tax reduction. He has further claimed to have increased his prices in February 2019 on account of inflation and other factors although at no stage between the period w.e.f. 15.11.2017 till date he has established that he has passed on the benefit of tax reduction commensurately. The Respondent has continued to increase his prices by more than what he could have done to off set the denial of ITC and he has not fixed them commensurately even once during the above period which could prove that he has passed on the benefit of tax reduction. Therefore, the DGAP has rightly computed the profiteered amount. Hence, the above contention of the Respondent is not tenable.

26. The Respondent has also argued that the right to trade was a fundamental right guaranteed under Article 19 (1) (g) of the Constitution which included the right to determine prices which could not be taken away without any explicit authority under the law. Therefore, this form of price control was a violation of Article 19 (1) (g). In this connection it would be relevant to mention that the Respondent has full right to fix his prices under Article 19 (1) (g) of the Constitution but he has no right to appropriate the benefit of tax reduction under the garb of the above right. The DGAP has not acted in any way as a price controlling authority as he does not have the mandate to do so. Under Section 171 read with Rule 129

of the above Rules the DGAP has only been mandated to investigate whether both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments have been passed on to the end consumers who bear the burden of the tax or not. The intent of this provision is the welfare of the consumers who are voiceless, unorganized and vulnerable. The DGAP has nowhere interfered with the pricing decisions of the Respondent and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

27. The Respondent has further argued that the base price of 7 SOTD items which were sold by him was Rs. 110/- per item till 14.11.2017 but the base price has been incorrectly mapped by the DGAP as Rs. 105/- while working out the average base price for the pre rate reduction period. However, the record of the case reveals that the Respondent, at no point in time, has furnished any invoice/ document which showed that the price of the SOTD items had been fixed as Rs. 110/- by the Respondent. It is also apparent that for computing the extent of profiteering, the DGAP has taken the product wise average base price for the items supplied in the pre rate reduction period from the Respondent's invoices which the Respondent had himself submitted and not from any secondary data/ source. Therefore, the base price of SOTD of Rs. 105/- per item computed by the DGAP is based on the information supplied by the Respondent himself. Since there had been no sales of the

above item between the period w.e.f. 01.11.2017 to 14.11.2017 the DGAP has taken the last sales which had been made by the Respondent in the month of August 2017, as the basis for calculation of the average base price of the SOTD items. As per the sales data submitted by the Respondent himself the average base price was mapped as Rs. 105/- per item which has been compared with the actual post rate reduction base price. Therefore, the DGAP has correctly taken the average base price of the SOTD items as Rs. 105/- for the pre rate reduction period and hence, the above contention of the Respondent is frivolous.

28. The Respondent has also contended that the franchisor i.e. M/s Subway India Pvt. Ltd. was charging 8% and 4.5% totalling 12.5% Royalty and Advertisement Charges on his net sales on which GST @ 12% and 18% was also being charged and after 01.07.2017 his royalty cost has directly increased by 1.769% which has not been considered by the DGAP. In this connection it would be appropriate to mention that there has been no change in the rates of royalty and advertisement charges in the post rate reduction period and hence, they have no impact on the base prices of the Respondent. These charges were already built in the base prices during the pre rate reduction period and hence, they cannot be added again in the base prices. These charges are also bound to increase as the Respondent has increased his base prices by more than the permissible limit of 8.72% which he cannot claim to exclude from

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the profiteered amount. Therefore, the above claim of the Respondent cannot be accepted.

29. The Respondent has also relied upon the decision of this Authority given in the case of ***Kumar Gandhrav v. M/s KRBL Limited (Case Number 03/2018 dated 04.05.2018)*** to support his case. In this context, it is pertinent to mention that in the above case no benefit of increase in the cost was given. Instead, the rate of tax had been increased from 0% to 5% on the impugned product and hence the provisions of Section 171 (1) were not applicable as there was no tax reduction. Therefore, the facts of the above case are different from this case and hence, they cannot help the Respondent.

30. The Respondent has also averred that during the period of investigation he has paid Rs. 17,16,774/- as delivery fee to the Online E-commerce platforms through which he was selling his products which has not been taken in to account by the DGAP while computing the base prices. In this respect it would be appropriate to state that the payment of delivery fee including the GST has no connection with the base prices as the Respondent has admitted increase in his sales due to use of the E-commerce platforms which has resulted in his earning more profits. There is no evidence on record which can establish that the Respondent has not recovered the delivery fee from his buyers. There is also no question of including the hypothetical ITC on the GST which would have been available to the Respondent in the post rate

reduction period while calculating the pre rate reduction average base prices as the Respondent was not making supplies through the above platforms during the pre rate reduction period. The above claim of the Respondent is frivolous and hence, it cannot be accepted.

31. The Respondent has also claimed that the DGAP while calculating the profiteered amount has erroneously added 5% notional amount on account of GST which has been collected from the customers and deposited with the Government of India with the monthly GST returns. This contention of the Respondent is not correct because the provisions of Section 171 (1) and (2) of the CGST Act, 2017 require that the benefit of reduction in the tax rate is to be passed on to the recipients/ customers by way of commensurate reduction in price, which includes both the base price and the tax. The Respondent has not only collected excess base prices from the customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on these excess base prices which they should not have paid. By doing so, the Respondent has defeated the very objective of both the Central as well as the State Government which aimed to provide the benefit of rate reduction to the general public. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of

tax reduction to his customers by charging excess GST. Had he not charged the excess GST the customers would have paid less prices while purchasing food items from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. The above amount can also not be recovered from the Government as it is required to be deposited in the CWFs of the Central and the State Government. Therefore, the above amount has been correctly included in the profiteered amount by the DGAP and therefore, the contention of the Respondent is untenable and hence it cannot be accepted.

32. The Respondent has further averred that the DGAP while calculating the profiteered amount has incorrectly applied a methodology similar to the 'zeroing methodology'. In this regard, we observe that no 'netting off' can be applied in the cases of profiteering, as the benefit has to be passed on to each customer on each product. Netting off, as demanded by the Respondent, would imply that the amount of benefit not passed on certain supplies (to certain customers/ recipients) would be subtracted from the amount of any excess (more than commensurate) benefit passed on other products and the resultant amount would be determined as the profiteered amount. If this flawed methodology is applied the Respondent would be entitled to subtract the amount of benefit which he has not passed on from the amount of excess benefit which he has claimed to have passed on which would result

in complete denial of benefit to the customers who were entitled to receive it. It has to be kept in mind that every recipient/ customer is entitled to the benefit of the tax rate reduction by way of reduced prices and Section 171 does not offer the Respondent to suo moto decide on any other modality to pass on the benefit of reduction in the rate of tax to his recipients. Therefore, any benefit of tax rate reduction passed on to a particular recipient or customer cannot be adjusted against the benefit of tax rate reduction that ought to accrue to another recipient or customer. Therefore, the above contention of the Respondent is not tenable.

33. The Respondent has also alleged that the DGAP has ignored the negative values and resorted to 'zeroing' to compute higher profiteering 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 of 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. The customers have to be considered as individual beneficiaries and they cannot be compared with dumped

goods and netted off. This Authority has also clarified in its various orders that the benefit of tax reduction 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 to each buyer. Hence, the above contentions of the Respondent is not correct as the Respondent cannot insist on applying 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 the customers which would amount to violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution.

34. The Respondent has also stated that the DGAP has not considered the amount of Rs. 2,34,510/- incurred by the Respondent on account of rate reduction in the prices of the products after GST rate reduction. In this connection it is mentioned that Section 171 of the CGST Act, 2017 requires passing of the benefit of tax reduction by commensurate reduction in prices only and therefore, the Respondent cannot claim to pass on the benefit through the promotional schemes. Such schemes have been offered by the Respondent to increase his sales in the normal course of his business which do not constitute passing on of the benefit. The Respondent cannot pass on the benefit as per his own convenience as he is legally bound to pass on the above benefit through commensurate price reduction only. Hence, the above contention of the Respondent is untenable and therefore, the total amount of Rs. 2,34,510/- claimed to have been passed on

as benefit of tax reduction through various sale promotion schemes cannot be reduced from the profiteered amount.

35. The Respondent has also contended that he was selling few MRP based products and the GST applicable on some of these products was 28% plus 12% Cess. After the rate reduction, he was not able to avail the ITC on such items. Therefore, the MRP based products where tax incidence has been increased due to the denial of ITC needed to be removed from the profiteered amount. In this regard, we find no ground to deviate from the submissions of the DGAP that the MRP was the maximum price at which the goods could be sold in retail. The value of transaction between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the MRP. Therefore, to determine the profiteering in respect of the MRP based items, the pre and post rate reduction transaction values were compared by the DGAP, regardless of whether the MRP was marked on the product or not. The DGAP has arrived at the profiteered amount by calculating the total impact of ITC denial which included the loss of ITC in respect of the MRP based items also. Therefore, MPR has no impact on the computation of the profiteered amount. Hence, the above plea of the Respondent is not maintainable.

36. The Respondent has further contended that the period of calculation of profiteered amount should be considered for a reasonable length of time. Therefore, keeping in mind the perishable nature of the items and various other factors the

profiteered amount should be restricted up to March, 2018. In this context, we observe that while the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017, the Respondent had increased the base prices of his products immediately w.e.f. 15.11.2017 and had taken no steps to pass on the resultant benefit of tax reduction by commensurate fixing of prices of his supplies at any point of time till 30.06.2019. In other words, the violation of the provisions of Section 171 of the CGST Act 2017 has continued unabated in this case and the offence continues till date. The Respondent has not produced any evidence to prove from which date the benefit was passed on by him. The fact that the Respondent has not complied with the provisions of Section 171 (1) of the above Act till 30.06.2019 requires that the profiteering is computed for the entire period and hence we do not see any reason to accept this contention of the Respondent. We further observe that had the Respondent passed on the benefit before 31.03.2019, he would have been investigated only till that date. The Respondent has failed to cite any ground due to which the profiteered amount should be computed till March 2018 only. Therefore, the period of investigation from 15.11.2017 to 30.06.2019 has been rightly taken by the DGAP for computation of the profiteered amount.

37. The Respondent has further argued that the CGST Act, 2017 did not prescribe any method of computation by which profiteered amount could be calculated. The above contention of the Respondent is frivolous as the 'Procedure and Methodology' for

passing on the benefits of reduction in the rate of tax and ITC or computation of the profiteered amount has been outlined in Section 171 (1) of the CGST Act, 2017 itself which provides that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" It is clear from the plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is ordered by the Central or the State Governments or a registered supplier avails benefit of additional ITC the same have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their tax revenue. It also provides that the above benefits are to be passed on any supply i.e. on each Stock Keeping Unit (SKU) of each product or unit of construction or service to every buyer and in case they are not passed on, the quantum of denial of these benefit or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such SKUs/units/services by the DGAP. What would be the 'profiteered amount' has been clearly defined in the explanation attached to Section 171. These benefits can also not be passed on at the entity/organisation/branch/invoice/product/ business vertical level as they have to be passed on to each and every buyer at each SKU/unit/service level by treating them equally. The above provision also mentions "any supply" which connotes each taxable

supply made to each recipient thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer on a particular product therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer, on another product. Each customer is entitled to receive the benefit of tax reduction or ITC on each SKU or unit or service purchased by him subject to his eligibility. The term "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the price which has to be computed in respect of each SKU or unit or service based on the price and the rate of tax reduction or the additional ITC which has become available to a registered person. The legislature has deliberately not used the word 'equal' or 'equivalent' in this Section and used the word 'Commensurate' as it had no intention that it should be used to denote proportionality and adequacy. The benefit of additional ITC would depend on the comparison of the ITC/CENVAT which was available to a builder in the pre-GST period with the ITC available to him in the post GST period w.e.f. 01.07.2017. Similarly, the benefit of tax reduction would depend upon the price and quantum of reduction in the rate of tax from the date of its notification. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from SKU to SKU or unit to unit or service to service and hence no fixed mathematical methodology can be prescribed

to determine the amount of benefit which a supplier is required to pass on to a buyer. Similarly, computation of the profiteered amount is also a mathematical exercise which can be done by any person who has elementary knowledge of accounts and mathematics. However, to further explain the legislative intent behind the above provision, this Authority has been authorised to determine the 'Procedure and Methodology' which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed mathematical formula, in respect of all the Sectors or the SKUs or the services, can be set for passing on the above benefits or for computation of the profiteered amount, as the facts of each case are different. In the case of one real estate project, date of start and completion of the project, price of the flat/shop, mode of payment of price or instalments, stage of completion of the project, rates of taxes pre and post GST implementation, amount of CENVAT and ITC availed/available, total saleable area, area sold and the taxable turnover received before and after the GST implementation would always be different from the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to the other project. Therefore, no set procedure or mathematical methodology can be framed for determining the benefit of additional ITC which has to be passed on to the buyers of the units. Moreover, this Authority under Rule 126 has been empowered to 'determine' Methodology & Procedure

and not to 'prescribe' it. Similarly, the facts of the cases relating to the sectors of Fast Moving Consumer Goods (FMCG), restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology adopted in the case of one sector cannot be applied to the other sector. Moreover, both the above benefits are being given by the Central as well as the State Governments as a special concession out of their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and therefore, they are bound to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous, mandatory and legally enforceable. The above provisions also reflect that the true intent behind the above provisions, made by the Central and the State legislatures in their respective GST Acts is to pass on the above benefits to the common buyers who bear the burden of tax and who are unorganised, voiceless and vulnerable. The Respondent is trying to deliberately mislead by claiming that he was required to carry out highly complex and exhaustive mathematical computations for passing on the benefit of tax reduction which he could not do in the absence of the procedure framed under the above Act. However, no such elaborate computation was required to be carried out as the Respondent was to maintain the base price of the product which he was charging as on 14.11.2017 and then add 8.72% of the base price on account of denial of ITC and

charge GST @5% w.e.f. 15.11.2017. Instead of doing that he has raised his prices by adding more than 8.72% of the base prices as is evident from Table-B supra. The average pre rate reduction base price of the product mentioned in the above Table was Rs. 120/- which could have been raised to Rs. 130.19/- by adding denial of ITC to the extent of 8.72%. After adding GST @ 5% amounting to Rs. 6.51/- the Respondent was required to sell it at the commensurate price of Rs. 136.70/- w.e.f. 15.11.2017. However, he had sold the above product at Rs. 140/- and hence, he has profiteered to the extent of Rs. 3.30/-. It is clear from the above narration of facts and the law that no procedure or elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of tax reduction. The Respondent cannot deny the benefit of tax reduction to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of tax reduction and the profiteered amount. Therefore, the above plea of the Respondent is wrong and hence, it cannot be accepted.

38. The Respondent has also claimed that the pricing of products depended on several commercial factors which were required to be taken in to account while computing the profiteered amount. In this connection, it would be pertinent to mention that the provisions of Section 171 (1) and (2) of the above Act require the Respondent to pass on the benefit of tax reduction to the consumers only and

have no mandate to look into fixing of prices of the products which the Respondent is free to fix. However, it cannot be accepted that his costs had increased on the intervening night of 14.11.2017/ 15.11.2017 when the rate reduction had happened which had forced him to increase his prices exactly equal or more then the reduction in the rate of tax. Such an uncanny coincidence is unheard off and hence there is no doubt that the Respondent has increased his prices for appropriating the benefit of tax reduction to deny the above benefit to his customers. Therefore, the above claim of the Respondent cannot be accepted.

39. The Respondent has further argued that various writ petitions have been filed challenging the orders passed by this Authority. These included ***WP (C) 378 of 2019 (Hindustan Unilever Ltd. v. Union of India), WP (C) 2347 of 2019 (Jubilant Food works Ltd. v. Union of India) and WP (C) 4213/2019 (Abbott Healthcare v. Union of India)*** in which the constitutional validity and computation methodology has been challenged and hence, the present proceedings should be kept pending till the above issues are settled. In this context, it would be relevant to mention that the Hon'ble High Court of Delhi has not directed this Authority to stop the proceedings in respect of the present case. Therefore, the present proceedings cannot be kept pending as they are to be completed within the prescribed period. Therefore, the above contention raised by the Respondent is not sustainable.

40. Based on the above facts the profiteered amount is determined as Rs. 7,53,854/- as has been computed vide Annexure-13 of the DGAP's Report dated 31.12.2019. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. Further, since the recipients of the benefit, as determined above are not identifiable, the Respondent is directed to deposit an amount of Rs. 7,53,854/- in two equal parts of Rs. 3,76,927/- each in the Central Consumer Welfare Fund and the Rajasthan State Consumer Welfare Fund as per the provisions of Rule 133 (3) (c) of the CGST Rules 2017, along with interest payable @ 18% to be calculated from the dates on which the above amount was realized by the Respondent from his recipients till the date of its deposit. The above amount of Rs. 7,53,854/- shall be deposited, as specified above, within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned CGST/SGST Commissioner.

41. 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 he has thus resorted to profiteering. Hence, he has committed an offence under section 171 (3A) of the CGST Act, 2017 and therefore, he is liable to penal action under the provisions of the above Section. Accordingly, a notice be issued to him directing him to explain why the penalty prescribed under Section

171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

42. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Rajasthan 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 Rajasthan State Government 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.

43. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 31.12.2019 the order was to be passed on or before 30.06.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date due to *force majeure*. Accordingly, this order is being passed today in terms of the Notification No. 55/2020-Central Tax dated 27.06.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017

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171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

42. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Rajasthan 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 Rajasthan State Government 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.

43. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 31.12.2019 the order was to be passed on or before 30.06.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date due to *force majeure*. Accordingly, this order is being passed today in terms of the Notification No. 55/2020-Central Tax dated 27.06.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017

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

Sd/-
(Dr. B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

16.7.2020

(A.K Goel)
NAA, Secretary

File No. 22011/NAA/122/Gauravfood/2020/3801-3805 Date:- 16.07.2020

Copy To:-

1. M/s Gaurav Sharma Food Industries, F-188B, Jata Shankar Apartment, Bagadia Bhawan, Subhas Marg, C-Scheme, Jaipur-302001.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
3. Pr. Chief Commissioner, CGST Jaipur Zone, New CR Building, Statue Circle, C-Scheme, Jaipur, Rajasthan-302005.
4. Commissioner of Commercial Taxes, Kar Bhavan, Ambedkar Circle, Jaipur, Rajasthan - 302 005.
5. Guard File.

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A. K. GOEL
SECRETARY, NAA