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

Case No.	95/2020
Date of Institution	31.01.2020
Date of Order	11.12.2020

In the matter of:

1. Shri I.P Saji, Shop No. 8, Happy Home Apt. No. 1, Shanti Park, Mira Road (E), Thane – 401107.
2. Director-General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Inox Leisure Pvt. Ltd., 5th Floor, Viraj Towers, Next to Andheri Flyover, Western Expressway Highway, Andheri (East), Mumbai – 400093.

Respondent

Quorum:-

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

1. None for Applicant No 1.

2. None for Applicant No 2.

3. None for the Respondent.

ORDER

1. The present Report dated 31.01.2020 has been received from the Director-General of Anti-Profiteering (DGAP) after a detailed investigation conducted under Rule 129 of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received from the Standing Committee on Anti-profiteering from Applicant No. 1, alleging profiteering in respect of the supply of restaurant service despite a reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017. Vide his Application, the above Applicant had alleged that the Respondent had increased the base prices of his items and did not pass on the benefit of reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 by way of commensurate reduction in prices, in terms of Section 171 of the CGST Act, 2017.

2. The DGAP has reported that on receipt of the aforesaid reference from the Standing Committee on Anti-profiteering on 02.05.2019, a Notice under Rule 129 of the Rules was issued by the DGAP on 13.05.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017 had not been passed on to his recipients by way of a 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 to furnish all documents in support of his reply. Further, the Respondent was afforded an opportunity to inspect the non-confidential evidence/information which formed the basis of the said Notice, during the period 21.05.2019 to 23.05.2019. The Authorized Representative of the Respondent availed of the said opportunity on 22.05.2019.

3. The DGAP had further reported that the period covered in the current investigation was from 15.11.2017 to 30.04.2019 and the time limit to complete the investigation was extended up to 01.02.2020 by the National Anti-profiteering Authority, in terms of Rule 129(6).

4. The DGAP had further reported that in response to his Notice dated 13.05.2019 and subsequent letters and summons the Respondent submitted his responses before the DGAP vide his e-mails/letters dated 22.05.2019, 03.06.2019, 12.06.2019, 18.06.2019, 09.07.2019, 22.07.2019, 14.08.2019, 26.08.2019, 29.08.2019, 03.09.2019, 23.09.2019, 30.09.2019 and 13.01.2020. Vide his various replies, the Respondent made the following contentions before the DGAP:-

   a. That he was engaged in the business of Film exhibition service (box office collection), Food and Beverage and advertisement services, etc. Further, it was submitted that the present inquiry was concerning

the supply of food and beverages by him wherein the price was dependent upon and/or significant changes based on the following parameters:

- Food and beverage prices depending on the types of film
- Date and time of the supply
- Other miscellaneous factors such as the location of the property, movie screening language (original or dubbed), etc.

b. That in the business of entertainment and leisure, the marginal utility changed every minute/hour/day depending upon the offering, and hence, there was no consistency in scenarios & considerations for pricing, therefore, any comparison was not just unwarranted but impossible. In other words, each film or each show was different from the other and hence, was not comparable for pricing considerations. Given this, every supply was unique and no comparison could be made for prices charged pre-post certain event (including tax events such as increase or reduction in the rate of tax or ITC allowance or disallowance. Also, given the above, the supply of food and beverage by the multiplexes could not be compared to the supply of food and beverages by the restaurants, where the supply of food and beverages was based on printed rate or menu card, which was fixed for medium to long duration. In the case of multiplexes, the prices were dynamic and were revised frequently depending upon

all the parameters stated above. Thus, any inquiry or investigation either needed to be dropped or could be undertaken only after taking into account all the aforementioned business nuances and uniqueness.

c. That he was providing the supply price data which highlighted that depending upon food/ beverage items, in question, and keeping in view the factors above, the prices might be dynamic on the same date (for different properties) or for the same property (on different dates). It signified that differentiation in the prices of tickets according to the film, the day and the time of the show as also the location of the property was completely business-driven. Thus in his case, no two supplies were comparable and prices were extremely dynamic and could go up and down depending upon the parameters stated above and any price change, therefore, could not be related to any profiteering by him.

d. That the meaning/definition of the term 'profiteering' was given in various scholarly references and that even in terms of Section 171 of the CGST Act, his case did'nt fit the criteria of a case of profiteering.

e. That before 15 Nov 2017, the supply of food and beverage by him was liable to GST rate of 18% with full ITC allowance, whereas w.e.f. 15 Nov 2017, his supply of food and beverages had become liable to

GST at 5% without ITC, which had a far-reaching impact on his business and profitability on account of the reduction in tax on outward supplies; and the increase in the cost of his direct and indirect procurements due to loss of ITC; that the actual loss of ITC had been reflected in the GST returns filed by him for periods covering 15 November 2017 onwards and the summary of the same, which duly reconciled with his GST returns, has been given in the table- 'A' below: -

Table-'A'

Period	Food and Beverage Taxable Turnover (i.e. net of taxes)	ITC Denied (in Full) and Reversal on Common ITC pool
15-Nov-17 to 31-Mar-18	31.80 Crores	4.87 crores

f. That it could be seen from the above Table that he had incurred a loss of 17% (approx.) but he had kept the ultimate prices to customers unchanged on the eve of change in GST rate and onwards. This enabled passing of the benefit of the reduced rate of tax and only partially compensated his losses by increasing the base prices, affected due to cum tax prices remaining unchanged. This showed that he was in full compliance with Section 171 of the CGST Act and no allegation of profiteering could be made against him.

g. That the subject complaint was lodged against his multiplex located in Dahlias, Mumbai, and that the

complainant had based his application on a comparison of two invoices close to the date of the change in law detailed above and had contended that the prices remained unchanged despite the reduction in the tax rate; that subsequently, GST authorities requisitioned data from him on profitability in the food segment; that the profitability in his business segment had witnessed a sharp decline on a relative basis and therefore, the allegation of profiteering was untenable.

h. That the Screening Committee and Standing Committee had only highlighted the increase in the base prices of food and beverages as the basis of profiteering by him.

i. That the locus-standi of the entire matter was that he had not reduced the prices despite the reduction in the GST rate applicable to his supplies of food and beverages which was a disorderly comparison without any merit; that the data tabulated in the Tables 'B' & 'C' below clarified that there was no profiteering whatsoever:-

Table-'B' (Amounts in Rs.)

Item	Before/ After Rate Change	Date	Total Amount Charged to Customer	Applicable GST Rate	Base Price (excl taxes)
Tea Georgia	Before	11-Nov-17	90.00	18%	76.27
	After	18-Nov-17	90.00	5%	85.71
Popcorn	Before	11-Nov-17	260.00	18%	220.34
	After	18-Nov-17	260.00	5%	247.62

Loss Incurred by the Respondent

Table-'C (Amounts in Rs.)

Particulars	Tea Georgia	Popcorn
Base Price Before the change in GST rates (A)	76.27	220.34
Loss of ITC	17.21%	17.21%
Loss of ITC (Amount) (B)	13.13	37.92
Prices should have been revised to (C = A+B)	**89.40**	**258.26**
GST 5% on above (D = 5% of C)	4.47	12.91
The price that should have been charged to the Customer (E = C+D)	**93.87**	**271.17**
Actual Price Charged (F)	90.00	260.00
Excess Benefit Passed on the to Customer (E-F)	**3.87**	**11.17**

j. That as illustrated above, no incremental profit was made by him, and that the ITC loss parallel to the rate change event – had actually resulted in overall losses to him since he had passed on the benefit to the customers; that that fact that he was making losses was overlooked by the Screening and Standing Committee, thus, the very basis of reference for detailed investigation to the DGAP was flawed.

k. that due to the very nature of the business of entertainment he kept evolving his offerings to patrons by opening new units/ properties or by revamping/ resizing the existing units/ properties as also by adding/ deleting premium elements and offering new food and beverages, as per market requirements and

his business strategy.

l. that the comparison of financial/sales data to examine profiteering, if any, should be limited to a reasonable/ limited/ defined length of time; that the data request from the DGAP spanned over 18 months and aimed at comparing price data of all the months commencing from November 2017 to April 2019 with October/ November 2017 as the base; that in his business, which followed a dynamic pricing approach, the prices were not even comparable daily.

m. that the investigation has grossly overlooked the intent of anti-profiteering provisions and the following comments of Chairman of this Authority seem to have escaped consideration in as much as the period to which the investigation was being extended:

"Chairman, National Anti-Profiteering Authority, assured companies that the Authority was ***not a price regulator*** *and neither does it have legislative intent. He was addressing an interactive session with industry organized by the Confederation of Indian Industry (CII) at Mumbai today.*

The Chairman mentioned that authorities were ***sensitive to natural business outcomes*** *and appreciate that* ***several factors contribute to pricing decisions such as supply and demand, supplier's cost and taxes, etc****. Hence, it was not justified to lay down uniform parameters across sectors."*

i. that it was evident from the above submission that the anti-profiteering provisions were not to be implemented in a manner that disregarded business outcomes and their impact on prices and the said provisions neither aimed at regulating the prices nor discouraged increase in prices; that this essence of law must duly be given effect right from the stage of commencement of investigation and that the subjectivity around business outcomes must be factored before attempting to compare any random data points over a period as long as 18 months.

5. The DGAP had also reported that vide the aforementioned e-mails/letters, the Respondent had also submitted the following documents/information:

(a) Copies of GSTR-1 returns for the period July 2017 to April 2019.

(b) Copies of GSTR-3B returns for the period July 2017 to April 2019.

(c) Copies of sample sale invoices along with sample SKU's at different properties.

(d) Copy of the price fluctuation data for different properties.

(e) Monthly Summary of Multiplex wise item-wise sales register for the period July 2017 to April 2019 for all the states.

(f) Actual ITC loss sheet and excess loss incurred due to benefit passed on.

(g) Input Tax Credit register for July 2017 to November 2017.

(h) Copy of Sample invoices of ITC availed during November 2017.

(i) Copy of Balance Sheets for the FY 2016-17 & 2017-18.

(j) Copy of Maharashtra GST Registration.

(k) Reconciliation of F&B sales and Non-F&B sales with GST Returns.

(l) Details of ITC Reversed on Stock of 14 November 2017 in proportion to expected use in F&B business.

6. The DGAP has further reported that the Respondent has also submitted that he was a listed company and his business data constitutes price sensitive information in terms of the listing agreement, accordingly, any public access or reporting should be prohibited; that the data dealt with his margin and profitability scenario, therefore, was also of direct interest to competitors and its publication could hurt his commercial interests and interests of the shareholders/public at large in as much any misuse by the competition (intended or inadvertent) would lead to erosion of shareholders' wealth; that thus **all the details/documents/ data submitted by him may be treated as confidential** in terms of Rule 130 of the CGST Rules 2017;

7. The DGAP has also reported that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the restaurant service from 18% to 5% w.e.f.

15.11.2017 with the condition that the ITC on the goods and services used in supplying the service was not taken, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017.

8. The DGAP has further submitted that the legal position on Section 171 of CGST Act, 2017 was unambiguous and could be summed up as follows:

(a) A supplier of goods or services must pass on the benefit of ITC or reduction in the rate of tax to the recipients by commensurate reduction in prices.

(b) The law did not offer a supplier of goods and services and flexibility to *suo moto* decide on any other modality to pass on the benefit of ITC or reduction in the rate of tax to the recipients.

Thus, while an increase in the cost of inputs and input services was a factor for the determination of prices, this factor was independent of the output GST rate. Hence, It could not be argued that elements of cost, unrelated to GST, had been affected by the change in the output GST rates. Therefore, in terms of Section 171 of the CGST Act, 2017, the claim made by the Respondent of an increase in the cost of inputs and input services was not considered by the DGAP.

9. The DGAP had further reported that the Respondent's contention of diminishing marginal position (month on

month) as per financial information pertaing to the pre and post tax rate reduction periods could not be considered; that the contention of the Respondent that anti-profiteering provisions attempted to regulate the prices and disregarded business outcomes and their its impact / question the base prices as Section 171 of the Act did not mandate control over the prices of the goods or services as it was to be determined by the supplier and that Section 171 only mandates that any reduction in the rate of the tax or the benefit of ITC which accrues to a supplier must be passed on to the consumers as these were concessions given by the Government and the suppliers were not entitled to appropriate them; that any such benefits must go to the consumers and in case the consumers were not identifiable the amount so collected by the suppliers was required to be deposited in the Consumer Welfare Fund; that he had not examined the cost component included in the base prices but had only factored the denial of ITC to the pre rate reduction base price since Anti-profiteering provisions attempted neither to regulate the prices nor to disregard any business outcomes.

10. It was also stated by the DGAP that the concern over the long period of investigation was frivolous since the period of Investigation has not been prescribed either in the CGST Act, 2017 or in the corresponding Rules/Notifications; that he had received the reference from the Standing Committee

on Anti-profiteering recommending a detailed investigation into the instant matter on 02.05.2019; hence the period from 15.11.2017 up to the latest month of receipt of reference was taken up for investigation, i.e. from 15.11.2017 to 30.04.2019; that the said fact has been conveyed to the Respondent.

11. The DGAP also stated that the contention of the Respondent that no methodology & procedure had been prescribed for such an investigation was found incorrect as the power to determine Methodology & Procedure as per Rule 126 of the Rules, had been conferred on this Authority by the Union of India, in the exercise of its powers given under Section 164 of the CGST Act, 2017, on the recommendations of the GST Council which was a Constitutional body created under the 101st Amendment of the Constitution; that the Authority, in the exercise of the power delegated to it under the above Rule, had notified the Methodology and Procedure, vide Notification dated 28.03.2018 which was available on its website. The DGAP has also stated that the Methodology and Procedure to be adopted for the determination of profiteering might vary from case to case, depending on the facts and circumstances of the case as well as the nature of goods or services supplied and hence no fixed methodology could be prescribed to determine the extent of profiteering in all cases; moreover that this Authority could only determine the Methodology and could not prescribe it as per the above Rule.

12. Further, the DGAP dismissed as incorrect, the contention of the Respondent that the references from the State Screening Committee and the Standing Committee were flawed since, in terms of Rule 128 of the Rules, the State Screening Committees and the Standing Committee had to examine the accuracy and adequacy of the evidence provided in the application and on being satisfied that there was *prima-facie* evidence to show that the supplier had not passed on the benefit of reduction in the 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, they had to refer the matter to DGAP for detailed investigation.

13. The DGAP has further reported that the Application was received in his office on 02.05.2019 from the Standing Committee along with the minutes of its meeting with its recommendation that the Application had been forwarded to the DGAP for carrying out the investigation and that the said action was totally in consonance with the contents of Rule 129 of the CGST Rules, 2017.

14. The DGAP has also reported that Respondent's contention that no adequate opportunity of representation was given by the State Screening Committee was not found tenable as Rule 133(2) of the CGST Rules, 2017 only bestows the power of granting any interested party the opportunity of being heard only to this Authority and that there was no such power available with the State Screening Committee or

Standing Committee; that Rule 133 (2) reads as follows- *"An opportunity on hearing shall be granted to the interested parties by the Authority where any request was received in writing from such interested parties".*

15. The DGAP has also reported that the Respondent's submissions related to his having opened new units/ properties or supplied new food items and beverages, etc. have been duly considered in the investigation and the profiteering has been computed only for those goods and services which were being supplied in the pre-tax rate reduction period, i.e. during the period 01.07.2017 to 14.11.2017.

16. The DGAP has also reported that the Respondent has argued that he had incurred ITC loss of 17% (approx.) and by keeping the final prices charged from customers unchanged on the eve of the reduction in the GST rate and later, he had passed on the benefit of the reduced rate of tax; that he had computed the ITC as a percentage of the total taxable turnover of the Respondent for the period July 2017 to October 2017.

17. The DGAP has reported that the Respondent had contended that he had different base prices in respect of his supplies depending on factors such as Category of Movies (Blockbuster, Popular or Regular), Movie Type (3D & Non-3D), Date and time of supply (Weekdays, Weekends or holidays), target customer, competition and locality of the

property. In this context, the DGAP has reported that this issue had been adequately addressed while computing the quantum of profiteering since the profiteering had been arrived at by comparing property-wise (property in operation in both, pre-tax rate reduction period, (i.e. as of 14.11.2017) and the post 14.11.2017 period and by comparing the item-wise average selling prices for the items sold during the period 01.11.2017 to 14.11.2017 (or the latest month in which an item was sold, if the said item had not been at all sold between 01.11.2017 and 14.11.2017), with the prices of the said items in the post 15.11.2017 period; that the computation accounted for the different base prices as given in the sdales data furnished by the Respondent.

18. On the contention of the Respondent that the prices for the supply of food and beverages by his multiplexes were dynamic and differential and could not be compared to the supply of food and beverages by restaurants where the prices printed on the menu card remained unchanged for long periods, the DGAP has reported that the said issue has been duly factored while determining the quantum of profiteering. In this context, the DGAP has reported that the details of the outward taxable supplies of 1650 items from the Respondent's 133 Multiplexes spread over 18 states were considered for the computation which was based on a comparison of the average selling prices for the items sold during the period 01.11.2017 to 14.11.2017 (or the latest month in the period July-October 2017 if the item had not been sold during

01.11.2017 to 14.11.2017) with the actual item-wise prices post 15.11.2017.

19. The DGAP has reported that during the investigation it was noticed that the lower GST rate of 5% had been charged on the increased base prices of the items in the post-tax rate reduction period after 15.11.2017, which established that the tax amount was computed @ 18% before 15.11.2017 and @ 5% w.e.f. 15.11.2017. The charging of the lower tax on a higher (enhanced) base price had resulted in the customers having to pay more than the commensurate price. Thus, while the Respondent's contention during the investigation that the tax amount was computed @18% before 15.11.2017 and at a reduced rate of 5% w.e.f. 15.11.2017 was correct, this in no way established that the commensurate benefit of the reduction in the GST rate had been passed on by him to his customers. On the contrary, the fact was that the customers should have paid a lower final price after the GST rate was reduced to 5% but the final item-wise prices remained unchanged for the customers and hence it was clear that the benefit was not passed on to them by the Respondent. DGAP has added that thus the only point for determination was whether the increase in the item-wise base prices was solely on account of denial of the ITC.

20. The DGAP has further reported that the assessment of the impact of denial of the ITC required the determination of ITC in respect of "restaurant service" as a percentage of the taxable

turnover from the outward supply of "products" during the pre-GST rate reduction period. To illustrate, if the ITC in respect of restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017, was up to 10%, one could conclude that there was no profiteering. However, if the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017, was by 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 products during the pre-GST rate reduction period was carried out by taking into consideration the period from 01.07.2017 to 31.10.2017 (and not up to 14.11.2017). This had been done by the DGAP for the following reasons:

(a) That the Respondent was required to reverse an amount of Rs.1,35,90,052/- on the closing stock of inputs and capital goods as of 14.11.2017. However, the correctness and completeness of the computation could not be ascertained and therefore it could not be relied upon for the investigation.

(b) That the invoice-wise outward taxable turnover in November 2017 was not furnished by the Respondent which was required for the computation of the taxable turnover for the period 01.11.2017 to

14.11.2017.

(c) That it was noticed that ITC had been availed by the Respondent in the period from 01.11.2017 to 14.11.2017 based on invoices issued later on in the month of November 2017 (after 15.11.2017) which could not be allowed since no ITC was permissible on or after 15.11.2017. Further, for the month of November, ITC was permissible to the Respondent only for invoices issued up to 14.11.2017 but he had availed ITC on input services that covered the whole month of November 2017. Hence the month of November 2017 was excluded from the computation

21. That while determining the ITC as a percentage of the total taxable turnover of the Respondent, the ITC for the period July 2017 to October 2017, as furnished in the GSTR-3B, has been adjusted by excluding the amount of ITC availed in respect of supplies of other/ non-restaurant services. Further, ITC availed on common inputs, input services and capital goods has been taken proportionately, based on the proportion of Respondent's turnover from restaurant service to his total turnover. While determining the net taxable turnover of the Respondent during the period July 2017 to October 2017, the total taxable turnover (only restaurant service) as per SKU wise sales summary duly reconciled with GSTR-1 returns for the period July 2017 to October 2017 had been taken into consideration by the DGAP. Finally, the ratio

of ITC to the net taxable turnover had been taken for determining the impact of denial of ITC for the period from July 2017 to October 2017. On this basis, the finding was that ITC amounting to Rs.8,92,55,966/- was available to the Respondent during the period July 2017 to October 2017 which was approximately 9.70% of the net taxable turnover of restaurant service (Rs. 92,01,72,389/-) 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. A summary of the computation of the ratio of ITC to the taxable turnover of the Respondent done by the DGAP is given in Table-'D' below:

Table–'D' **(Amount in Rs.)**

Particulars	July-2017	Aug.-2017	Sept.-2017	October-2017	Total
ITC Availed as per GSTR-3B (A)	5,10,45,836	8,64,73,023	12,02,04,147	12,48,44,525	38,25,67,531
ITC availed Exclusively on Non Restaurant Services (B)	32,21,451	1,12,90,601	3,40,34,664	4,17,10,519	9,02,57,234
ITC availed Exclusively on Restaurant Services (C)	40,14,636	76,62,990	1,02,60,402	94,26,274	3,13,86,503
ITC availed on Common inputs, input services and capital goods (D)	4,38,09,549	6,75,19,432	7,58,89,081	7,37,05,732	26,09,23,794
Total Outward Taxable Turnover as per GSTR-1 (E)	93,73,66,472	1,08,47,21,802	1,01,26,41,557	1,09,61,74,705	4,13,09,24,536
Total Restaurant Taxable Turnover as per SKU Wise Sale Register (F)	21,65,99,800	24,03,35,295	21,27,81,452	25,04,55,842	92,01,72,389
Total Turnover other than restaurant service (G)= (E) - (F)	72,07,66,672	84,43,86,507	79,98,60,105	84,57,18,863	3,21,07,52,147
Proportionate ITC availed towards restaurant Service (H)=(D*F/E)	1,01,22,975	1,49,59,875	1,59,46,204	168,40,410	5,78,69,463
Total ITC availed towards Restaurant Service (I) = (C+H)	**1,41,37,611**	**2,26,22,865**	**2,62,26,606**	**262,66,684**	**8,92,55,966**
Net Outward Taxable Turnover for the period July, 2017 to October, 2017 (J) = (F)	**21,65,99,800**	**24,03,35,295**	**21,27,81,452**	**25,04,55,842**	**92,01,72,389**
The ratio of ITC to Net Outward Taxable Turnover (K)= (I/J)					**9.70%**

22. It was further reported by the DGAP that the analysis of the details of item-wise outward taxable supplies during the period of 15.11.2017 to 30.04.2019 revealed that the Respondent had increased the base prices of different items supplied by him 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 as a part of restaurant service during the period 15.11.2017 to 31.03.2019 were compared and it was established that the Respondent increased the base prices by more than 9.70% i.e., by more than what was required to offset the impact of denial of ITC in respect of 1434 items (out of a total of 1650 items) sold during the same period. Thus, the conclusion was that in respect of these items, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on. It was also claimed by the DGAP that there was no profiteering in regard to 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 the input tax credit, or these were new products launched in many states or sold in new Multiplexes which started operation post 15.11.2017.

23. The DGAP has also reported that having established the fact of profiteering, the next step for him, was to quantify the same. In this regard, the methodology adopted could be explained by illustrating the calculation in respect of a specific item i.e., SAMOSA (2PCS.) sold in a particular multiplex i.e. MUMBAI METRO CINEMA, during the period 01.11.2017 to 14.11.2017 (pre-GST rate reduction) was taken by the DGAP and an average base price (after discount) was worked out by dividing the total taxable value by the total quantity of the said item sold by the Respondent during the above period. The average base price of this item was compared with the actual

selling price of this item sold in the same Multiplex during the post-GST rate reduction period i.e. on or after 15.11.2017 as is illustrated in the Table-'E' below:

Table-'E' **(Amount in Rupees)**

Sl. No.	Description	Factors	Pre Rate Reduction (01.11.2017 to 14.11.2017)	Post Rate Reduction (From 15.11.2017)
1.	Item Description	A	SAMOSA (2PCS.)	
2.	Multiplex Name	B	MUMBAI METRO CINEMA	
3.	The total quantity of the item sold	C	347	
4.	Total taxable value (after Discount)	D	41,170/-	
5.	Average base price (without GST)	E=(D/C)	118.65/-	
6.	GST Rate	F	18%	5%
7.	Denial of ITC of 9.70% as per table- 'D' above	G=E*9.70%		11.51/-
8.	Commensurate Base price (post Rate reduction) (Excluding GST)	H=E+G		130.16/-
9.	Commensurate Selling price (post Rate reduction) (including GST)	I=105% of H		136.67/-
10.	Post reduction illustrative month	J		Jan-2018
11.	Total quantity Sold	K		1,788
12.	Total Invoice Value (including GST)	L		2,50,320/-
13.	Actual Selling price (post rate reduction) (including GST)	M=L/K		140/-
14.	The excess amount charged or Profiteering per unit	N=M-I	3.33/-	
15.	Total Profiteering	O= K*N	**5,954/-**	

24. It was further reported by the DGAP that the Respondent did not reduce the selling price commensurately in respect of the item/ product 'SAMOSA (2PCS.)', despite the GST rate reduction from 18% to 5% w.e.f. 15.11.2017, vide Notification No.41/2017 Central Tax (Rate) dated 14.11.2017, and thus he had profiteered by an amount of Rs. 5,954/- on the said item sold in a particular multiplex in a particular period since he had not passed on the benefit of reduction in GST rate to his recipients/ customers by way of a commensurate reduction in the price as mandated by the provisions of Section 171 of the CGST Act, 2017. On the basis of the above calculation as illustrated in Table-'E', profiteering was worked out for all the items supplied by the Respondent in the two periods.

25. The DGAP has also stated that for computing the total profiteering, only those items were considered where the increase in base prices was more than what was required to offset the impact of denial of the input tax credit. The DGAP has further reported that based on the aforesaid pre and post-reduction in GST rates, the impact of denial of ITC and the details of item-wise outward supplies for the period 15.11.2017 to 30.04.2019, the amount of net higher sale realization on account of the increase in the base prices of the items supplied by the Respondent, despite the reduction in GST rate from 18% to 5% (with denial of ITC). or in other words, the profiteered amount works out to Rs. 3,85,30,314/- (including GST on the base profiteered amount).

26. The DGAP has also reported the details of the place-wise break up (State or Union Territory) of the total profiteered amount of Rs. 3,85,30,314/- vide Table- 'F' below:-

Table- 'F'

S.No.	Name of State	State Code	Total Profiteering (Rs.)
1	Andhra Pradesh	37	21,91,020
2	Chhattisgarh	22	2,52,833
3	Delhi	7	16,46,621
4	Goa	30	19,13,126
5	Gujarat	24	21,72,745
6	Haryana	6	11,93,313
7	Jharkhand	20	4,96,181
8	Karnataka	29	31,02,637
9	Kerala	32	2,61,609
10	Madhya Pradesh	23	7,16,906
11	Maharashtra	27	99,20,757
12	Orissa	21	9,82,190
13	Punjab	3	6,16,561
14	Rajasthan	8	23,84,474
15	Tamil Nadu	33	20,72,177
16	Telangana	36	11,26,811
17	Uttar Pradesh	9	13,88,348

18	West Bengal	19	60,92,005
Grand Total			**3,85,30,314**

27. The DGAP has further reported that thus the allegation of profiteering made by Applicant No. 1 stood confirmed against the Respondent and that the quantum of profiteering, inclusive of GST, worked out to **Rs. 3,85,30,314/- in terms of** Section 171(1) of the CGST Act, 2017 which reads as follows- *"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".*

28. The above Report of the DGAP dated 31.01.2020 was considered by this Authority and it was decided to hear the parties on 27.02.2019. A Notice dated 04.02.2020 was issued to the Respondent asking him to explain why the Report dated 31.01.2020 furnished by the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed. Sh. Rohit Jain and Sh. Adarsh Somani, Authorized Representatives, represented the Respondent while none appeared on behalf of Applicant No. 1 and 2.

29. The Respondent vide his written submissions dated 27.02.2020 has made the following averments:-

a) That the allegations made in the Impugned Report were baseless and untenable on merits; that he had not contravened the provisions of Section 171 of the CGST Act and the Rules made thereunder and has duly discharged all its obligations; that each of his

submissions below may be treated as mutually exclusive and without prejudice to each other.

b) That the Impugned Report of DGAP has travelled far beyond the complaint filed before the Screening Committee and was liable to be rejected on this ground alone; that the complaint was lodged only in respect of Tea Georgia & Popcorn (i.e. Subject Goods) and in terms of Rule 129 of the CGST Rules, the Screening Committee forwarded the case to the Standing Committee, which referred the matter to the DGAP for further investigation limited to the Subject Goods only qua the state of Maharashtra; that however, the DGAP has expanded the scope of his investigation to cover all the items sold without the approval of the Standing Committee, a pre-requisite under Rule 129(1) of the CGST Rules that reads as follows:-*"Where the Standing Committee is satisfied that there is a prima-facie evidence to show that the supplier has not passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, it shall refer the matter to the Director General of Anti-profiteering or a detailed investigation."*

c) that in terms of sub-rule (3) of Rule 129 of the Rules, ibid, the notice to be issued by the DGAP before the start of the investigation should inter-alia mention "the description of the goods or services in respect of which

the proceedings have been initiated"; that it was a specific requirement under the above Rule to mention, in the notice, the description of the goods or services which is a clear indication that proceedings could be initiated only in respect of those goods which were described in the Notice; that, however, in the present proceedings, the Notice issued nowhere mentioned that an investigation was being initiated for all the items; that this indicated that while the scope of the proceedings was dictated or restricted by clear reference to the description of the subject products in the Notice itself, DGAP has suo-moto expanded the scope improperly.

30. That he wished to rely on the following orders passed by the Authority wherein the investigation has been restricted only to the products against which the complaint was filed:

- **Sh. Rishi Gupta v. M/s Flipkart Internet Pvt. Ltd.**
- **Sh. Ankur Jain v. M/s Kunj Lub Marketing Pvt. Ltd.**
- **Sh. Sandeep Puri v. M/s Glenmark Pharmaceutical Ltd.**

31. The Respondent has further submitted that if the manner of doing a particular act was prescribed under any statute, the act must be done unambiguously in the manner prescribed or should not be done at all. Assumption/ presumption about the scope of the investigation could not be left to the mercy of interpretation, where the rules warrant that the scope was defined. Strong reliance in this regard was placed by the Respondent on the decision in the case

of State of Uttar Pradesh v. Singhara Singh wherein it was held that:

"8. The rule adopted in Taylor v. Taylor [(1875) 1 Ch D 426, 431] is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory."

Citing the above case law, the Respondent also submitted that the aforesaid principle was first laid down in the case of Taylor v. Taylor and thereafter was followed by Lord Roche in the case of Nazir Ahmad v. King Emperor who pronounced as under:

"where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all."

32. The Respondent has further submitted that the DGAP in the given scenario was mandated by GST law to follow a pattern of action while carrying out the investigation. In light thereof,

without any specific complaint, any evidence, or any description whatsoever in the Notice, the DGAP could not have *suo-moto* broadened the scope of the investigation to products other than those which had been referred to it either by the Standing Committee or this Authority. It was for this reason that Rule 133 of the CGST Rules had been amended prospectively by insertion of sub-rule (5) vide Notification No. 31/2019 – Central Tax dated 28.06.2019 granting powers to this Authority (and not to the DGAP) which could expand the scope of an investigation. Even in that scenario, this Authority had to give reasons to believe that there was a contravention of the provisions of Section 171 of the CGST Act 2017. The said amendment, which, was prospectively applicable, has been extracted herein below:

"(5) (a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule (6) of rule 129, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub-rule (1), direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules."

33. The Respondent reiterated that, had the DGAP been given the powers to expand the scope of the investigation as it deemed fit, there would have been no need to insert sub-rule 5 of Rule 133 granting powers (only) to this to expand the scope of investigations. Hence, even after the amendment, it was only this Authority that has been given the power to expand the scope of investigation; however, before the Authority did so, it was incumbent upon it to record the reasons for the same. However, in the present facts, the DGAP, without the authority of law, had already commenced its inquiry in respect of all the items without any instructions whatsoever from this Authority, which was a substantive omission of duty, which went to the very root of the investigation conducted by DGAP which has without the authority of law and hence the entire investigation was void ab-initio. The Respondent also submitted that the Amendment effected vide Notification No. 31/2019 – Central Tax dated 28.06.2019 also could be applied to the present proceedings because as far as the question of jurisdiction was concerned, it was a substantive law in nature and substantive law could not be retrospectively amended. In this regard, the Respondent has placed strong reliance on Continental Commercial Corporation v. ITO, wherein the Hon'ble Madras High Court while dealing with an amendment that expanded the jurisdiction of the Income Tax Officer, held that such an amendment must be prospective and could have a retrospective effect. The relevant extract of Para 6 of the judgment is quoted below:

"Even so, the learned counsel for the revenue contended that section 274(2) and the amendment made by Act 42 of 1970 are procedural in nature and, therefore, the amendment would apply to all cases of infringements whether committed before or after the amendment. In other words, the amendment was retrospective and would apply to even a case where the return was filed before the amendment. The learned counsel, in this connection, also relied on the marginal note saying "procedure". We are unable to agree with this contention of the learned counsel. The provision relates to the jurisdiction of the Income-tax Officer to deal with penalty proceedings. Before the amendment, the Income-tax Officer could deal with cases falling under section 271(1) (c) only if the minimum penalty imposable did not exceed a sum of Rs. 1,000. Under section 271(1) (c) (iii) the minimum penalty imposable is a sum equal to the amount of income in respect of which the particulars have been concealed or inaccurate particulars have been furnished. In cases where the minimum penalty imposable exceeds the sum of Rs. 1,000, the Income-tax Officer shall refer the case to the Inspecting Assistant Commissioner. Under the amended provision, the Income-tax Officer is enabled to deal with cases in which the amount of income concealed did not exceed the sum of Rs. 25,000. In other cases, it is the Inspecting Assistant Commissioner who would have jurisdiction to deal with penalty proceedings. Thus, those cases in which the income concealed was in excess of Rs. 1,000 but below Rs. 25,000 which were originally within the jurisdiction of the Inspecting Assistant Commissioner are now to be dealt with by the Income-tax Officer. The amendment had thus

enlarged the jurisdiction of the Income-tax Officer. Being a question dealing with the jurisdiction of an officer to deal with a case we are unable to agree with the learned counsel that the amendment was retrospective in effect in the sense that it would apply even to a case where the offence or infringement was committed prior to the amendment."

34. Further, the Respondent has submitted that in the case of Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board, the Hon'ble Supreme Court declared that any substantive law shall operate prospectively unless the retrospective operation was clearly made out in the language of the statute. The Respondent had also claimed that in the present proceedings even an endeavor by the NAA/DGAP to expand the scope should be construed as ultra vires and bad in law.

35. The Respondent also contended that the issue of *suo-moto* assuming jurisdictional powers by DGAP assumed far greater significance because the anti-profiteering provisions purport to have stigmatic and penal consequences. The same was also highlighted by the Hon'ble Bombay High Court in the recent case of Hardcastle Restaurants Pvt. Ltd. v. UOI wherein while guiding this Authority on the importance of fair-decision making, the Hon'ble Court stated that the term profiteering was used under the CGST Act and CGST Rules in a pejorative sense with penal consequences that even extended to cancellation of registration. Hence, he has claimed that the authorities (DGAP, this Authority) ought to be circumspect while exercising their powers while undertaking investigation and issuing rulings.

36. Further, the Respondent has submitted that it was also settled rule of law when a statute was penal in character, it must be strictly followed. In the case of State of Jharkhand v. Ambay Cements, the Hon'ble Supreme Court has held as under:

"It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

The Respondent had also placed strong reliance on the recent decision of the Hon'ble Delhi Court in the case of Reckitt Benckiser India Pvt. Ltd. v. UOI wherein the Court directed that no information was required to be submitted to DGAP other than the information pertaining to the goods mentioned in the Application. The relevant extract of the ruling in Reckitt Benckiser (supra) was re-iterated herein below:

"The Court is of the view that the Petitioner has made out a prima facie case for grant of limited interim relief. It is directed that, till the next date, it will not be required to furnish information to the DGAP pursuant to the impugned notice other than information pertaining to the Subject Goods. It is, however, clarified that the NAPA's inquiry as far as the Subject Goods is concerned will proceed in accordance with law."

37. The Respondent has further submitted that the DGAP's jurisdiction

was circumscribed by the specific powers granted under the aforementioned provisions. Therefore, the authorities could not confer on themselves additional jurisdiction vested other than as provided under the law. In this regard, reference was made to the case of Northern Plastics Limited v. Hindustan Photo Films Mfg. Co. Ltd. wherein the Hon'ble Supreme Court inter-alia held that the Tribunal being a creature of the statute and deriving its jurisdiction and powers from the statute could not venture into an exercise beyond the mandate of the statute. The Respondent also submitted that it has provided the complete information/ details as sought by the DGAP as a responsible corporate assessee and in good order to facilitate the investigation all along. The Respondent further submitted that this act should, by no stretch of the imagination, be considered as the acquiescence of the fact that the DGAP has jurisdictional powers to investigate in respect of all products.

38. The Respondent has further contended that in any event, in so far as the issue of jurisdiction was concerned, the provisions had to be strictly construed and no authority could confer to itself a jurisdiction wider than that vests in it. It was well settled that where there was an absence of jurisdiction, even by consent of parties, the jurisdiction could not be expanded. Reliance in this regard was placed on the case of CIT v. Dalipur Construction Pvt. Ltd. Decided by the Hon'ble Allahabad High Court wherein the department inter-alia argued that once objection regarding jurisdiction is not taken before the assessing officer, the order could not be challenged. However, the Hon'ble Court rejecting the argument of the Department inter-alia observed that lack of jurisdiction was not a

mere irregularity but nullity in the eyes of law and if an authority has no jurisdiction, the same could not be conferred even by the consent of parties.

39. The Hon'ble High Court in the case of Dalipur Construction (supra) inter-alia has relied on the following decisions to enunciate that jurisdiction could not be conferred by consent or acquiescence:

Judgements	Relevant Text
United Commercial Bank Limited v. Their Workmen1	"No acquiescence or consent can give a jurisdiction to a court of limited jurisdiction which it does not possess."
Kiran Singh v. Chaman Paswan2	"A defect of jurisdiction ... strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."
Benarsi Silk Palace v. CIT3	"Jurisdiction could be conferred only by statute and not by consent and acquiescence. Since jurisdiction is conferred upon Income Tax Officer to proceed under Section 34 (1) only if he issues a notice an assessee cannot confer jurisdiction upon him by waiving the requirement of notice

[1] AIR 1951 SC 230
[2] AIR 1954 SC 340
[3] [1964] 52 ITR 220 (All)

Judgements	Relevant Text
	because jurisdiction cannot be conferred by consent or acquiescence"

40. The Respondent also submitted that the DGAP had exceeded its jurisdiction and has thus travelled far beyond its power by investigating all products which neither formed a part of the complaint examined by the Standing Committee nor was it mentioned in the Notice issued by the DGAP. The investigation conducted by DGAP was therefore in gross violation of the mandate in terms of Rule 129 of the CGST Rules and went to the very root of the investigation. The Respondent further submitted that the entire investigation and the proceedings were, therefore, liable to be quashed on this ground alone.

41. The Respondent also stated that the initiation of the proceedings was flawed and time-barred. The Screening Committee had not adhered to the time limit prescribed under Rule 128 of the CGST Rules. The Screening Committee was legally bound to examine a complaint strictly within a period of two months from the date of receipt of such complaint.

42. The Respondent had also submitted that the FAQs released by this Authority on its website against Question No. 3, mentioned the fact that the Screening Committee was mandatorily required to complete its investigation within a period of two months.

"The Committees shall complete the investigation within a period of

two months from the date of the receipt of a written application or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority."

43. It was further claimed by the Respondent that Additional Commissioner of State Tax (Member of Screening Committee) vide his letter dated 17.01.2019 intimated the Commissioner (Member of Screening Committee) stating that the complaint received on 21.11.2017 against the Respondent was a fit application to be forwarded to the Standing Committee and requested him to forward the complaint to the Standing Committee for further action. The Screening Committee took nearly 14 months (from November' 17 to Jan'19), instead of the prescribed time limit of 2/3 months to examine the complaint. Further, the Screening Committee vide letter issued in February 2019 forwarded the complaint to the Standing Committee. Both the letters were attached as Annexures. Thereafter, the Standing Committee after review of the matter referred the same to the DGAP on 02.05.2019 for further investigation. The delay by the Screening Committee had a serious impact on the period of investigation adopted by the DGAP. He has argued that if the Screening Committee had not taken 14 long months to examine the complaint, the period of investigation would have been much shorter. He has also claimed that this has also been admitted by the DGAP in the Impugned Report (para 17, Page No 16), which is extracted below:

..... *"This office has received the reference from the*

Standing Committee on Anti-profiteering on 02.05.2019 to investigate the matter, hence the period from 15.11.2017 up to the latest month of receipt of reference was taken up for investigation i.e. from 15.11.2017 to 30.04.2019 which has already been conveyed in para-5 above."

44. The Respondent has further submitted that the forwarding of complaint from the Screening Committee was even beyond the extended period of one month that could have been allowed by this Authority. Further, the use of negative words "not exceeding a further period of one month" under Rule 128 has an inbuilt element of a "mandatory" prescription. It meant that the legislature intended this Authority to condone the delay of only one month and any further condonation would render the phrase "not exceeding a further period of one month" wholly otiose.

45. It has been further argued by the Respondent that where a limitation period was prescribed and the condonation of delay period was also prescribed in law, it was not permissible to further extend or condone the delay. When an extension period was prescribed in law, the delay (beyond the extension) could not be condoned even by the Courts. In the case of Singh Enterprises v. CCE, the issue raised before the Hon'ble Supreme Court was whether the High Court has the power to condone the delay after the lapse of the prescribed extension of 30 days. The Hon'ble Supreme Court at Para 8 inter-alia observed as under:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to

condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."

46. The Respondent has also relied upon the following decisions to submit that period of limitation and the condonation period when

statutorily prescribed has to be strictly adhered to and could not be relaxed:

- *CCE v. Hongo India (P) Limited and Another*
- *Amchong Tea Estate v. UOI4*
- *Simplex Infrastructure Limited v. UOI5*

47. The Respondent has averred that the forwarding of application by the Screening Committee was even beyond the extended period of one month that could be allowed only by this Authority. Further, it was apparent that the Screening Committee had exceeded the statutory period of two months (to conclude investigation) by seven times. It was argued by the Respondent that the delay was deliberate because, on account of this unlawful delay, the DGAP was allowed an unfettered free play to expand the period of investigation till April 2019 and arrive at a stratospheric alleged profiteering amount of Rs. 3.85 crores (approx.) A period of limitation prescribed by a Rule could not be diluted, more so when the delay has such grave financial implications & hardships caused to the taxpayer.

48. The Respondent has also submitted that the use of the word "shall" in Rule 128 was indicative of the seriousness which the Screening Committee ought to have attached to the prescribed timeline. The use of the word "shall" in a statute denoted mandatory prescription. The strict requirement of two months was specified to ensure that the taxpayers should not be asked to produce documents and face

[4] 2010 (257) E.L.T. 3 (S.C.)
[5] (2019) 2 SCC 455

inquiry after a prolonged delay, as it would irreversibly affect their defence. Further, vide an amendment dated 28.06.2019, the said period of two months could be extended only for a month by this Authority with reasons to be recorded in writing. Understandably, the purpose of giving reasons in writing was to ensure that the power to extend the period of limitation was exercised for valid reasons based on material considerations and that the power was not abused by irrelevant considerations or extraneous purposes.

49. The Respondent submitted that after the lapse of the period of two months, the Screening Committee was not vested with the right to examine the matter any longer. He further claimed that no reasons for the expansion of this period were ever recorded and none were supplied to the Respondent or formed part of the record. Even otherwise, as stated earlier, the extended period had also lapsed, and the Screening Committee had lost its jurisdiction to proceed any further in the matter. On the expiry of the limitation period, the right of the Screening Committee to examine the matter was extinguished, and a very valuable right has come to vest in the Respondent that the investigation could not proceed any further. In this regard, reference was made by the Respondent to the judgment of Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others, wherein the Hon'ble Supreme Court considered the respective rights of the parties upon expiry of the limitation period as under:

"26. The law of limitation is a substantive law and has definite

consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

50. The Respondent has also submitted that the Hon'ble Supreme Court, in the case of State of Punjab v. Shreyans Industries Ltd., has held that once the period of limitation expired, the immunity to being subject to assessment sets in and the right of the tax officer to make assessment got extinguished. It was further stated in the case of Shreyans Industries (supra) that once an assessment has already become time-barred, a valuable right accrues in favour of the assessee. The relevant extract from Para 23 of the judgment is quoted below:

"If one is to go by the aforesaid dicta, with which we entirely agree, the same shall apply in the instant cases as well. In the context of the Punjab Act, it can be said that extension of time for assessment

has the effect of enlarging the period of limitation and, therefore, once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. Therefore, there would be no question of extending the time for assessment when the assessment has already become time-barred. A valuable right has also accrued in favour of the assessee when the period of limitation expires."

51. The Respondent has further submitted that a similar proposition concerning immunity from being subjected to further investigation and extinction of the right of the officer to investigate on the expiry of the period of limitation had been espoused in the case of Bharat Heavy Electricals Limited v. CCT as well as in the case of Thirumalai Chemicals v. UOI.

52. The Respondent has also placed reliance on the decision of the Hon'ble Madras High Court in the case of A. M. Ahamed & Co. v. Commissioner of Customs (Imports), Chennai wherein the proceedings initiated after the legally prescribed time limit was set aside on the ground that the notice issued by the department were time-barred. The relevant extract of the ruling in the case of A. M. Ahamed (supra) is quoted herein below:

"25. In the case on hand, it is not the contention of the respondents that the time limit prescribed in Regulation 22(1) is only directory and not mandatory. It is not even the contention of the respondents that the time limit prescribed in Regulation 22(1) need

not be strictly adhered to. On the question that the first respondent is duty bound to initiate proceedings within 90 days from the date of receipt of offence report, there are no two opinions, at least before me. Therefore, the decision of the Division Bench of the Delhi High Court is of no assistance to the respondents. Hence the first contention is to be upheld."

53. The Respondent has submitted that once the initiation of investigation proceedings was bad in law since the Screening Committee had gone beyond the permissible time limit (including the extended period), the entire proceedings would be rendered void ab initio and without the authority of law. The proper initiation of investigation proceedings was a pre-requisite for conferring the jurisdiction especially given that there were no power to this Authority to suo-moto expand the time limit for initiation of the subject investigation. Given the above, the Respondent submitted that the continuance of the proceedings was contrary to the mandate of Rule 128 of the CGST Rules and was in clear violation of the rule of law and that of limitation. He submitted that this violation of a mandatory provision by the Screening Committee rendered the entire proceeding in the present case as unsustainable and liable to be summarily set aside.

54. The Respondent has also submitted that the DGAP had failed to submit the Impugned Report within the time limit as prescribed under the statute. In terms of sub-rule (6) of Rule 129, as it stood on the date of initiation of proceedings by DGAP, required that the

investigation report must be submitted within a period of three months from the date of receipt of a reference from the standing committee. The relevant extract is provided below:

(6) The Director General of Anti-profiteering shall complete the investigation within a period of three months of the receipt of the reference from the Standing Committee or within such extended period not exceeding a further period of three months for reasons to be recorded in writing as may be allowed by the Authority and, upon completion of the investigation, furnish to the Authority, a report of its findings along with the relevant records.

55. The Respondent has further submitted that the investigation was neither completed by the DGAP nor a corresponding report submitted in the prescribed 3 months period from the date of initiation of proceedings and that the Impugned Report was furnished only in the 9th month from the date of initiation of proceedings; that since the maximum possible time limit (subject to procedural aspects) available with the DGAP itself was 6 months under the Rules, it followed that if the investigation could not be completed and the report was not submitted within such period, the investigation has to retire owing to the law of limitation. However, the investigation was continually pursued thereafter until the submissions of the impugned Report. The Impugned Report, thus, ought to be set aside on this very basis since the stipulated time limit was paramount as per statutory provisions and the DGAP has failed to adhere to the same. The Respondent also claimed that the

Impugned Report, so funished, was thus null & void and must be adjudged as bad in law.

56. Further, it was submitted by the Respondent that the initial 3 month's time limit was enhanced to 6 months vide Notification No. 31/2019 – Central Tax dated 28.06.2019. However, it was a common principle of law that any amendment to the fiscal statutes had to be applied prospectively unless the amended provisions expressly provide for retroactive application. Moreover, in the instant case, since the amendment had an impact imposing an additional burden or adversity on the taxpayers concerned, there was no case of its retroactive application. The Respondent, in this regard, has placed reliance on the case of Continental Commercial Corporation (supra) and also on the following rulings:

- *Govinddas v. Income Tax Officer 10 and CIT Bombay v. Scindia Steam Navigation Company Limited.* In either case, the Court had remarked that one of the established rules of interpretation was that unless explicitly stated, a piece of legislation was presumed not to be intended to have a retrospective operation.

- *In CIT v. Vatika Township Private Limited6, the Court* upheld the principle of "lex prospicit non-respicit", which means that 'the Law looks forward and not backward'. Accordingly, the Court was pleased to order that no amendment will have retrospective effect unless expressly indicated along with the amendment itself.

57. The Respondent has submitted that in the instant case there was

[6] TS 573 SC 2014

no context, neither in the amended Rule and not even through any Revenue Circular or Clarification or any white paper/ object memorandum, etc. (by whatever name called), laying out the object of the said amendment, which was suggestive of its retrospective application. He further claimed that the enhanced time limit of 6 months could not be made applicable to investigations pending as on the date of such amendment, since the proceedings were initiated under the law before the amendment and hence, would be subjected to conditions/ limitations as existed on that relevant date.

58. The Respondent has contended that notwithstanding the above, and assuming for the mere sake of argument that the 6 months period was available to DGAP in the instant proceedings, it remained a glaring fact that the investigation was completed beyond the stipulated 6 months period too. Hence, the additional period also could not rescue the void character of proceedings as explained above.

59. The Respondent has also submitted that in the given scenario, the only way the Impugned Report would stand the test of law would be when the below conditions were cumulatively satisfied:

a. *The amended 6 months period was available to the proceedings; and*

b. *The said period was further lawfully extended by another 3 months.*

60. It was further submitted by the Respondent that assuming for the mere sake of argument and without admitting that the condition (a) above was satisfied and hence, the essence would be a lawful grant of extension; that it was his understanding of the common legal procedures that wherein a statute contained the power to grant of such extensions, no such extension which would prejudice and adversely impact the interest of the parties could be approved unilaterally without according an opportunity of representation to the party so adversely impacted; that in the instant case, the extension was sought and approved between DGAP and this Authority without his knowledge and without according him an opportunity to represent his case and averments; that he was deprived of an opportunity to present his case against the grant of such extension; that he wished to rely on the ruling of Hon'ble Madras High Court in Gaunir Impex Private Limited v. Commissioner of Customs (Imports), Tuticorin, wherein the Hon'ble High Court had an occasion to examine whether in a scenario where the statute allowed time bound issuance of show cause notice (concerning seized goods), could the said period be extended without following the principles of natural justice. Following were the remarks of the Hon'ble High Court made on the said subject matter:

The answer to this question is against the department. Section 110(2) of the Act gives six months time to take action against the defaulter in accordance with law. Furthermore, sufficient cause is required to be shown for extension of time. The reading of proviso

to Section 110(2) shows that it is only as sufficient cause being shown that the period can be extended by six months. The burden is on the department to show cause as to why the necessary formalities could not be completed in six months as provided. The show cause notice to party therefore is not a mere formality, but a statutory right to oppose the decision for extension of time.

The Respondent has cited the above decision and submitted that for extension of time-limits an opportunity of representation was required since the issue in the instant case was on a similar footing.

61. The Respondent has also submitted that since no such opportunity of representation was granted to the Respondent, the extension so granted by this Authority to the DGAP was invalid and not tenable under the prescribed code. The decision to allow the extension, in the present case, was clearly devoid of legal merits and failed on the principles of natural justice as well and was, therefore, illegal.

62. The Respondent has further contended that the CGST Act and the CGST Rules did not prescribe any procedure or mechanism for calculation of profiteering due to which the DGAP arbitrarily adopted a methodology that best suited its motive. Given the absence of knowledge of the basis on which the DGAP had to act, the Respondent was compelled to accept any procedure adopted by DGAP and the opportunity of full defence to the Respondent was also curtailed. This violateed the principles of natural justice.

63. The Respondent has also submitted that as per Rule 126 of the CGST Rules, it was this Authority that could determine the

methodology and the procedure. However, in the present proceedings, the DGAP has used its own methodology and procedure to determine the alleged profiteering amount. This violates the mandate given under Rule 126 since the DGAP did not have the statutory power to determine the methodology and procedure that had to be considered while computing the profiteering amount.

64. Further, the Respondent has contended that till 27.02.2020 this Authority had failed to determine any methodology and procedure in respect of the calculation of the profiteering amount. The 'Procedure and Methodology issued on 19.07.2018 by this Authority only provided the procedure pertaining to investigation and hearing but prescribes no method pertaining to the calculation of the profiteered amount and there had been no indication on how to conclude that there was profiteering due to change in the rate of tax and whether such computation had to be done invoice-wise, product-wise, business vertical-wise or state-wise, etc. The statutory provisions, the CGST Rules, and even the methodology prescribed were completely silent on the computation provision according to which it could be concluded that a supplier has indulged in profiteering. The Respondent was left to the subjective discretion of the DGAP without any guiding factors/ instructions or safeguards. In absence of any guidelines in the CGST Act or the CGST Rules, the power given to this Authority to determine methodology to a case of "excessive delegation" of powers.

65. The Respondent has also averred that it was not only his case that

a basic need of having a mechanism to compute 'profiteering' with proper checks and balances was being raised. The same was also raised by the Advisor to the Chief Minister, Punjab as well as the Chief Economic Advisor in the 17th GST Council Meeting held on 18.06.2017. The Respondent has also submitted that despite all the concerns raised by several authorities and interested parties, the issue remained unattended, resulting in grave injustice to the Respondent. A relevant extract from the minutes of the 17th GST Council Meeting is quoted below:-

"The Adviser to the Chief Minister, Punjab stated that profit should be carefully defined as to whether it referred to profit at the product and service level, vertical level, or entity level. He added that it was necessary to see how credit was being allocated to each product and thereafter determine the profitability for each product. The Chief Economic Adviser stated that the anti-profiteering clause was a mistake and the discretion it provided might lead to its abuse and cause harassment. Therefore, it was necessary to circumscribe it. He added that it would be difficult to implement it because of the difficulty in determining what profit was, what profiteering was, etc."

66. Further, the Respondent has contended that this Authority, in the case of Jubilant Foodworks Ltd., has itself admitted in Para 47 that no methodology for calculation of profiteered amount could be fixed as parameters required to be taken into account would vary from industry to industry. The stance of this Authority that no methodology/ guidelines could be prescribed for computing the

profiteering amount was untenable and highlighted the lacunae of methodology, which was required to be devised under the law. In this regard, the Respondent has submited that in the case of anti-dumping levies under the Customs Tariff Act, 1975, there were broad guidelines based on which the extent of dumping and anti-dumping duty was quantified. Even under anti-dumping investigations, the products under consideration were from completely different industries, still, the general principles for the determination of injury and dumping margin were well enshrined under the law and the Rules made thereunder. In this regard, the principles for the determination of injury, evidence of dumping, and calculation of non-injurious price have been provided in a detailed manner under the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

67. The Respondent has also submitted that similar anti-profiteering provisions existed in Australia and the Australian Competition and Consumer Commission entrusted with overseeing the price responses pursuant to the implementation of GST, laid down guidelines to provide greater certainty for determination/ quantification of profiteering. This included the net dollar margin method and the price margin method which were the fundamental principles for the determination of price variances and changes. Similarly, under the erstwhile Malaysian GST law, a proper mechanism. with formulae, was provided under the Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High

Profits) Regulations 2018. Any profit charged over and above the determined 'Net Profit Margin' during a given time frame was considered as 'unreasonably high profit' and was liable for penal action under the law.

68. For his next contention, the Respondent has placed reliance on (a) the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise and Customs Kerala v. Larsen and Toubro Limited wherein it was held that in the absence of machinery provisions for computation of taxable value, the levy of tax would become non-existent and (b) the decision of the Hon'ble Supreme court in Commissioner of Income Tax, Bangalore v. B. C. Srinivasa Shetty, wherein the Apex Court, while considering Section 45 of the Income Tax Act, held that in the absence of a methodology of computation, the charging section would fail the test of scrutiny. Citing the above decisions, the Respondent has averred that anti-profiteering provisions were a part of a taxing statute and the same principles, as enunciated in the judgments quoted above, would apply to them and that it was well settled in taxation laws that the absence of the method of computation of quantum of demand payable would result in the demand itself being declared as invalid.

69. The Respondent has also contended that during the course of the prolonged investigation or even thereafter, he was never been put to notice or offered any hearing to understand how the DGAP was computing the profiteering; that the said denial of hearing by the

DGAP was in gross violation of the principles of natural justice; that he places his reliance on the decision of the Hon'ble Supreme Court in the case of Automotive Tyre Manufacturers Association v. Designated Authority, wherein the Directorate General of Anti-dumping and Allied Duties (DGAD) had passed an order without granting personal hearing to the parties and the said order was quashed by the Apex Court on the ground that it was a violation of the principles of natural justice. The relevant extract from the judgment was quoted herein below:

"83. The procedure prescribed in the 1995 Rules imposes a duty on the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witnesses, etc. and also clear up his doubts during the course of the arguments. Moreover, it was also observed in Gullapalli [AIR 1959 SC 308], if one person hears and other decides, then personal hearing becomes an empty formality"

70. The Respondent has further argued that the DGAP could not be given a free pass to compute profiteering randomly without paying any heed to commercial/ business realities or mathematical principles; that there was a complete lack of transparency and an obvious disconnect in the approach followed by the DGAP which varies from case to case; for instance, in the present case, the DGAP had considered an exceedingly long period of investigation of nearly 1.5 years from 15.11.2017 to 30.04.2019 and the only

reason provided in the impugned Report was that it was according to the date on which reference was received from Standing Committee recommending investigation by the DGAP.

71. The Respondent has further averred that the DGAP, being a specialist in carrying out anti-profiteering investigations, cannot be believed to be oblivious of the fact that the forwarding of the complaint along with the recommendation from the Screening Committee to the Standing Committee, was itself time-barred. It appeared to the Respondent that the DGAP had willfully chosen to ignore the contravention of Rule 128 of the CGST Rules by the Standing Committee.

72. The Respondent has also cited the following cases as examples and contended that the DGAP has been considering different periods of investigation in different cases investigated by him:-

Sr. No	Case No	Investigation Period	Total Period
1.	20/2018	From 15.11.2017 to 28.02.2018	3.5 months
2.	02/2019	From 15.11.2017 to 31.03.2018	4.5 months
3.	59/2019	From 27.07.2018 to 30.09.2018	2 months
4.	46/2019	From 01.01.2019 to 31.03.2019	3 months
5.	14/2018	From 15.11.2017 to 31.01.2018	2.5 months

Sr. No	Case No	Investigation Period	Total Period
6.	08/2018	From 15.11.2017 to 31.01.2018	2.5 months
7.	Current Investigation	From 15.11.2017 to 30.04.2019	~18 months

73. Based on the above, the Respondent has alleged that the DGAP has investigated his case in a manner that evidenced arbitrariness and inequality; that the DGAP has adopted that period of investigation/ method of computation which was the best suited for it to reach its preconceived objective; that such an approach of the DGAP was a violation of Article 14 of the Constitution of India and the concept of equality before the law; that reliance in this regard has been placed on the decision of the Hon'ble Supreme Court in the case of Ajay Hasia and Ors. V. Khalid Mujib Sehravardi and Ors wherein it was inter-alia observed that wherever there was arbitrariness in the State action, whether it was of the legislature or the executive, Article 14 immediately springed into action and struck down such action. The concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and was a golden thread that ran through the whole of the fabric of the Constitution. The Respondent has relied upon the following decisions to submit that the taxing statutes must conform to Article 14 of the Constitution of India:

- *The State of A.P. and another v. Nalla Raja Reddy and others*[7]
- *Kunnathat Thathunni Moopil Nair etc. v. the State of Kerala and another*[8]

74. Based on the above submissions, the Respondent has contended that the absence of any prescribed mechanism to compute "profiteering" coupled with inexplicable prolonged investigation of ~18 months when many other investigations were between 2 to 4.5 months clearly manifested arbitrariness and was violative of Article 14 of the Constitution of India; that this was a sufficient ground to strike down the Impugned Report. It has also been argued by the Respondent that the provisions of Section 171(1) could be made applicable to only such contracts that transitioned an event of downward revision of GST rates.

75. It has been further argued by the Respondent that the anti-profiteering provisions were introduced to contain the profiteering impact of any favourable change in the rate of tax or allowance of input tax credits i.e. by pushing businesses to pass on the benefit accrued. Given this, it would merit perceiving the impact of these provisions only on such commercial contracts (for buying and selling of goods/ services), which existed and were not completely serviced at the time of change in the rate of tax and/ or ITC allowance. All subsequent supplies/ sale contracts under such existing contracts would warrant compliance with the anti-profiteering provisions.

[7] AIR 1967 SC 1458
[8] AIR 1961 SC 552

76. The Respondent has further submitted that in those contracts which were negotiated/ executed after the new tax rate regime came into effect, the prices were agreed to in the post-tax-rate reduction period as per Section 64A of the Sale of Goods Act, 1930, and these agreed prices could not be further examined for profiteering as for such new contracts in which the conditions of Section 171(1) of the CGST Act were not triggered and that since the provisions of Section 171 of the Act, ibid, did not envisage fixing of prices, the instant proceedings violated the provisions of Article 19(1) (g) of the Constitution of India. Further, confirmation of profiteering for a long period of 18 months adopted for the investigation implied that prices should not have been increased/ revised for such a long period, which made it plausible to argue that DGAP was abusing its powers to indirectly contain/ limit prices, for which it was not constitutionally and statutorily empowered. The Respondent has also stated that the above argument rested on the backdrop of this Authority's own comments, which were published vide its press release on 04.10.2018, which are as under:

".....National Anti-Profiteering Authority, assured companies that the National Anti-Profiteering Authority is not a price regulator and neither does it have legislative intent....."

The Respondent has added that given the above the impugned Report of the DGAP merited to be quashed by this Authority.

77. The Respondent has also submitted that Section 171(1) of the CGST Act, which laid down the framework for anti-profiteering

in the context of GST laws, reads as follows- " *171. (1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.". which implied that* no profiteering should be done in the name of GST in an event of (a) reduction in tax rate or (b) benefit of enhanced ITC and that the benefit of the same should be passed on to the recipient of supply by way of commensurate reduction in prices.

78. The Respondent has also submitted that the key aspect to be analyzed was what factual scenario would constitute 'profiteering' and has relied on the FAQs published on the CBIC website on the subject matter, which provides as under:

"Q1 What is profiteering?

Ans. In terms of Section 171 of the CGST Act, 2017, the suppliers of goods and services should pass on the benefit of any reduction in the rate of tax or the benefit of input tax credit to the recipients by way of commensurate reduction in prices. The willful action of not passing on the above benefits to the recipients in the manner prescribed is known as 'profiteering'."

79. Citing the above the Respondent has contended that the key aspects that emerge about profiteering were - (a) there must accrue a benefit from the specified event, and (b) The benefit was 'willfully' not passed on to the recipient by a commensurate reduction in prices (i.e. the prescribed action in Section 171(1) of the CGST Act); that profiteering could be confirmed only if the benefit has not been passed on to the

recipients willfully by the supplier, implying thereby that a mala-fide intent on part of the supplier must be proved.

80. The Respondent has further submitted that earning profits through lawful means was not a sin; that the provisions of Section 171 of the CGST Act could be triggered only in a case where a registered person made exorbitant profits through unlawful means; that the term 'profiteering' was not defined anywhere under the GST law or the Rules made thereunder; that only a marginal note to Section 171 mentioned the term "Anti Profiteering measure"; that it was a settled law that marginal notes could be referred to for understanding the intention of the legislature, as decided in the case of Commissioner of Income Tax, Gujarat v. Vadilal Lallubhai, wherein the Hon'ble Court has held that a marginal note indicated as to what exactly was the mischief that was intended to be remedied; that he also relied on the decision in the case of Indian Aluminium Company v. Kerala State Electricity Board, wherein the Hon'ble Supreme Court has held that marginal notes could be relied upon to show what the section was dealing with; that the term "Profiteering" has been defined as under:

Sr. No	Particulars	Reference
1	Taking advantage of unusual or exceptional circumstances to make excessive profits	Black's Law Dictionary

Sr. No	Particulars	Reference
2	Make or seek to make an excessive profit	Shorter Oxford English Dictionary
3	To seek or obtain excessive profits, one who is given to making excessive profits	Law Lexicon
4	As nouns, the difference between profit and profiteering is that profit is total income or cash flow minus expenditures the money or other benefit a business receives in exchange for products and services sold at an advertised price while profiteering is the act of making an unreasonable profit not justified by the corresponding assumption of risk, or by doing so unethically	Wiki Diff online
5	Any conduct or practice involving the acquisition of excessive profits	Mount vs. Welsh

81. The Respondent has further argued that the above meanings/ definitions/ connotations, read together with the FAQ (supra), suggest that profiteering could be said to have been done only if there has been a willful lack of fairness, i.e. either when any incremental margins or profits were made in comparison to the base scenario with similar facts and circumstances or when such incremental profits were not derivatives of action that conformed to

the established business practices and/ or pricing trends; that a bare reading of the aforementioned definitions suggested that profiteering could be alleged only when a person made excessive, unreasonable, or exorbitant profits and that the mere act of earning profits has not profiteering; that his case was not one where any exorbitant or unreasonable profits were made unlawfully and hence it could be said that he had profiteered.

82. The Respondent also reiterated his submissions made before the DGAP that the prices of food and beverages were dynamic and dependent on several market-driven factors; that the item-wise prices were incumbent on multiple factors that kept changing rapidly (a fact that was well evidenced by the historical data of operations), such as:-

- *Depending on the types of film*
  - *Blockbuster film*
  - *Popular film*
  - *Regular film or others*

- *Date and timing of supply*
  - *The First 1-3 days from film release were generally more rewarding*
  - *Few days after word of mouth spreads about the film, the revenues started picking up*
  - *Later days were generally less occupied and less rewarding*
  - *Weekends were more rewarding than weekdays*

- *Holidays (including the festival period) were more rewarding than regular days*

- *Other miscellaneous factors*
  - *Location of the property (or target customers)*
  - *Movie screening language (original or dubbed)*
  - *Target Customer & Competition etc.*

83. The Respondent has also reiterated his submission made before the DGAP that in the business of entertainment and leisure, the marginal utility changed every minute/ hour/ day depending upon the offering, and hence, there was no consistency in scenarios & considerations for pricing, therefore, any comparison was not just unwarranted but impossible. In other words, the demand/ supply scenario changed with each film or each show, which was different from the other and hence, not comparable for pricing considerations. Given this, every supply was unique and no comparison could be made of prices charged pre & post certain events (including tax events such as increase or reduction in the rate of tax or ITC allowance or disallowance).

84. It was also submitted by the Respondent that given the above, the supply of food and beverages by the multiplexes could not be compared to the supply of food and beverages by the restaurants, where the supply of food and beverage was based on printed rate or menu card, which were fixed for medium to long duration. In the case of multiplexes, the prices were dynamic and revised frequently

depending upon all parameters stated above. Therefore, the computation of profiteering should be undertaken only given the business nuances and uniqueness of his case.

85. The Respondent has also reiterated his submissions made before the DGAP that the supply price data depending upon food/ beverage items, in question, and keeping in view the factors above; the prices could be dynamic on the same date (for different properties) or for the same property (on different dates). It signified differentiation by the film, the day and time of the show, the location of the property etc.

86. The Respondent has also reiterated his submission made before the DGAP that in the present case, no two supplies were comparable and prices were extremely dynamic and could go up and down depending upon the parameters stated above and any price change, therefore, could not lead to any profiteering by the Respondent.

87. Further, the Respondent has reiterated his submission made before the DGAP that it was proven beyond doubt that the dynamic pricing (and frequent price changes) was a natural business outcome of the industry in which the Respondent operated, implying that prices of any given two or more instances were rendered incomparable to the said fact itself.

88. The Respondent has also reiterated his other submissions that the

DGAP had chosen to ignore key business aspects/ natural business outcomes even though this Authority, in its press release dated 04.10.2018, had indicated that the authorities needed to be sensitive to natural business outcomes; that the DGAP had incorrectly considered an inordinately long period of investigation from 15.11.2017 to 30.04.2019, which implied that the DGAP was trying to regulate the prices, which was beyond the intent of the law; that prices have to change on account of the impact of costs and as a response to the pricing strategy of the competitors; that the DGAP had failed to consider factors, such as the increase in the input costs, electricity consumed, fuel, rent, etc. on account of general inflation, but has only considered the impact of denial of ITC; that unless all the costs were considered, the finding of the DGAP was not tenable; that his business data (culled from his audited financial statements) clearly demonstrated that over time his margins have shrunk as detailed in the Chart below:-

CHART

(Amounts in INR Crores)

Particulars	FY 2017-18	FY 2018-19
F&B Revenue	306	436
F&B Cost	74	112
Total Cost (in proportion of revenues)	24.18%	25.69%

Note: Financial facts & figures taken from published and audited financial statements.

That the data in the above Chart showed that his costs had been increasing in the post-tax rate reduction period due to denial of ITC and his margins were shrinking: that this aspect ought to have been considered in alleging/ determining the amount of profiteering.

89. The Respondent has further submitted that he placed reliance on the decision of this Authority in the case of Kumar Gandharv v. KRBL Ltd. wherein this Authority had accepted the argument that the price of Basmati rice was increased on account of various market factors including the increase in the purchase price of paddy and thus, there was no element of profiteering; that in the above-cited case, the MRP of the product was increased from Rs. 540 to Rs. 585, which constituted an increase of 8.33%, keeping in view, the increase in the purchase price; the increase in the cost has been accepted by this Authority itself as a reason for the price increase; that the entire exercise undertaken by the DGAP should be set aside since the amount of profiteering has been computed arbitrarily.

90. The Respondent has reiterated that the provisions of Section 171 of the CGST Act could restrict the right of the Respondent to increase prices in the normal course of business for such a prolonged period and that the DGAP has assumed that the powers under Chapter XV of the CGST Rules were akin to price control mechanism and has sought to impinge on his fundamental right to decide the selling price of his items/ goods.

91. The Respondent has also reiterated his submission that there were no guidelines regarding the period for which further prices could or could not be revised, but the DGAP has stretched the investigation to nearly 1.5 years after the reduction of tax rate w.e.f. 15.11.2017, which was inexplicable; that the Impugned Report was silent about till when the increase in prices undertaken by the Respondent would be considered as profiteering. In the absence of any period of limitation, it would imply that any increase in prices by Respondent would be considered as profiteering till the time he is in business. It meant that the Respondent was bound by the Authorities in taking commercial decisions qua the pricing of the product even if it had valid reasons to do so, which was a violation of Article 19(1) (g) of the Constitution of India.

92. The Respondent has also reiterated his submission that anti-profiteering provisions, as well as the constitution of the DGAP, were part of a taxing statute and not of a price regulation statute; that without any explicit authority of law, the DGAP could not force a blanket mandate to keep the prices in check as the same was violative of the freedom of trade and commerce; that he placed reliance on the case of Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Limited & Ors., wherein it was held that in the absence of any statutory power to fix tariffs, a delegated authority could not regulate the tariffs and any such action was ultra vires pf the Constitutional provisions; that in his case, the price revisions, if any, had happened only in the ordinary course of business and the same should not be seen as a contravention of Section 171 of the CGST Act; that his case was triggered by the

amendment of two GST aspects that directly impacted his business and his margins and these aspects were GST rate reduction and his ineligibility to avail ITC qua the food & beverage business with effect from 15.11.2017; that the cumulative impact of the two aspects was the key to the determination of profiteering, if any, as explained in the illustration below:

Particulars	Up to 14.11.2017	15.11.2017 onwards
Gross Price of supplies	100	100
Tax included in price above at 18% & 5% respectively	15.25	4.76
Base price realized by the Respondent	84.75	95.24
(%) Increase in prices [(95.24 - 84.75) / 95.24]		11.01%

93. Citing the above illustration, the Respondent has submitted that if the ITC loss was more than or equivalent to 11.01%, there was no profiteering since the increased prices were sufficient to offset the ITC losses; that, however, the illustrative factual position in his case was given in the Chart below:

CHART

Summary of ITC

Particulars	Amount (INR)
ITC loss booked between 15.11.2017 – 31.03.2018	129,737,879
ITC loss booked on transition inventory (i.e. closing stock as of 14.11.2019)	13,590,052

Total ITC loss (as per GSTR 3B)	A	143,327,931

% loss on base price pre-rate change

Particulars		Amount (INR)
Taxable turnover (Revised Prices)	B	1,160,087,992
Taxes - 5%	C	58,004,400
Total (a)	D = B + C	1,218,092,392
Erstwhile tax rate	E	18%
Re-computed base price	F = D/(1+E)	1,032,281,688
ITC loss as % of pre-rate change prices	A / F	13.88%

94. Referring to the above Chart, the Respondent has contended that the increase in the base prices of the items supplied by him was not enough to offset the loss of ITC, since the loss of ITC was 12.35% whereas the base prices had increased by 11.01% and hence his case was not a case of profiteering.

95. It was also submitted by the Respondent that the actual proportion of ITC to total turnover in his case was significantly different from that adopted by the DGAP; that in Para 27 of his Report, the DGAP has applied an arbitrary amount of ITC in the computation; that he wished to make the following contentions to dispute the DGAP's computation:-

a. Adoption of a period of 4 months from July to October 2017 to compute the average base prices in the pre-tax-rate reduction period - The adoption of the said period was arbitrary and without

any logic. The impugned Report did not provide any rationale for such an approach.

b. Non-consideration of credits, pertaining to the period from July to October 2017 that were availed in later periods, which was allowed under the GST law. It was a business fact that invoices were accounted for belatedly for various reasons beyond Respondent's control and a provision for the same existed under the GST law. Hence such ITC, that correlated to the period July to October 2017 ought to be considered while computing the quantum of profiteering.

c. Arbitrary vivisection of the ITC pool into F & B and Non-F & B businesses - During the relevant period i.e. July-October 2017, F & B was a fully taxable activity and enjoyed no restriction to corresponding ITC allowance. Given this, the law had no prescription on how to segregate the ITC attributable or co-relatable only to the F & B business. In the absence of such a prescription, the DGAP has erred in arbitrarily vivisecting the ITC pool for F & B business, which was not tenable under the law.

96. The Respondent has further contended that if the above contentions had been considered in the computation, the percentage of ITC to Turnover would stand modified as under:-

Particulars	Data as per	ITC	Total

	Impugned Report (refer Para 27)	corresponding to Invoices Dated Between July-October 2017 availed in later months	
Total ITC Availed as per GSTR-3B	38,25,67,531	8,19,83,201	46,45,50,732
Total Outward Taxable Turnover as per GSTR-1 (as duly reconciled at Annexure 22 of the Impugned Report)	4,13,09,24,536	[redacted]	4,13,09,24,536
ITC %			11.25%

97. It was submitted by the Respondent that the impact of ITC @11.25% ought to have been considered by DGAP while computing the amount of profiteering but the DGAP has erred in the computation and as such the computation needed to be revisited.

98. The Respondent has also contended that he has not violated the provisions of Section 171; and that even if it was assumed for the mere sake of argument that he had profiteered, the profiteering

ought to have been computed based on the correct impact of his ITC loss.

99. It has been argued by the Respondent that the DGAP had computed the net increase in cost due to denial of ITC to be 9.70% of the turnover of sales. The said percentage has been computed based on the ITC availed by the Respondent from July 2017 to October 2017. This was conceptually illogical and biased action of the DGAP to merely give effect to its motive to determine as high profiteering as may be possible notwithstanding the merits of its approach. The Respondent has submitted that if the DGAP wished to persist with the ITC loss % computed for the July-October 2017 period, it would be relevant to ensure that data so adopted/ considered was free from any sampling errors. The Respondent has also averred that the key aspect in the present case was that there could be a timing difference in the booking of expenses and hence, an automatic timing difference in availing the corresponding ITC too. In Respondent's case, ITC on several invoices pertaining to the months of July-October 2017 was availed in subsequent periods. To make the ITC loss computation comprehensive and free of any sampling errors, it would be prudent to consider the ITC qua actual purchases in a given period irrespective of the month/ period of its availment. The Respondent has submitted the computation of ITC loss thus, updated as is detailed in the Chart below:-

Amounts (INR)

Particulars	Key	ITC corresponding to Invoices Dated Between July-October 2017		Total (Representing the True & Fair position)
		Availed in Return for July-October 2017 period (as considered by DGAP)	Availed in Later Months	
ITC Availed as per GSTR-3B	A	38,25,67,531	8,19,83,201	46,45,50,732
ITC availed Exclusively on Non-Restaurant Services	B	9,02,57,234	4,94,85,043	13,97,42,277
ITC availed Exclusively on Restaurant Services	C	3,13,86,503	37,09,230	3,50,95,733
ITC availed on Common inputs, input services and capital Goods	D	26,09,23,794	2,87,88,928	28,97,12,722
Total Outward Taxable Turnover as per GSTR-1	E	[redacted]	4,13,09,24,536	4,13,09,24,536
Total Restaurant Taxable Turnover as per SKU Wise Sale Register	F		92,01,72,389	92,01,72,389
Total Turnover other than	G = E-F		3,21,07,52,147	3,21,07,52,147

Particulars	Key	ITC corresponding to Invoices Dated Between July-October 2017		Total (Representing the True & Fair position)
		Availed in Return for July-October 2017 period (as considered by DGAP)	Availed in Later Months	
restaurant service		[redacted]		
Proportionate ITC availed towards restaurant Service	H = D*F/E	5,78,69,463 (refer Page 22 of Impugned Report)	64,12,796	6,42,82,259
Total ITC availed towards Restaurant Service	I = C + H	8,92,55,966	1,01,22,026	9,93,77,992
Net Outward Taxable Turnover for the period July-October 2017	J = F	92,01,72,389	[redacted]	92,01,72,389
The ratio of Input Tax Credit to Net Outward Taxable Turnover K= I/J		9.70%		10.80%

100. The Respondent submitted that the aforesaid details were duly furnished before the DGAP vide his letter dated 30.09.2019 and subsequently a sample invoice verification was also done by DGAP; that ITC for July-October 2017 invoices, which was availed belatedly in later periods, ought to have been considered by the DGAP to arrive at the correct position, on the same lines as decided by this Authority in its Order No. 14/2018 dated 16.11.2018 (more

specifically Para 9 and Para 30 of the Order).

101. The Respondent has also reiterated that the DGAP had not reasoned its approach to adopt 4 months ITC for profiteering computation. However, while evaluating base prices, the DGAP had only adopted the data from the most recent tax period immediately preceding the rate change event. It was further submitted by the Respondent that such an inconsistent approach in data adoption was neither warranted nor tenable. Accordingly, the DGAP should have considered ITC only of October 2017 (i.e. the month immediately preceding the rate change event). From data quoted within the impugned Report itself, it followed that ITC – Turnover percentage for October 2017 was pegged at 10.49%, which should have been considered for the computation since such an approach would not just present consistency in action but would also be a good measure to leave aside the data that has the potential of abnormality.

102. It was also submitted by the Respondent that since the investigation was being done post-facto rather than on a live basis, one should actually look at actual ITC loss suffered by the Respondent, the data of which was available on record & summary has been presented below. The ITC loss percentage based upon actual data post the rate change event could alone be the most authentic basis for the present computation of alleged profiteering since it neither averaged/ nor projectioned/ nor has any inbuilt assumptions. It represented actual financial loss incurred by the Respondent, which ought to be netted off/ adjusted in the determination of alleged profiteering

amount, as detailed in the Table:-

TABLE

Amounts (INR)

Particulars	Key	15.11.2017 to 31.03.2019
ITC Loss as shown in GSTR 3B Return for the period 14.11.2017 to 31.03.2019	A	56,68,27,492
Total Restaurant Taxable Turnover as per GSTR 1 Return per SKU Wise Sale Register for 15.11.2017 to 31.03.2019	B	5,54,03,41,745
ITC Loss %	C = A/B	10.23%

103. Citing the above Table, it was reiterated by the Respondent that since the actual loss data was available, any alleged profiteering should be determined on considering the same and not otherwise. The Respondent has submitted that from the above Table, it could be observed that various approaches (with respective merits) invariably showed that his ITC as a percentage of turnover was in a narrow range, with the median being close to 10.8%.

104. Reiterating his contentions, the Respondent requested this Authority to order the DGAP to re-visit the computation vis-à-vis the ITC loss considered. He also added that the highlighting of the computational anomalies should in no way be construed to its admission of profiteering, in any manner whatsoever.

105. The Respondent also submitted that while arriving at the total alleged profiteering amount, a notional 5% amount had been incorrectly included in the profiteered amount by the DGAP on the ground that it represented the excess GST collected by him, based on the increased base prices, from his recipients. The Respondent has submitted that the amount already paid to the Government in terms of Section 76(1) of the CGST Act 2017 and hence it could not be held that he has profiteered from such amount since he had not retained the same; He has added that he placed reliance on the decision of the Hon'ble Apex Court in the case of R.S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited, wherein the Hon'ble Supreme Court has analyzed the term "collected" meant in the context of the Sales Tax legislation of Gujarat as follows:- *"Section 37(1) uses the expressions, in relation to forfeiture, "any sum collected by the person ... shall be forfeited". What does "collected" mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that "collected" means "collected and kept as his" by the trader."*

106. Citing the above decision, the Respondent has stated that the amount of GST collected from the customers was a liability of tax (reflected under the head of 'Liabilities' in the Balance Sheet) which was subsequently deposited with the Government. The accounting treatment accorded to account for the applicable GST was as depicted below:

Transaction	Journal Entry	Amount (Rs.)	Amount (Rs.)
Outward Sales - Creation of GST Liability	Customer A/c..... Dr.	105	
	To Sales Outward.....Cr.		100
	To IGST Tax Payable.....Cr.		5
Payment of GST Liability to Government	IGST Tax Payable .....Dr.	5	
	To Bank.....Cr.		5

107. The Respondent has also submitted that if the above relief was upheld, the computation would also be in line with the proposition advocated by this Authority in the following case as well as the commentary in its press release.

Extract of the Order dated 16.11.2018 in case no. 14/2018 (Hardcastle Restaurants):

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

Extract of the press release dated 04.10.2018

"...it is simple to decide the profiteering by comparing the corresponding invoices of pre-revised rates to post revision which is an accounting procedure and no legality is required. By reduction of rates, the Government sacrifices revenue but commensurate reduction should be passed on to the end consumers."

108. Citing the above, the Respondent has submitted that the addition of 5% GST to the average base prices should be excluded from the calculations and that consequentially, the alleged profiteering amount would reduce by Rs. 18,34,777/- (3,85,30,314 X 5/105).

109. The Respondent, whilst reiterating all his submissions and averments, requested this Authority to set aside the Report of the DGAP dated 31.01.2020.

110. The submissions filed by the Respondent were forwarded to the DGAP for filing his clarifications under Rule 133(2A) of the CGST Rules, 2017. The DGAP has filed his point-wise clarifications dated 23.03.2020 and the same are re-iterated as under:

a) **Para- 'A':** DGAP has exceeded its power by investigating products beyond contours of the complaint which goes to the very root of its jurisdiction.

Clarification by DGAP: The submission of the Respondent in this regard was refuted by highlighting the contents of Rule 129(1) of the CGST Rules, 2017 in which it was clearly stated that the Standing Committee on being satisfied that the supplier had not passed on the benefit of tax reduction on the goods and services or the benefit of Input Tax Credit to the recipients commensurately, would refer the matter to the DGAP for a detailed investigation. Thus, on the receipt of the reference from the Standing Committee, NOI was issued on 13.05.2019 asking the Respondent to furnish the details of all supplies made by it in respect of restaurant service (SAC: 9963) and not limited to a particular item provided by it. Thus the DGAP had not exceeded its jurisdiction by investigating whether the benefit of ITC had been passed on all the supplies made by the Respondent. Further, with regard to Respondent's reference of the judgment of the Hon'ble High Court of Delhi in the case of M/s Reckitt Benckiser India (P) Ltd. vs. UOI in WP (C) 7743/2019, wherein the Hon'ble High Court of Delhi granted relief that only the inquiry as far as the concerned product would continue till final disposal of the petition, it was noted that there is no such stay/directions issued in the present proceedings. Further, it was an interim relief only and no final judgment has been passed and hence its ratio was not applicable in this case.

b) **Para- 'B':** Examination of over 14 months by the Screening Committee is in clear violation of Rule 128 of the CGST, Rules, 2017.

Clarification by DGAP: He had received the reference from the Standing Committee on Anti-profiteering on 02.05.2019 with a remark that the complaint had been forwarded to the DGAP for carrying out the investigation. The said action aligned with the contents of Rule 129 of the Central Goods and Services Tax Rules, 2017.

c) **Para- 'C':** The DGAP failed to complete the investigation proceedings & issue the report within the prescribed period thus rendering the impugned report null and void.

Clarification by DGAP: - In this case, a reference was received from the Standing Committee on 02.05.2019 to investigate the subject matter and NOI was issued on 13.05.2019. Thus the Statutory timeline to complete the investigation was on 01.08.2019 (three months) without extension in terms of Rule 129(6) of the Central Goods and Services Tax Rules, 2017. In the meantime, vide Notification No. 31/2019- Central Tax dated 28.06.2019, the period to investigate the case was replaced with "**Six months**" in place of **"three months"** earlier which could be extended by a further period of three months (total nine months) by this Authority. Accordingly, after the expiry of six months, a necessary extension of three months was duly granted by the National Anti-profiteering Authority which was clearly mentioned in para-6 of its report dated 31.01.2020 and reproduced as follows: -*"6. The time limit to complete the investigation was extended up to 01.02.2020 by the National Anti-profiteering Authority, in terms of Rule 129(6) of the Rules,*

vide letter F.No. 22011/NAA/19/2018/6019 dated 31.10.2019".

Thus, the submission of the Respondent that the report of the DGAP was time-barred was bereft of facts.

d) **Para-'D':** No Methodology prescribed to derive profiteering; thus, leading to an arbitrary exercise of powers by DGAP.

Clarification by DGAP: The contention of the Respondent of not prescribing the Methodology & Procedure for investigation is incorrect. In this regard, it was submitted that the power to determine Methodology & Procedure as per Rule 126 of the Central Goods and Services Tax Rules, 2017 has been conferred on this Authority by Central Government in the exercise of its powers given under section 164 of Central Goods and Services Tax Act, 2017, on the recommendations of the GST Council which was a Constitutional body created under the 101st Amendment of the Constitution. This Authority, in the exercise of the power delegated to it under the above Rule, had notified the Methodology and Procedure, vide Notification dated 28.03.2018 which is available on its website. It was further submitted that the Methodology and Procedure to be adopted for the determination of profiteering might vary from case to case, depending on the facts and circumstances of the case as well as the nature of goods or services supplied. No fixed Methodology could be prescribed to determine profiteering in all cases. Moreover, the Authority could only determine the Methodology and not prescribe it as per the above Rule. Further, regarding the contention of the Respondent that

different period of investigation was taken up in different cases the reason has already been explained that since the report was received from Standing Committee in May 2019, the review was done until April 2019. The same has also been mentioned in para-17 of this office report dated 31.01.2020 which is reproduced below:

"17. It is also noted that the Respondent raised concern over period of investigation. In this regard, it is submitted that the period of Investigation has been prescribed neither in the Central Goods and Services Tax Act, 2017 nor in the corresponding Rules/Notifications. This office has received the reference from the Standing Committee on Anti-profiteering on 02.05.2019 to investigate the matter, hence the period from 15.11.2017 up to the latest month of receipt of reference was taken up for investigation, i.e. from 15.11.2017 to 30.04.2019 which has already been conveyed in para-5 above."

e) **Para- 'E':** Provision of Section 171 (1) cannot be applied to the present case in absence of any transitional supply contract.

Clarification by DGAP: - The contention of the Respondent that the provisions of Section 171 of the CGST, Act, 2017 did not apply to its case was not tenable as it was found to increase the priced of several items by more than ITC loss suffered by it. The same has been explained in Paras 27 & 28 of this office report dated 31.01.2020. The relevant extract is reproduced below:

" 27.....the ratio of input tax credit to the net taxable turnover has been taken for determining the impact of denial of input tax credit for the period from July, 2017 to October, 2017 On this basis the findings are that input tax credit amounting to Rs. 8,92,55,966/- was available to the Respondent during the period July, 2017 to October, 2017 which is approximately 9.70% of the net taxable turnover of restaurant service (Rs. 92,01,72,389/-) supplied during the same period... "

"..... Further, the analysis of the details of item-wise outward taxable supplies during the period of 15.11.2017 to 30.04.2019, reveals that the Respondent had increased the base prices of different items supplied as a part of restaurant service to make up for the denial of input tax credit post-GST rate reduction. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period 15.11.2017 to 31.03.2019 were compared and it is established that the Respondent increased the base prices by more than 9.70% i.e., by more than what is required to offset the impact of denial of input tax credit in respect of 1434 items (out of a total of 1650 items) sold during the same period. Thus, the conclusion is that in respect of these items, the commensurate benefit of reduction in rate of tax from 18% to 5% had not been passed on. It is also clear that there was no profiteering in regard to the remaining items on which there was either no increase in base price or the increase in base price is less or equal to the denial of input tax

credit, or these were new products launched in many states or sold in new Multiplex started operation post 15.11.2017."

f) **Para- 'F':** Anti-profiteering provision, if at all, can be triggered only in instances where an unlawful manner of business is established.

Clarification by DGAP: - DGAP in its report dated 31.01.2020 has nowhere questioned lawful profits made by the Respondent. Only those transactions have been taken up where the prices post rate cut have been increased more than the impact of ITC loss suffered by it. Further, an explanation has already been given in the reply supra.

g) **Para- 'G':** Adopting 18 months as the period of investigation to determine alleged profiteering acts as a price control mechanism and is clearly violative of the Right to trade.

Clarification by DGAP: - The objection raised by the Respondent has been duly redressed in para-16 of this office report dated 31.01.2020 which is reproduced below:

"16. Further, the contention of the Respondent that anti-profiteering provisions attempt to regulate the prices and disregard business outcomes & their impact on prices is not correct. Directorate General of Anti-profiteering has not attempted to examine or question the base price as Section 171 does not mandate control over the prices of the goods or services as they are to be determined by the supplier. Section 171 only mandates that any reduction in the rate of the tax or

the benefit of ITC which accrues to a supplier must be passed on to the consumers as both are the concessions given by the Government and the suppliers are not entitled to appropriate them. Such benefits must go to the consumers and in case they are not identifiable, the amount so collected by the suppliers is required to be deposited in the Consumer Welfare Fund. This 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. Therefore, neither Anti-profiteering attempted to neither regulate the prices nor disregard any business outcomes."

h) **Para- 'H':-** The loss on account of ITC disallowance is higher than the revision in prices:-

Clarification by DGAP: - Already replied supra in reply to point E. Further queries raised by the Respondent in this para have already been addressed in para-26 of DGAP report dated 31.01.2020 which is reproduced as under: -

"26. The assessment of the impact of denial of the input tax credit, which is an uncontested fact, requires the determination of the input tax credit in respect of "restaurant service" as a percentage of the taxable turnover from the outward supply of "products" during the pre-GST rate reduction period. To illustrate, if the input tax credit in respect of restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base price w.e.f.

15.11.2017, is up to 10%, one can conclude that there is no profiteering. However, if the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017, is by 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Therefore, this exercise to work out the input tax credit in respect of restaurant service as a percentage of the taxable turnover from products during the pre-GST rate reduction period has 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. This has been done for the following reasons:

1) *The Respondent submitted that he was required to reverse an amount of Rs. 1,35,90,052/- on the closing stock of input and capital goods as on 14.11.2017. However, the correctness and completeness of the computation cannot be ascertained and therefore it cannot be relied upon.*

2) *The invoice-wise outward taxable turnover in November 2017 was not provided by the Respondent to compute taxable turnover for the period 01.11.2017 to 14.11.2017.*

3) *On several invoices, the credit was taken between 01.11.2017 to 14.11.2017 but they pertained to services availed during the whole month of November 2017. The details of sample invoices and observations are mentioned in* ***Annex-20****."*

i) **Para- 'I':** The computation of alleged profiteering hastily overlooks the correct ITC loss & includes other arbitrary additions.

Clarification by DGAP:- With regard to Respondent's submission that ITC against invoices of July to October, 2017 period, which were booked in later periods also be taken into consideration, it was submitted that Section 16(2) the Central Goods and Services Tax Act, 2017 prescribes certain conditions for entitlement of ITC which are as follows:-

i. Respondent is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other taxpaying documents as may be prescribed;

ii. Respondent has received the goods or services or both.

iii. subject to the provisions of section 41, the tax charged in respect of such supply has been paid to the Government, either in cash or through the utilization of input tax credit admissible in respect of the said supply; and

iv. Respondent has furnished the return under section 39:

The DGAP has clarified that with effect from 15.11.2017, the Respondent was not allowed to avail ITC in terms of Notification no.46/2017- Central Tax (Rates) dated 14.11.2017, Therefore, the Respondent was not eligible to take ITC w.e.f. 15.11.2017 on the strength of invoices received post 15.11.2017 when the aforesaid notification debarred the Respondent from availing ITC took effect. As the Respondent has received the taxable invoices post 15.11.2017 when he was not eligible to avail ITC in terms of Notification no. 46/2017 Central Tax (Rate) dated 14.11.2017, therefore the same could not be considered for computation of

denial of Input Tax Credit to net turnover ratio. The DGAP has further clarified that he had already explained the reason for considering the invoices for the July to October 2017 period for computation of input tax credit as a percentage of the total taxable turnover in Para-26 of his Report dated 31.01.2020.

j) Regarding the request of the Respondent for considering the actual ITC loss data for the period 15.11.2017 to 31.03.2019, the DGAP has stated that the same was not tenable as the same could only be computed after the end of the period i.e. on or after April 2019 which could not be factored in on the eve of GST rate reduction i.e. on 15.11.2017. DGAP has clarified that he has computed the input tax credit as a percentage of the total taxable turnover of the Respondent for the period July 2017 to October 2017 for reasons cited in Paras 26 & 27 of his Report dated 31.01.2020.

k) Regarding the contention of the Respondent that 5% GST has been incorrectly added to the profiteering amount, the DGAP has clarified that Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017, required the supplier of goods or services to pass on the benefit of the tax rate reduction to the recipients by way of commensurate reduction in price. Price includes both, the base price and the tax paid on it. 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 deposited in the Consumer Welfare Fund, 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 return 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.

111. The DGAP's clarifications dated 23.03.2020 were supplied to the Respondent vide this Authority's Order dated 01.06.2020. In response, the Respondent vide his letter dated 21.07.2020 requested time to file his rejoinder against the clarifications dated 23.03.2020 filed by the DGAP. The above request was allowed by this Authority and the Respondent was granted further opportunity to file his rejoinder latest by 28.08.2020. In response thereto, the Respondent has filed his below-detailed written submissions dated 27.08.2020, in which has averred as follows:-

112. That the DGAP was not the competent authority to increase the scope of the investigation in any profiteering complaint beyond the items that have been complained against and thus DGAP had not just exceeded jurisdiction but also conveniently disregarded the established legal & judicial position on the subject matter.

112.1 That in response to his detailed submissions, DGAP's Supplementary response merely provided an ineffectual explanation; that while upholding the validity of its action, the

DGAP has failed to adduce any legal averments in rebuttal of the contentions made by him and lack the necessary explanation.

112.2 That the DGAP has clarified that unlike the case of ***Reckitt Benckiser India Private Limited v. UOI*** he Delhi High Court has specifically stayed investigations for an item outside the limits of the complaint, no such direction has been issued by any competent court in his (Respondent's) case, ignoring the fact that the directions of the Delhi High Court' contained in its Order dated 22.08.2019 were absolute and constituted a valid precedent for any/ all other matters too since the relevant portion of the Order reads as follows:- *"1. The interim order dated 19th July 2019 is made absolute during the pendency of the writ petition. The application is disposed of."* ; that the DGAP has not interpreted the Order of the Hon'ble Delhi High Court correctly.

112.3 That the insertion of sub-rule (5) under Rule 133 of the CGST Rules 2017, effected vide Notification No. 31/2019 – Central Tax dated 28.06.2019, expressly granted powers only to this Authority (and not to the DGAP) as this Authority could expand the scope of the investigation; that the DGAP has been silent on this issue.

112.4 That the DGAP appeared to be taking the shelter of Rule 129(1) of the CGST Rules 2017 to decide the scope of its investigation; that the said Rule did not provide any validity to the action of the DGAP; that on the contrary, with the insertion of sub-rule (5) under Rule 133, the intent of the law became much clearer as no other Rule of the Rules ibid, had such an expansion of the scope of profiteering investigation or else the said Rule would not have been required.

112.5 That the legal position as demonstrated by him in relevant context

had been duly buttressed and strengthened by the available jurisprudence none of which has been disproved by the DGAP. It was a settled position of law, that case laws quoted by the taxpayer if not properly distinguished then, such action amount to tacit acceptance of the taxpayer's connected arguments. In the present case, the judicial precedents submitted by him had been completely overlooked despite being placed on record, leave alone distinguishing the same. This Authority may, accordingly, consider these legal aspects before passing any final order in the present matter to avoid any futile and long-lasting litigation; that the DGAP had itself submitted that further comments could be sought from the Screening Committee on the matter. This statement itself attested DGAP's acceptance of futile delay in procedure undertaken by the Screening Committee. Given that the statutory prescription had been breached in the said case, the reference by the Standing Committee itself was illegal, and hence, the proceedings ought to be quashed on that basis alone; that the statutory limitation period for completion of investigation and issuance of the corresponding report was not adhered to by DGAP. Contextually, the amendment made in the CGST Rules timelines was only prospective and not available in the present case, which was initiated and was in progress before the relevant amendment; and that the extended period as utilized by DGAP was allowed to it without following principles of natural justice and hence, jeopardizing his interest.

112.6 That the DGAP's Supplementary Report, in Part C, failed to rebut his (Respondent's) contentions in word and spirit.; that DGAP's response seemed to be based upon conjecture that the Amendment to Sub- Rule (6) of Rule 129 by Notification No. 31/2019 – Central Tax dated 28.06.2019 would be operative for

ongoing investigation as well.

112.7 That vide the amendment to said Sub-Rule, the normal period allowed for completion of the investigation was extended from 3 months to 6 months though without an express stipulation of whether the amendment would apply prospectively or to ongoing cases as well. Given the said position, he submitted that in the absence of an express stipulation, the amended timelines could not be applied retrospectively, or to any ongoing proceedings initiated before the said amendment. The Respondent reiterated that he relied upon settled jurisprudence in this regard.

112.8 that the DGAP himself acknowledges that the time limit allowed for completion of an investigation, without extension, was 3 months only; that the relevant Rule was amended to provide six months without establishing the legal basis of its claim. The Authority might, therefore, note that the DGAP has failed to explain the legitimacy of its position.

112.9 that the DGAP has altered its position as per his own convenience between different investigation matters and various aspects of the investigation. At this juncture, it wished to refer to the case of **S. Ganapathy vs. Mahindra Lifestyle Developers Limited**[9], wherein the DGAP opined that one of the many amendments brought by Notification No. 31/2019 – Central Tax dated 28.06.2019, should apply prospectively and would not have any bearing on ongoing investigations. The relevant text from the said judgment is extracted below:

"*Though there was a time frame for investigation and submission of*

Report in case of a reference received from the Standing Committee (which was duly adhere to in the initial investigation), there was no such timeline for the examination of the claims as per the directions of this Authority and for the first time, vide Rule 133 (5) of the CGST Rules, 2017, introduced w.e.f. 28.06.2019 it has been stated that "any investigation or enquiry carried out on the direction of the NAA shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 shall mutatis mutandis apply to such investigation or enquiry".

He submitted that since Rule 133 (5) of the Central Goods & Services Tax Rules, 2017 was introduced with prospective effect from 28.06.2019 it had no bearing on the ongoing investigation.

112.10 Further, it was submitted by the Respondent that the approach of the DGAP was a grave miscarriage of justice since it has applied different yardsticks and calculations in different cases as per his convenience. This Authority must take due cognizance of the inconsistencies in DGAP's conduct across different matters that the impugned Report breached the law of limitation and was, therefore, null & void. He also submitted that no opportunity of hearing was granted to him while allowing the DGAP extended period to complete investigation, hence, the matter had traversed natural justice and jeopardized his interest. In such a case, the Impugned Report could not be held legitimate since it rightfully ought to be barred by limitation.

113 The Respondent has also argued that the DGAP's approach of measuring each business with the same yardstick was against the principle advocated by this Authority itself in multiple cases. The peculiar

facets of the Respondents business, where the price of the same products varied from location to location and for the same location for different show days, show timings, films, etc; must be given due importance while computing the profiteering, which had not been done by the DGAP.

113 The Respondent contended that the profiteering provisions could not be applied to supplies other than transitional cases, which were either live or under process when the relevant change in law took place. Adding to its averments, the Respondent submitted that where the provisions of profiteering were applied to supplies covered otherwise than by transitional contract, the same would tantamount to regulating prices, which was not the mandate of Section 171 of the CGST Act.

114 The Respondent has also submitted the following averments:

a. The proportion of ITC loss to the turnover for the period 15.11.2017 to 31.03.2018, suffered by the Respondent was 12.35%; whereas the actual increase in the base selling price was only 11.01%. Leave alone profiteering, the Respondent could not even fully recoup the actual loss suffered by it.

b. An uneven approach had been adopted by the DGAP for computing the percentage of ITC availed and the average selling price before the tax rate reduction. While the sales of one item has been considered for 4 months (July 2017 to October 2017), in the case of another item the computation is based on the sales data for October 2017. Due to this inconsistent approach, the DGAP has incorrectly arrived at the eligible ITC percentage of 9.70%, whereas it should be 10.49%.

c. The DGAP has failed to consider the eligible ITC for the period 01.07.2017 to 14.11.2017, which was availed on or after 15.11.2017, in the computation of the ratio of ITC to turnover. Due to this flaw, a lower eligible ITC percentage of 9.70% was determined instead of 10.80%.

d. The Respondent has further submitted that the computation of ITC loss percentage should be based on actual numbers as reported by the Respondent in the periodic GST returns including reversal of ITC on closing stock of goods as of 14.11.2017; rather than on any hypothetical basis, as done by the DGAP.

e. It was further submitted by the Respondent that the bifurcation of ITC availed during July 2017 to October 2017 between Food & Beverages and other businesses, had been done on frivolous basis rather than considering the actual data. Due to this error, the eligible ITC percentage was determined to be lower than the authentic figure of 11.25%.

115 Further, the Respondent has submitted that the ITC reversed on closing stock of goods as of 14.11.2017 was reported in the GSTR-3B return filed for the month of May 2019. The Respondent had enclosed a certificate issued by an independent Chartered Accountant certifying the amount of ITC reversed on closing stock of goods as of 14.11.2017 and disclosure thereof in the GST returns. The Respondent had also submitted that the provisions related to payment of GST on the supply of services were governed by Section 13 i.e. time of supply of services. It provided that, if the invoice was issued with in the prescribed time, the time of supply was earlier than the date of invoice or date of payment. The time of

supply in the present case, in terms of Section 13 was determined based on the date of the invoice. Further, the Respondent has also stated that the term 'time of supply' has not been defined under the CGST Act. Reference in this regard has been invited to the Point of Taxation Rules, 2011 ("POT Rules"), which were analogous to the time of supply provisions under the CGST Act. He has also claimed that Rule 2(e) of POT Rules defined the term 'point of tax' (comparable to 'time of supply'), as the point in time when a service would be deemed to have been provided. Conversely put, the actual performance of service, might not be relevant for determining the point of tax.

116 It was also submitted by the Respondent that the time of supply in the present case arose on the date of issuance of invoice. The eligibility to avail ITC was dependent on the date of receipt of service i.e. when the service was deemed to be provided and not the underlying period covered by such invoice. The services were received during the period when the Respondent was eligible to avail ITC. Hence, the ITC has been rightly availed.

117 The Respondent has further submitted that there was no such restriction prescribed under Section 16(2) to disallow ITC in the present case. As provided above, the eligibility to avail ITC must be determined based on the date of receipt of underlying supply and not concerning any other date such as the date of availing ITC in the books of account. Additionally, Section 16(4) empowered the taxpayer to avail ITC in respect of a financial year by earlier of (a) September of the following year or (b) filing of Annual return. The Respondent had appropriately availed ITC within the given

limitation period.

118. Given the above, the Respondent has contended that it would be judicious to consider the ITC on invoices dated 01.07.2017 to 14.11.2017, which was availed in later periods to arrive at the correct position. Such an approach was merited by past action of DGAP, which had been approved by this Authority in the case of **Hardcastle Restaurants Pvt. Ltd.**, as stated in para 9 and para 30 of the order. The approach was meritorious since it ensured that there was no selective bias, sampling errors and hence, the results so obtained were just & reasonable.

119. Further, the Respondent has placed reliance on the decision of Hon'ble Chennai Tribunal in the case of **Same Duetz-Fahr India Pvt. Ltd.**, wherein it was upheld that the eligibility to avail ITC was with reference to the date of receipt of inputs in the factory and subsequent exemption granted to the final product shall not impair such right. The Tribunal further said that the denial of ITC on inputs reaching the factory after the prescribed date was possible, however, eligibility to avail ITC on inputs received before the exemption was not hampered and that such credit could be availed at a later date too. The relevant part is extracted as under:

Therefore, the right vested on the appellant to get credit on the input came into its factory before 9-7-2004 remain unimpaired. Deniability of Cenvat credit on inputs reaching the factory after 9-7-2004 may be possible. Law is also well settled in Dai Ichi Karkaria Ltd., that there is no provision in the

rule to recover Cenvat credit in the event the goods manufactured prior to a cutoff date are cleared at a subsequent date. The Cenvat credit earned being permitted to be used with indefeasible right that cannot be denied in absence of any express provision of law in that behalf.

120. The Respondent has also submitted that it would be preposterous to compute the ITC loss based on extrapolation of proportionate data rather than simply relying upon the actual data reported by the Respondent. The DGAP has provided a flimsy argument that since the actual data was not available on the date of the rate change, hypothetical data should be considered.

121. It was further submitted that various petitions were pending in the High Courts in which the petitioners have raised important issues regarding the constitutional validity of the anti-profiteering provisions along with computation method/ procedures adopted by this Authority for calculating profiteering amount. It was further submitted that the Hon'ble High Court of Delhi in the case of ***Nani Resorts and Floriculture Private Limited vs UOI***[10], had ordered that all the 33 identified matters be listed for hearing on 24.08.2020. These *inter alia* includes ***Hindustan Unilever Limited v UOI***[11], ***Jubilant Food works Limited v UOI***[12] , ***and Abbott Healthcare v UOI***[13].

The Respondent has requested that based on the above the proceeding should be stayed till the time the issue of constitutional validity and computation methodology is settled by the Courts.

122. The Respondent has also submitted that the impugned Report sweepingly ignored the business peculiarities. Basis the same, in the first place no amount of profiteering could be determined given the incomparability of any two supplies by the Respondent. The supplies, it may be noted, were rendered incomparable owing to the sheer nature of business and varying utility of each supply (as perceived by the customer since it was in the business of entertainment). The business of entertainment, was never static, and hence, that alone is the primary defense for non-maintainability of comparisons and the inapplicability of profiteering provisions on the same. The decision of the Authority, accordingly, would be of huge relevance and the Respondent crave for justice with full faith in this Authority. The relevance of a fair decision, in favour of the Respondent appreciating the business peculiarities and legal averments submitted, was further advanced given the impact of pandemic and consequent lockdowns on its business. The Cinema exhibition sector too had borne the brunt of the pandemic. While the sector was among the first businesses to get impacted due to a country-wide lockdown, it was amply clear now that it would be among the last ones to be allowed to reopen for operations. The Respondent has been already under lockdown for the last 5 months now, and despite unlock 3 already announced, he was still shut with no clarity on the resumption of operations. If that was not enough, the apprehensions in the minds of consumers, which started impacting our revenues weeks before the lockdown, would remain prevalent for a longer time, even after he reopened. The list of

challenges did not end here. Producers of those movies which would supposedly have helped him garner huge Box Office revenues had started opting for direct release on digital platforms. This trend was potentially causing grave damage to the cinematic value chain and his potential revenue prospects. The Respondent had further contended that the kind of headwinds, which its premier venture, INOX Leisure Ltd. was facing, coupled with a ZERO revenue stretch of more than 160 days now, has already challenged his strong business foundation and shaken up his financial stability. The Respondent was finding it difficult to discharge even the salaries to his employees and other routine expenditures in absence of any revenue now. He was fighting for survival hence; any liability imposed for the said profiteering would lead to the closure of the business. Given the ground realities, the case needed to be seen sympathetically as well. The Respondent has further added that the Respondent's representation in the present proceedings was further severely obstructed by the fact that since mid-March '20, several of his employees had tested positive for Covid-19. This has led to a complete shutdown of even back-office operations for a significant period; thus, impacting ability to either submit responses or appear before this Authority. The Respondent would like to report the severity of the issues, sadly though, given the demise of some of the said employees, an irrecoverable loss of the Respondent. The Respondent has stated that without prejudices, at least the deserving claim for input credit should be allowed so that it could attempt to close the liability if any.

123. The DGAP submitted his supplementary Report dated 08.10.2020 vide which he has submitted parawise clarification on the Respondent's submission dated 21.08.2020 which are as under: -

(I) He submitted that the submission of the Respondent that the report of the DGAP is based on the hypothetical data and not on actual data is bereft of facts.The ratio of input tax credit to the net taxable turnover has been computed on the basis of actual data submitted by the Respondent. He also reiterated that the Respondent's contention of considering actual ITC loss data for the period 15.11.2017 to 31.03.2018 is not tenable as the same can only be computed only after the end of period i.e. on or after April, 2018 which cannot be factored in on the eve of GST rate reduction i.e. on 15.11.2017. The DGAP has computed the input tax credit as a percentage of the total taxable turnover for the period July, 2017 to October, 2017.

(II) With regard to the Respondent submission that ITC against invoices of July to Oct., 2017 period, which are booked in later periods also be taken into consideration, he submitted that Section 16(2) the Central Goods and Services Tax Act, 2017 prescribes certain conditions for entitlement of ITC which are:

a. Respondent is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

b. Respondent has received the goods or services or both.

c. subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

d. Respondent has furnished the return under section 39:

Further, with effect from 15.11.2017, Respondent was not allowed to avail ITC in terms of Notification no.46/2017- Central Tax (Rates) dated 14.11.2017, Therefore, in terms of provisions of Section 16(2)(a) Respondent was not eligible to take ITC w.e.f. 15.11.2017 on the strength of invoices received post 15.11.2017 when the aforesaid notification debarred the Respondent from ITC availment. As Respondent has received the taxable invoices post 15.11.2017 when he was ineligible to avail ITC in terms of Notification no. 46/2017 Central Tax (Rate) dated 14.11.2017, therefore the same cannot be considered for computation of denial of Input Tax Credit to net turnover ratio.

However, the DGAP has inadvertently not considered the ITC availed during the period 01-14 Nov. 2017 pertaining to the invoices issued from July 2017 to Oct., 2017. Therefore, he has re-computed the ratio of Input Tax Credit to Net Outward Taxable Turnover after adding the amount of ITC pertaining to the invoices issued from July 2017 to Oct., 2017 but availed during 01-14 Nov., 2017 and also excluding the amount of ITC pertaining to the period before July, 2017 which was availed during the period July, 2017 to Oct., 2017 as per GSTR-3B returns. Accordingly, the ratio of Input Tax Credit to Net Outward Taxable Turnover is determined as 10.22% as per table below:

Table-'D (revised)'

Particulars	July-2017	Aug.-2017	Sept.-2017	Oct.-2017	Total
ITC Availed as per GSTR-3B (A)	5,10,45,836	6,64,73,023	12,02,04,147	12,48,44,525	38,25,67,531
ITC availed Exclusively on Non Restaurant Services (B)	32,21,451	1,12,90,601	3,40,34,664	4,17,10,519	9,02,57,234
ITC availed Exclusively on Restaurant Services (C)	40,14,836	76,62,990	1,02,80,402	94,28,274	3,13,86,503
Add: ITC Exclusively on Restaurant Services of July, 2017 to October, 2017 availed in the month of November, 2017 GSTR-3B **(Annex-23)** (D)	33,227	64,258	1,50,217	22,04,815	24,52,517
ITC availed on Common inputs, input services and capital goods (E)	4,38,09,549	6,75,19,432	7,58,89,081	7,37,05,732	26,09,23,794
Add: Common ITC of July, 2017 to October, 2017 availed in the month of November, 2017 GSTR-3B **(Annex-23)** (F)	32,405	6,37,689	24,84,290	71,79,538	1,03,33,922
Less: Common Input Tax Credit pertaining to prior July, 2017 but availed in July,2017 to October, 2017 GSTR-3B **(Annex-24)** (G)	(6,72,096)	(1,87,777)	(29,461)	-	(8,89,334)
Net ITC availed on Common inputs, input services and capital goods (H)=(E+F-G)	**4,31,69,858**	**6,79,69,344**	**7,83,43,910**	**8,08,85,270**	**27,03,68,382**
Total Outward Taxable Turnover as per GSTR-1 (I)	93,73,86,472	1,06,47,21,802	1,01,26,41,557	1,09,61,74,705	4,13,09,24,536
Total Restaurant Taxable Turnover as per SKU Wise Sale Register (J)	21,65,99,800	24,03,35,295	21,27,81,452	25,04,55,842	92,01,72,389
Total Turnover other than restaurant service (K)= (I) - (J)	72,07,86,672	84,43,86,507	79,98,60,105	84,57,18,863	3,21,07,52,147
Proportionate ITC availed towards restaurant Service (L)= (H*J/I)					6,02,25,143
Total ITC availed towards Restaurant Service (M) = (C+D+L)					**9,40,64,163**
Net Outward Taxable Turnover for the period July, 2017 to October, 2017 (N) = (J)					**92,01,72,389**
Ratio of Input Tax Credit to Net Outward Taxable Turnover (O)= (M/N)					**10.22%**

(III) Further with regards to the total profiteering, only those items where the increase in base price is more than what is required to offset the impact of denial of input tax credit, have been considered. On the basis of the pre and post reduction in GST rates, the impact of denial of input tax credit and the details of outward supplies (other than zero rated, nil rated and exempted supplies) during the period 15.11.2017 to 30.04.2019, as per the item wise sales registers, the amount of net higher sale realization due to increase in the base price of the service, despite the reduction in GST rate from 18% to 5% (with denial of input tax credit) or in other words, the revised profiteered amount comes to **Rs. 3,10,56,939/- (including GST on the base profiteered amount).** The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. 3,10,56,939/- is furnished in table- 'F (revised)' below:

(IV)

Table- 'F (revised)'

S.No.	Name of State	State Code	Total Profiteering (Rs.)
1	Andhra Pradesh	37	17,66,048
2	Chhattisgarh	22	2,03,793
3	Delhi	7	13,27,241
4	Goa	30	15,42,054
5	Gujarat	24	17,51,318
6	Haryana	6	9,61,857
7	Jharkhand	20	3,99,941
8	Karnataka	29	25,00,847
9	Kerala	32	2,10,867
10	Madhya Pradesh	23	5,77,855
11	Maharashtra	27	79,96,518
12	Orissa	21	7,91,684
13	Punjab	3	4,96,972
14	Rajasthan	8	19,21,980
15	Tamil Nadu	33	16,70,255
16	Telangana	36	9,08,253
17	Uttar Pradesh	9	11,19,063
18	West Bengal	19	49,10,394
Grand Total			**3,10,56,939**

124. The Respondent vide his additional submissions dated 19.10.2020 on the supplementary Report of the DGAP dated 08.10.2020 he submitted that the profiteering provisions being applicable to only transitional contracts the DGAP's office has stated sweeping commented that the profiteering is found in later contracts also and hence, provision of Section 171 extended to such later period. The DGAP has failed to explain its position that why a contract of sale that is proposed/ executed/ serviced (all events) post the change in rate of tax should even concern Section 171 in first place (the computational aspects should be delved into only if provisions are applicable at an in-principle level). It is submitted that the prices of supplies would but naturally change over a period of time including in our case where the prices have been revised (including downwards) purely out of commercial considerations. As per

DGAP's view once the rate of tax has been lowered, any subsequent price increase (for indefinite period) would fall within purview of profiteering provisions. He requested the Authority take cognizance of his other legal submissions regarding scope of the investigation; the investigation being time barred; Lacunae in procedures and arbitrary methodology of computation of profiteering amounts; etc The Respondent further submitted that regarding ITC allowance the DGAP has partially acceded to his submissions/ argument on the manner of computation of ITC loss %. However the DGAP again failed to be set out a legal basis for his new approach. The DGAP has once again erred in its approach by only partially accepting Respondent's claim regarding ITC loss (%). Such approach, of rejecting the balance claim, is devoid of legal merits and ought to be set aside. He also reiterated his earlier submissions regarding ITC loss (%) which are as follow:-

a. ITC eligibility on procurement is determined qua the outward supplies for which such procurements has been used.

   Procurements vide July to October 2017 invoices were used for outward supplies in the same period and not thereafter

b. The right to avail ITC arises on the date of receipt of supplies. The limitation period for actual availment (once the right is established) is a statutory prescription.

c. For July to October 2017 invoices, the right to avail ITC thereupon arose in the same period

d. The period of limitation for actual availment is expressly provided at Section 16 of the CGST Act – for FY 2017-18 invoices – the same is allowed up to March 2019

e. The GST rate change event of 15 November 2017, providing a bar on ITC availment was prospective. Hence, procurement prior to that date continue to be eligible for ITC availment even after the change in law.

f. Only such procurements, that bear nexus to outward supplies made after that date (i.e. on or after 15 November 2017), are barred for ITC availment. and other eligible ITC could be availed even after the relevant GST rate change event.

He also submitted that these submissions are without prejudice to his earlier submissions that the ITC loss % should be calculated on basis of data on actual loss during the period post change in rate of tax.

125. A copy of the objections dated 29.10.2020 filed by the Respondent was supplied to the DGAP for filing further clarifications under Rule 133(2A) of the CGST Rules, 2017 to which the DGAP has filed clarifications dated 09.11.2020, wherein he has reiterated his earlier submissions of the supplementary Report dated 08.10.2020.

126. The DGAP's Supplementary Report dated 09.11.2020 was supplied to the Respondent vide Order dated 11.11.2020 to file his consolidated and concise submissions by 18.11.2020. The Respondent haa filed his consolidated submissions dated 18.11.2020, wherein he has stated that:

S. No.	Particulars of Averment/Ground
1	DGAP has exceeded its power by investigating products beyond

	contours or the complaint which goes to the very root of its jurisdiction.
2	Examination over 14 months by the screening committee is in clear violation of Rule 128 of the CGST Rules.
3	The DGAP failed to complete the investigation proceedings & issue the Report thereof within the prescribed time thus rendering the impugned report Null & Void.
4	No methodology was prescribed to derive profiteering, thus, leading to an arbitrary exercise of powers by DGAP.
5	Provision of Section 171(1) cannot be applied to the present case in absence of any transitional supply contract.
6	Anti-profiteering provision, if at all, can be triggered only in instances where an unlawful manner of business is established.
7	Adopting 18 months as the period of investigation to determine alleged profiteering acts as a price control mechanism and is clearly violative of the right to trade.
8	The loss on account of its disallowance is higher than the revision in prices.
9	Incorrect addition of 5% GST to the alleged profiteering amount.
10	Proceedings/Notice to be kept in abeyance pending finality of various petitions.

127. We have carefully considered 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?

128. It is revealed from the record that the Respondent has been operating a total of 133 multiplexes in 18 states and dealing with 1650 items while supplying restaurant services after 15.11.2017. 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 case 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 the 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 present investigation has been carried out w.e.f. 15.11.2017 to 30.04.2019.

129. It is also evident that the Respondent has been dealing with a total of 1650 items during the period from 15.11.2017 to 30.06.2019. 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 the DGAP has reported that the GST

rate of 5% has been charged w.e.f. 15.11.2017, however, the base prices of 1434 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 prices paid by the consumers were not reduced commensurately, inspite of the reduction in the GST rate.

130. 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:

(a) The Respondent was required to reverse an amount of Rs. 1,35,90,052/- on the closing stock of inputs and capital goods as on 14.11.2017. However, the correctness and completeness of the computation could not be ascertained and therefore it could not be relied upon.

(b) The invoice-wise outward taxable turnover in November 2017 was not provided by the Respondent to compute taxable turnover for the period 01.11.2017 to 14.11.2017.

(c) On several invoices, the credit was taken between 01.11.2017 to 14.11.2017 but it pertained to services availed during the whole month of November 2017.

Accordingly, the ratio of ITC to the net taxable turnover has been computed for determining the impact of denial of ITC, by taking in

to consideration the ITC and the turnover which was available/obtained by the Respondent till 31.10.2017. As per the case record, ITC amounting to ₹ 8,92,55,966/- was available to the Respondent during the period from July 2017 to October 2017 which was approximately 9.70% of the net taxable turnover of the restaurant service amounting to ₹92,01,72,389/- 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.

131. 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 31.03.2018 that the Respondent had increased the base prices of the 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 31.03.2019 (Post-GST rate reduction) have been compared and it has been found that the Respondent has increased the base prices by more than what was required to offset the impact of denial of ITC in respect of 1434 items (out of a total of 1650 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.

132. Based on 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 30.04.2019, 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 ₹3,85,30,314/- including the GST on the base profiteered amount. The details of the computation have been given by the DGAP in Annexure-22 of his Report. However, the DGAP vide his Supplementary Report dated 08.10.2020 has partially accepted the objection of the Respondent regarding under-reporting of the eligible ITC allowance. The DGAP has submitted that the ratio of input tax credit to the net taxable turnover has been computed on the basis of actual data submitted by the Respondent himself before him and it was reiterated by him that the Respondent's contention of considering actual ITC loss data for the period 15.11.2017 to 31.03.2018 was not tenable as the same could only be computed after the end of the period i.e. on or after April 2018 which could not be factored in on the eve of GST rate reduction i.e. on 15.11.2017. The DGAP has computed the input tax credit as a percentage of the total taxable turnover of the Respondent for the period July 2017 to October 2017 for the reasons cited in paras 26 & 27 of the DGAP report dated 31.01.2020.

133. The Respondent has submitted the DGAP has wrongly calculated the loss of ITC and failed to consider ITC loss booked between 15.11.2017 to 31.03.2018 and accordingly calculated the loss of ITC as 9.70% which should have been 13.88%. Further the DGAP vide its supplementary Report dated 08.10.2020 has submitted that he had inadvertently not considered the ITC availed during the period 01-14 Nov 2017, pertaining to invoices issued from July 2017 to Oct 2017 and hence accepted the revised ITC loss as 10.22% instead of 9.70%. Further the Respondent's contention of considering actual ITC loss data for the period 15.11.2017 to 31.03.2018 was not tenable as the same could only be computed after the end of period i.e. on or after April, 2018 which could not be factored in on the eve of GST rate reduction i.e. on 15.11.2017. The DGAP has computed the input tax credit as a percentage of the total taxable turnover for the period July, 2017 to October, 2017. Further we agree with the DGAP that ITC against invoices of July to Oct., 2017 period, which were booked in later periods could not be considered as Section 16 (2) the Central Goods and Services Tax Act, 2017 prescribed certain conditions for entitlement of ITC which are:

(a) Respondent is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed.

(b) Respondent has received the goods or services or both.

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the

Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) Respondent has furnished the return under section 39:

Further, with effect from 15.11.2017, Respondent was not allowed to avail ITC in terms of Notification No. 46/2017- Central Tax (Rates) dated 14.11.2017, Therefore, in terms of provisions of Section 16 (2) (a) Respondent was not eligible to take ITC w.e.f. 15.11.2017 on the strength of invoices received post 15.11.2017 when the aforesaid notification debarred the Respondent from ITC availment. As Respondent has received the taxable invoices post 15.11.2017 when he was ineligible to avail ITC in terms of Notification no. 46/2017 Central Tax (Rate) dated 14.11.2017, therefore the same cannot be considered for computation of denial of Input Tax Credit to net turnover ratio. He has also relied upon **the Hon'ble Chennai Tribunal in the case of Same Duetz-Fahr India Pvt. Ltd**. Wherein it was upheld that the eligibility to avail ITC is with reference to the date of receipt of inputs in the factory and subsequent exemption granted to the final product shall not impair such right. The Tribunal further said that the denial of ITC on inputs reaching the factory after the prescribed date is possible, however, eligibility to avail ITC on inputs received before the exemption is not hampered and that such credit could be availed at a later date too however, the present case is different from the above quoted case and the denial of ITC arose out of the Notification no. 46/2017 Central Tax (Rate) dated 14.11.2017 which was not the scenario in the above quoted case.

However, the DGAP has admitted that he has inadvertently not considered the ITC availed during the period 01-14 November 2017 pertaining to the invoices issued from July 2017 to October 2017. Therefore, the DGAP has re-computed the ratio of Input Tax Credit to Net Outward Taxable Turnover after adding the amount of ITC pertaining to the invoices issued from July 2017 to October 2017 but availed during 01-14 November 2017 and also excluding the amount of ITC pertaining to the period before July 2017 which was availed during the period from July 2017 to October 2017 as per GSTR-3B returns. Accordingly, the ratio of Input Tax Credit to Net Outward Taxable Turnover was determined as 10.22% as per Table- 'D (revised)' as is given below:

Table-'D (Revised)'

Particulars	July-2017	August-2017	September-2017	October-2017	Total
ITC Availed as per GSTR-3B (A)	5,10,45,836	8,64,73,023	12,02,04,147	12,48,44,525	38,25,67,531
ITC availed Exclusively on Non Restaurant Services (B)	32,21,451	1,12,90,601	3,40,34,664	4,17,10,519	9,02,57,234
ITC availed Exclusively on Restaurant Services (C)	40,14,836	76,62,990	1,02,80,402	94,28,274	3,13,86,503
Add: ITC Exclusively on Restaurant Services of July, 2017 to October, 2017	33,227	64,258	1,50,217	22,04,815	24,52,517

availed in the month of November, 2017 GSTR-3B **(Annex-23)** (D)					
ITC availed on Common inputs, input services and capital goods (E)	4,38,09,549	6,75,19,432	7,58,89,081	7,37,05,732	26,09,23,794
Add: Common ITC of July, 2017 to October, 2017 availed in the month of November, 2017 GSTR-3B **(Annex-23)** (F)	32,405	6,37,689	24,84,290	71,79,538	1,03,33,922
Less: Common Input Tax Credit pertaining to prior July, 2017 but availed in July,2017 to October, 2017 GSTR-3B **(Annex-24)** (G)	(6,72,096)	(1,87,777)	(29,461)	-	(8,89,334)
Net ITC availed on Common inputs, input services and capital goods (H)=(E+F-G)	**4,31,69,858**	**6,79,69,344**	**7,83,43,910**	**8,08,85,270**	**27,03,68,382**
Total Outward Taxable Turnover as per GSTR-1 (I)	93,73,86,472	1,08,47,21,802	1,01,26,41,557	1,09,61,74,705	4,13,09,24,536
Total Restaurant Taxable Turnover as per SKU Wise Sale Register (J)	21,65,99,800	24,03,35,295	21,27,81,452	25,04,55,842	92,01,72,389

Total Turnover other than restaurant service (K)= (I) - (J)	72,07,86,672	84,43,86,507	79,98,60,105	84,57,18,863	3,21,07,52,147
Proportionate ITC availed towards restaurant Service (L)= (H*J/I)					6,02,25,143
Total ITC availed towards Restaurant Service (M) = (C+D+L)					**9,40,64,163**
Net Outward Taxable Turnover for the period July, 2017 to October, 2017 (N) = (J)					**92,01,72,389**
The ratio of Input Tax Credit to Net Outward Taxable Turnover (O)= (M/N)					**10.22%**

134. As regards the total profiteering, the DGAP has submitted that only those items where the increase in base price was more than what was required to offset the impact of denial of the input tax credit, have been considered. Based on the pre and post-tax reduction GST rates, the impact of denial of input tax credit and the details of outward supplies (other than zero-rated, nil rated, and exempted supplies) during the period 15.11.2017 to 30.04.2019, as per the item-wise sales registers, the amount of net higher sale realization due to increase in the base price of the service, despite the reduction in GST rate from 18% to 5% (with denial of ITC) or in other words, the revised profiteered amount comes to **Rs. 3,10,56,939/- (including GST on the base profiteered amount).** The details of the computation are given in **Annexure-25 (Confidential)** of the DGAP Report.

The place (State or Union Territory) of the supply-wise break-up of the total profiteered amount of Rs. 3,10,56,939/- is furnished in Table- 'F (revised)' below:

Table- 'F (Revised)'

S.No.	Name of State	State Code	Total Profiteering (Rs.)
1	Andhra Pradesh	37	17,66,048
2	Chhattisgarh	22	2,03,793

3	Delhi	7	13,27,241
4	Goa	30	15,42,054
5	Gujarat	24	17,51,318
6	Haryana	6	9,61,857
7	Jharkhand	20	3,99,941
8	Karnataka	29	25,00,847
9	Kerala	32	2,10,867
10	Madhya Pradesh	23	5,77,855
11	Maharashtra	27	79,96,518
12	Orissa	21	7,91,684
13	Punjab	3	4,96,972
14	Rajasthan	8	19,21,980
15	Tamil Nadu	33	16,70,255
16	Telangana	36	9,08,253
17	Uttar Pradesh	9	11,19,063
18	West Bengal	19	49,10,394
Grand Total			**3,10,56,939**

135. The Respondent has also argued that the DGAP has exceeded its power by investigating products beyond contours of the complaint which goes to the very root of his jurisdiction. He also quoted certain cases such as **Northern Plastics Limited v. Hindustan Photo Films Mfg. Co. Ltd. and CIT v. Dalipur Construction Pvt. Ltd. Supra.** However, these cases are of no use to him as it is observed that the DGAP has been mandated under Rule 129 of the CGST Rules, 2017 to conduct a detailed investigation and submit his Report to this Authority under Rule 129 (6) to determine whether the above benefits have been

passed or not in terms of Section 171 (1) and Rule 133 (1) of the above Rules. Under Rule 129 (2) of the said Rules, only the DGAP has the mandate to conduct an investigation and collect the necessary evidence to determine whether these benefits have been passed on. Further, the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs vide its Office Order No. 05/Ad.IV/2018 dated 12.06.2018 in pursuance of the Government of India (Allocation of Business) 34th Amendment Rules, 2018 has assigned the following duties to the DGAP:-

a) Conduct of investigation to collect the evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of the input tax credit has been passed on to the recipient by way of commensurate reduction in prices, in terms of Section 171 of the Central Goods and Services Tax Act, 2017 and the rules made thereunder.

b) Responsibility for coordinating anti-profiteering work with the National Anti-profiteering Authority, the Standing Committee, and the State level Screening Committees."

Therefore, it is clear from the above provisions that the office of the DGAP has been charged with the responsibility of conducting a detailed investigation to collect the evidence necessary to determine whether both the above benefits have been passed on or not in terms of the provisions of Section 171 of the CGST Act, 2017 and the Rule 129. The above Rule has been framed by the Central Government under Section 164 of the CGST Act, 2017 read with Section 171(3)

which has the approval of the Parliament and all the State Legislatures and of the GST Council which is a constitutional body established under 101st Amendment of the Constitution and also has the approval of the Central Government and the State Governments. There is no provision in the above Act or the Rules which provides that the investigation shall be limited to the products against which complaint has been received. On the contrary, every product on which the rate of tax has been reduced is required to be investigated by the DGAP and report submitted to this Authority to determine whether the above benefits have been passed on as per the provisions of Section 171 of the above Act. Moreover, Section 171 (2) of the above Act empowers this Authority to examine all such cases in which the benefit of tax and ITC is required to be passed on. Since the account of ITC is kept for all the products in one common ledger/Register the same cannot be apportioned product-wise hence, all the products being supplied by the Respondent are required to be investigated to determine whether the benefit of tax reduction after duly considering the denial of ITC has been passed on or not. Rule 133 (5) is a mere clarification of the provisions of Section 171 (2) and hence, the DGAP has rightly conducted his investigation covering all the products in respect of which the rate of tax was reduced, with prior notice to the Respondent and hence, no order was required to be passed under Rule 133 (5) by this Authority. The Respondent has increased his prices to deny the benefit of tax reduction in respect of all the product and not only against any particular product. The Respondent cannot get away by appropriating the benefit which he is legally bound to pass, on the ground that no complaint has been

made in respect of the other products. Moreover, the benefit is not to be paid by him out of his own pocket, since it has been granted from the public exchequer to benefit the common consumers. Therefore, the above claim of the Respondent is not correct and hence the same cannot be accepted.

136. Further, the Respondent has contended that the Screening Committee took over 14 months to examine the complaint which was in clear violation of Rule 128 of the CGST Rules, 2017. However, in the instant case a complaint was filed by the Applicant No. 1 to the State Screening Committee of Maharastra on 21.11.2017 which was further forwarded by Screening Committee to the Standing Committee after examination in February 2017. Further, perusal of the above Rule shows that no time limit was prescribed under Rule 128 (2) for the Screening Committee to examine the complaint when it was filed and the time limit of 02 months was only inserted vide Notification No. 31/2019 Central Tax dt. 28 June 2019. Hence, no timeline has been violated by the Screening Committee in the instant case.

137. The Respondent has further argued that the DGAP has failed to complete the investigation proceedings and submit the report thereof within the prescribed time, thus, rendering the impugned report null and void. However, it is revealed that a reference was received from the Standing Committee by the DGAP on 02.05.2019 to investigate the subject matter and NOI was issued on 13.05.2019 and the statutory timeline to complete the investigation was on 01.08.2019 (three months) without extension in terms of Rule 129(6) of the Central Goods and Services Tax Rules, 2017. However, vide Notification No.

31/2019- Central Tax dated 28.06.2019 which got implemented with immediate effect on all pending proceedings, the period available to the DGAP to investigate the case was extended to 'Six months' in place of 'three months' earlier which could be extended by a further period of three months (total nine months) by this Authority. After the expiry of six months, necessary extension of three months was duly granted by this Authority which has been clearly mentioned in para-6 of the DGAP report dated 31.01.2020. Thus, the submission of the Respondent that the report of the DGAP is time-barred is bereft of facts.

138. The Respondent has further submitted that the CGST is a substantive law in nature and substantive law could not be retrospectively amended. He also placed reliance on the cases of **Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board and Continental Commercial Corporation v. ITO Supra.** However the above mentioned cases are of no assistance to the Respondent as the Notification No. 31/2019- Central Tax dated 28.06.2019 has come into force with immediate effect for the pending proceedings and was not retrospectively implemented. The Respondent submitted that the period of limitation and the condonation period when statutorily prescribed has to be strictly adhered to and cannot be relaxed. He also placed reliance on the cases **of CCE v. Hongo India Pvt. Limited and another, Amchong Tea Estate v. UOI, Simplex Infrastructure Limited v. UOI, Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others, State of Punjab v. Shreyans Industries Ltd., Bharat Heavy Electricals**

Limited v. CCT, Thirumalai Chemicals v. UOI, A. M. Ahamed & Co. v. Commissioner of Customs (Imports), Govinddas v. Income Tax Officer and CIT Bombay v. Scindia Steam Navigation Company Limited Supra. However, the above mentioned cases are of no assistance to him as the period fixed under Rule 128, 129(6) and 133 (1) of the CGST Rules, 2017 is directory in nature and not mandatory as no consequences have been provided in case the time limit prescribed under the above Rules is not followed. This has been ruled by the Hon'ble High Court of Delhi in its Order dated 10.02.2020 passed in WP(C) 969/2020 in the case of ***M/s. Nestle India Ltd. v. Union of India & Ors.*** Therefore, the above argument of the Respondent is not maintainable.

139. The Respondent submitted that earning profits through lawful means was not a sin; that the provisions of Section 171 of the CGST Act could be triggered only in a case where a registered person made exorbitant profits through unlawful means. He has also placed reliance upon the various cases such as the case of **Commissioner of Income Tax, Gujarat v. Vadilal Lallubhai, Indian Aluminium Company v. Kerala State Electricity Board and Mount v. Welsh Supra.** In this regard it would be pertinent to mention that Section 171 has not been framed to ensure profit of the Respondent as the benefit has to be passed irrespective of the fact whether he is in profit or loss as he does not have to pass it from his own pocket since the same has been given to the ordinary consumer by the Central and the State Governments from their precious tax revenue by cutting down on the welfare schemes. The Respondent

cannot misappropriate it against his profit at the expense of voiceless, unorganised and vulnerable public. Section 171 also does not require consideration of cost as it requires computation of the benefit of tax reduction to be passed on by the Respondent and in case he does not pass it then the profiteered amount has to be computed. Therefore, the reliance placed by the Respondent on the above judgements is misplaced which does not help his case.

140. It was further contended by the Respondent that no methodology was prescribed to compute profiteering which has led to an arbitrary exercise of powers by the DGAP. 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 the 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 benefits 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 of the CGST Act. These benefits can also not be passed on at the entity/organization/ branch/ invoice/ product/ business vertical level as they have to be passed on to each 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 that 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 authorized 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 installments, 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 of the CGST Rules 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 unorganized, 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 of 14.11.2017 and then add 10.22% 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 10.22% of the base prices as is evident from the above discussion. 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 a 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.

141. Further The Respondent has placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Central Excise and Customs Kerala v. Larsen and Toubro Limited supra*** wherein it has been held that in the absence of machinery provisions for computation of taxable value, the levy of tax would become non-existent. Reliance was also placed on the **cases of State of Uttar Pradesh v. Singhara Singh, State of Jharkhand v. Ambay Cements, Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Limited & Ors and *Commissioner of Income Tax, Bangalore v. B. C. Srinivasa Shetty supra***. However, the above quoted cases are not being followed as the

facts of the present case are different from the above-quoted cases. The Respondent has failed to understand that Section 171 is not a charging section and anti-profiteering provisions do not levy any tax. Section 171 (1) provides for only passing on the benefit of tax reduction or additional ITC by a commensurate reduction in the price.

142. The Respondent has also argued that the provisions of Section 171 (1) cannot be applied to the present case in the absence of any transitional supply contract. The contention of the Respondent is incorrect, as they are applicable in all such cases in which the rate of tax has been redcued and are not subject to any contract entered in to by the parties. Paasing on of the benefit of tax reduction is a matter of public policy which cannot be superseded by any private contract whether substing or to be executed in future after the tax reduction.

143. The Respondent has further added that the Anti-Profiteering provisions could be triggered only in the instances where an unlawful manner of business was established. However, the DGAP in his Report dated 31.01.2020, has nowhere questioned the lawful profits made by the Respondent. Only those transactions have been taken up where the prices post rate cut have been increased more than the impact of ITC loss suffered by the Respondent and the benefit of tax reduction has been denied to the customers. Hence, the Respondent's contention is found to be incorrect.

144. The Respondent has also argued that adopting 18 months as the period of investigation to determine the alleged profiteering acts as a price control mechanism and was clearly violative of the right to trade. 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 a commensurate reduction in the prices of his supplies at any point of time till 30.04.2019. 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 to 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 30.04.2019 has been rightly taken by the DGAP for computation of the profiteered amount.

145. 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 that 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 it 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.

The Respondent has also contended that the approach of the DGAP was a violation of Article 14 of the Constitution of India and the concept of equality before the law. The Respondent also relied upon the following decisions to submit that the taxing statutes must conform to Article 14 of the Constitution of India, **The State of A. P. and another v. Nalla Raja Reddy and others, Kunnathat Thathunni Moopil Nair etc. v. the State of Kerala and another**

and Ajay Hasia and Ors. V. Khalid Mujib Sehravardi and Ors Supra. The above quoted cases cannot be relied upon in present case as Section 171 (1) of the CGST Act 2017 provides for only passing on the benefit of tax reduction by a commensurate reduction in the price and there is no provision of taking into account the cost of production as per the provisions of the above Section. The Respondent can only increase his prices up to denial of benefit of ITC to him and no more and an increase in the prices more than the denial of the ITC amounts to violation of the above provisions. The Respondent cannot claim violation of Article 14 on the ground that he has not been allowed to include his costs in the prices on the date of the reduction in the rate of tax as such a claim would be against the provisions of Section 171 (1) of the CGST Act. The Respondent had enough time from 01.07.2017 to 14.11.2017 to increase his prices due to an increase in his cost however, a sudden increase in his cost on 15.11.2017 is a deliberate attempt not to pass on the benefit of tax reduction and appropriate the amount of benefit. Therefore, the above contention of the Respondent is not maintainable.

146. It was further argued by the Respondent that the loss on account of ITC disallowance is higher than the revision in prices. However, the Respondent has failed to produce any evidence to prove that the price increase was not sufficient to compensate the loss of denial of ITC which has been rightly computed as 10.22%. The Respondent was to maintain the base price of the product which he was charging as on 14.11.2017 and then add the amount 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 denial of ITC as is evident from the above discussion. It is also clear from the above narration that the Respondent has increased the base prices of 1434 items more than the loss on account of ITC disallowance. Further, with effect from 15.11.2017, Respondent was not allowed to avail ITC in terms of Notification No. 46/2017- Central Tax (Rates) dated 14.11.2017, therefore, in terms of provisions of Section 16(2)(a) Respondent was not eligible to avail ITC w.e.f. 15.11.2017 on the strength of invoices received post 15.11.2017 when the aforesaid notification debarred the Respondent from ITC availment. As Respondent has received the taxable invoices post 15.11.2017 when he was ineligible to avail ITC in terms of Notification No. 46/2017 Central Tax (Rate) dated 14.11.2017, therefore the same cannot be considered for computation of denial of Input Tax Credit to net turnover ratio.

147. Further, the Respondent has contended that the incorrect addition of 5% GST to the alleged profiteering amount has been done. 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. 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.

148. The Respondent had contended that the proceedings/Notice be kept in abeyance pending finality of the various writ petitions which 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 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.

149. Based on the above facts the profiteered amount is determined as Rs. 3,10,56,939/- as has been revised vide the DGAP's Supplementary Report dated 08.10.2020. 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. 3,10,56,939/- in two equal parts of Rs. 1,55,28,470/- each in the Central Consumer Welfare Fund and the State Consumer Welfare Funds as mentioned in the Table 'F' Revised, 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. 3,10,56,939/- 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.

150. 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 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. However, a perusal of the provisions of Section 171 (3A) under which penalty has been prescribed for the above violation shows that it has been inserted in the CGST Act, 2017 w.e.f. 01.01.2020 vide Section 112 of the Finance Act, 2019 and it was not in operation during the

period from 15.11.2017 to 30.04.2019 when the Respondent had committed the above violation and hence, the penalty prescribed under Section 171 (3A) cannot be imposed on the Respondent retrospectively. Accordingly, notice for the imposition of penalty is not required to be issued to the Respondent.

151. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST of the States given in the Table 'F' Revised supra 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 in the abve Table. 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.

152. A copy each of this order be supplied to the Applicants, the Respondent, and the concerned Commissioner CGST/SGST of the States given in Table 'F' - Revised 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

(A. K. Goel)
NAA, Secretary

F. No. 22011/NAA/95/Inox Leisure/2020/6497 Date: 11.12.2020

Copy To:-

1. M/s Inox Leisure Pvt. Ltd., 5th Floor, Viraj Towers, Next to Andheri Flyover, Western Expressway Highway, Andheri(East), Mumbai - 400093.
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, office of Commissioner of commercial Tax, vikrikar bhavan, old high court building, panji, Goa-403 001
5. Commissioner of commercial Taxes, c-5, Rajya kar bhavan, near times of India, ashram road, Ahmedabad.
6. Commissioner of commercial Taxes, vanijya bhavan, plot no. 1-3, sector-5, panchkula. Pin - 134 151.
7. Commissioner of commercial Taxes, commercial Taxes Department, project bhawan, dhurva, Ranchi- 834 004.
8. Commissioner of commercial Taxes, vanijya therige karyalaya, 1st main road, Gandhinagar, Bangalore- 560 009
9. Commissioner of commercial Taxes, Government secretariat, Thiruvananthapuram -695001.
10. Commissioner of commercial Taxes, Moti Bangla compound, m.g. Road, Indore
11. Commissioner of commercial Taxes, GST bhavan, mazgaon, Mumbai- 400 010.
12. Commissioner of commercial Taxes, office of the Commissioner of state Tax, banijyakar bhawan, old secretariat compound, cuttack - 753 001.
13. Commissioner of commercial Taxes, office of Excise and Taxation Commissioner, bhupindra road, patiala- 147 001.
14. Commissioner of commercial Taxes, kar bhavan, ambedkar circle, jaipur, rajasthan - 302 005.
15. Commissioner of commercial Taxes, papjm building, greams road, chennai – 600 006.
16. Commissioner of commercial Taxes, o/o the Commissioner of state Tax, ct complex, nampally station road, hyderabad - 500 001.
17. Commissioner of commercial Taxes, office of the Commissioner, commercial Tax, u.p. Commercial Tax head office vibhuti khand, gomti nagar, lucknow (u.p).
18. Commissioner of commercial Taxes, 14, beliaghata road, kolkata - 700 015.
19. Commissioner of commercial Taxes, deptt of trade & Taxes, vyapar bhavan, ip estate, new delhi-2 pin -110 002.
20. Chief Commissioner of central Goods & Services Tax, Bhopal zone 48, administrative area, arera hills, hoshangabad road, Bhopal M.P. 462 011.
21. Chief Commissioner of central Goods & service Tax c.r.building rajaswa vihar, bhubaneswar-751007.
22. Chief Commissioner of central Goods & service Tax Chandigarh zone C.R. Building, plot no.19a, sector17c, chandigarh-160017.

23. Chief Commissioner central Goods & service Tax , cochin zone C.R.building, i.s.press road, Ernakulum cochin - 682018.
24. Chief Commissioner of central Goods & Services Tax Delhi zone C.R. Building, I.P. Estate, new delhi - 110 109.
25. Chief Commissioner of central Goods & service Tax, Hyderabad zone GST bhavan, I.B.stadium road, basheer bagh, Hyderabad -500 004.
26. Chief Commissioner of central Goods & Services Tax Jaipur zone, new central revenue building, statue circle, Jaipur -302 005.
27. Chief Commissioner of central Goods & Services Tax, Meerut zone opp. Ccs university,mangal pandey nagar, meerut-250 004.
28. Chief Commissioner of central Goods & Services Tax, Mumbai zone GST building, 115 m.k. Road, opp. Churchagate station, mumbai-400020.
29. Chief Commissioner of central Goods & Services Tax, Telangkhedi road, civil lines, Nagpur 440001.
30. Chief Commissioner of central Goods & Services Tax Panchkula, sector-8, Panchkula , sco – 407408.
31. Chief Commissioner of central Goods & Services Tax, Pune zone GST bhawan ice house, 41a, sasoon road, opp. Wadia college, pune -411001.
32. Chief Commissioner of central Goods & Services Tax, Vadodara zone 2nd floor, central Excise building, race course circle, Vadodara 390 007
33. Chief Commissioner of central Goods & Services Tax Visakhapatnam zone GST Bhavan, port area, Visakhapatnam-530 035.
34. Commissioner of commercial Taxes, cct@odishatax.gov.in.
35. Chief Commissioner of central Goods & Services Tax Bengaluru zone C.R. Building Queen's Road, Bengaluru.
36. Chief Commissioner of central Goods & Services Tax, Ahmedabad Zone, GST Bhavan, Revenue Marg, Ambawadi, Ahmedbad -380015.
37. Chief Commissioner of central Goods & Services Tax, Chennai Zone, 26/11, Mahatma Gandhi Road, Nungambakkam, Chennai – 600034.
38. Chief Commissioner of central Goods & Services Tax, Kolkata Zone, 2nd Floor, GST Bhavan, 180, Shantipally, R.B. Connector, Kolkata – 700107.
39. Chief Commissioner of central Goods & Services Tax, Lucknow Zone, 7-A, Ashok Marg, Lucknow – 226001.
40. NAA website/Guard file.

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