

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

Case No. : 25/2018

Date of Institution : 01.10.2018

Date of Order : 27.12.2018

In the matter of:

Director General of Anti-Profiteering, Indirect Taxes & Customs,
2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg,
Gole Market, New Delhi-110001.

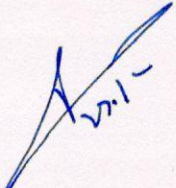
Applicant

Versus

1. M/s Raj & Company, 16, DDA Market, Neeti Bagh,
New Delhi-110049.

Respondent

Quorum:-

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

Present:-

1. Sh. Akshat Aggarwal Assistant Commissioner and Sh. Bhupender Goyal, Assistant Director (Costs).
2. Sh. Mukesh Malik, Proprietor for the Respondent

ORDER

1. This report dated 08.08.2018, has been received from the Directorate General of Anti-Profiteering (DGAP) under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that on the receipt of a reference dated 27.02.2018, where a complaint was filed with the Secretary National Anti-Profiteering Authority (NAA), alleging that certain major manufacturers of Fast Moving Goods Consumer Goods (FMCGs) including M/s Garnier Laboratories Ltd., had not passed on the benefit of reduction in the rate of tax from 28% to 18% w.e.f. 15.11.2017, was forwarded to the DGAP for necessary action and the DGAP had forwarded it to the Standing Committee to prima facie verify the veracity of the complaint. The Standing Committee vide the minutes of its meeting dated 13.04.2018 requested the DGAP to initiate investigation under Rule 129 (1) of the CGST Rules, 2017 stating that the Respondent had not fully passed on the benefit of the tax reduction from 28% to 18% granted vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017, instead he had increased the base price to keep the MRP of his product Garnier Nat Shade 3 to maintain the same price which he was charging before the rate of tax was reduced on 15.11.2017 and

thus, the Respondent had indulged in profiteering in contravention of the provisions of Section 171 of the CGST Act, 2017 and hence appropriate action should be taken against him. In this connection the following invoices issued by the Respondent were also submitted to the DGAP for further investigation:-

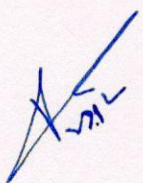
Sr. No.	Invoice No. and date	Description of products	MRP (in Rs.)	Discounted Base price (in Rs.)	Rate of GST	Price charged (inclusive of GST) (in RS.)
1.	LCBL039761702884 11.10.2017	Garnier Nat Shade 3	35	24.41	28%	31.25
2.	LCBL039761704221 30.11.2017	Garnier Nat Shade 3	40	26.48	18%	31.25

2. The DGAP vide notice dated 30.05.2018 had called upon the Respondent to submit his reply on the allegation levelled and also to suo moto determine the quantum of benefit which he had not passed on during the period between 15.11.2017 to 31.03.2018 on the above product. The Respondent was also requested to provide copy of the audited balance Sheet, Price List for the products sold after 15.11.2017 but not sold during 01.11.2017 to 14.11.2017, details of outward taxable supplies from 01.11.2017 to 31.03.2018 for all the products impacted by GST rate reduction w.e.f. 15.11.2017.

3. The Respondent in response to the above notice submitted various documents vide his replies dated 06.07.2018 and 31.07.2018. After examination of the replies submitted by the Respondent the DGAP has informed that the Respondent had contended that they had passed on the benefit of reduction in the tax rate to the customers by way of a GST Scheme No. SCH1700722, by giving a discount of 12.5% on the product. The DGAP has further intimated that after the investigation, it was found that the Respondent was required to sell the said goods at the pre 15.11.2017 base price and should have charged GST of 18% on such base price, to pass on the benefit of reduction in the rate of tax from 28% to 18%. Since the Respondent is a supplier registered under GST GSTINo. 07AAGPM9486L1ZW, it was his statutory responsibility and obligation to pass on the benefit of reduction in the GST rate to his recipients.
4. The DGAP has further intimated that by increasing the base price of the said goods the Respondent had maintained the pre-GST rate reduction cum-tax price thus denying the benefit of GST rate reduction to the consumer. The DGAP has further stated that the Respondent submitted that he had passed on the benefit of reduction in tax rate to the customer by way of a GST Scheme No. SCH1700722 by providing a discount of 12.5% on the base price of the product Garnier Nat Shade 3 under the said scheme. However, even after taking into account the discount of 12.5% (Rs. 3.78 per

piece) offered under the Scheme, the base price of the product worked out to be Rs. 26.48 per piece, which was more than the pre rate reduction price of Rs. 24.41 per piece, charged by the Respondent for the same product.

5. The DGAP has further stated that the details submitted by the Respondent were analysed and it was found that 388 products supplied by the Respondent during the period between 15.11.2017 to 31.03.2018 were impacted by the reduction in the rate of GST from 28% to 18% w.e.f. 15.11.2017. Out of the above 388 products 81 products were not sold during the period between 01.11.2017 to 14.11.2017 and hence, the reference prices for calculating the profiteering amount for these products were not available. Of out these 81 products, 41 products were newly introduced items post GST rate reduction w.e.f. 15.11.2017. For the remaining 40 items, the reference prices for calculation of the profiteered amount had been taken from the price list (for the period pre 15.11.2017) submitted by the Respondent, which further revealed that out of these 40 items, the base prices of 34 products were increased by the Respondent and the base prices of 6 products were reduced. Out of the remaining 307 products (388-81=307) which were sold during the period 01.11.2017 to 14.11.2017, it was observed by DGAP that the base prices of 259 products were increased and the base prices of 48 products were reduced post 15.11.2017. Thus, in respect of total 388 items, it was found that the base prices of 293 (259+34) products were



increased post 15.11.2017, for 54 products, the base prices were reduced post 15.11.2017 and 41 products were newly introduced post 15.11.2017. Thus, the total amount of profiteering in respect of these 293 products supplied by the Respondent during the period w.e.f. 15.11.2017 to 31.03.2018, was arrived at Rs. 3,43,109/-.

6. The above report was considered by the Authority in its meeting held on 14.08.2018 and it was decided to hear the interested parties (Applicant and the Respondent). The Applicant was represented by Sh. Akshat Aggarwal, Assistant Commissioner and Sh. Bhupender Goyal, Assistant Director (Costs). The Respondent was represented by Sh. Mukesh Malik.

7. The Respondent vide his written submissions filed on 18.09.2018 and 21.09.2018 stated that the demand raised on him was incorrect as he was only a distributor of the products in question. He has further added that the MRP was fixed by the manufacturer i.e. M/s L'oreal and the billing system was based on the web based software of the manufacturer in which he could upload the quantity of the products to be sold to his customers. He further added that other figures such as MRP, Basic Rate, Discount, if any and GST calculations etc. were loaded/ printed by the manufacturer's software itself. He also stated that if he wanted to give any cash discount (on the basis of the Dealer's better payment terms etc.) out of his earnings, this discount entry could be

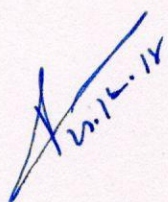


uploaded by him in the end of the billing amount before arriving at the final payable figure.

8. The Respondent has filed his further submissions on 25.09.2018 in which he has stated that the DGAP had compared two invoices raised for Garnier Natural Shade 3 which were for non-comparable SKUs. While invoice No. LCBL039761702884 dated 11th October 2017 was issued when the MRP of the product was Rs. 35, subsequent invoice No. LCBL039761704221 dated 30th November 2017 referred to by the DGAP was issued by him when the MRP of the product was Rs. 40. He has further added that while it has been alleged that the profiteering has been done by keeping the base price constant after GST rate reduction, the DGAP has failed to note that the base price has been kept constant even after increase in the MRP of the product. By paying the same base price as earlier, potential realization by retailer has increased to the extent of increase in the MRP (i.e. Rs.5). He has also contended that the MRP was decided by the Manufacturer as required under the law as such he should not be questioned for any such revision of MRP. He has further contended that the calculation made by the DGAP was incorrect and the proposed demand was in excess of the profiteering liability. He has also stated that the present notice by proposing cancellation of registration obtained by him under GST the law as a measure of penalty was not only grossly disproportionate to the alleged contravention, but was also extremely prejudicial to the very sustenance of his operations.

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9. The Respondent again vide his written submissions dated 03.10.2018 stated that as per the mathematical calculations the reduction in the GST was 7.8% so far as the above product was concerned. He has claimed that considering the base price of the product as 100, gross price inclusive of GST @ 28% would be 128 and the gross price inclusive of GST @ 18% would be 118 and hence due to reduction on Rs.128 of Rs. 10 ($128 - 118 = 10$) the percentage reduction would be $10/128 = 7.8\%$. He has also submitted that he had a closing stock of approximately 19.9 lakhs as on 15.11.2017, when the GST rate of 18% came into force and as such his manufacturers should have passed on $19.9 \text{ lakhs} \times 7.8\% = 1.56 \text{ lakhs}$ as GST profiteering benefit to him. He has further submitted that he had passed on this GST rate reduction benefit through schemes during the period between 15.11.2017 to 31.12.2017 and the quantum of benefit passed was as per the mandated requirement. He has also claimed that post 15.11.2017; he had bought products from the manufacture @ 18% GST which were sold subsequently to the customers at the prevailing GST rate of 18%. He has claimed that all the purchases and sales made after 15.11.2017 did not attract anti profiteering provisions under section 171 of the CGST Act,2017 as there was no benefit in tax rate that had accrued to him as he was buying and selling goods at the same GST rate of 18%.


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10. The Respondent has filed his further submissions on 16.10.2018 and 18.10.2018 in which he has stated that his sale invoices showed that the MRP of Rs. 35 was not increased to Rs. 40 but the MRP of Rs. 40 was decreased to Rs. 35 during the two months of September and October 2017, when the manufacturer had allowed a Special Promo Discount of Rs. 5 on the MRP for a short period of 2 months as a Consumer promotion benefit. He has also added that the manufacturers had not increased the MRP to Rs. 40 which had prevailed for several months before the GST Rate was reduced from 28% to 18%. He has further added that the total quantity sold by him between 15.11.2017 to 31.03.2018, between 15.11.2017 to 31.03.2018 from the Closing Stocks available as on 14.11.2017 and the benefit to be passed on and the total benefit passed on through GST schemes was mentioned below:-

	Units	Value
Total Qty Sold between 15.11.2017 to 31.03.2018	158468	
Total Qty sold between 15.11.2017 to 31.03.2018 from Closing Stock as on 14.11.2017 (A)	23298	17,18,661.0
Benefit to be passed on (A)		1,34,055.6
Total benefit passed on Through GST Schemes		1,52,564.0

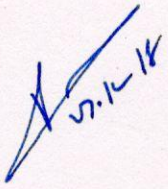
11. Clarification was sought from the DGAP on the issues raised by the Respondent in respect of the submissions dated 25.09.2018 made by the Respondent. The DGAP vide his Report dated

01.10.2018 has intimated that both the invoices had goods of same description with different MRPs and rest all the other issues raised by the Respondent had already been covered in the Investigation Report itself.

12. During the course of proceedings, M/s L'oreal the manufacturer of the product in question, was also asked to clarify the claims made by the Respondent in respect of the control on the software and increase of base price after 14.11.2017. M/s. L'oreal in it's written submissions filed on 03.10.2018 stated that they had ensured that the benefits reach the ultimate consumer by instructing the distributors to reduce the prices. It has also claimed that the notice was liable to be dropped as it was without jurisdiction and since M/s L'oreal and the Respondent were two different legal entities undertaking transactions on principal to principal basis and neither section 171 of the CGST Act nor under any provisions of the CGST Rules could be invoked against it in the proceedings initiated against the Respondent. It further stated that without prejudice, it had taken all the necessary steps and was under a bona-fide belief that the price benefit on account of reduction in the GST rate had already been passed on to it's customers. It further added that the pricing of the products sold by the distributors was not controlled by the it and that the alleged statement made by the Respondent that the software was controlled by it and sale price of the distributors was also fixed by it was not correct, as it did not exercise any control whatsoever on the prices through the software. It also

maintained that according to the agreement, the distributor was entitled to give discounts and sell the goods at a price lower than the recommended price to his customers. It also contended that the consequential imposition of penalties u/s 122-125 of CGST Act, 2017 or Rule 133 of CGST Rules could not be done against the Respondent only against whom the proceedings were initiated.

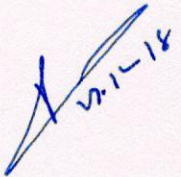
13. We have carefully considered the DGAP's report, the record and the written submissions of the Respondent and M/s. L'oreal, placed before us as well as the claim made by the Applicant. The fact that the GST rates have been reduced vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017, with effect from 15.11.2017 is not in dispute. The Respondent is a distributor who is duly registered under the above Act and hence the benefit of rate reduction was required to be passed on by him to the recipients as per the provisions of Section 171 of the CGAT Act, 2017. From the perusal of the invoices dated 11.10.2017 and 30.11.2017 it is noticed that the Respondent had increased the base price of Garnier Nat Shade 3 from Rs. 24.41 (price charged prior to rate reduction) to Rs. 26.48 (price charged after rate reduction). Similarly from the perusal of Annexure-13 of the DGAP's Report it is clear that to retain the MRPs of all his products at pre-GST rate reduction the Respondent had increased the base prices of his products to the extent of GST rate reduction. Thus it is established that out of the 388 products the base prices of 293 (259+34) products were increased by him inspite of the rate reduction to maintain the pre rate reduction prices. Accordingly the Respondent


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has charged increased base prices on the above products thus indulging in profiteering.

14. Accordingly, the Respondent has denied the benefit of Rs. 3,43,109/- to his customers which he was required to pass on to them and thus it has been established that the Respondent has acted in contravention of the provisions of section 171 of the CGST Act, 2017 by not providing commensurate reduction in the prices of the products supplied by him. Accordingly the amount of profiteering is determined as Rs. 3,43,109/- as per the provisions of Rule 131(1) of the CGST Rules 2017.

15. The Respondent has vehemently argued that he had no control on the fixing of base prices as well as the MRPs as both of them were fixed by the manufacturer M/s L'oreal India Pvt. Ltd. through it's software. The Respondent has also claimed that the MRP of the above product was not increased from Rs. 35 to Rs. 40 but discount of Rs. 5 was given on it in the months of September and October 2017. However the documents filed by the Respondent show that the discount was to the extent of 12.5% on the MRP of Rs. 40 as is apparent from the invoice No. LCBL039761704221 dated 30.11.2017 and 5% on the other products. In this invoice nowhere it has been mentioned that this discount was on account of the reduction in the GST rate from 28% to 18%. Moreover the Respondent has himself claimed that during the months of September and October regular promotional discounts were given

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on most of the products. Therefore the discounts provided to the customers after GST rate reduction are required to be considered as the on going existing promotional schemes during the pre-GST rate reduction period. The argument of the Respondent that the prices were controlled by the manufacturer does not hold good in as much as he is registered supplier under the CGST/SGST Act, 2017 and is bound to follow the notification dated 14.11.2017 to pass on the benefit of GST rate reduction. The legal obligation imposed upon him cannot be ignored only because he is not the manufacturer who controls the prices, as he is accountable as a supplier to pass on the benefit of GST rate reduction. There is no evidence to show that he had corresponded with the manufacturer for decrease in the base prices on account of the GST rate reduction. Hence it is apparent that the Respondent inspite of his legal obligation has enhanced the prices of all the 293 products and resorted to profiteering.

16. M/s L'oreal India Pvt. Ltd. has also claimed that it was the obligation of the Respondent to pass on the benefit of the trade discount/ price rebate schemes to the retailers or ultimate consumers. Therefore as a registered supplier the Respondent was legally bound to pass on the benefit of GST rate reduction.

17. Therefore the Respondent is directed to reduce the prices of all the above products as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017 by making commensurate reduction in their prices keeping in view the reduction in the rate of tax so that the benefit is passed on to the recipients. The Respondent is also

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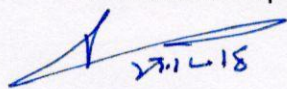
directed to deposit the profiteered amount of Rs.3,43,109/- along with the interest to be calculated @ 18% from the date when the above amount was collected by him from his customers till the above amount is deposited as the same has been used by him in his business. Since the recipients in this case are not identifiable the above amount of profiteering of Rs. 3,43,109/- along with interest shall be deposited by the Respondent in the Consumer Welfare Fund of the Central Government and the State of Delhi respectively as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017 under the supervision of the DGAP. The above amount shall be deposited within a period of 3 months by the Respondent from the date of receipt of this order failing which the same shall be recovered by the concerned Central/State GST Commissioner as per the provisions of the CGST/SGST Act, 2017 and shall be deposited as has been directed vide this order. Since the present investigation in to the issue of not passing on the benefit of reduction in the rate of tax by the Respondent has been conducted w.e.f. 15.11.2017 to 31.03.2018 only, the DGAP is directed to further investigate the quantum of profiteering which the Respondent has made thereafter and submit his report accordingly.

18. It is also established from the above facts that the Respondent had issued incorrect invoices while selling all the above products to his customers as he had not correctly shown the basic prices which he should have legally charged from them. The Respondent had also compelled them to pay additional GST on the increased prices though the incorrect tax invoices which would have otherwise

resulted in further benefit to the customers which he had failed to pass on. It is also established from the record that the Respondent has deliberately and consciously acted in contravention of the provisions of the CGST Act, 2017 by issuing incorrect invoices which is an offence under Section 122 (1) (i) of the above Act and hence he is liable for imposition of penalty under the above Section read with Rule 133 (3) (d) of the CGST Rules, 2017. Although notice for imposition of penalty has already been issued to the Respondent of 16.08.2018 but the Respondent has not been heard on the quantum of penalty. Therefore, keeping in view the principles of natural justice it would be appropriate to give him opportunity of being heard. Accordingly, a fresh notice may be given to him to explain why penalty should not be imposed on him.

19. A copy of this order be sent to the Applicant and the Respondent free of cost. File of the case be consigned after completion.

Certified copy



(A.K. Goel)
Secretary NAA



Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(R. Bhagyadevi)
Technical Member

F.No.22011/NAA/63/Raj&Co./2018 | 1317 - 1320 Dated: 27.12.2018

Copy to:-

1. M/s Raj & Company, 16, DDA Market, Neeti Bagh, New Delhi-110049.
2. Commissioner, Commercial Tax, Vyapar Bhawan, IP Estate, New Delhi-110002
3. Director General Anti-Profitteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001
4. NAA website/ Guard File.