

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


**Case No.** : 42/2019  
**Date of Institution** : 28.03.2019  
**Date of Order** : 26.06.2019

**In the matter of:**

1. Mr. Mohammad Azid Ramzani, Ramzani Villa, 404/7, A-Block, Dr. Zakir Hussain Colony, Hapur Road, Meerut, Uttar Pradesh-250002.
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2<sup>nd</sup> Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

  
M/s Adarsh Marbles, Idgah Station Road, Near Jain Nagar,  
Meerut City.

Respondent

Quorum:-

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

Present:-

1. None for the Applicant No. 1.
2. Smt. Gayatri, Deputy Commissioner, for the Applicant No. 2.
3. Sh. Sandeep Jain, Proprietor and Sh. Praveen Jain, Advocate for the Respondent.

**ORDER**

1. This report, dated 05.12.2018, has been received by this Authority from the Director General of Anti-Profiteering (DGAP) under Rule 129 (6) of the Central Goods and Service Tax (CGST) Rules, 2017. The facts of the present case are that an application dated 22.02.2018 was filed by the Applicant No. 1 before the Uttar Pradesh State Screening Committee on Anti-profiteering constituted under Rule 128 of the above Rules alleging that the Respondent had not passed on the benefit of reduction in the rate of tax from 28% to 18% w.e.f. 15.11.2017, granted vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017, as he had increased the base price of the "Vitrified Tiles" (here-in-



after referred to as the product) from Rs. 750/- in the pre-rate reduction period to Rs. 814/- in the period post implementation of the notification dated 14.11.2017. The Applicant No. 1 had also claimed that since the Respondent had increased the MRP of the product after the rate of tax was reduced on it, he 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 regard, Uttar Pradesh State Screening Committee had relied on two invoices issued by the Respondent, one dated 06.11.2017 (Pre rate revision) and the other dated 09.12.2017 (Post rate revision), as has been discussed in table given below:-

Table

Sr. No.	Name of the Product Supplied	Pre GST rate revision on 15.11.2017			Post GST rate revision on 15.11.2017		
		Invoice No. & Date	Tax Rate	Base Price (in Rs.)	Invoice No. & Date	Tax Rate	Base Price (in Rs.)
1	Vitrified Tiles (HSN Code 6901)	1649 06.11. 2017	28%	750	1950 09.12. 2017	18%	814

2. The above complaint was examined by the Standing Committee and vide the minutes of its meeting dated 25.05.2019, it requested the DGAP to initiate investigation under Rule 129 (1) of the CGST Rules, 2017 and collect evidence necessary to determine whether the base price of the product had been increased by the

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Respondent in respect of the supply made to the Applicant No. 1 or not.

3. In this connection, a Notice under Rule 129 of the CGST Rules, 2017, was issued on 18.06.2018 by the DGAP to the Respondent, directing the Respondent to intimate as to whether he admitted that he had contravened the provisions of Section 171 of the CGST Act, 2017, by increasing the price of the product after the rate reduction. The Respondent was also asked to suo moto determine the quantum of profiteering, if any, on account of increase in the price of the product and indicate the same in his replies to the Notice issued by the DGAP. Further, four subsequent reminders were also sent to the Respondent but the Respondent did not submit the requisite documents. The DGAP then issued summons to the Respondent under Section 70 of the CGST Act, 2017 read with Rule 132 of the CGST Rules, 2017 on 14.08.2018 to appear before the DGAP on 24.08.2018 along with the relevant documents. The Respondent appeared before the DGAP on 24.10.2018 and submitted the information /documents and tendered a statement. Further, it was observed by the DGAP, that the specific description of the product, i.e., size/colour etc. was not provided in the outward sales data submitted by the Respondent. The DGAP thus again issued Summons under Section 70 of the CGST Act, 2017 read with Rule 132 of the CGST Rules, 2017 on 22.10.2018 to the Respondent to appear before the DGAP on 29.10.2018 along with the relevant documents. The Respondent submitted the information



/documents and tendered his statement before the DGAP on 29.10.2018. The DGAP further sent a letter to the Respondent on 12.11.2018 to submit data for the period July, 2017 to October, 2017, along with details of the sizes of the vitrified tiles supplied by him. But the Respondent did not submit the required data. The Applicant was also given an opportunity to inspect the non-confidential evidences/information received from the Respondent between 30.11.2018 to 03.12.2018. However, the Applicant No. 1 did not inspect the record.

4. The DGAP requested this Authority for grant of extension in time to complete the investigation up to 09.12.2018 which was allowed by this Authority under Rule 129 (6) of the CGST Rules, vide its order dated 21.08.2018. The present investigation pertains to the period between 15.11.2017 to 30.06.2018.
5. The DGAP, in his Report, has stated that the Respondent submitted his replies to the DGAP, vide letters dated 23.07.2018, 02.09.2018, 23.09.2018, 08.10.2018, 22.10.2018, 01.11.2018 and 15.11.2018. Vide his replies, the Respondent submitted that he is a retailer of tiles and his business was not based on MRP or fixed prices but at prices lower than MRP. He added that, no sale was made on MRP since his customers bargained the price based on the volume of requirement of tile boxes and finalized the deal at competitive prices. He further added that the Applicant No. 1 had offered to purchase vitrified tiles at a net price of Rs. 960/- per box, even though the MRP was Rs. 1300/- per box and that he had to accept the above price offered by the above Applicant due



to competition and downfall in the business. The Respondent has further submitted that the above Applicant had also filed a complaint in the office of State Goods and Service Tax, U.P. D.C (SIB), Meerut in March, 2018 as a consequence of which he had returned an amount of Rs. 150/- with interest to the above Applicant on the advice of the SGST office. The statement of the Respondent was also recorded by the DGAP on 14.08.2018 in which the Respondent stated that he was only involved in the selling of Kajaria tiles of different sizes and designs and that he had been purchasing them at the dealer's price and that on these dealer prices, his suppliers were providing him various promotional discounts. He has further stated that since lot of competition was involved in his business, he was selling tiles to his customers at competitive prices based on bargaining, notwithstanding the MRP printed on the boxes. The Respondent has also stated that while the MRP of the product was Rs. 1350/- per box before 15.11.2017 and Rs. 1250/- per box after 15.11.2017, he had sold, the product at an invoice price of Rs. 960/- per box during both the above periods, i.e. in the periods pre and post 15.11.2017. He also intimated that as per his knowledge, there was no requirement to pass on the benefit of reduction in the GST rate from his end, as he was involved in the business of bargaining and selling the product below MRP. The Respondent also submitted copies of his GSTR-1 returns for November, 2017 to July, 2018, copies of his GSTR-3B returns for November, 2017



to July, 2018 and data of his Outward sales for the period from 01.11.2017 to 30.06.2018.

6. The DGAP has also stated in his Report that the Central Government on the recommendations of the GST Council had reduced the GST rate on the above product from 28% to 18% w.e.f. 15.11.2017 vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017, in consequence of which the Respondent was required to sell the above product on the base price which was being charged by him before 15.11.2017 and levy GST @18% so that the benefit of reduction in the rate of tax could be passed on to his customers. This is also a matter of fact which has not been contested by the Respondent.
7. The DGAP has further examined the issue relating to passing on of the benefit of reduction in the rate of GST to the recipients of goods after arriving at the base prices of the tiles, pre 15.11.2017 and post 15.11.2017. The DGAP has also intimated that from the invoices available, it was clear that the Respondent has increased the base prices of the tiles when the rate of tax was reduced from 28% to 18% and did not pass on the commensurate benefit of rate reduction to his customers. It was the Respondent's statutory responsibility and obligation to pass on the benefit of reduction in the GST rate to his customers. However, it was evident from the invoices submitted by the above Applicant, that by increasing the base price of the product from Rs. 750/- to Rs. 814/-, the benefit of the GST rate reduction was not passed on to him.



8. The DGAP has also analysed the outward sales data for the period 01.11.2017 to 30.06.2018 of the tiles supplied by the Respondent and stated that the prices of the same even before reduction in the tax rate w.e.f. 15.11.2017 used to vary across different invoices for the same period. For example, prior to GST rate reduction w.e.f. 15.11.2017, the Respondent had sold the tiles (size 2"X1") in the price range between Rs. 234 to Rs. 525. Therefore, the average base prices for all sizes available from the sale data, have been considered to be the base prices during the pre-rate reduction period for a specified size. The DGAP has further observed from the analysis of outward sales data for the period 01.11.2017 to 14.11.2017 that for certain tile sizes such as (Size 13X80) there was no sale in the said period. The DGAP has also submitted that a letter was sent to the Respondent on 12.11.2018 to submit data for the period July, 2017 to October, 2017, along with sizes of the tiles. But even after several requests, the Respondent had failed to submit the desired data. As such, it was not possible to determine the base prices of all such products sold by the Respondent.

9. The DGAP has further concluded that the base prices of the tiles were increased although there was a reduction in the GST rate from 28% to 18% w.e.f. 15.11.2017. Thus, by increasing the base prices consequent to the reduction in the GST rate, the commensurate benefit of reduction in GST rate from 28% to 18% was not passed on to the recipients. Thus, the total amount of profiteering covering the period 15.11.2017 to 30.06.2018, was



Rs. 54,67,149/-. The DGAP has also stated that all the supplies were made in the State of Uttar Pradesh only.

10. The above Report was received on 06.12.2018 and was considered by the Authority in its sitting held on 11.12.2018 and it was decided to hear the Applicants and the Respondents on 02.01.2019.

11. Five personal hearings were accorded to the parties on 11.01.2019, 13.02.2019, 22.02.2019, 06.03.2019, 23.04.2019, wherein none appeared on behalf of the Applicant No. 1; the Applicant No. 2 was represented by Smt. Gayatri, Deputy Commissioner and the Respondent was represented by Sh. Sandeep Jain, Proprietor and Sh. Praveen Jain, Advocate.

12. The Applicant No. 1 vide his email dated 14.01.2019 submitted that the prices of the Respondent's shop were fixed and he had purchased the product at the same MRP which the Respondent had told him to pay. He further intimated that the Respondent had offered him a cheque of Rs. 150/- by post, but he had refused to accept that cheque. He further stated that by sending him the above mentioned cheque, the Respondent had admitted to have resorted to profiteering.

13. The Respondent has filed written submissions on 25.01.2019, 13.02.2019 and 06.03.2019. Vide his submissions, he has stated that profiteering was not defined in the CGST Act, 2017 and he further furnished the definition of the profiteering as per various dictionaries. He has further stated that the Anti-profiteering provision was made to gain the confidence and to bring sense of

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security among the consumers towards the Act. However, in absence of any notified/specified rules for the proceedings under the anti-profiteering provision, there was lack of clarity regarding factors to be considered for profiteering or methods for determination of profiteering.

14. The Respondent further pointed out certain major lapses in the calculation sheet of profiteered amount. He submitted that the DGAP had taken the base prices for all the categories of products for the period prior to 15th November 2017 arbitrarily as the average of all discounted prices at which he had sold the goods (tiles) during the period of 1st November 2017 to 14th November 2017, in place of the MRP based standard prices. Further, the DGAP had taken a single price/rate as base price for all the qualities of the product in a particular size category; whereas, there was much price variation among the various qualities of tiles of any size category. He also submitted that the DGAP had compared selling price (inclusive of GST) with cum-tax Base Price (Ideal selling price based on above assumptions) and had taken the difference as profiteering. The amount of profiteering should not be inclusive of tax. He has also pointed out that the DGAP had mentioned that the facts regarding pricing (MRPs) and the circumstances under which sacrifices on MRPs were made, had been clarified by the Respondent during investigation and also, it was specifically mentioned under Para No.-14(d) of the DGAP report that the Respondent had brought into his notice that the MRPs of the goods were commensurately revised/reduced, taking





into account the effect of change in the tax rate from 28% to 18% with effect from 15/11/2017. But, the DGAP, instead of examining the veracity of the said facts, had wandered around the irrelevant factors and had misdirected the investigation.

15. The Respondent has also submitted that the DGAP had selected the period from 15<sup>th</sup> November 2017 to 30<sup>th</sup> June 2018 which seemed to be excessive. He has further submitted that he had submitted all the information, as required by the DGAP, which he was capable of and this fact was already acknowledged in the DGAP's report. The Respondent also stated that it was the discounted price, not the transaction price, at which he was entitled to sell the goods (tiles), and there was hardly any occasion when he was capable of selling goods at MRPs and thus, it was the MRP based standard price (i.e., before discount base price), and not the discounted price, which was relevant to be considered as base price for determination of ideal selling price (post tax rate revision) for the purpose of making comparison while calculating the profiteering. He has also mentioned that the MRP was fixed by the manufacturer, whenever there was a change in price of its products. He has also enclosed a detailed list of MRPs issued from time to time by the Manufacturer (M/s Kajaria Ceramics Limited).

16. The Respondent has also cited the precedence of the outcomes in similar complaints of profiteering settled in the case of **KSC and another Vs. M/s Maruti Suzuki India Ltd.** in Case No. 01/2019 decided on 02/01/2019 and in the case of **KSC and another Vs.**



M/s Asian Paints Ltd. in Case No. 29/2018 decided on 27.12.2018 by the Authority according to which reduction in discount did not amount to profiteering. He has also mentioned that Section 171 of CGST Act, 2017 was intended to safeguard the interest of the consumers and deal with the violators who did not pass on the benefits to be passed on to the consumers, through anti-profiteering measures and there was no intention of the legislature to regulate the competitive prices and corresponding rebates and discounts and a dealer could not be forced to grant a certain amount of rebate or discount or to maintain the uniformity in rebates and discounts and allowing of rebate or discount was completely a discretionary subject for the dealers, which could not be regulated through the legislation.

17. He has further submitted that even if the contention of the Applicant No. 1 be taken according to his own viewpoint, the said transactions could be described as under:-

**TABLE**

Sl. No.	Particulars		Before change in		After change in Tax	
			Tax (GST)	Rate	(GST) Rate	[after
			[up to 14/11/2017]		14/11/2017]	
1	Product description (Complete Detail given under Annexure - 2)	<b>A</b>	Vitrified Tiles (4'x2')	Vitrified Tiles (32'x32')	Vitrified Tiles (4'x2')	Vitrified Tiles (32'x32')
2	HSN Code (Chapter heading)	<b>B</b>	6907	6907	6907	6907
3	Invoice No.	<b>C</b>	1649	1649	1950	1950
4	Date of transaction	<b>D</b>	6/11/17	6/11/17	9/12/17	9/12/17
5	MRP/Ideal MRP (incl. of tax) [Effective up to 14/11/2017]	<b>E = (G+H)</b>	1370.00	1250.00	1262.97 (#)	1152.34 (#)
6	Rate of GST	<b>F</b>	28%	28%	18%	18%



7	Amount of GST	$G = \frac{ExF}{(1+F)}$ Or, $(H \times F)$	299.69	273.44	192.66	175.78
8	Base Price /Ideal Price (exclusive of Tax) [MRP/(100%+Rate of GST)]	$H = (E - G)$	1070.31	976.56	1070.31 (@)	976.56 (@)
9	Selling Price (exclusive of tax)	$I$	750.00	750.00	814.00	814.00
10	Rebate/Discount/(Profit eering)	$J = (H - I)$	320.31	226.56	256.31	162.56

**Note:** (#) : Ideal MRP after 14/11/2017 is calculated by charging GST at revised rate over the ideal Price taken as base price.  
(@) : Base Price/Ideal Price for the period from 15/11/2017 onwards has been taken equal to the Base Price before and up to 14/11/2017

18. He has also submitted that the negotiation of price with the customers was always at cum-tax rate and not ex-tax rate and the buyers were interested only in the total price which they were liable to pay against the goods purchased and the ultimate user of the goods had to bear the burden of tax according to the fundamental principles of Indirect Taxation.

19. The Respondent, vide his written submissions dated 06.03.2019, has also enclosed copies of bills, sales details of the products sold by him, a table showing details of the products along with their price per box which is given below:-

Pre Revision 15.11.2017					Post Revision 15.11.2017			
S.N o.	Description	Invoice no	Date	Price Per Box (Rs.)	Invoi ce no	Date	Price Per Box (Rs.)	Differenc e in Price (Rs.)
1	Tile Size <b>6X18</b> (CRM.PREM. DIGI STONE Kajaria)	1580	05-11- 2017	<b>422.00</b>	2162	29-12- 2017	<b>404.00</b>	-18.00
2	Tile Size <b>12X18</b> (CRM Pre Digital Kajaria)	1592	07-11- 2017	<b>296.00</b>	2179	06-01- 2018	<b>289.93</b>	-6.07
3	Tile Size <b>12X18</b> (CRM UTY.e Digital Kajaria)	1367	13-10- 2017	<b>210.00</b>	2331	09-01- 2018	<b>198.31</b>	-11.69



4	Tile Size <b>16x32</b> (CRM Com. Digital Kajaria)	1567	03-11- 2017	<b>374.00</b>	1871	01-12- 2017	<b>320.23</b>	-53.77
5	Tile Size <b>16x32</b> (CRM Com. Digital Kajaria)	1624	03-11- 2017	<b>515.63</b>	1949	09-12- 2017	<b>496.61</b>	-19.02
7	Tile Size <b>2X2</b> (PVT PRE. D/C Kajaria)	1337	14-10- 2017	<b>775.00</b>	2325	08-01- 2018	<b>705.08</b>	-69.92
8	Tile Size <b>2X2</b> (PVT PRE. S/S Kajaria)	1578	05-11- 2017	<b>563.00</b>	1939	08-12- 2017	<b>515.00</b>	-48.00
9	Tile Size <b>32X32</b> (PVT. COM. SP. COLO. Kajaria)	1640	06-11- 2017	<b>966.40</b>	1950	09-12- 2017	<b>814.00</b>	-152.40
10	Tile Size <b>32X32</b> (PVT. STD SO LI & PLUS Kajaria)	1313	11-10- 2017	<b>1000.0</b> <b>0</b>	2506	23-01- 2018	<b>994.06</b>	-5.94
11	Tile Size <b>48X8</b> (ETER. COM. H.D. WOOD Kajaria)	1690	11-11- 2017	<b>542.00</b>	1835	23-11- 2017	<b>523.73</b>	18.27
12	Tile Size <b>48X8</b> (ETER. COM. H.D. WOOD Kajaria)	1564	02-11- 2017	<b>960.00</b>	1708	16-11- 2017	<b>948.00</b>	-12.00
13	Tile Size <b>48X8</b> (ETER. STD. H.D. WOOD Kajaria)	1580	05-11- 2017	<b>637.00</b>	1919	06-12- 2017	<b>587.29</b>	-49.71
14	Tile Size <b>4X2</b> (ETR.COM PO. HD Kajaria)	1251	06-10- 2017	<b>750.00</b>	2392	17-01- 2018	<b>745.76</b>	-3.24
15	Tile Size <b>4X2</b> (ETR.PREM. PO. HD Kajaria)	1564	02-11- 2017	<b>1250.00</b>	2434	21-01- 2018	<b>1220.00</b>	-30.00
16	Tile Size <b>4X2</b> (ETR.STD. PO. HD Kajaria)	823	08-09- 2017	<b>875.00</b>	2395	17-01- 2018	<b>800.00</b>	-75.00
17	Tile Size <b>4x4</b> (ETR.COM PO. HD Kajaria)	965	17-09- 2017	<b>850.00</b>	2414	13-01- 2018	<b>813.56</b>	-36.44
18	Tile Size <b>5X32</b> (ETR.COM PO. HD Kajaria)	1678	09-11- 2017	<b>500.00</b>	2755	15-02- 2018	<b>494.00</b>	-600
19	Tile Size <b>5X32</b> (ETR.STD PO. HD Kajaria)	571	13-08- 2017	<b>620.00</b>	1955	03-12- 2018	<b>513.00</b>	-113.00
20	Tile Size <b>6X24</b> (CRM UTY DIGITAL Kajaria)	1668	08-11- 2017	<b>375.00</b>	2013	10-12- 2017	<b>271.19</b>	-103.81
21	Tile Size <b>12X12</b> (CRM Pre Digital Kajaria)	1616	02-11- 2017	<b>430.00</b>	1750	11-12- 2017	<b>424.00</b>	-06.00

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20. The Respondent has also contended that the DGAP's computation of profiteered amount of Rs. 54,67,149/- was based on imaginary calculations, conjectures and surmises. He has further contended that the DGAP had wrongly taken a single price/rate as base price for all the qualities of tiles in a particular size category. Vide his submissions dated 23.04.2019, he has stated that the Authority had impliedly set aside the calculations made by the DGAP and had directed the DGAP to investigate/calculate afresh the matter. However, the DGAP did not do that.

21. Vide his further submissions dated 12.06.2019, the Respondent has also averred inter-alia that the DGAP had taken separate rates for the same size items twice which was shown below:-

<u>TILE SIZE</u>	<u>AVERAGE BASE RATE</u>
(i) 2X1	374.55
(ii) 12X24	262.95
(iii) 48X8	525.00
(iv) 8X48	644.28

He has submitted that the item no (i) & (ii) were of the same size with only difference of feet & inches and similarly item no (iii) & (iv) were of the same size.

22. The Respondent has also claimed that in the profiteering calculation sheet of the DGAP enclosed with his report dated 05.12.2018 the column of the size in respect of 39 items had been left blank. He has also mentioned that in the above mentioned sheet, the calculation figures were also erroneous. His submission on this issue is as below:-



**" Sales Total as per Base Rate (Before 15.11.2017)**

By DGAP (Total of Column "C" X Column "G" )	2,50,74,143.71
Add: profiteering (Total of Column "O")	<u>54,67,148.44</u>
	3,05,41,292.15
Less: Losses (Total of Column "M" X Column "G")	<u>4,13,883.01</u>
	<u>3,01,27,409.14</u>
However, Total Sale after 15.11.2017 (Total of Column "H")	<u>2,93,81,995.77</u>
DIFFERENCE:	7,45,413.36"

23. The Respondent further submitted that the Average method so adopted by the DGAP for ascertaining base price rate was not recognized in any accounting standard or law /norms and nothing can be calculated correctly by this method. He has advanced his argument as below:-

" **Table** Amount (in Rs.)

	<b>A</b>	<b>B</b>	<b>C</b>	<b>TOTAL (A+B+C)</b>
Quantity Sold	100	300	600	1000
Sales Rates before 15.11.2017 per unit	234	400	525	
Sales Rates after 15.11.2017 per unit	230	390	520	
Actual Profiteering after 15.11.2017	0	0	0	0
Profiteering if Average Rate taken Rs. 386.33 AS the DGAP had done	(230-386.33)X100 =0	(390-386.33)X300 =1101	(520-386.33)X600+ =80202	81303.00
Actual Sales after 15.11.2017	23000	117000	312000	452000.00

*Adarsh*



However, sale on the basis of Average Rate 386.33X1000				386330.00
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*From the above average rate methodology, it is clear that average rate theory results in blunders. In the above example, even in case of loss in actual, the average calculation method declared it to be Profiteering of Rs. 81,303.00. Even considerable difference in sale figure i.e Rs.386330.00 against actual sale of Rs.452000.00. Hence average method is not recognised in any accounting standard/ law and not in use anywhere in the world. Therefore, the average theory of DGAP in the instant case has no leg to stand as by this (imaginary) average theory for calculating the profiteering is taken, every trader shall be restricted to sale the same product on same rate even after 15.11.2017 (tax reduce date) else it shall amounts to profiteering as done in the case of Noticee hereon also as is clear from the above example."*

24. The Respondent also cited the law settled in the case of **Kerala State Screening Committee on Anti Profiteering Vs. M/s Win Win Appliances** in Case No. 20/2019 decided on 22.03.2019 by this Authority vide which the DGAP had reduced the Profiteering amount from Rs. 1,20,194/- to Rs. 32197/- which showed the DGAP's casual working style. He has further cited the judgement of Hon'ble Allahabad High Court in the case of **Markande v. Sudama Chaubey, AIR 2007:**

*"Actually law is very clear on this point that if there is certain pleadings made by one party and the same is not controverted or disputed in the pleadings of the other party, the fact asserted in that pleadings should be taken to be*



correct and no proof for the same is required to be produced in the Court. In the present case the plaintiff in spite of the fact that his pleadings had been left unchallenged from the side of the defendant, did also file the evidence through an affidavit in support of his case and that has been rightly found to be sufficient by the lower appellate Court to prove his case."

25. The Respondent has also cited the judgements of Hon'ble Supreme Court in the cases of:-

(i) **K.P. Varghese Vs. The Income Tax Officer 1981 AIR 1922** which stated that

*"It is a well settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue. To throw the burden of showing that there is no understatement of the consideration, on the assessee would be to cast an almost impossible burden upon him to establish the negative, namely that he did not receive any consideration beyond that declared by him"*

(ii) **Commissioner of Income Tax, Guwahati & Vs. M/s. Sati Oil Udyog Ltd. & ANR ( 2015) 56 taxmann.com 285 (SC)** which stated that

*"The burden of proving that the assessee has so attempted to evade tax is on the revenue which may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully payable by it."*

(iii) **Government Of Andhra Pradesh Vs. Guntur Tobaccos Ltd 1965 AIR 1396** which stated that

*"Whether a contract for service or for execution of work, involves a taxable sale of goods must be decided on the facts and circumstances of the case. The burden in such a case lies upon the taxing authorities to show that there was a taxable sale, and that burden is not discharged by merely showing that property in goods which belonged to the party performing service or executing the contract stands transferred to the other party".*

26. He has also submitted that from the above judgements, it was clear that it was duty of the DGAP to properly investigate and to calculate actual profiteering by following the proper accounting norms so that the Respondent might not be penalized, which the DGAP did not do.

*Adarsh*



27. He has further intimated that there was no restriction on fixing Base / Sale rate before 15.11.2017 and the provisions of Section 171 of CGST Act were inapplicable due to no change in the tax rates. He has further clarified that there was no restriction on accepting the profit according to Article 19 (g) of the Constitution of India before 15.11.2017 but the profiteering would be applicable after 15.11.2017 when the rates of GST were reduced from 28% to 18%. He has also submitted the profiteering calculation sheet as per his calculation and calculated the profiteering as Rs. 86,386.11. He has also furnished the copy of ITR along with P & L Account and audit report to show that the gross profit of whole business (Business of Tiles and marble stone etc.) for the period 01.04.2017 to 31.03.2018 was Rs. 77,78,021.26 against the turnover of Rs. 9,73,67,069.50.

28. The Respondent has also mentioned that, if the Authority was of the contrary view, against the Respondent, then a fair opportunity should be given to him in the interest of natural justice since the Authority has ample powers under the law in view of the law settled by the Constitution Bench of the Hon'ble Supreme Court in the cases of **State of M.P. Vs. Chintaman Sadashiva Vaishampayan AIR 1961 SC 1623** and **Lakshman Exports Ltd. Vs. Collector of Central Excise (2005) 10 SCC 634**.

29. The DGAP was also asked to submit his report on the issues raised by the Respondent. The DGAP vide his Reports dated 05.02.2019 and 12.02.2019 has submitted that Section 15(1) of the Central Goods and Services Tax, Act, 2017 reads as: -



*"The value of a supply of goods and/or services shall be the transaction value, that is the price actually paid or payable for the said supply of goods and/or services where the Supplier and the recipient of the supply are not related and the price is the sole consideration for the supply".*

Thus, the relevant value for calculating profiteering was the transaction value and not the MRP. The DGAP has further submitted that the calculation sheet submitted by the Respondent was not acceptable since the MRPs had been considered for calculating profiteering instead of the transaction value. The DGAP has further submitted that all the other issues raised by the Respondent and also by the Applicant No. 1 had already been incorporated in his Report dated 05.12.2018.

30. The DGAP vide his report dated 28.03.2019 has stated that all these issues had already been covered in his Report dated 05.12.2018.

31. The Respondent filed his last submissions on 23.04.2019. Vide his above submissions, the Respondent has stated that the DGAP, vide his report dated 28.03.2019, had only tried to cross explain the written submissions of the Respondent but had not asked him (the Respondent) for any further information or data which the DGAP ought to have done.

32. We have carefully considered the material placed before us and all the submissions made by the Applicant No. 1 dated 14.01.2019, Respondent No. 1 dated 25.01.2019, 13.02.2019,



06.03.2019 and 23.04.2019, and by the DGAP dated 05.02.2019, 12.02.2019 and 25.03.2019.

33. It is revealed that the Central Govt. vide Notification No.41/2017-Central Tax (Rate) dated 14.11.2017 had reduced the rate of GST from 28% to 18% in respect of the tiles with effect from 15.11.2017, the benefit of which was required to be passed on to the recipients by the Respondent as per the provisions of Section 171 of the CGST Act, 2017. From the above discussion and the invoices available, it is revealed that the Respondent had increased the base price of the product from Rs. 750/- to Rs. 814/-, when the rate of tax was reduced from 28% to 18% with effect from 15.11.2017. Thus, by increasing the base price of the product, post-GST rate reduction, the benefit of reduction in tax rate was not passed on to the Applicant No.1 by the Respondent.

34. As far as the contentions of the Respondent mentioned in Para 13 to 28 and in Para 31 of this order are concerned the same are discussed herein below.

- (i) He has stated that the word 'Profiteering' was not defined in CGST Act, 2017 and its meaning in various dictionaries defined it as an 'unfair', 'unusual' and most likely an 'illegal element'. He has further contended as follows: - "*the profiteering is not appreciable in any trade/industry*". Perusal of Section 171 of the CGST Act 2017, show that it details the prospective of profiteering under the Act and hence dictionary meaning has no relevance, moreover profiteering is not acceptable in the trade if it is illegally derived by appropriating the benefits which are

*Adarsh*



granted by the Government from the public funds to the consumers.

- (ii) He has also stated that Section 171 was brought into CGST Act, 2017 to gain the confidence and provide sense of security among the consumers towards the Act and in the absence of any notified/specified rules for the proceedings under the anti-profiteering provision, there was lack of clarity regarding factors to be considered for profiteering, process or method for determination of profiteering etc. This averment of the Respondent also has no substance and rather incorrect, since the rules for the proceedings under the anti-profiteering provision has already been given as per Rule 126 of the CGST Rules, 2017, which states that:-

*“The Authority may determine the methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices.”*

- (iii) He has pointed out major errors in the DGAP's report. The first was that the method of calculation was arbitrary as average of all discounted prices was taken in place of MRPs based standard prices. Secondly, selection of single base price (rate) for different qualities of tiles whereas there was much variation among the various qualities of tiles in any size category and third one, that the element of Tax (GST) was also included in profiteering. Since the Respondent had not made supplies on





the basis of MRPs but has done so on discounted prices, there appears to be no relevance of MRP in this particular case as the product having MRP of Rs.1300/- was sold at Rs. 960/- to the Applicant No. 1 on both the occasions i.e. pre and post rate reduction of GST wherefrom the base price was ascertained by reverse calculation and the base price for pre and post rate reduction of GST was arrived at as Rs. 750/- and Rs. 814/- exclusive of tax at the rate of 28% and 18 % respectively. Second contention that the single base price for different qualities was taken, the same is also not acceptable because copies of invoices of the Respondent do not carry any details of quality/colour/texture/brand of the tiles supplied. Even the brand of the tiles was not been mentioned in the invoices. Hence, we find that the approach adopted for reckoning the profiteering by the DGAP is correct. While making the above observation, we keep in mind that the Respondent has not provided any specific details of the goods, i.e. the size/quality/colour/texture etc. of the tiles supplied by him through the invoices dated 06.11.2017 and 09.12.2017, therefore, we are bound to accept above two invoices as both these invoices do not carry details of the quality, size colour and brand name even. Profiteering has to be seen from the prism of the consumer and if he had to pay more than the commensurately reduced price, it amounts to profiteering. In fact, even if the tax has been paid in excess of the correctly leviable amount by the Respondent, the consumer has been



deprived of the benefit of commensurate reduction in price, hence such an element of tax has been correctly included in the calculation of the profiteered amount. Hence, we uphold the DGAP's computation of the profiteered amount made vide Annexure- 15 and reject the objections of the Respondent made in this regard.

- (iv) The Respondent's submission that in the investigation report of the DGAP the facts regarding pricing (MRP) and the circumstances under which sacrifice on MRP had been made, had been clarified during investigation which was specifically mentioned in para 14 (d) of the report that the Respondent had brought into his notice that the MRPs of the goods were commensurately revised/reduced taking into account the effect of change in the tax rate from 28% to 18%, it is found that no such data was provided by the Respondent which mentioned size, texture or quality of goods supplied by the Respondent and hence no correlation can be made or deciphered in absence of any method of correlating supply invoices and MRPs. Also the relevant value for calculating profiteering has to be the transaction value and not the MRPs as DGAP has rightly quoted Section 15(1) of the CGST Act, 2017.

Contention of the Respondent that Section 15 was relevant for calculation of tax (GST) and was not applicable in the calculation of profiteering is not tenable, as in this case where MRP was of no relevance as the product was being sold at



much lower price than the MRP. Also his contention that he had been selling his goods at much lower prices than the MRPs and terming this act as passing on the benefit was also not correct and cannot be accepted.

- (v) As regards his submission that the period selected for calculation of profiteering was from 15<sup>th</sup> Nov 2017 to 30<sup>th</sup> June 2018 which seemed to be excessive, having regard to the stock holding period of the Respondent as well as periodicity of price revision by the manufacturer, since no documentary evidence to this effect was produced by the Respondent, hence this contention cannot be considered.
- (vi) On his submission that the transaction price was not the standard price at which the Respondent was entitled to sell the goods, but it was the discounted price most of the times, the Authority is of the view that with no document to sustain this averment especially because the supply invoice had no details of size, quality & texture etc. and the Respondent has not provided the invoices of his suppliers in respect of his purchases despite being asked to do so several times, merely supplying MRP list of his supplier is not sufficient and hence this submission of the Respondent cannot be accepted.
- (vii) The facts of the cases referred by the Respondent viz. of **KSC and another Vs. M/s Maruti Suzuki India Ltd.** Case No. 01/2019 decided on 02/01/2019 and of **KSC and another Vs. M/s Asian Paints Ltd.** Case No. 29/2018 decided on 27.12.2018, are not similar to the facts of the instant case as



the Respondent in this case could not prove that the amount charged after GST was on account of reduction in the discount, rather it can be inferred that the base price was increased after tax rate reduction. In table 'A' of his submission, the Respondent has merely portrayed the discounts which were reduced after rate reduction, hence the above cases cannot be relied upon.

(viii) In respect of the Respondent's submissions that no law can regulate his profit margin and discounting patterns, it is pertinent to mention here, that though this Authority agrees with his argument that no law can regulate his profit margin and discounting patterns but the fact is that the Respondent is trying to divert his act of profiteering towards reduction of discount of which he has no evidence. His submission that the buyers are interested in cum-tax invoices also has no ground as it appears to be an effort to hide his act of non-passing of tax reduction benefit and later on terming it as a reduction in discount.

(ix) As regards the submission dated 06.03.2019 of the Respondent, wherein he has submitted some copies of bills, sales details of the tiles and a table showing details of the goods along with their price per box is concerned, it is observed that those invoices appear non comparable as the word 'tiles' and only the size is mentioned in these invoices showing that price was reduced from Rs. 422 on 25.11.2017 to Rs. 404 on 29.12.2017. Therefore, we find that absolutely no



inference from these documents can be drawn to conclude that in both these invoices the goods sold were of same quality. Producing invoices having merely description of same size of tiles sold does not establish that the price was actually reduced.

- (x) Submission of the Respondent that the DGAP has made imaginary calculations and that their report is based on conjectures and surmises also does not hold good in the absence of details and comparable invoices provide by the Respondent. His contention that the quality was not considered does not hold good as the invoices produced by him do not carry details about quality, texture etc. and it is these parameters that are relevant here. Therefore, the DGAP has correctly based his calculations on averaging which is acceptable in the facts and circumstances of the present case.
- (xi) Also, the contention of the Respondent that the period selected for calculation of profiteering from 15.11.2017 to 30.06.2018 was excessive is also not acceptable as no proper grounds have been advanced by him as to why the same should not have been considered.
- (xii) The Respondent in his submission dated 23.04.2019 has stated the incorrect facts by claiming that in the hearing dated 06.03.2019, the Authority had set aside the calculations made by the DGAP and the DGAP was directed to investigate/calculate afresh the matter. In fact DGAP was only asked to submit his report on the submission dated 06.03.2019

*V. Bhatnagar*



of the Respondent which he has done vide his Report vide dated 28.03.2019.

- (xiii) The Respondent in his submission dated 12.06.2019 has also stated that DGAP had wrongly taken separate rates for the same sized tiles twice. This fact cannot be considered since he has produced no documentary evidence before the DGAP to substantiate this claim. He also did not furnish any purchase data, neither before the DGAP not before the Authority despite being asked for the same by the Authority. His claim of size column in respect of the 39 items sizes being left blank in the calculation sheet of the DGAP also does not hold good since he did not provide the data of those 39 items sizes before the DGAP.
- (xiv) The Respondent has further questioned the methodology so adopted by the DGAP. We find that his contention regarding methodology is incorrect since the methodology adopted by the DGAP was the most apt and the Respondent's submissions questioning the DGAP's methodology have no basis, being without any documentary basis. The Respondent's submissions are nothing but an afterthought. The DGAP has conducted its investigation correctly and his calculations are acceptable in the facts and circumstances of the present case. The Respondent's claim regarding table given in the Para 23 of this Order also cannot be accepted due to non-availability of the purchase date and even the data of sales is based on the invoices which further do not corroborate the calculations now

*1/2/20*



given by the Respondent. Further, the invoices submitted by the Respondent did not have details viz. size, quality etc.

(xv) His further contention regarding the case of **Kerala State Screening Committee on Anti Profiteering Vs. M/s Win Win Appliances** in Case No. 20/2019 decided on 22.03.2019 is also incorrect and is not applicable in the present case since the facts of the above mentioned case are distinct from the instant case. It is also pertinent to mention here that while the Screening Committee conducts a mere prima-facie scrutiny of any complaint/application and verifies the evidence, if any, it is the DGAP which conducts thorough investigation into any matter related to Anti-Profiteering provisions. Therefore, the said contentions of the Respondent are not accepted.

(xvi) It is respectfully submitted that the case laws referred to in Para 25 which the Respondent has submitted cannot be relied upon since the present proceedings are under Section 171 of the CGST Act, 2017 which aims at protection of consumers and not about collection of taxes.

(xvii) The contention of the Respondent regarding the DGAP not properly investigating the instant case is also incorrect since the DGAP has properly investigated in line with the general principles adopted by this Authority.

(xviii) The contention of the Respondent regarding no restriction on accepting the profit according to Article 19 (g) of the constitution of India does not hold since the profit/loss etc. has no relevance in any proceedings under Section 171 of the

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CGST Act, 2017. Profiteering, as referred under the said Section does not have any correlation with profit.

- (xix) The contention of the Respondent regarding not giving him a fair opportunity in the interest of natural justice is also incorrect since he was given adequate opportunities of hearing but even then he did not submit the purchase invoices and other documents as desired by the Authority.
- (xx) The contention of the Respondent which is detailed in the Para 31 of the present order is also incorrect. In this context, we find that the Respondent had not cooperated during the entire period of investigation and had not submitted the requisite data at any point of time. During the proceedings of the Authority, such submissions of the Respondent are devoid of any meaning as at no stage the case was considered fit to be sent for re-investigation.

35. Based on the above facts it is established that the Respondent has acted in contravention of the provisions of Section 171 of the CGST Act, 2017 and has not passed on the benefit of reduction in the rate of tax to his recipients by commensurate reduction in the prices. Accordingly, the amount of profiteering is determined as Rs. 54,67,149/- as per the provisions of Rule 133 (1) of the CGST Rules, 2017. The Respondent is therefore directed to reduce the prices of his products as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017, keeping in view the reduction in the rate of tax so that the benefit is passed on to the recipients. The Respondent is also directed to deposit the profited amount of

*15/02/2019*



Rs. 54,67,149/- along with the interest to be calculated @ 18% from the date when the above amount was collected by him from the recipients till the above amount is deposited. The Respondent is further directed to refund an amount of Rs. 75/- ( $750 \times 1.28 = 960$  -  $750 \times 1.18 = 885$ ) to Applicant No. 1. along with the interest @ 18%. Since rest of the recipients in this case are not identifiable, the Respondent is directed to deposit the amount of profiteering of Rs. 27,33,537/- in the Central Consumer Welfare Fund (CCWF) and Rs. 27,33,537/- in the Uttar Pradesh State CCWF as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017, along with 18% interest. The above amount shall be deposited within a period of 3 months from the date of receipt of this order failing which the same shall be recovered by the Commissioner CGST/SGST as per the provisions of the CGST/SGST Act, 2017, under the supervision of the DGAP.

36. It is also established from the above facts that the Respondent had issued incorrect invoices while selling the above product to his recipients as he had incorrectly shown the base prices and had also compelled them to pay additional GST on the increased prices through the incorrect tax invoices which would have otherwise resulted in further benefit to the recipients. 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

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133 (3) (d) of the CGST Rules, 2017. Since he has not submitted his reply on the issue of penalty, therefore, in the interest of natural justice before imposition of penalty a notice is issued to him asking him to explain why penalty should not be imposed on him.

37. A copy of this order is sent to the Applicants, Commissioners CGST/SGST of Uttar Pradesh and to the Respondent free of cost. File of the case be consigned after completion.



Certified copy

*Bhupinder Batar*  
26/6/19

(Bhupinder Batar)  
Assistant Commissioner, NAA

Sd/-  
(B. N. Sharma)  
Chairman

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

Sd/-  
(R. Bhagyadevi)  
Technical Member

Sd/-  
(Amand Shah)  
Technical Member

File No. 22011/NAA/120/Adarsh/2019

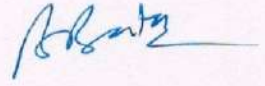
Dated: 26.06.2019

Copy to:-

1. Mr. Mohammad Azid Ramzani, Ramzani Villa, 404/7, A-Block, Dr. Zakir Hussain Colony, Hapur Road, Meerut, Uttar Pradesh-250002.
2. M/s Adarsh Marbles, Idgah Station Road, Near Jain Nagar, Meerut City, Uttar Pradesh-250001.
3. Commissioner of Commercial Taxes, Office of the Commissioner, Commercial Tax, U.P. Commercial Tax Head Office Vibhuti Khand, Gomti Nagar, Lucknow, Uttar Pradesh-226010.



4. Chief Commissioner of Central Goods & Services Tax, Meerut Zone Opp. CCS University, Mangal Pandey Nagar, Meerut, Uttar Pradesh- 250004.
5. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
6. NAA Website/Guard File.



**BHUPINDER BATAR**  
ASSISTANT COMMISSIONER  
NATIONAL ANTI-PROFITEERING AUTHORITY (GST)  
CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS  
MINISTRY OF FINANCE, NEW DELHI