

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

Case No. 74/2019
Date of Institution 20.06.2019
Date of Order 17.12.2019

In the matter of:

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

Applicant

Versus

M/s Krishna Trading Company, B-37, Vasant Kunj Enclave,
Nanda, New Delhi-110003.

Respondent

Quorum:-

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



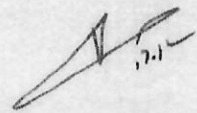
Present:-

1. Sh. Rana Ashok Rajneesh, Assistant Commissioner for the Applicant.
2. Mr. Ganesh Aggarwal, Authorised Representative and Mr. R. P. Jindal, Advocate for the Respondent.

ORDER

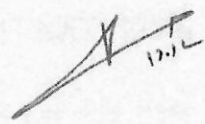
1. A Report dated 29.10.2018 was received from the above Applicant (here-in-after referred to as the DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received by the Standing Committee on Anti-Profiteering under Rule 128 (2) of the above Rules from the DGAP alleging that the Respondent had not passed on the benefit of reduction in the GST rate from 28% to 18% w.e.f. 15.11.2017 on the goods which he was supplying and he had maintained the prices at the pre-GST rate reduction level. In this connection, two invoices issued by the Respondent to M/s Raj Super Store, bearing No. KTCG30375 dated 14.11.2017 and KTCG633331 dated 05.12.2017 for supply of "Kit Kat 4 Finger 18" (here-in-after referred to as the product), were also received by the Committee. The above reference was examined by the above Committee and was referred to the DGAP, vide minutes of its meeting dated 13.04.2018 for detailed investigations under Rule 129 (1) of the CGST Rules, 2017.

2. The DGAP had called upon the Respondent to submit his reply on the above allegation and had also asked him to suo moto determine the quantum of benefit which had not been passed on by the Respondent after the GST rate reduction for the period w.e.f. 15.11.2017 to 31.05.2018. The Respondent had submitted replies vide his letters/e-mails dated 20.07.2018, 04.09.2018, 28.09.2018, 16.10.2018 and 22.10.2018 and submitted that he was working on a margin of 5%; that the infrastructure with respect to the billing, prices etc. was provided by M/s Nestle India Ltd.; that he had no authority to change or modify the said infrastructure and software; that he had no role in pricing of the goods; that the stock of the goods under investigation lasted maximum for a period of three to four days and the said stock was nil at the time of implementation of GST; that from 01.11.2017 to 14.11.2017 a trade promotion scheme was being run whereby a discount of 2% was offered on minimum purchases of Rs. 300/- leading to Rs. 22.27 being charged to the customer for the above product against the regular price without trade promotion of Rs. 22.73/-; and that though a benefit of 2.6% had been passed on the above product as against the effective benefit of 7.8% accruing at HSN level, higher benefit compared to the benefit accruing had been passed on to the customers on other product packs under the same HSN code and GST benefit commensurate with the reduction in tax rate had been passed on at an aggregate product HSN category level. The Respondent had submitted the following documents along with the reply:-



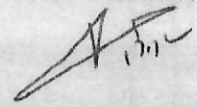
- a) Details of invoice-wise outward taxable supplies (other than zero rated) made to M/s Raj Super Store only for the product "Kit Kat 4 Finger 18" from 01.07.2017 to 31.03.2018.
- b) Copies of GSTR-1 and GSTR- 3B Returns from July, 2017 to May, 2018.
- c) The details of outward taxable supplies for the months of December, 2017 to May, 2018.
- d) The list of MRPs of the products effective pre and post 15.11.2017.

3. The DGAP vide his Report dated 29.10.2018 had submitted that from the invoices made available as detailed above, it was clear that the Respondent had increased the unit base price of the product in question from Rs. 17.40 to Rs. 18.76 when the rate of tax was reduced from 28% to 18%, so as to keep the cum-tax selling price almost the same as it was prior to rate reduction w.e.f. 15.11.2017. Regarding the Respondent's claim of discount offered under the trade promotion scheme, it was observed that a discount of 2% had been offered in the invoice No. KTCG30375 dated 14.11.2017. The discount was increased to 2.61% in the invoice No. KTCG33331 dated 05.12.2017. However, there was no mention in the invoice that the discount being offered was on account of GST rate reduction w.e.f. 15.11.2017, rather it appeared to be in the nature of trade discount being offered earlier.



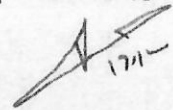
4. The DGAP had also submitted that total benefit of 2.6% passed on by the Respondent by way of discount post GST rate reduction, was not in conformity with the effective benefit of 7.8% that was required to be passed on to the recipients. He has further submitted that Section 171 (1) of the Central Goods and Services Tax Act, 2017 required that "a 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." Thus, the Respondent's contention that higher benefit compared to the benefit accruing had been passed on to the customers on other product packs under the same HSN code, was not acceptable and as a supplier registered under the GST (GSTIN 07AITPA0656R1ZO), it was the Respondent's statutory responsibility to pass on the benefit of reduction in the GST rate to his customers. The DGAP had also stated that by increasing the base price of the above product and more or less maintaining the pre-GST rate reduction cum-tax price, the benefit of the GST rate reduction was not passed on to the recipients.

5. The DGAP had also claimed that the Respondent had submitted the details of outward taxable supplies of all his products which revealed that the base prices of most of the products were increased after reduction in the tax rates w.e.f. 15.11.2017. He had further claimed that during the period from 15.11.2017 to 31.05.2018, the Respondent had supplied a total of 328 products (25 HSN codes), out of which 209 products (9 HSN codes) were impacted by the reduction



in the rate of GST from 28% to 18% w.e.f. 15.11.2017. Out of these 209 items, 21 were newly introduced products post GST rate reduction w.e.f. 15.11.2017 and out of the remaining 188 items (209-21), 17 items were not sold during the period from 01.11.2017 to 14.11.2017. He had also contended that the pre 15.11.2017 reference prices for these 17 items, had been taken from the price list for the period pre 15.11.2017, submitted by the Respondent vide e-mail dated 22.10.2018. He had further contended that out of the 188 items, it was found that the base prices of 116 products were increased and the base prices of 72 products were reduced post 15.11.2017, thus, out of total 209 items impacted by the GST rate reduction w.e.f. 15.11.2017, the base prices of 116 products were increased post 15.11.2017; the base prices of 72 products were reduced post 15.11.2017 and 21 products were newly introduced post 15.11.2017. The DGAP had also intimated that the amount of profiteering in respect of these 116 products supplied by the Respondent during the period from 15.11.2017 to 31.05.2018, came to Rs. 16,45,564.62/-, as per the details furnished in Annexure-16 of the his above Report. It was further intimated by the DGAP that all the supplies were made in the State of Delhi only.

6. The above Report was considered by this Authority in its sitting held on 13.11.2018 and it was decided to hear the interested parties on 28.11.2018. A notice was also issued to the Respondent on 13.11.2018 asking him to explain why the Report dated 29.10.2018 should not be accepted and his liability for violation of the provisions



of Section 171 of the CGST Act, 2017 should not be fixed. He was also asked to show cause why penal provisions under Section 29, 122-127 of the CGST Act, 2017 read with Rule 21 & 133 of the CGST Rules, 2017 should not be invoked against him. The above hearing was postponed to 11.12.2018 and again to 18.12.2018 on the Respondent's request. On 18.12.2018 Sh. Ganesh Aggarwal, Authorised Representative appeared on behalf of the Respondent. The DGAP was represented by Sh. Rana Ashok Rajneesh, Assistant Commissioner. The Respondent orally submitted that his billing software was fully managed/controlled by the manufacturer viz. M/S Nestle India Ltd. and he couldn't make any change in it except that of quantity. He further submitted that his godown had been sealed by the local Municipal Authorities and he was not in a position to produce relevant documents to defend his case. This Authority after considering his above request allowed him to file his reply on 08.01.2019 which was further extended to 16.01.2019 in the interest of justice. On 16.01.2019 Sh. R. P. Jindal, Advocate and Sh. Ganesh Aggarwal, Authorised Representative appeared on behalf of the Respondent and submitted that the impugned Report of the DGAP was based on misconception of law and erroneous understanding and application of the Anti-Profiteering provisions enshrined in Section 171 of the CGST Act, 2017 and he had passed on the GST benefit on account of the rate reduction consistent with the law. The rate reductions announced on 15.11.2017 and 25.01.2018 were with immediate effect and accordingly, he had carried out price reductions based on the price reductions made by the manufacturer M/s Nestle

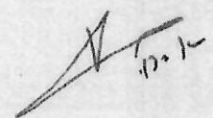
India Ltd. and there has been no profiteering whatsoever by him in the present case. He had further submitted that he was a distributor of M/s. Nestle India Ltd. and he was engaged in the distribution and sale of various food products including coffee, noodles, chocolate and confectionary etc., under well-known brand names like NESCAFE, MAGGI, KITKAT, etc., after purchasing the same from M/s Nestle India Ltd. He had also claimed that the GST rate on the products supplied by the Respondent was reduced from 28% to 18% or from 18% to 12% from 15.11.2017 vide Notification No. 41/2017-Central Tax (Rate) and in respect of certain other products, the rate of GST was reduced from 18% to 12% w.e.f. from 25.01.2018 vide Notification No. 06/2018-Central Tax (Rate). The Respondent had also stated that based on the same set of findings in respect of same set of products a Report had been submitted by the DGAP relating to M/s Nestle India Ltd., which was being contested by the above Company on diverse grounds. He had further stated that proceedings were pending before this Authority pursuant to the Report of the DGAP and hence, it would be in the fitness of things if the present proceedings initiated against the Respondent, who was a distributor of M/s Nestle India Ltd., were taken up for adjudication after the proceedings initiated against M/s Nestle India Ltd, were concluded. The Respondent also requested that the proceedings based on the impugned Report of the DGAP may be adjourned to a future date to await the decision in the proceedings initiated against M/s Nestle India Ltd. The Respondent's submission were forwarded to the DGAP for filing Report, who vide his Report dated 29.01.2019 had stated that the

Respondent had only denied the allegation of profiteering and had not raised any question of fact or law.

7. During the pendency of the present proceedings while examining the Annexures furnished by the DGAP vide his above Report it was observed that the DGAP had not given:-

- (i) The details of the products and the profiteered amount on which the rate of tax was reduced from 28% to 18% vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017.
- (ii) The details of the products and the profiteered amount on which the rate of tax was reduced from 18% to 12% vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017.
- (iii) The details of the products and the profiteered amount on which the rate of tax was reduced from 18% to 12% vide Notification No. 06/2018-Central Tax (Rate) dated 25.01.2018.

8. Therefore, vide order dated 24.04.2019 the case was sent back to the DGAP under Rule 133 (4) of the CGST Rules, 2017 for further investigation to furnish the details of the profiteered amount and the products on which the rates of tax were reduced. The DGAP vide his Report dated 19.06.2019 has submitted the details of the 116 products impacted due to GST rate reductions as follows:-



Notification No. and Date	Reduction in rate of tax	No. of Products impacted	Profiteering (in Rs.)
41/2017 dated 14.11.2017	28% -18%	81	14,62,981
41/2017 dated 14.11.2017	18% -12%	32	1,69,379
06/2018 dated 25.01.2018	18% -12%	3	13,199
Total		116	Rs. 16,45,559

9. We have carefully heard both the parties and have also gone through the record of the case placed before us and it has been revealed that the Central Govt. had reduced the rate of GST from 28% to 18% and from 18% to 12% vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 and from 18% to 12% vide Notification No. 06/2018- Central Tax (Rate) dated 25.01.2018 in respect of the products being sold by the Respondent, the benefit of which was required to be passed on to the recipients by the Respondent as per the provisions of Section 171 (1) of the above Act.



10. It is also revealed from the perusal of the tax invoices issued by the Respondent that he had sold the above product having MRP of Rs. 25/- at the discounted base price of Rs. 17.40/- vide invoice No. KTCG30375 dated 14.11.2017 when the rate of GST was 28% and at the price Rs. 18.76/- vide invoice No. KTCG633331 dated 05.12.2017 when the GST was reduced to 18% which showed that instead of reducing the base price due to reduction in the rate of tax he had increased it by Rs. 1.36 and hence, he had not passed on the benefit of tax reduction to his customers as is clear from the Table given below:-

Sr. No.	Invoice No. and date	Description of product	MRP (in Rs.)	Discounted Base Price (in Rs.)	Rate of GST	Price charged (inclusive of GST) (in Rs.)
1	KTCG30375 14.11.2017	Kit Kat 4 Finger 18	25	17.40	28%	22.27
2	KTCG33331 05.12.2017	Kit Kat 4 Finger 18	25	18.76	18%	22.13

11. The argument of the Respondent that his billing software was fully managed/controlled by the manufacturers viz. M/S Nestle India Limited and he couldn't make any change in it except that of quantity was not legally tenable because he being a registered person under the GST was legally bound to pass on the benefit of rate reductions in terms of Section 171 (1) of the CGST Act, 2017 which clearly stated

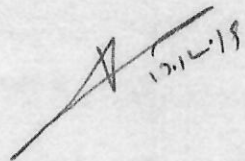
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that every registered person has to pass on the benefit of reduction in the rate of tax on any supply of goods and services to the recipients by way of commensurate reduction in prices.

12. The Respondent has vehemently argued that in respect of same set of products, findings of profiteering have been given by the DGAP relating to M/s Nestle India Ltd. which were pending before this Authority and therefore, the present proceedings initiated against him, as he was a distributor of M/s Nestle India Ltd., should be taken up after the proceedings initiated against M/s Nestle India Ltd. were concluded. The above argument of the Respondent does not hold good as the Respondent being a registered person was bound to pass on the benefit of tax reduction to his customers which he cannot deny to them on the ground that profiteering proceedings were pending against the above Company. The Respondent has admitted in his submissions that he was aware of the above tax reductions and hence he should have immediately reduced his sale prices commensurate with the rate reductions. He also cannot claim that he has not reduced the prices of the above 116 products as their prices were not reduced by M/s Nestle India Ltd. The Respondent has also not produced any evidence to prove that M/s Nestle India Ltd. had increased the prices after the rate reductions. There is also no evidence to suggest that the Respondent had raised the issue of price reductions with M/s Nestle India Ltd. after the tax reductions were notified, therefore, he cannot shift his responsibility to comply with the provisions of Section 171 (1) of the above Act on M/s Nestle India Ltd. Pendency of profiteering proceedings against M/s Nestle

India Ltd. also has no connection while determining accountability of the Respondent for profiteering under Section 171 (1) of the above Act as he is responsible for passing on the benefit on his own account. Granting of discounts also does not amount to passing on of the benefit of tax reductions as they have been given as a normal trade practice by the Respondent. The Respondent could also not have passed the benefit of tax reduction which was available on the purchase of one product on the other product as this benefit was required to be passed on every product to each customer who had purchased that product as per the provisions of Section 171 (1) of the above Act. Accordingly, the above contentions of the Respondent cannot be accepted.

13. It is clear from the narration of the facts stated above that the Respondent has indulged in profiteering in violation of the provisions of Section 171 (1) of the CGST Act, 2017 and has not passed on the benefit of reductions of tax given vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 and Notification No. 06/2018 dated 25.01.2018 in respect of the 116 products as per the details given in para supra to his customers and has thus profited an amount of Rs. **16,45,559/-** therefore, he is liable for action under Rule 133 of the CGST Rules, 2017, the relevant provisions of which state as under:-

 12/12/18

14. Accordingly, a sum of Rs. 16,45,559/- is determined as the profiteered amount in respect of the 116 products including an amount of Rs. 14,62,981/- which has been profiteered in respect of 81 products on which the rate of tax was reduced from 28% to 18% and an amount of Rs. 1,69,379/- on 32 products on which the GST was reduced from 18% to 12% w.e.f. 15.11.2017 and 3 products on which the tax rate was reduced from 18% to 12% w.e.f. 25.01.2018, as per the provisions of Rule 133 (1) of the CGST Rules, 2017. The Respondent is directed to reduce the sale prices of the above products immediately commensurate with the reductions in the rates of tax as were notified on 14.11.2017 and 25.01.2018 respectively and pass on the benefit of reductions in the rates of tax to his customers. Since the recipients in this case are not identifiable, the Respondent is directed to deposit the amount of profiteering of Rs. 8,22,779.50 in the Central Consumer Welfare Fund (CCWF) and Rs. 8,22,779.50 in the Delhi State CCWF as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017, along with 18% interest PA from the date from which the above amount was realised by the Respondent from his customers, as all the supplies were made in the State of Delhi. The above amount shall be deposited within a period of 3 months from the date 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.

15. It is also established from the above facts that the Respondent has profiteered an amount of Rs. 16,45,559/- as he has not passed on the benefit of tax reductions to his customers. It is also apparent that the

Respondent has deliberately and consciously acted in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and hence he is liable for imposition of penalty under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017. Keeping in view the principles of natural justice, before imposition of penalty, a notice be issued to him asking him to explain why penalty should not be imposed on him under the above provision. Accordingly, the show cause notice dated 13.11.2018 issued to the Respondent asking him to explain why penal provisions under Section 29, 122-127 of the CGST Act, 2017 read with Rule 21 & 133 of the CGST Rules, 2017 should not be invoked against him is withdrawn to that extent.

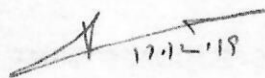
16. A copy of this order be sent to both the Applicant and the Respondent free of cost. File of the case be consigned after completion.

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

Sd/-
(Amand Shah)
Technical Member

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

Certified Copy


17.12.19

(A.K Goel)
(Secretary, NAA)



File No. 22011/NAA/103/Krishna/2018 / 7244
Copy to:-

Dated: 17.12.2019

1. M/s Krishna Trading Company, B-37, Vasant Kunj Enclave, Nanda, New Delhi-110003.

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

3. Guard File/Website.

