BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY UNDER

THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	13/2020
Date of Institution	09.09.2019
Date of Order	06.03.2020

In the matter of:

1. Sh. Rahul Sharma, M/s Local Circles India Pvt. Ltd., 2413, 4th Floor, Express Trade Tower-2, Sector-132, Noida-201301.
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s McNROE Consumer Products Pvt. Ltd., 3rd Floor, 16, N. S. Road, Kolkata-700001.

Respondent

Quorum:-

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

Present:-

1. None for the Applicants.
2. Sh. Tarun Gulati, Senior Advocate, Sh. Kumar Visalaksh, Advocate, Sh. Rajat Chabra, Advocate, Sh. Rahul Khurana, Advocate, Sh. Saurabh Dugar, Chartered Accountant and Sh. S. K. Taparia, Whole Time Director for the Respondent.

ORDER

1. The present Report dated 04.09.2019 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the present case are that the DGAP had received a reference from the Standing Committee on Anti-Profiteering on 27.03.2019 to conduct a detailed investigation in respect of an application dated 30.07.2018 (Annexure-1) filed by the Applicant No. 1 against the Respondent in respect of supply of Deodorant 'Wild Stone Deo Chrome BX 120 ml'. The Applicant No. 1 had stated that the above product had been shipped by the Respondent to M/s Big Bazar, Inderlok on 28.09.2017 under Purchase Order No. 8114615731 with the MRP of Rs 250/-, was again supplied on 04.12.2017 under Purchase Order No. 8115262327 with the MRP of Rs. 250/- and on 16.06.2018 it was again sold under Purchase

Order No. 4518224285 with the same MRP of Rs. 250/-. The above Applicant had alleged that the Respondent had not pass on the benefit of reduction in the GST rate from 28% to 18% w.e.f. 15.11.2017 which was reduced vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 in terms of Section 171 of the CGST Act, 2017 and instead, he had increased the base price of 'Wild Stone Deo Chrome BX 120 ml' Deodorant to maintain the same MRP of Rs. 250/-.

2. The DGAP in his above Report has stated that the Standing Committee in its meeting held on 11.03.2019 had examined the above said reference and it had referred the application to the DGAP for detailed investigation under Rule 129 (1) of the CGST Rules, 2017 to determine whether the benefits of reduction in the rate of tax or ITC had been passed on by the Respondent to his recipients or not.

3. Thereafter, the DGAP on receipt of the reference from the Standing Committee on Anti Profiteering, had issued a notice to the Respondent on 08.04.2019 (Annexure-2) under Rule 129 (3) of the above Rules, calling upon the Respondent to reply as to whether he admitted that the benefit of tax reduction had not been passed on to the recipients by way of commensurate reduction in prices and if so, to *suo-moto* determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents. The Respondent was also given an opportunity to inspect the non-confidential evidence/information

furnished by the Applicant No. 1 during the period from 15.04.2019 to 17.04.2019. However, the Respondent did not avail of the said opportunity.

4. The DGAP in his above Report has stated that the period covered by the current investigation was from 15.11.2017 to 31.03.2019. The time limit to complete the investigation was extended upto 26.09.2019 by this Authority vide its Order dated 19.06.2019 (Annexure-3) in terms of Rule 129 (6) of the CGST Rules, 2017.

5. The DGAP has also stated that in response to the notice dated 08.04.2019, the Respondent has submitted replies vide letters/e-mails dated 18.04.2019 (Annexure-4), 24.04.2019 (Annexure-5), 10.05.2019 (Annexure-6), 17.05.2019 (Annexure-7), 14.06.2019 (Annexure-8), 01.08.2019 (Annexure-9), and 08.08.2019 (Annexure-10) and has stated that:-

   a. He had reduced the prices of his products post rate reduction in GST vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 and the same had been duly communicated to all the channel partners. The said reduction was done w.e.f. 28.11.2017 due to the reason that till that date, he was analysing the impact of the above Notification on his products and was computing the revised MRPs and thereafter he had communicated the revised MRPs to his channel partners.

   b. He had also distributed stickers of the revised MRPs for putting them on the stocks available with the channel partners and all

the fresh sales made by him had been done on the reduced MRPs.

6. The DGAP in his Report has further stated that vide the aforesaid letters, the Respondent had submitted the following documents/information:-

   a. GSTR-1 & GSTR-3B Returns for the period from October, 2017 to March, 2019 for all the registrations held all over India.
   b. Details of invoice-wise outward taxable supplies during the period from July, 2017 to December, 2019.
   c. Price Lists (pre and post November, 2017) for all the products, specifically indicating the SKUs impacted by the GST rate reduction w.e.f. 15.11.2017.
   d. Sample copies of invoices issued to the dealers, pre and post 15.11.2017.

7. The DGAP in his report has also submitted that the reference from the Standing Committee on Anti-Profiteering, various replies of the Respondent and the documents/evidence placed on record had been carefully examined by him and the main issues to be examined were whether the Respondent had reduced the rate of GST from 28% to 18% on the goods supplied by him w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the

rate of GST had been passed on by the Respondent to the recipients, in terms of Section 171 of the CGST Act, 2017.

8. The DGAP has further mentioned that in respect of the issue of reduction in the rate of GST, it was observed that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the goods supplied by the Respondent from 28% to 18% w.e.f. 15.11.2017, vide S. No. 57A, and 60A of the Schedule III appended to the Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 (Annexure-11). This was a matter of fact which had also not been contested by the Respondent.

9. The DGAP in his report has further submitted that before enquiring into the allegation of profiteering, it was important to examine Section 171 (1) of the CGST Act, 2017 which governed the anti-profiteering provisions under the CGST Act, 2017 which reads as "*any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the DGAP has claimed that the legal requirement was abundantly clear that in the event of benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of the goods or services supplied. Such reduction in price could only be in terms of money, so that the final price payable by a recipient got reduced commensurate with the reduction in the tax rate or benefit of ITC. He has further claimed that this was the only legally prescribed mechanism to pass on the benefit of ITC or reduction in the rate of

tax under the GST regime and there was no other method which a supplier could adopt to pass on such benefits.

10. The DGAP has also reported that the Respondent had claimed that he had reduced the prices of all his products post rate reduction of GST vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 and the same was communicated to all the channel partners. The said reduction was done by him w.e.f. 28.11.2017 as till this date, he was analysing the impact of the Notification on his products and computing the revised MRPs. To verify the correctness of the Respondent's claim, the DGAP has compared the price of a particular product on different dates as per the data submitted by the Respondent. The details of the same have been furnished by the DGAP in the Table-A below:-

TABLE-A

S.No.	Vch. No.	Date	PLACE OF SUPPLY	GOODS DESCRIPTION	QTY (PCS)	Base Price (RATE/UNIT)
1	DEL/GTI-641	14/11/2017	Delhi	Affair (BS) 150ml	40	115.72
2	DEL/GTI-703	24/11/2017	Delhi	Affair (BS) 150ml	40	127.81
3	DEL/GTI-705	24/11/2017	Delhi	Affair (BS) 150ml	40	127.81
5	DEL/GTI-729	29/11/2017	Delhi	Affair (BS) 150ml	40	120.91
6	DEL/GTI-730	29/11/2017	Delhi	Affair (BS) 150ml	80	120.91
7	DEL/GTI-779	09/12/2017	Delhi	Affair (BS) 150ml	80	120.91

11. The DGAP has further reported that it was evident from the Table-A that the Respondent had increased the base price of the above product after GST rate reduction (post 14.11.2017) and then reduced the same but still kept the increased base price (i.e. Rs.

120.91 as against Rs. 115.72) as compared to the pre-GST rate reduction price. The DGAP has therefore, concluded that the claim of the Respondent was incorrect.

12. The DGAP in his Report has also stated that the next issue was to determine and quantify the profiteering made by the Respondent on account of not passing on the benefit of the reduction in the rate of GST on the goods supplied to the recipients, in terms of Section 171 of the CGST Act, 2017. As per the invoices submitted by the Respondent, the DGAP has observed that the Respondent had increased the base prices of the goods when the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017 and the commensurate benefit of GST rate reduction was not passed on to the recipients. On the basis of aforesaid pre and post-reduction GST rates and the details of the outward taxable supplies (other than zero rated, nil rated and exempted supplies) of all the products supplied during the period from 15.11.2017 to 31.03.2019, as furnished by the Respondent, the amount of net higher sales realization due to increase in the base prices of the impacted goods, despite the reduction in the GST rate from 28% to 18% or in other words, the profiteered has been computed as Rs. 21,94,96,828/- by the DGAP. The details of the computation have been given by him vide Annexure-12 attached to his Report. The DGAP has arrived at the above profiteered amount by comparing the average of the base prices of all the products sold by the Respondent during the period from 01.10.2017 to

14.11.2017, with the actual invoice-wise base prices of all the products sold during the period from 15.11.2017 to 31.03.2019 after the GST rate reduction from 28% to 18%. The excess GST so collected from the recipients by the Respondent, has also been included in the aforesaid profiteered amount as the excess prices collected from the recipients also included the GST charged on the increased base prices.

13. The details of place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. 21,94,96,828/- have been furnished by the DGAP in Table-B given below:-

Table-B

(Amount in Rs.)

Sr. No.	State	State Code	General Trade	Modern Trade	E-Commerce Trade	Final Profiteering
1	Jammu and Kashmir	1	2153988	4953	0	2158941
2	Himachal Pradesh	2	1788631	793	0	1789424
3	Punjab	3	5731053	1324990	0	7056043
4	Chandigarh	4	580131	500829	0	1080960
5	Uttarakhand	5	2070786	75635	0	2146421
6	Haryana	6	4097845	1979616	1746235	7823696
7	Delhi	7	9840759	2009376	1660	11851795
8	Rajasthan	8	13812919	1540627	0	15353546
9	Uttar Pradesh	9	22273117	1996219	0	24269336
10	Bihar	10	5698092	621167	0	6319259
11	Sikkim	11	319134	0	0	319134
12	Arunachal Pradesh	12	194462	0	0	194462
13	Nagaland	13	811158	0	0	811158
14	Manipur	14	382678	0	0	382678
15	Mizoram	15	232524	0	0	232524
16	Tripura	16	1095268	3409	0	1098677
17	Meghalaya	17	457750	0	0	457750
18	Assam	18	7164063	636054	0	7800117
19	West Bengal	19	11436665	351961	0	11788626
20	Jharkhand	20	4522384	690168	0	5212552

21	Odisha	21	11706772	1176834	0	12883606
22	Chattisgarh	22	8576800	0	0	8576800
23	Madhya Pradesh	23	24697908	528286	0	25226194
24	Gujarat	24	10138881	1753591	0	11892472
25	Maharashtra	27	19982374	7241984	1799	27226157
26	Karnataka	29	5798401	1574107	0	7372508
27	Goa	30	597649	5219	0	602868
28	Kerala	32	1209329	469677	0	1679006
29	Tamil Nadu	33	1751785	1115094	0	2866879
30	Puducheery	34	88797	0	0	88797
31	Telangna	36	4063323	2506843	0	6570166
32	Andhra Pradesh	37	5229373	1134903	0	6364276
Total			18,85,04,799	2,92,42,335	17,49,694	21,94,96,828

14. The DGAP in his Report has contended that in the present case, the base prices of the goods under investigation had indeed been increased post GST rate reduction w.e.f. 15.11.2017 and thus, by increasing the base prices of the goods consequent to the reduction in the GST rate, the commensurate benefit of reduction in the GST rate from 28% to 18%, was not passed on to the recipients by the Respondent. The total amount of profiteering covering the period from 15.11.2017 to 31.03.2019 has been worked out to be Rs. 21,94,96,828/-. Hence, in view of aforementioned findings, it has been claimed by the DGAP that provisions of Section 171(1) of the CGST Act, 2017 have been contravened by the Respondent in the present case.

15. The above investigation Report was received by this Authority from the DGAP on 09.09.2019 and was considered in its sitting held on 11.09.2019 and it was decided to accord an opportunity of hearing to the Applicants and the Respondent on 27.09.2019.

Notice was also issued to the Respondent directing him to explain why the Report dated 04.09.2019 furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. Only the Respondent appeared for the hearing wherein vide his submissions dated 04.12.2019, he has submitted :-

a. That the complaint was lodged in respect of the Deodorant 'Wild Stone Deo Chrome BX 120 ml', however, the DGAP has expanded the scope and investigated more than 250 products that too from different categories such as Perfumes, Talcum Powder and Shaving Creams etc. without the approval of the Standing Committee. He has also stated that the DGAP has investigated a different Deodorant which was in the name and style of "Affair (BS) 150 ml" for which no complaint has even been filed.

b. That as per Rule 129 (3) of the above Rules, the notice issued by the DGAP before start of the investigation should have *inter-alia* mentioned *"the description of the goods or services in respect of which the proceedings have been initiated"*. Specific requirement to mention the description of the goods or services was a clear indication of the fact that the proceedings could be initiated only in respect of those goods which were described in the notice. But in the present proceedings, the DGAP in his notice had nowhere mentioned that an investigation was being

initiated for all the products by giving description of the Perfumes, Talcum Powder, Shaving Creams and After-shave Lotions etc. Thus, the scope of the proceedings was restricted to the description of the product mentioned in the notice itself and could not be *suo-motu* expanded by the DGAP at a later stage.

c. That reliance was placed by the Respondent on the orders passed by this Authority in the following cases wherein the investigation had been restricted to the products against which the complaint was filed:-

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

d. That it was a settled principle in law that if the manner of doing a particular act was prescribed under any statute, that act must be done in the manner so prescribed or should not be done at all. Reliance in this regard has been placed on the case of ***State of Uttar Pradesh v. Singhara Singh*** wherein it was held that:-

"8. The rule adopted in Taylor v. Taylor [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act

and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory."

e. That the aforesaid principal was first laid down in the case of ***Taylor v. Taylor*** and thereafter was followed by Lord Roche in the case of ***Nazir Ahmad v. King Emperor*** who ruled as under:-

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

f. That the DGAP was mandated by the CGST law to follow a pattern of action while carrying out the investigation. Without any specific complaint, evidence or description whatsoever in the notice, the DGAP could not have *suo-motu* broadened the

scope of investigation to the products other than that which had been referred to him either by the Standing Committee or this Authority. It was for this reason that Rule 133 of the CGST Rules has been amended prospectively by insertion of sub-rule (5) vide *Notification No. 31/2019-Central Tax* dated 28.06.2019 by granting powers to this Authority and not to the DGAP, as it was this Authority which could actually expand the scope of investigation. In-fact, even in that scenario, this Authority has to record *reasons to* come to the conclusion that there was contravention of the provisions of Section 171.

g. That had the DGAP been given the powers to expand the scope of the investigation, there was no need to insert sub-rule 5 in Rule 133 granting power only to this Authority to expand the scope of investigation. Hence even after the amendment, it was only this Authority which had the power to expand the scope of the investigation, however, before this Authority did so, it was incumbent upon it to clearly record the reasons for the same.

h. That reliance was placed by the Respondent on the judgement passed in the case of ***Continental Commercial Corporation v. ITO*** wherein the Hon'ble Madras High Court while dealing with an amendment that expanded the jurisdiction of Income Tax Officer, had held that such an amendment must be prospective and could not have a retrospective effect. The

relevant extract of Para 6 of the judgment has been quoted below:-

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

income concealed did not exceed the sum of Rs. 25,000. In other cases it is the Inspecting Assistant Commissioner who would have jurisdiction to deal with penalty proceedings. Thus, those cases in which the income concealed was in excess of Rs. 1,000 but below Rs. 25,000 which were originally within the jurisdiction of the Inspecting Assistant Commissioner are now to be dealt with by the Income-tax Officer. The amendment had thus enlarged the jurisdiction of the Income-tax Officer. Being a question dealing with the jurisdiction of an officer to deal with a case we are unable to agree with the learned counsel that the amendment was retrospective in effect in the sense that it would apply even to a case where the offence or infringement was committed prior to the amendment."

i. That further in the case of ***Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board,*** the Hon'ble Supreme Court had declared that any substantive law shall operate prospectively unless retrospective operation was clearly made out in the language of the statute. Therefore, in the present proceedings even an endeavour by this Authority/DGAP to expand the scope shall be construed as *ultra vires* and bad in law.

j. That the issue of *suo-moto* assuming jurisdictional powers by the DGAP had far greater significance because the anti

profiteering provisions purport to have stigmatic and penal consequences. The same was also highlighted by the Hon'ble Bombay High Court in the recent case of ***Hardcastle Restaurants Pvt. Ltd. v. Union of India*** wherein, while guiding this Authority on the importance of fair-decision making, the Hon'ble Court has stated that the term profiteering was used under the CGST Act and Rules in a pejorative sense with penal consequences that even extended to cancellation of registration. Hence, the authorities (DGAP, NAA) ought to be circumspect while exercising their powers while undertaking investigation and issuing rulings.

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

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

l. That in the case of ***Reckitt Benckiser India Pvt. Ltd. v. Union of India*** the Hon'ble High Court of Delhi has directed that no information was required to be submitted to the DGAP other than the information pertaining to the goods under investigation. In other words, the DGAP could investigate only those products which had been referred to it either by the Standing Committee or this Authority. The relevant extract of the ruling given in the case of ***Reckitt Benckiser*** *(supra)* has been cited by the Respondent as under:-

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

m. That this Authority and the DGAP were creatures of the statute and had been conferred powers under the statute or under the rules. Their jurisdiction was circumscribed by the specific powers granted under the aforementioned provisions. Therefore, they did not have preliminary powers and could not confer on themselves additional jurisdiction other than what was provided under the law. In this regard, reference has been

made to the case of ***Northern Plastics Limited v. Hindustan Photo Films Mfg. Co. Ltd.*** wherein the Hon'ble Supreme Court *inter-alia* has held that the Tribunal being a creature of the statute and deriving its jurisdiction and powers from the statute could not venture into an exercise beyond the mandate of the statute.

n. That the Respondent has provided complete information/details as sought by the DGAP as a responsible corporate assessee to facilitate the investigation although all along, he had been fully aware of the expanded scope of the investigation in his case. This act by no stretch of imagination should be considered as an acquiescence of the fact that the DGAP had jurisdictional powers to investigate in respect of all the products.

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

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

p. That the Hon'ble Court while passing its decision in the case of ***Dalipur Construction*** *(supra) inter-alia* relied on the following decisions to enunciate that jurisdiction could not be conferred by consent or acquiescence:-

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

q. That the Standing Committee was legally bound to examine a complaint strictly within a period of two months from the date of receipt of such complaint in terms of Rule 128 of the Rules. However, the Standing Committee had not adhered to the time limit prescribed under Rule 128 of the CGST Rules. The DGAP through his notice dated 08.04.2019 had informed that the Standing Committee on Anti-Profiteering on 27.03.2019 had

directed the DGAP to conduct a detailed investigation in respect of a complaint dated 30.07.2018 *i.e.* the Standing Committee took nearly 8 months (from July' 18 to March' 19) instead of the prescribed time limit of 2 months to examine the complaint. The delay by the Standing Committee had a serious impact on the period of investigation adopted by the DGAP. If the Standing Committee had not taken 8 long months to examine the complaint, the period of investigation would have been much shorter.

r. That in addition to the above, reliance was placed on the judgement passed in the case of ***Singh Enterprises v. CCE.*** The issue raised before the Hon'ble Supreme Court was whether the High Court has power to condone the delay after the lapse of prescribed extension of 30 days. The Hon'ble Supreme Court in Para 8 *inter-alia* observed as under:-

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short "the Limitation Act") can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of

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

s. That as per the decisions in the cases of ***CCE v. Hongo India (P) Limited and Another, Amchong Tea Estate v. Union of India*** and ***Simplex Infrastructure Limited v. Union of India*** the period of limitation and the condonation period when

statutorily prescribed had to be strictly adhered to and could not be relaxed.

t. That the reference from the Standing Committee was even beyond the extended period of one month that could be allowed by this Authority. Further, it was apparent that the Standing months (to conclude investigation) by four times. It appeared that the delay was deliberate because on account of this unlawful delay, the DGAP was allowed an unfettered free play to expand the time period of investigation till March 2019 and had arrived at a stratospheric alleged profiteering amount of Rs. 21.94 Crore (approx.). A period of limitation prescribed by a Rule could not be diluted, more so when the delay had such grave financial implications.

u. That the use of word "shall" as used in Rule 128 was indicative of the seriousness which the Standing Committee ought to have attached to the prescribed timeline. The use of word "shall" in a statute denoted mandatory prescription. The strict requirement of two months was specified to ensure that the taxpayers should not be asked to produce documents and face enquiry after prolonged delay, as it would irreversibly affect their defence. Further, *vide* an amendment dated 28.06.2019, the said period of two months could be extended only for a month by this Authority with reasons to be recorded in writing. Understandably, the purpose of giving reasons in writing was to ensure that the power to extend the period of limitation was

exercised for valid reasons based on material considerations and that the power was not abused by irrelevant considerations or extraneous purposes.

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

"26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of

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

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

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

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

x. That similar proposition with regard to immunity to being subject to further investigation and extinction of the right of the officer to investigate on expiry of period of limitation had been espoused in the case *of* ***Bharat Heavy Electricals Limited v. CCT*** as well as in the case of ***Thirumalai Chemicals v. Union of India.***

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

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

question that the first respondent is duty bound to initiate proceedings within 90 days from the date of receipt of offence report, there are no two opinions, at least before me. Therefore, the decision of the Division Bench of the Delhi High Court is of no assistance to the respondents. Hence the first contention is to be upheld."

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

aa. That the CGST Act and the Rules made thereunder did not prescribe any procedure or mechanism for calculation of profiteering due to which the DGAP had arbitrarily adopted a methodology that best suited his motive. Given the absence of

knowledge of the basis on which the DGAP had to act, the Respondent was compelled to accept any procedure adopted by the DGAP and the opportunity of full defence to him was also curtailed. This was in violation of principles of natural justice. Further, as per Rule 126 of the CGST Rules, this Authority may determine the Methodology and the Procedure. However, in the present proceedings, the DGAP had used his own methodology and procedure to determine the alleged profiteering amount. This was in violation of the mandate given under Rule 126. The DGAP did not have the statutory power to determine the methodology and procedure that had to be considered while computing the profiteering amount.

bb. That till date this Authority has failed to determine any methodology and procedure in respect of the calculation of the profiteering amount. The 'Procedure and Methodology' issued on 19.07.2018 by this Authority only provided the procedure pertaining to investigation and hearing but no method has been notified/prescribed pertaining to calculation of profiteered amount and there has been no indication on how to conclude that there was profiteering due to change in the rate of tax and whether such computation has to be done invoice-wise, product-wise, business vertical-wise or state-wise etc. The statutory provisions, the CGST Rules and even the methodology prescribed was completely silent on the computation provision according to which it could be concluded

that a supplier has indulged in profiteering. The Respondent was left to the subjective discretion of the DGAP without any guiding factors/instructions or safeguards. In the absence of any guidelines in the statute or rules, the power given to this Authority to determine methodology was a case of *"excessive delegation"* of powers.

cc. That the same issue was also raised by the Advisor to the Chief Minister, Punjab as well as the Chief Economic Advisor in the 17th GST Council Meeting held on 18.06.2017.

dd. That this Authority in the case of M/s ***Jubilant Foodworks Ltd.*** has itself admitted in Para 47 that no methodology of calculation of profiteered amount could be fixed as parameters required to be taken into account would vary from industry to industry. The stance of this Authority that no methodology/guidelines could be prescribed for computing the profiteering amount was untenable. In the case of anti-dumping levies imposed under the Customs Tariff Act, 1975, there were broad guidelines on the basis of which the extent of dumping and anti-dumping duty was quantified. Even under the anti-dumping investigations, the products under consideration were from completely different industries, still, the general principles for determination of injury and dumping margins were well enshrined under the law and the rules made thereunder. In this regard, the principles for determination of injury, evidence of dumping and calculation of non-injurious price had been

provided in a detailed manner under the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

ee. That the Hon'ble Supreme Court in the case of ***Commissioner of Central Excise and Customs Kerala v. Larsen and Toubro Limited*** had held that in the absence of machinery provisions for computation of taxable value, the levy of tax would become non-existent. Reliance was also placed on the decision of the Hon'ble Supreme Court given in the case of ***Commissioner of Income Tax Bangalore v. B. C. Srinivasa Shetty***. The Apex Court while considering Section 45 of the Income Tax Act had held that in absence of methodology of computation, the charging section would fail the test of scrutiny. The anti-profiteering provisions were part of taxing statute and the same principles as enunciated in the judgments quoted above would apply on it. It was well settled in taxation law that the absence of the method of computation of quantum of tax payable would result in the levy being declared as invalid.

ff. That during the course of the prolonged investigation or even thereafter, the Respondent had never been put to notice or offered any reasoning (through grant of a hearing or otherwise) as to how the DGAP was going to derive profiteering. Non-provision of hearing by the DGAP before alleging profiteering against the Respondent was in gross violation of the principles

of natural justice. Reliance on the decision of the Hon'ble Supreme Court in the case of ***Automotive Tyre Manufacturers Association v. Designated Authority,*** was placed wherein the Directorate General of Anti-dumping and Allied Duties (DGAD) had passed an order without granting personal hearing to the parties and the order was quashed as it was found to be in violation of principles of natural justice. The relevant extract from the judgment is quoted herein below:-

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

gg. That the DGAP could not be given a free pass to compute profiteering in a random manner without paying any heed to the commercial/business realities or mathematical principles. There was a complete lack of transparency and a patent disconnect in the approach followed by the DGAP which varied from case to

case. For instance, in the present case, the DGAP had considered an exceedingly long period from 15.11.2017 to 31.03.2019 (nearly 1.5 years). No reasons whatsoever had been given in the impugned Report as to why such an extended period was specifically chosen and not any other period. Such an approach of the DGAP was violation of Article 14 of the Constitution and the concept of equality before law.

hh. That reliance was placed on the decision of the Hon'ble Supreme Court given in the case of ***Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors.*** wherein it was *inter-alia* observed that wherever there was arbitrariness in the State action, whether it be of the legislature or of the executive, Article 14 immediately sprang into action and struck down such action. Reliance was also placed upon the decisions in the cases of ***State of A. P. and another v. Nalla Raja Reddy and others & Kunnathat Thathunni Moopil Nair etc. v. State of Kerala and another*** in this regard.

ii. That in the absence of any prescribed mechanism to compute the "profiteering" coupled with inexplicable prolonged investigation of over 16.5 months when many other investigations were between 2 to 4.5 months clearly manifested arbitrariness and was violative of Article 14 of the Constitution.

jj. That earning profits through lawful means was not a sin. The provisions of Section 171 of the CGST Act could be triggered only in a case where a registered person made exorbitant

profits *albeit* by unlawful means. The term 'profiteering' was not defined anywhere under the GST law or the rules made thereunder; however, the marginal note to Section 171 stated "Anti Profiteering measure". It was a settled law that marginal notes could be referred for understanding the intention of the legislature. In this regard reliance was placed on the decision given in the case of ***Commissioner of Income Tax Gujarat v. Vadilal Lallubhai*** wherein the Hon'ble Apex Court had held that the *"marginal note also gives an indication as to what exactly was the mischief that was intended to be remedied."* Similarly, in the case of ***Indian Aluminium Company v. Kerala State Electricity Board*** the Hon'ble Supreme Court had held that marginal notes could be relied to show what the section was dealing with.

kk. That meaning of the terms "Profiteering" was provided as under:-

Profiteering	taking advantage of unusual or exceptional circumstances to make excessive profits	Black's Law Dictionary
	Make or seek to make an excessive profit	Shorter Oxford English Dictionary
	To seek or obtain excessive profits, one who is given to making excessive profits	Law Lexicon

ll. That the aforesaid definitions suggested that profiteering was only when a person made excessive, unreasonable or

exorbitant profits. The act of earning profits *per se* was not profiteering. In the present case, the Respondent had not made any exorbitant or unreasonable profits in an unlawful manner. Accordingly, it could not be said that the Respondent had profiteered.

mm. That as per the audited financial statements for the FY 2017-18 and FY 2018-19, even the actual profits earned by the Respondent were significantly lower than the alleged amount of profiteering:-

Financial Year	Profit After Tax (Rs.)
FY 2017-18	3.61 crores
FY 2018-19	4.31 crores
Total	**7.92 crores**

nn. That in view of the above, if the contention of the DGAP that the Respondent had profiteered to the extent of Rs. 21.94 Crore (approx.) was considered as genuine, it would mean that the Respondent would have incurred huge losses of approximately Rs. 14.02 Crore (Rs. 21.94 Crore – Rs. 7.92 Crore) had it not been involved in the alleged profiteering.

oo. That over the past 5 years, his profits had only gradually increased and there were no abnormal/exorbitant/excess/ unreasonable profits that could be attributed as profiteering. After meeting all expenses, the Respondent was able to earn meagre profits in relation to his sales. The profits of the

Respondent as a percentage of his sales ranged between 0.9 to 1% which was a sign that the Respondent was barely able to cover his costs. The same was evident from the audited annual financial statements of the Respondent. If the allegation of the DGAP was considered (without admitting), profiteering of Rs. 21.94 crores (approx.) should result in huge losses which could not be the intent of the law.

pp. That the Respondent has indeed reduced the MRP of the complained Deodorant from Rs. 250/- to Rs. 230/- per unit which was precisely in line with the reduction in the tax rate. Mathematically, the reduction in MRP could be represented as under:-

MRP / (1+Existing GST Rate) x (1+Revised GST Rate)

Rs. 250 / (1+0.28) x (1+0.18) = Rs. 230.47 (rounded off to Rs. 230)

qq. That as per a Study Report released by the Comptroller and Auditor General of India in June, 2010 which laid the ground for incorporating the anti-profiteering provisions under Section 171 of the CGST Act also mentioned about the need for reduction in the MRP pursuant to reduction in the VAT rates. The CAG was solely concerned by the fact that even after reduction in the VAT rates, the MRP or the price actually borne by the consumer had not been reduced by sellers.

rr. That in the case of ***Sh. Sandeep Puri v. M/s Johnson & Johnson***, this Authority has itself stated in Para 44 that the

intention of anti-profiteering legislation was to protect the interest of the consumers.

ss. That the Respondent has also relied upon the case of ***Pawan Sharma v. M/s Sharma Trading Company,*** wherein this Authority has stated that where the tax rate was reduced from 28% to 18%, the Respondent should have reduced the same amount (10%) by a mathematical calculation from the MRP at which goods were sold. Application of the said ratio to the present case clearly demonstrated that the Respondent had fulfilled this requirement by reducing the rate of tax charged from 28% to 18%.

tt. That he had passed on the entire benefit of reduction in the tax rate by way of reduction in MRPs. Further, in order to expedite the passing of benefit to the consumers by way of reduced MRPs, he had revised the older MRPs with new MRP stickers. The same was also communicated to all his channel partners *vide* letters and emails dated 27.11.2017 and/or 28.11.2017. He had also submitted the sample letters and e-mails sent to the distributors which were attached as Annexure-4. Sample invoices and sample purchase orders showing sale of the complained product at reduced MRP of Rs. 230/- was also attached as Annexure-5.

uu. That he had reduced the MRPs of the impacted goods *w.e.f.* 28.11.2017. In respect of the time limit required to pass on the benefit of rate reduction, the CGST Act did not provide any time

frame within which the commensurate reduction in prices had to be undertaken. Therefore, in the absence of any time period in the law, a reasonable time period was required to be given to bring the necessary reduction in prices pursuant to the GST rate reduction. Non-granting of any period for price revision would be unreasonable and an absurdity.

vv. That it was impossible to change the prices of the impacted goods overnight since there were practical issues as well as legal requirements which were required to be complied with. He had to check the old stock levels with his depots, distributors and retailers across the country, send communication to all his channel partners, print and distribute stickers with reduced MRP etc. All such activities took around 12-13 days and for these reasons, the MRPs of the impacted goods were reduced *w.e.f.* 28.11.2017, pursuant to the reduction in the GST rate from 15.11.2017. This was clearly a reasonable time frame for implementing the change in rate reduction.

ww. That the law could not force a man to do a thing which was impossible as was laid in the legal maxim of *"Lex Non Cogit Ad Impossibilia"* (the law did not expect a person to do the impossible). The said principle had been accepted and applied by the Hon'ble Apex Court in the case of ***State of MP v. Narmada Bachao Andolan*** wherein it was held as under:-

"40. Thus, where the law creates a duty or a charge and the party is disabled to perform it without any fault on his part and has no control over it, the law will in general excuse him."

xx. That the duty of reduction in the prices commensurate to the reduction in the rate of GST could not be forced upon him from the very next day and there must be an element of reasonableness. In the absence of any specific time period to reduce prices, a reasonable time had to be provided and hence the time period from 15.11.2017 to 27.11.2017 should be considered as a reasonable time required by the Respondent to reduce the MRPs of his products.

yy. That there were numerous other products in respect of which the MRPs were reduced pursuant to the GST rate reduction. The details have been furnished as under:-

Product Name	MRP as on	
	Pre GST reduction	Post GST reduction
Wild Stone Deo Chrome BX 120 ml (Subject Goods)	250	230
Wild Stone Ultra Sensual 40 ml	65	60
Wild Stone Ultra Sensual 150 ml	195	180
Wild Stone Night Rider 150ml	195	180
Wild Stone Forest Spice Spray Perfume 50ml	299	275

In respect of the above claim, the Respondent has alsp submitted sample invoices showing reduced MRPs (Annexure-6).

zz. That the provisions of Section 171 had been a double whammy for him. Despite the fact that the cost of the impacted goods had increased, he had to reduce the prices in order to comply with the law. He had precisely passed the benefit to the consumers by way of an absolute reduction in the MRPs of his products while under Section 171 of the CGST Act, he was only required to pass the benefit by way of "commensurate" reduction in prices.

aaa. That there was no time period prescribed under the CGST Act to check the period of investigation conducted by the DGAP. The DGAP has abused this freedom by considering the entire time period from 15.11.2017 to 31.03.2019 as the period of investigation. It was unconceivable that a business could not revise the prices for such a prolonged period of time.

bbb. That he had increased the MRPs of his products only *w.e.f.* 15.03.2018 due to several factors *viz.* (a) rise in cost (b) response to the pricing strategy of the competitors and (c) change in season, among others.

i. Rise in Cost:-

a. That he had to revise the prices of his goods due to increase in their cost. The cost of the impacted goods had increased in the manner tabulated below;-

Product	Particulars	01.07.2017 to 14.11.2017	15.11.2017 to 14.03.2018	15.03.2018 to 31.03.2018	FY 2018-19
Wild Stone Deo Chrome BX 120 ml	Cost p.u.	99	107	110	117
	% increase	-	8%	11%	18%

b. That a certified cost sheet showing rise in cost was attached as Annexure-7.

c. That reliance was placed on the decision of this Authority in the case of ***Kumar Gandharv v. KRBL Ltd.*** wherein this Authority had accepted that the price of Basmati rice was increased on account of various market factors including rise in purchase price of paddy and thus, there was no element of profiteering.

ii. Response to Pricing Strategy of Competitors:-

a. That he was dealing in lifestyle products where the perception of the consumers towards the brand was of utmost importance. The brand's equity was influenced by everything from the type of consumers who will buy the

product, to how much they were willing to pay for the product. In case the prices of the products were lower than that of the competitors, at times, such lower pricing was perceived to denote inferior quality of the product thereby affecting the brand equity in the market. Therefore, in order to maintain the brand equity, at times, it did become a necessity to respond to market forces including the pricing adopted by the competitors.

b. That it was necessary to respond to the pricing strategies of the competitors and as a fit business response, the MRPs of the goods were increased w.e.f. 15.03.2018. This was in tandem with the price moves of the competitors (sample invoices attached as Annexure-8). An illustration in this regard has been furnished by the Respondent as under:-

Competitor	Product	MRP pre GST rate reduction	MRP post GST rate reduction (Dec'17-Jan'18)	MRP Revision (Feb'18 - Mar'18)	Remarks
JK Helene Curtis Ltd.	Park Avenue Body Deo	199	199	199	The competitor maintained the same MRP post the GST

					rate reduction so there was no subsequent rise in MRP during Feb-March.
Vanesa Care Pvt. Ltd.	Denver Hamilton Deo	210	199	210	The competitor increased the MRP before onset of summers during Feb-March. It was incumbent upon the Respondent to raise MRP of the Subject Goods

c. That his competitors–M/s JK Helene Curtis Limited had maintained the same MRP of Rs. 199 on its "Park Avenue Body Deo 150 ml" deodorant even after reduction in the GST rate. Therefore he did not feel the need to further increase his prices during Feb-March'18 when the other competitors where raising their prices. The other competitor – M/s Vanesa Care Pvt. Ltd. had increased the MRP of his product "Denver Hamilton Deo 165 ml" before onset of summers during Feb-March'18 and thus, in order

to maintain brand equity, it was incumbent upon the Respondent to respond to the competition.

d. That such competitive market forces could not be ignored by this Authority and reduction in the tax rate could not be the sole determinant of price fixation. On the basis of the submissions made above, it could be seen that the price increase *w.e.f.* 15.03.2018 was made only in the ordinary course of business which could not be termed as an act of profiteering under Section 171 of the CGST Act.

iii. Change in Season:-

a. That the business of the Respondent was seasonal in nature with summers being the peak. Any revision in the prices, mostly happened either before the onset of summers (Feb-March) or the onset of winters (October-November). The Respondent when felt need to increase the prices, had accordingly increased the MRPs of the goods from 15.03.2018 *i.e.* before the start of next peak season. An illustration has been furnished by the Respondent in the Table given below which showed that even before the GST regime whenever there was a revision in prices, it had happened generally before the change in the seasons:-

Product	Change in MRP	Effective Month
Wild Stone Hydra Energy Deo 75 ml	From Rs. 95 to Rs. 99	February 2016
Wild Stone Ultra Sensual 75ml	From Rs. 85 to Rs.95	March 2014
UltraSensual After Shave Lotion	From Rs. 90 to Rs. 105	March 2014
Ultra Sensual Shaving Cream 30 gms	From Rs. 27 to Rs. 30	October 2015

b. That the sample circulars communicating the revised MRPs to the channel partner were attached as Annexure-9.

c. That the DGAP had completely ignored all the aforesaid commercial factors which had led to the MRP increase *w.e.f.* 15.03.2018 and had termed it as an act of profiteering. It was known that the pricing of a product was based on commercial factors including direct and indirect costs, inflation and customer perception etc. Hence, determination of ideal selling price of a product was much more complex and detailed than a simple arithmetic calculation.

d. That the provisions of Section 171 of the CGST Act could not restrict the right of the Respondent to increase prices in the normal course of business for such a prolonged period. The DGAP had assumed that the powers under Chapter XV of the CGST Rules were akin to price control

mechanism which sought to impinge on the fundamental right of the Respondent to decide the selling price of the goods.

e. That there were no guidelines regarding the period for which further prices could or could not be revised. As per the Impugned Report, the alleged profiteering figures had been calculated for the price increase had been undertaken upto the period of March 2019. This was completely arbitrary and directly in the teeth of settled principles of law. The DGAP had stretched the investigation to nearly 1.5 years and appeared to have formed an opinion that there could be no subsequent rise in prices of the goods consequent to the reduction of tax rate *w.e.f.* 15.11.2017. There was no rhyme or reason for the DGAP to adopt such a course or form such an opinion.

f. That the DGAP's Report was silent till when the increase in prices undertaken by the Respondent would be considered as profiteering. In the absence of any period of limitation, it would imply that any increase in prices by the Respondent would be considered as profiteering till the time he was in business. It meant that the Respondent was bound not to take commercial decisions *qua* the pricing of his products even if he had valid reasons to do

so. This was in violation of Article 19 (1) (g) of the Constitution.

g. That by computing profiteering for the period beyond 15.03.2018, the DGAP had infringed the right of the Respondent to decide the selling prices of his products because such revision in MRPs was in the normal course of business. It was an attempt by the DGAP to indirectly put a cap on the sale prices of the products being sold by the Respondent which violated his right to carry on trade as per Article 19 (1) (g) of the Constitution. By considering the price increase w.e.f. 15.03.2018 for computing profiteering, the DGAP had tried to step into the shoes of a price regulator and such an action implied that the Respondent could never increase the prices of his products pursuant to a GST reduction.

h. That the anti-profiteering provisions as well as the constitution of the DGAP were part of the taxing statute. The unfettered way in which the period of investigation had been stretched by the DGAP had brought the entire exercise into the realm of price regulation act. Without any explicit authority under the law passed by the Parliament or the State Legislature, the DGAP could not force a blanket mandate to keep the prices in check as the same was violative of freedom of trade and commerce. Reliance was placed on the case of ***Petroleum and Natural Gas***

Regulatory Board v. Indraprastha Gas Limited & Ors. wherein it had been held that in the absence of any statutory power to fix tariffs, a delegated authority could not frame regulations to cover the area pertaining to determination of tariffs and such regulations were held to be *ultra vires*.

i. That the price revision *w.e.f.* 15.03.2018 had happened only in the ordinary course of business and any period beyond such date should not be seen as contravention of Section 171 of the CGST Act.

ccc. That the base prices of the subject goods had been revised only on account of re-alignment in profit margins at the level of the intermediaries *i.e.* the distributors and retailers. The margin re-alignment was subjected to inter-party agreements executed between the Respondent and his distributors and retailers and the ultimate consumer was nowhere affected. The actual price payable by the consumer had indeed been reduced commensurate with the reduction in the GST rate.

ddd. That initially (on introduction of GST) he had increased the profit margins of the distributors and the retailers from 6% to 6.75% and from 15% to 17% respectively. The reason for increase in margins was the additional working capital blockage that the intermediaries (*i.e.* distributors and retailers) had to incur on account of increased payment of GST at the rate of 28%. In order to maintain the same return on investment by the

intermediaries, this was a business necessity. Subsequently, when the GST rate was reduced from 28% to 18%, there was reduction in the working capital blocked by the distributors and the retailers. Therefore, he had reduced the profit margins of distributors and retailers from 6.75% to 6.20% and from 17% to 15.50% respectively. The letters sent by the Respondent communicating the revised margin structure were attached as Annexure-10.

eee. That the revision in base prices was a mere re-alignment of margins commensurate with the change in the capital commitment of the intermediaries on account of change in rate of tax. It was a commercial arrangement agreed by the Respondent and the intermediaries *inter-se* while the consumer had derived the commensurate benefit from reduction in the GST rate. The re-alignment of margin should not be a cause of concern for the DGAP in a scenario where the MRPs paid by the consumers had reduced commensurate with the reduction in the GST rate.

fff. That it was nobody's case that Section 171 of the CGST Act restricted a supplier to revise the 'base price' of the products pursuant to a GST rate reduction. The law nowhere provided for doing a 'base price' comparison and it appeared that this practice of 'base price' comparison had been evolved *suo-motu* by the DGAP. The Respondent was well within his right to revise the base price of the product till such revision did not

take away the benefit of GST rate reduction from the customers. It was only to be seen if the benefit of reduction in the tax rate had resulted in commensurate reduction in prices of the goods paid by the consumers. The findings of the DGAP that the base prices of the product had not been reduced was of no consequence when the benefit had been passed on to the ultimate consumers by way of reduction in MRPs. Reliance has been placed on the decision given in the case of the **Kerala State Screening Committee on Anti-Profiteering v. Asian Paint Ltd.** wherein this Authority had held that increase in the base price on account of reduction in discount offered from dealer's margin did not amount to profiteering.

ggg. That the margins given to the intermediaries had reduced. In other words, the discount that was given to them had been trimmed which had accordingly resulted in a slight change in base prices of the impacted goods. Thus, it was submitted that such amount should be excluded from the amount of alleged profiteering. If the impact of reduction in the profit margins of intermediaries was considered, the alleged profiteering amount computed by the DGAP should be reduced by Rs. 2,73,07,915/-.

hhh. That he had passed on the commensurate benefit of reduction in the GST rate by way of reducing the MRPs and the DGAP had erred in considering the base prices in order to determine contravention of Section 171 of the CGST Act. Even

at a base price level, the computation by the DGAP was conceptually inaccurate. In this regard, the various instances have been summated by the Respondent hereunder:-

i. **<u>Averaging Prices at pan India Level was conceptually Inappropriate:-</u>**

a. That the DGAP in his impugned Report had considered the product-wise average base price for the base period at an all-India level and then compared it with the invoice-wise actual base prices during the Impugned Period. The said methodology was conceptually wrong as a single average base price across country for a product could not be taken when the prices for different depots (markets) might vary according to their respective economic dynamics (including factors such as (a) varied transportation, warehousing & logistics cost (b) competition pricing (c) varied market penetration strategies (d) credit period offered to various vendors (e) price elasticity of demand and (f) organizational objectives, among others). Sample invoices showing price variation at depots were attached as Annexure-11.

b. That in order to demonstrate the inaccuracies that the mechanism followed by the DGAP may throw up, the

Respondent has furnished an illustration as has been mentioned below:-

Product X	Before GST rate reduction		Post GST rate reduction		
Depot	Depot Avg. Base Price (A)	India Avg. Base Price as per DGAP (B)	Actual Base Price post GST rate reduction (C)	Notional Profiteering as per DGAP (D=C-B)	Actual Profiteering (E=C-A)
Patna	120	100	120	20	Nil
Hisar	80	100	80	-20*	Nil
Thane	100	100	100	0	Nil
Total				20	Nil

**Negative values have been set to '0' by the DGAP.*

c. That upon perusal of the illustration above, it was evident that in case of Patna depot the actual average base price of Product X was Rs. 120/- whereas when the base price was averaged for all the three depots (as per the methodology adopted by the DGAP) the average base price of Product X was Rs. 100. Now, if the actual base price post GST rate reduction was Rs. 120/- which was compared with the average all India base price of Rs. 100 computed by the DGAP, there was a notional profiteering of Rs 20/-. However, when the average base price at Patna depot (Rs. 120) was compared with the actual base price (Rs. 120) post GST rate reduction, there was no element of profiteering.

d. That if the calculation by the DGAP was done at the depot level alone, the alleged profiteering amount (without

admitting) should be reduced to Rs. 16,30,22,644/- (reduction by Rs. 5.64 Crore approximately).

ii. **Incorrect Inclusion of Modern Trade Buyers as General Trade Buyers:-**

a. That the profiteering amount had been computed for three categories of trade *viz.* (i) General Trade (ii) Modern Trade and (iii) E-Commerce Trade. In his computations, the DGAP had adopted separate average base prices for all the three categories. The DGAP had wrongly considered some of the customers under the category of General Trade instead of Modern Trade. This had a direct impact on the average base price considered and consequently on the amount of profiteering computed. For illustration purposes, the parties which belonged to the Modern Trade but had been wrongly considered under the General Trade by the DGAP are as under:-

S. No.	Buyers considered under General Trade instead of Modern Trade
1	Shree Ganesh Enterprises
2	M K Enterprises
3	Ramesh Sales Agencies' MT
4	Om Agency (MT)
5	Maa Enterprise
6	Shivam Enterprises
7	Mahaveer Agencies
8	Atharva Enterprises, Nasik
9	Swastik Distributors
10	Om Agencies (Thane)

b. That if the customers were rightly categorized under the Modern Trade, the alleged profiteering amount would be reduced by Rs. 13,22,335/-. The working of the same has been attached as Annexure-12.

iii. **The DGAP has ignored the negative values and resorted to 'zeroing' to yield higher profiteering:-**

a. That the DGAP while calculating the amount of alleged profiteering has ignored the transactions where the prices were effectively reduced. In essence, it meant that where tax benefit had been passed on to the customers by the Respondent (*w.r.t.* specific products) in excess of the required amount, the DGAP has conveniently chosen to ignore such instances. This effectively meant that the DGAP did not offset positive profiteering (Rs. 20) against the negative profiteering (-Rs. 20) (treating these as 'zero' for the purpose of profiteering) and had arrived at an inflated and arbitrary figure of profiteering.

b. That the DGAP could not on one hand consider the average for determining the base prices before GST rate reduction and ignore all the negatives after its comparison with post GST sale prices, as it would lead to artificially inflated alleged profiteered amount. This was popularly called 'zeroing' which had been held to be incorrect.

c. That the methodology of 'zeroing' as adopted by the DGAP was against the position adopted by the Government of India in the anti-dumping investigations. In 1999, India had challenged the European Commission on the model of zeroing. According to the said methodology, while calculating the dumping margin only those products were considered which were being dumped and those products which were not being dumped were not considered. The Government of India disputed this practice and had taken a stand against such methodology at the WTO and argued that while determining the dumping margin, all products should be taken into consideration rather than only those which showed positive dumping.

d. That reference was made to the Report No. WT/DS141/AB/R dated 01.03.2001 of the Appellate Body of the World Trade Organization, regarding anti-dumping duties on imports of cotton-type bed linen from India. In the said case, exporters from India who were exporting bed linen to EU faced an anti-dumping investigation by the EU. In some cases, the exporters were exporting at positive dumping margin, whereas in many cases there was a negative dumping margin. The European Commission applied its general practice of not netting off the positive and negative dumping margins. In fact, they applied 'zero' for negative dumping margins and calculated only positive

dumping margins and thereby arrived at a higher dumping margins for exporters from India. The Government of India objected to this approach of the European Commission and the matter was taken to the Dispute Settlement Body of the World Trade Organization which held in favour of Government of India. In an appeal filed by the EU, the Appellate Body held that the practice of not netting off of positive dumping and negative dumping margins was not correct. Thus, the Government of India had succeeded before the WTO Appellant Body which had held that the positive and negative dumping margins must be taken together. Post this landmark decision, European Commission had to give up the zeroing method in the bed linen case and other subsequent cases.

e. That the Government of India has consistently opposed the zeroing methodology before the WTO whereas the DGAP under the anti-profiteering provisions was taking completely opposite position when it came to the calculation of the so called 'profiteering'. Hence, it was requested to accept the method of 'netting off'. This was because the methodology adopted by the DGAP was contrary to the stand taken by the Government of India. In case 'netting off' was adopted by the DGAP in his working, the alleged profiteering amount shall be reduced by Rs. 2,52,84,303/-. The workings of the same have been attached as Annexure-13.

iv. **Wrong Inclusion of Sales Made from 15.03.2018:-**

a. That the DGAP had arbitrarily stretched the scope of the investigation till March 2019 and had formed an opinion that there could be no subsequent rise in prices of goods consequent to the reduction of tax rate *w.e.f.* 15.11.2017. At the cost of repetition, such revision in prices from 15.03.2018 had happened due to various commercial factors such as rise in costs, response to the price moves by competitors and change in the seasons.

b. That the period from 15.03.2018 (or at most 31.03.2018) should not be considered by the DGAP in his computations and the amount of alleged profiteering should be reduced by Rs. 8,40,67,476. The workings of the same have been attached as Annexure-14.

v. **Incorrect Addition of 18% GST as Profiteering Amount:-**

a. That while arriving at the total alleged profiteering amount, a notional 18% amount had been incorrectly added. The DGAP's Report has mentioned that the GST collected from the recipients was also included in the profiteered amount because the excess prices collected from the recipients also included the GST charged on the increased base prices. Since, the amount has

already been paid to the Government hence it could not be held that the Respondent had profiteered from such amount.

b. That Section 76 (1) of the CGST Act provided that if any person has collected any amount in the nature of tax but has not deposited the same with the Government he was liable to pay to the Government such amount irrespective of the fact whether the supplies for which such amount was collected were taxable or not. The provision reads as under:-

"Notwithstanding anything to the contrary contained in any order or direction of any Appellate Authority or Appellate Tribunal or court or in any other provisions of this Act or the rules made thereunder or any other law for the time being in force, every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to the Government, shall forthwith pay the said amount to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not."

c. That the inclusion of the GST would have been correct had the case of the DGAP been that the applicable GST

had been collected and kept by the Respondent and was not deposited with the Government. In this regard, reliance was placed on the case of ***R. S. Joshi Sales Tax Officer Gujarat v. Ajit Mills Limited*** wherein the Hon'ble Supreme Court had analysed the term "collected" in the context of Sales Tax legislation of Gujarat. It was observed in this decision as under:-

"Section 37(1) uses the expressions, in relation to forfeiture, "any sum collected by the person ... shall be forfeited". What does "collected" mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that "collected " means "collected and kept as his" by the trader."

d. That the amount of GST collected from the customers was a liability of tax (reflected under the head of 'Liabilities' in the Balance Sheet) which was subsequently deposited with the Government. The accounting treatment accorded to account for the applicable GST was as has been depicted below:-

Transaction	Journal Entry	Amount (Rs.)	Amount (Rs.)
Outward Sales - Creation of GST Liability	Customer A/c.....Dr.	118	
	To Sales Outward.....Cr.		100
	To IGST Tax Payable.....Cr.		18
Payment of GST Liability to Government	IGST Tax Payable .....Dr.	18	
	To Bank.....Cr.		18

e. That since the amount collected as GST from the recipients on alleged profiteering amount had already been deposited with the Government and there was no factual dispute on this aspect, inclusion of GST component again to calculate the alleged profiteering was incorrect. The Respondent had not profiteered from the GST collected from the recipients on behalf of the Government. In case the GST amount was included in alleged profiteering calculation, it would lead to double payment of GST to the Government.

f. That the addition of 18% GST to the average base prices should be excluded from the calculations. Due to this exclusion, the alleged profiteering amount should be reduced by Rs. 33,484,248/-. The workings of the same have been attached as Annexure-15.

vi. **Increase in Cost of Goods:-**

a. That he had revised the prices of the impacted goods *w.e.f.* 15.03.2018 as a normal business decision taking

into account various factors (as discussed above) including rise in cost of material, other direct and indirect costs and maintainability of brand equity etc. However, the DGAP had completely ignored such significant factors while determining the profiteering amount. This demonstrated complete lack of application of mind as regards the accounting/costing principles and business dynamics. It was a settled accounting principle (known as matching concept) that revenues had to be matched against corresponding costs/expenses in order to determine the appropriate profits.

b. That if the incremental cost before the GST rate reduction and post GST rate reduction was taken into account for the units sold during the impugned period, the total incremental cost (based on DGAP workings) would stand at Rs. 20,68,82,274/-. The workings of the same have been attached as Annexure-16.

vii. **Exclusion of Sales Returns:-**

a. That during the period of investigation, the Respondent had sales returned on various products but the DGAP had failed to exclude such sales from the profiteered amount which were returned by the customers. The Respondent had issued credit notes in respect of all such sales of

goods which had been returned and hence the transactions did not effectively amount to supply of goods. Therefore, such transactions and (deemed) margins made thereon would not fall under the ambit of Section 171 of the CGST Act. Further, the Respondent had not received any money for such sales which were returned and there was no question of making any profiteering.

b. That in the case of ***Grasim Industries Ltd. v. State of Kerala,*** the Hon'ble High Court of Kerala had held that sales returned meant a return of the very goods purchased by the buyer in whole or in part and it was a reversal of the sale, as if the sale had not taken place in respect of the returned goods.

viii. **Exclusion of Supplies to KCHP Technologies as they are Un-comparable:-**

a. That the goods sold to one of the buyers i.e. M/s KCHP Technologies Private Limited **(KCHP)** could not be considered by the DGAP while computing the amount of profiteering. There were apparent differences between the terms of trade with KCHP and the other distributors. A comparison of KCHP with the other e-commerce

distributors should be akin to comparing apples and oranges.

b. That the DGAP while arriving at the alleged profiteering amount had considered KCHP at par with other e-commerce distributors and had considered the average base prices for the products which were applicable to the other e-commerce distributors. However, the terms agreed with KCHP were more in the nature of a business partner where apart from the goods being sold to it, there were several other services that were provided.

c. That the pricing offered to KCHP could not be compared at par with the other e-commerce distributors. In-fact, the business partnership with KCHP was altogether at a different level and could not be compared with the other distributors under the General Trade or Modern Trade category. The differences were tabulated as under side by side:-

KCHP	Other Distributors
▪ Involved in product promotion at online marketplaces by way of display, banner etc	▪ No product promotion is done
▪ Directly caters to B2C segment when orders are placed on website "www.wildstone.in" and "www.ownyourtemptation.com"	▪ Not involved in B2C sales
▪ Responsible for carrying out regular maintenance of websites as well as data mining of customers	▪ No data mining and website maintenance is done
▪ Carries out product cataloguing for the entire portfolio across all digital platforms	▪ No product cataloguing is done
▪ Involved in photography supervision, content creation for all deos, perfumes etc.	▪ Not involved in any such services
▪ Provides digital marketing support by way of programming and designing banners/e-mailers etc.	▪ No digital marketing is done
▪ Credit period of 60 days is allowed	▪ No credit is allowed instead goods are sold on advance payments

d. That copy of the agreement dated 16.04.2018 entered between KCHP and the Respondent was attached as Annexure-17.

e. That KCHP had been made a business partner only from FY 2018-19 and there were no transactions with KCHP in the FY 2017-18. Given this, there were no pre-GST rate reduction prices that could be compared with the post GST rate reduction prices for KCHP. The sales made to KCHP should not be considered by the DGAP in his computations and in such a scenario, the alleged profiteering amount should stand reduced by Rs. 17,46,234/-.

ix. <u>Inclusion of Commercial Credit Notes and Freebies:-</u>

a. That the 'base price' comparison could not be adopted for computing or determining profiteering in terms of Section 171 of the CGST Act. Even if the base price was taken for the computations, the discounts given through credit notes and freebies should be reduced from the alleged profiteering amount. The DGAP had ignored such credit notes and freebies provided by the Respondent while arriving at the alleged profiteering amount.

b. That it was a known practice that discounts could also be given by way of credit notes and free items. It could not be said that only the discount which was shown at the invoice level should be allowed as a deduction and the discount which was provided through credit notes should be ignored. The Respondent had received only the net amount of the invoice *less* the discount given by way of the credit notes.

c. That in the case of ***Union of India v. Bombay Tyres International (P) Ltd.*** the Hon'ble Supreme Court *inter-alia* had held that discounts allowed in trade should be deductible from the sale price:-

"(1) Trade discounts - Discounts allowed in the trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price."

d. That in the recent case of ***Maya Appliances Private Ltd. v. CCT***, the Hon'ble Supreme Court *inter-alia* had held that the discount given at a point in time subsequent to original sale was a regular trade practice and therefore qualified for deduction from the taxable value.

e. That the Hon'ble Andhra Pradesh High Court in the case of ***Godavari Fertilizers and Chemicals Ltd. v. CCT*** had *inter-alia* concluded that a discount given by means of credit notes issued subsequent to the sale was as much a trade discount admissible to deduction in determining the turnover.

f. That on the basis of market trends and festival offers etc. discounts were provided by way of issuance of credit notes to the distributors in the normal course of business. Likewise, the Respondent had issued free items such as soaps etc. to distributors as incentives on a cyclical/trend basis. The value of commercial credit notes as well as the value of freebies given to the distributors should be excluded from the alleged profiteering amount.

iii. That that there was no computational methodology prescribed under the GST law to determine the amount of profiteering as envisaged under Section 171 of the CGST Act. The methodology currently followed by the DGAP while computing the alleged profiteering amount was principally inaccurate in as much as it did not take into account relevant accounting/costing

principles and critical factors such as (a) adjustments for value of sales return, rise in cost of goods sold and credit notes etc. (b) depot-wise comparison of pre and post GST rate reduction prices instead of pan-India average base prices and (c) a reasonable investigation period at the most till 14.03.2018.

jjj. That if all the above said irregularities were corrected, there was no profiteering whatsoever that could be attributed to the Respondent. The same has been demonstrated by the Respondent with the help of detailed working captured in the Tables given below:-

a. Scenario-1:- Considering the period from 15.11.2017 to 31.03.2019:-

Particulars (Depot-wise)	Amount (Rs.)
Period from 15.11.17 to 27.11.17	4,050,634
Period from 28.11.17 to 14.03.18	18,899,180
Period from 15.03.18 to 31.03.18	7,532,280
Period from 01.04.18 to 31.03.19	132,540,550
Sub-Total	**163,022,644**
Deductions on account of:	
Less: Sales Return	(767,363)
Less: Negative Profiteering	(3,943,436)
Less: Margin Re-alignment of Intermediaries	(21,410,842)
Less: Rise in Cost	(176,339,618)
Less: Credit Notes and Freebies	(269,295,509)
Less: Sales made to KCHP Technologies	(958,985)
Less: Party Swapping	(648,862)
Net Amount of Profiteering/(No Profiteering)	**(310,341,971)**

b. Scenario-2:- Considering the period from 15.11.2017 to 14.03.2018:-

Particulars (Depot-wise)	Amount (Rs.)
Period from 15.11.17 to 27.11.17	4,050,634
Period from 28.11.17 to 14.03.18	18,899,180
Total	**22,949,814**
Less: Negative Profiteering	(529,412)
Less: Margin Re-alignment	6,310,751)
Less: Rise in Cost	30,511,199)
Less: Credit Notes and Freebies	49,511,119)
Less: Party Swapping	(251,178)
Net Amount of Profiteering/(No Profiteering)	**64,163,845)**

16. Supplementary Reports were called from the DGAP on the above submissions of the Respondent. The DGAP vide his Reports dated 18.12.2019 and 10.01.2020 has submitted:-

i. That the mandate of Section 171 of the CGST Act, 2017 was very clear that any reduction in the rate of tax or the benefit of ITC has to be passed on to every recipient of goods or services by way of commensurate reduction in price and hence, this benefit has to be calculated for each and every product supplied. Therefore, the objective of Section 171 was to ensure that the benefit of reduction in the rate of tax or benefit of ITC has been passed on to the recipient and not retained by the supplier. The issue involved was that the Respondent did not pass on the benefit of reduction in the tax rate by not reducing the prices of the products commensurately to the recipients. If the investigation was restricted to the alleged product then the recipients/customers of the other impacted products, who had not made any complaint against the Respondent, would never

get the commensurate benefit from the Respondent. Further, the law did not stipulate to restrict the investigation only to the alleged product or to the complainant/applicant. He has given an example of the product "Affair (BS) 150 ml" to show how the profiteering was arrived at in the instant case.

ii. That the DGAP, under the provisions of Section 171 of the CGST Act, 2017 read with Rule 129 of the CGST Rules, 2017, has to conduct investigation as per the directions of the Standing Committee on Anti-profiteering and to submit Report of his findings to this Authority under Rule 129 (6) of CGST Rules, 2017. Therefore, the investigation was conducted within the scope of Section 171 of the CGST Act, 2017 on the basis of the information and documents collected from the Respondent and the Report of his findings had been submitted to this Authority. The DGAP was not bound to discuss his findings with the Respondent before submitting his Report to this Authority. Moreover, the DGAP was merely submitting Report of his findings to this Authority and was not deciding or adjudicating the case where under personal hearing was to be granted.

iii. That the product "Affair (BS) 150 ml" had been taken for example in the Report dated 04.09.2019. It did not imply that the profiteering was computed only on the goods illustrated in the example. Here the issue involved was that the Respondent had not passed on the benefit of reduction in the tax rate (reduced from 28% to 18% vide Notification No. 41/2017-

Central Tax (Rate) dated 14.11.2017) by not reducing the price of the impacted products commensurately to his customers. The Respondent was comparing two products which had nothing to do with the anti-profiteering measures defined under Section 171 of the CGST Act, 2017 read with Chapter XV of the CGST Rules, 2017.

iv. That the DGAP was not bound to seek clarification or approval from the Standing Committee which goods were to be included in the investigation. As per Rule 129 (1) of the Rules, it was clear that when Standing Committee referred the case to the DGAP for detailed investigation where the supplier had not passed on the benefit of reduction in the rate of tax on the supply of goods or services to the recipients by way of commensurate reduction in prices, then the investigation had to be carried out in detail on all the goods impacted by the rate reduction. The said Rule nowhere stipulated that the investigation was to be restricted to the alleged goods or DGAP should seek clarification or approval from the Standing Committee.

v. That the complaint was originally against one of the products of the Respondent. But few other products of the Respondent were also impacted by the said GST rate reduction Notification. Therefore, the DGAP has investigated all the goods impacted by the said Notification of rate reduction. The investigation carried out by him was very much in accordance with the intent

and spirit of the anti-profiteering provisions of the CGST Act, 2017 and Rules made thereunder.

vi. That as per Rule 126 of the CGST Rules, 2017, this Authority has been empowered to determine the Methodology and Procedure for determination as to whether the reduction in the rate of tax or the benefit of ITC had been passed on by the registered person to the recipients by way of commensurate reduction in prices. The said Rule nowhere stipulated that this Authority shall prescribe Methodology and Procedure to quantify the amount of profiteering. Thus, the extent of profiteering has to be arrived at on a case to case basis, by adopting suitable method based on the facts and circumstances of each case as well as the nature of goods or services supplied. Any uniform methodology for determination of the quantum of benefit to be passed on could not be adopted. As per Rule 126 of the Rules, the word used was 'determine' and not 'prescribe'. This Authority had already notified the Methodology and Procedure under Rule 126 on 28.03.2018. Hence, the Methodology and Procedure for determination of profiteering might vary from case to case, depending on the facts and circumstances of the case as well as the nature of goods or services supplied. Therefore, the cases quoted by the Respondent were different from the instant case.

vii. That Rule 133 of the CGST Rules, 2017 has been amended by insertion of sub-rule (5) (a) to cover the other goods which were

not covered in the DGAP's Report and in case this Authority has reasons to believe that there had been contravention of the provisions of Section 171 of the CGST Act, 2017, it has power to expand the scope of investigation in respect of the goods which were not covered by the DGAP in his Report under the above Rule. Therefore, the DGAP has conducted his investigation within the scope of Section 171 of the CGST Act, 2017 and the Rules made thereunder. In the instant case, since this Authority had not invoked the provisions of Rule 133 (5) (a) as amended vide Notification No. 31/2019-Central Tax dated 28.06.2019, there was no question of the retrospective effect of the same.

viii. That the Hon'ble High Court of Delhi vide Order dated 19.07.2019 in the W.P. (C) 7743/2019 has directed that, till the next date, the petitioner was not required to furnish the information to the DGAP other than the information pertaining to the complained product, accordingly the investigation was limited to the complained product only. However, the Hon'ble High Court in its next order dated 22.08.2019 has made its previous order dated 19.07.2019 absolute during the pendency of writ petition which was still pending before the Hon'ble Court. Therefore, the interim relief granted to the petitioner in that case could not be applied notionally to other cases of investigation.

ix. That initially an application dated 30.07.2018 was filed before the Standing Committee on Anti-Profiteering under Rule 128 of

the CGST Rules, 2017. The said application was returned to the Applicant for the want of proper invoices on the directions of the Standing Committee. The Standing Committee on Anti-profiteering again received the complaint in the month of February, 2019 and vide its meeting held on 11.03.2019, it was decided to refer the matter to the DGAP for a detailed investigation. This decision was received in DGAP's office on 27.03.2019 and accordingly a notice under Rule 129 of the CGST Rules, 2017 was issued to the Respondent on 08.04.2019.

x. That vide Notification No. 41/2017–Central Tax (Rate) dated 14.11.2017, the Central Government has reduced the tax rate from 28% to 18% on various consumer goods which was effective from 15.11.2017. Based on the facts and circumstances of the case, the investigation was carried out covering the period from 15.11.2017 to 31.03.2019, which was a reasonable period of time.

xi. That the act of profiteering has got nothing to do with the profit making or the loss making status of the supplier. Even a supplier having overall loss in his business could have profiteered by denying the benefit which ought to be passed on to the recipients. Even a loss making entity or supplier could indulge in profiteering and conversely, a profit making entity could pass on the due benefit to the recipients, in terms of Section 171 of the CGST Act, 2017. In the instant case, the

issue involved was that the Respondent did not pass on to the recipients the benefit of reduction in the tax rate by not reducing the prices of the products commensurately.

xii. That the legislative intent behind Section 171 of the CGST Act, 2017, was to pass on the benefit of tax rate reduction by way of commensurate reduction in price. Mere charging of GST at the reduced rate was not sufficient to pass on the benefit of tax rate reduction. Even when the GST was charged at the reduced rate, the benefit which ought to be have been passed on to the recipient, could still be denied by increasing the base price. MRP was the maximum price at which goods could be sold in retail. The value of transaction between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the MRP. Therefore, regardless of whether the MRP was required to be marked on the product or not, the pre and post-tax rate reduction transaction values were compared to determine profiteering. In case of closing stock carrying higher MRP, while the manufacturer was under statutory obligation to affix the addiction revised MRP, everybody in the supply chain was legally required to pass on the benefit of tax rate reduction by maintaining the base price and charging GST at the reduced rate on such base price. Therefore, under the provisions of the Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with reduction in the rate of tax, the cum-tax selling price

would remain unchanged. There was no significance of MRP in establishing any profiteering, especially when the transaction was not at the retail stage.

xiii. That the Report dated 04.09.2019 was submitted by the DGAP on the basis of category-wise sales data submitted by the Respondent. On due verification from the data submitted by the Respondent it was observed that the Respondent had classified the 10 buyers mentioned in his submissions 04.12.2019 under 'General Trade Category' and accordingly profiteering had been calculated.

xiv. That in the cases where the prices of the products were reduced more than what was required to, there would be no profiteering but this extra reduction of price could not be appropriated against the other products where the reduction was less or not at par with the commensurate reduction. Every recipient was eligible for his due benefit from the supplier. The benefit of one recipient could not be adjusted against the other recipient as it was against the mandate of the Section 171 of the CGST Act, 2017.

xv. That the legal requirement as per the law was that in the event of benefit of ITC or reduction in the rate of tax, there must be commensurate reduction in prices of the goods or services. The price would include both basic price and the tax charged on it. Therefore, any excess amount collected from the recipients, even in the form of tax, must be returned to the recipients. In

case, the recipients were not identifiable, the said amount was required to be deposited in the Consumer Welfare Fund (CWF). The Respondent, by way of increasing his prices, has forced his customers/recipients to pay extra tax which they were not liable to pay. Therefore, it was clear that the amount of extra tax (GST) on the increased base prices was an amount paid by the customers/recipients which they were not supposed to pay. If any supplier has charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively deposited in the Consumer Welfare Fund, regardless of whether such extra tax collected from the recipient had been deposited in the Government account or not.

xvi. That the Respondent had not submitted the documents related to the return of sold products. However, the benefit of the sales return could have been given if the Respondent had submitted the documentary evidence like sales return documents and credit notes etc.

xvii. That the Respondent had not submitted the details of terms of trade with M/s KCHP Technologies. Therefore, in the absence of any documentary evidence, the claim of the Respondent was not acceptable.

xviii. That the value for the purpose of Goods and Services had been defined in Section 15 of the CGST Act, 2017 which stated that the value shall be transaction value. Therefore, a document

after supply had been effected would be considered only if an agreement was there and it was specifically linked with the invoices and the ITC had been reversed by his recipients. Further the particulars which were to mentioned in the credit note were stated in Rule 54 (1) (A) of the above Rules. In the present case, since, the Respondent had failed to submit the copies of credit notes showing that this condition has been satisfied, the benefit could not be given to him.

17. The Respondent vide submissions dated 20.01.2020 has stated that a new vital fact had been brought to his notice by the DGAP in his supplementary Reports by stating that the present investigation was not started on the basis of the application dated 30.07.2018 but it was started on the basis of the application which was received in the month of February, 2019. The above fact was not mentioned by the DGAP in his notice or the Report and hence the present proceedings were not maintainable. He has also stated that the Hon'ble Supreme Court in the case of ***CCE Bangalore v. Brindavan Beverages (P) Limited*** has held that:-

"There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. The show cause notice is the foundation on which the Department has to build up its case. If the allegations in the show cause notice are not specific

and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice."

i. He has further stated that in the case of ***Shipli Enterprises v. CCE Allahabad***, it has been held that when factual information was not properly disclosed in the show cause notice, then such notice was vague and proceedings arising out of such notice were not sustainable in the eyes of law.

ii. He has also pleaded that the Hon'ble High Court of Calcutta in the case of ***Delta International Limited v. Commissioner of Customs*** has held that missing ingredients in show cause notice could not be incorporated even by High Courts and a notice had to be adjudged the way it was issued. In para 17 of the decision pronounced in the above case it had been stated as under:-

"17. The court in its appellate jurisdiction should not, on the basis of submissions made in the affidavit or in the notes of submission or from the bar, allow to incorporate the missing ingredients in the show cause notice. That is plainly impermissible. The show cause notice has to be adjudged the way it is issued."

iii. He has further placed reliance on the case of ***United Arab Shipping Agency Co. (I) P. Ltd. v. CC (Import),*** wherein complaint was filed by an importer before the Customs authority against the shipping company as the shipping company had denied moving the containers to a specific container freight station. Based on the complaint the Customs authority issued a show cause notice to the shipping company without enclosing a copy of the complaint. The Hon'ble Tribunal held such show cause notice issued by Customs authority as vague as neither complaint letter nor gist of allegation was contained therein which effected the right of the company to submit a proper response. Thus, the entire proceedings were vitiated on this ground alone.

iv. He has also requested to provide the following documents:-

- Date on which the complaint dated 30.07.2018 was returned by the Standing Committee.
- Copy of complaint filed in February 2019 along with its supporting evidences.
- Date on which the complaint was filed in the month of February 2019.

18. The Respondent has filed the following submissions on 27.01.2020:-

a. That the DGAP in his reply dated 18.12.2019 has stated that value of sales return should be excluded from the

amount of alleged profiteering once the Respondent submitted documentary evidence like sales return and credit notes etc. In this regard the Respondent has submitted documentary evidences vide Annexures 1 to 12.

b. That as per the DGAP's submissions dated 18.12.2019, it was observed that the complaint which was the basis of the present investigation against the Respondent was again received in February 2019. Therefore, the complaint was the very basis of investigation for jurisdictional facts and in the interest of justice and fair play, he should be supplied the connected documents.

19. Supplementary Report was also called from the DGAP under Rule 133 (2A) of the CGST Rules, 2017 on the submissions dated 20.01.2020 and 27.01.2020 filed by the Respondent. The DGAP vide his Report dated 27.02.2020 has stated:-

i. That after considering the sales return data submitted by the Respondent, the profiteered amount has been re-calculated and accordingly the revised profiteering analysis has been furnished in revised Annexure-12. The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. 21,84,79,790/- has been furnished by the DGAP in the below Table:-

S. No.	Row Labels	State Code	General Trade	Modern Trade	E-Commerce trade	Final Profiteering
1	Andhra Pradesh	37	5227562	1121697	0	6349258
2	Arunachal Pradesh	12	194462	0	0	194462
3	Assam	18	7138419	636054	0	7774474
4	Bihar	10	5692599	621167	0	6313766
5	Chandigarh	4	573872	0	0	573872
6	Chhattisgarh	22	8545118	500829	0	9045947
7	Delhi	7	9732859	1983347	1660	11717866
8	Goa	30	597649	5219	0	602869
9	Gujarat	24	10112053	1753591	0	11865645
10	Haryana	6	4097845	1962477	1746235	7806556
11	Himachal Pradesh	2	1749130	793	0	1749923
12	Jammu and Kashmir	1	2153988	4953	0	2158941
13	Jharkhand	20	4515539	688505	0	5204044
14	Karnataka	29	5796479	1536896	0	7333376
15	Kerala	32	1208947	456132	0	1665079
16	Madhya Pradesh	23	24634011	516543	0	25150554
17	Maharashtra	27	19899548	7193605	1799	27094952
18	Manipur	14	382678	0	0	382678
19	Meghalaya	17	457750	0	0	457750
20	Mizoram	15	232524	0	0	232524
21	Nagaland	13	800496	0	0	800496
22	Odisha	21	11652717	1162048	0	12814765
23	Puducherry	34	88797	0	0	88797
24	Punjab	3	5719747	1315455	0	7035203
25	Rajasthan	8	13760615	1539037	0	15299652
26	Sikkim	11	319134	0	0	319134
27	Tamil Nadu	33	1750656	1103957	0	2854613
28	Telangana	36	3974706	2502476	0	6477183
29	Tripura	16	1095268	3409	0	1098677
30	Uttar Pradesh	9	22138663	1995031	0	24133694
31	Uttarakhand	5	2070786	75635	0	2146420
32	West Bengal	19	11384660	351961	0	11736621
Grand Total			**187,699,280**	**29,030,817**	**1,749,694**	**218,479,790**

ii. Further, para-wise clarifications except those which have already been mentioned in the paras mentioned above, on the Respondent's additional written submission, submitted by the DGAP are as under:-

Para 2 to 17 The issue has already been addressed by the DGAP in his reply to Para 2.2 of his reply dated 18.12.2019 which is reproduced below:

Para 2.2 It is clarified that initially an application dated 30.07.2018 was filed before the Standing Committee on Anti-Profiteering under Rule 128 of the CGST Rules, 2017. On the directions of the Standing Committee, the said application was returned back to the Applicant for the want of proper invoices. The complaint was again received by the Standing Committee on Anti-profiteering in the month of February, 2019. The Standing Committee on Anti-Profiteering in its meeting held on 11.03.2019, decided to refer the matter to DGAP for a detailed investigation. This decision was received in DGAP's office on 27.03.2019 and accordingly a Notice under Rule 129 of the CGST Rules, 2017 was issued to the Noticee on 08.04.2019. However, further clarification if any, may please be sought from the Standing Committee on Anti-profiteering.

Para 18 to 25 The issue of time period has also been addressed by in reply to Para 2.3.10 to 2.3.15 of his reply dated 18.12.2019 which is reproduced below:

Para 2.3.10 to 2.3.15 The Government, vide Notification No. 41/2017 –Central Tax (Rate) dated 14.11.2017, reduced the tax rate from 28% to 18% on various consumer goods which was effective from 15.11.2017. An application dated

30.07.2018 was filed before the Standing Committee on Anti-Profiteering under Rule 128 of the CGST Rules, 2017. The said application was returned back to the Applicant for the want of proper invoices. The complaint was again received by the Standing Committee on Anti-profiteering in the month of February, 2019. The Standing Committee on Anti-Profiteering in its meeting held on 11.03.2019, decided to refer the matter to DGAP for a detailed investigation. This decision was received in DGAP's office on 27.03.2019 and accordingly a Notice under Rule 129 of the CGST Rules, 2017 was issued to the Noticee on 08.04.2019. Based on the facts and circumstances of the case, the investigation was carried out covering the period 15.11.2017 to 31.03.2019, which is a reasonable period of time.

Para 30 The issue of excess benefit passed on to the customers has also been addressed under reply to Para 3.4. (c) of this office's reply dated 18.12.2019 which is reproduced below:

Para 3.4.

(c) The mandate of the Section 171 of the CGST Act, 2017 is very clear which states that any reduction in the rate of tax or the benefit of input tax credit has to be passed on to the recipient by way of commensurate reduction in price. In other words, every recipient of goods or services has to get

the due benefit from the supplier. Therefore, in the cases where the prices of the products were reduced more than what was required to, in those cases though there would be no profiteering but this extra reduction of price cannot be appropriated with the other products where the reduction is less or not at par with commensurate reduction. Every recipient is eligible for his due benefit from the supplier. The benefit of one recipient cannot be adjusted with the other recipient.

Para 32 The submission of the Respondent has been considered and profiteering has been revised accordingly as stated under Para 2 above.

Para 33 to 35 The issue has already been addressed in his reply dated 18.12.2019 vide Para 3.4(h) which is reproduced below:

Para 3.4

(h) During the investigation, the Respondent did not make any such submission. Therefore, in absence of any documentary evidence, this claim of the Respondent is unacceptable at this point of time.

Further, the trade with KCHP is not substantially different with that of other distributors as it is primarily doing online product promotion which is not very costly.

Para 36 This issue has been addressed by this office in its reply dated 10.01.2020 which is reproduced below:

Para 3.4.

(b) **Incorrect inclusion of Modern Trade Buyers as General Trade Buyers:** - It is clarified that during the investigation, the Respondent had submitted category-wise sales data on the basis of which Report dated 04.09.2019 was submitted. On verification of the data/information submitted by the Respondent during the time of investigation, it has been observed that the Respondent had classified these 10 buyers mentioned in table of Para 3.4.7. under the 'General Trade Category' and accordingly profiteering has been calculated.

Para 37 to 39 The Respondent's averment is incorrect. In competitive market conditions every supplier is giving incentives and freebies to promote and increase his sales. These incentives and freebies were not given by the Respondent in lieu of the GST rate reduction. Now, claiming these incentives and freebies as passing on the benefit of rate reduction appears to be incorrect at this point of time.

20. The Respondent vide his submissions dated 03.03.2020 has stated that:-

a. Despite taking several extensions from this Authority, the DGAP has miserably failed to rebut his submissions. In fact, in the latest reply dated 27.02.2020, the DGAP has mostly

reiterated and quoted paragraphs in verbatim from his earlier replies.

b. Despite availing of repeated extensions, most of his submissions that were made at the time of oral hearings and/or by way of written submissions have been left unaddressed by DGAP, let alone being considered. Such submissions inter-alia included the following:-

- There cannot be any instance of profiteering when the ultimate price payable by the consumer has been reduced on account of reduction in MRP commensurate with reduction in tax rates;
- Revision in prices are on account of (a) rise in costs (b) response to pricing strategy of competitors and (c) change in season;
- DGAP cannot suo-moto expand the investigation scope to goods other than the subject goods in respect of which complaint was received;
- The period of investigation is extremely long and unreasonable even when Investigations in similar class of consumer products are considered;
- It is inappropriate to take average base price at pan-India level instead depot wise average base prices should have been adopted.

c. His right of a fair opportunity to defend is prejudiced by the very fact that the Respondent has not been provided with the complaint filed in February 2019 along with the new Invoices

that formed the entire basis of the present investigation. The gap for the first time in the Reply dated 18.12.2019 disclosed new material facts and the Respondent vide his additional written submissions and a letter dated 21.01.2020 sought connected information as under:-

- Date on which the Invalid complaint dated 30.07.2018 was retuned by the Standing Committee,
- Date on which complaint was filed again in the month of February 2019,
- Copy of complaint filed in February 2019 along with new supporting invoices (evidences curing the defect for which the earlier invalid complaint was returned),
- Minutes of the meeting held by the Standing Committee on 11.03.2019

21. This Authority has carefully examined the DGAP's Reports, the written submissions of the above Applicants as well as that of the Respondent. The issues to be decided by this Authority in the present case are as under:-

1) Whether the Respondent is liable to pass on the benefit of tax reduction w.e.f. 15.11.2017 to his buyers ?
2) Whether there has been any violation of the provisions of Section 171 of the CGST Act, 2017 by the Respondent?
3) If yes then what is the quantum of profiteered amount?

22. In this connection it would be appropriate to refer to the provisions of Section 171 of the CGST Act, 2017 which provide as under:-

"(1). *Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*

(2). The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether ITC availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3) The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

(3A) Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be

liable to pay penalty equivalent to ten per cent. of the amount so profiteered:

PROVIDED that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

Explanation:- For the purpose of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services of both."

23. It is revealed from the perusal of the record that the Central Government, on the recommendation of the GST Council, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017, had reduced the GST rate on a number of goods supplied by the Respondent from 28% to 18% w.e.f. 15.11.2017.

24. Perusal of the Report dated 04.09.2019 filed by the DGAP shows that the Respondent had claimed that he had reduced the prices of his all products post rate reduction of GST as announced vide the Notification dated 14.11.2017 and the same was duly communicated to all his channel partners. He has also claimed that this reduction was carried out w.e.f. from 28.11.2017 due to the reason that till that date he was analyzing the impact of the above Notification on his products and was computing the revised

MRPs. To verify the above claim made by the Respondent the DGAP has examined the prices of his product "Affair BS 150 ml" as per the data submitted by him for different dates as has been illustrated in the following Table-A: -

Table-A

S.No.	Vch. No.	Date	PLACE OF SUPPLY	GOODS DESCRIPTION	QTY (PCS)	Base Price (RATE/UNIT)
1	DEL/GTI-641	14/11/2017	Delhi	Affair (BS) 150ml	40	115.72
2	DEL/GTI-703	24/11/2017	Delhi	Affair (BS) 150ml	40	127.81
3	DEL/GTI-705	24/11/2017	Delhi	Affair (BS) 150ml	40	127.81
5	DEL/GTI-729	29/11/2017	Delhi	Affair (BS) 150ml	40	120.91
6	DEL/GTI-730	29/11/2017	Delhi	Affair (BS) 150ml	80	120.91
7	DEL/GTI-779	09/12/2017	Delhi	Affair (BS) 150ml	80	120.91

25. it is evident from the Table-A that the base price of the above product was Rs. 115.72 per unit on 14.11.2017 before the tax reduction and it was increased to Rs. 127.81 per unit on 24.11.2017 after the rate reduction. The base price was reduced to Rs. 120.91 per unit on 29.11.2017 and was maintained as Rs. 120.91 per unit on 09.12.2017. But still the base price of Rs. 120.91 was higher than the base price of Rs. 115.72 which was prevalent before 15.11.2017 and which was required to be maintained by the Respondent post rate reduction. Therefore, it is clear that the Respondent has not maintained the pre rate reduction base prices of his products which he was legally required to maintain to pass on the benefit of rate reduction instead he had increased them post rate reduction and then again reduced them but not commensurately.

26. The DGAP on the basis of the pre and post-reduction GST rates and the details of the outward taxable supplies (other than zero rated, nil rated and exempted supplies) of all the products supplied by the Respondent during the period from 15.11.2017 to 31.03.2019, as furnished by him, had originally calculated the amount of net higher sales realization due to increase in the base prices of the impacted goods, despite the reduction in the GST rate from 28% to 18% or in other words, the profiteered amount as Rs. 21,94,96,828/-. However, the DGAP vide his supplementary Report dated 27.02.2020 has revised the profiteered amount to Rs. 21,84,79,790/- after re-examining some of the contentions of the Respondent. The details of the computation have been given by the DGAP in Annexure-12 and revised Annexure-12. The excess GST so collected from the recipients, has also been included in the aforesaid profiteered amount as the excess prices collected from the recipients also included the GST charged on the increased base prices.

27. Perusal of Annexure-12 shows that the DGAP has calculated average base prices of all the products which were being supplied by the Respondent, distribution channel wise viz. CSD, E-Commerce, General Trade and Modern Trade, in respect of which the rate of tax was reduced e.g. in respect of the General Trade Channel base prices of 203 products have been calculated out of which in respect of 102 products the average base prices have been computed on the basis of the actual supplies made by the Respondent w.e.f. 01.11.2017 to 14.11.2017. In respect of 93 products the average

prices have been mapped from the similar products and in respect of 8 products the average base prices have been computed on the basis of the prices which were charged by the Respondent during the month of October, 2017 as no supplies of these products had been made during the period from 01.11.2017 to 14.11.2017. These base prices were compared by the DGAP with the actual base prices charged by the Respondent between the period from 15.11.2017 to 31.03.2019 and it was found by him that the Respondent had charged more base prices than what were prevalent during the pre rate reduction period. The DGAP has computed the profiteered amount separately for the supplies made by the Respondent to the CSD Canteens, E-commerce Platforms, General Trade and Modern Trade as the Respondent had charged different base prices to each of them.

28. The DGAP has compared the average pre rate reduction base prices with the actual post rate reduction prices due to the reasons that (i) it was not possible to compare the average base prices pre and post rate reduction as the post rate reduction the benefit has to be legally passed to each buyer on the actual transaction value received by the Respondent from each of such buyer (ii) it was also not possible to compare the actual to actual base prices pre and post rate reduction as the same buyer may have not purchased the same product during both the above periods and some of the buyers may have purchased some products during the post rate reduction period and not during the pre rate reduction period or vice versa (iii) the Respondent had

charged different base prices to his customers during the pre rate reduction period and therefore, the only alternate available was to compute the average base prices for the above period so that comparison could be made with the post rate reduction actual base prices (iv) the average pre rate reduction base prices have been computed for a very short period of 14 days which almost gives representation of actual base prices charged during the pre rate reduction period (v) in respect of those products where no sales had been made during the above period of 14 days prices mentioned in the price lists issued by the Respondent himself have been taken and (vi) in respect of only 8 products base rates prevailing during the month of October have been considered. The above methodology adopted by the DGAP to compute the profiteered amount is in consonance with the methodology determined by this Authority in the cases decided by it till date and hence the same is held to be reliable, reasonable, appropriate, legal and binding on the Respondent in terms of Section 171 of the above Act.

29. That the Respondent has stated in his submissions that the complaint was lodged in respect of the Deodorant 'Wild Stone Deo Chrome BX 120 ml'. However, the DGAP has expanded the scope and investigated more than 250 products without having power to do so. In this connection it would be relevant to refer to Section 171 (1) and (2) of the CGST Act, 2017 which state as under:-

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"(1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.

(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him."

30. It is clear from the perusal of the above Sub-Sections that the benefit of tax reduction or ITC is to be passed on by each registered person by commensurate reduction in prices on each supply to every recipient by commensurate reduction in the prices and this Authority is empowered to examine whether these benefits have been passed on or not. To assist this Authority an investigating agency designated as the DGAP has been created under Rule 129 of the CGST Rules, 2017 to conduct detailed investigation and submit Report to this Authority under Rule 129 (6) to determine whether the above benefits have been passed or not in terms of Section 171 (1) and Rule 133 (1) of the above Rules. Under Rule 129 (2) the DGAP has mandate to conduct investigation and collect necessary evidence to determine whether these benefits have been passed on. Further, the Government of India, Ministry of

Finance, Department of Revenue, Central Board of Indirect Taxes and Customs vide its Office Order No. 05/Ad.IV/2018 dated 12.06.2018 in pursuance of the Government of India (Allocation of Business) 34th Amendment Rules, 2018 has assigned the following duties to the DGAP:-

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

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

31. Therefore, it is clear from the above provisions that the office of the DGAP has been charged with the responsibility of conducting detailed investigation to collect evidence necessary to determine whether both the above benefits have been passed on or not in terms of the provisions of Section 171 of the CGST Act, 2017 and the Rules made there under. The above Rules have been framed by the Central Government under Section 164 of the CGST Act, 2017 which has approval

of the Parliament and all the State Legislatures and of the GST Council which is a constitutional body established under 101st Amendment of the Constitution and the express approval of the Central Government and the State Governments. There is no provision in the above Act or the Rules which provides that the investigation shall be limited to the products against which complaint has been received. On the contrary every product on which the rate of tax has been reduced is required to be investigated by the DGAP and report submitted to this Authority to determine whether the above benefits have been passed on as per the provisions of Section 171 of the above Act. The Respondent cannot get away by appropriating the benefit which he is legally bound to pass, on the ground that no complaint has been made in respect of the other products, as the benefit is not to be paid by him out of his own pocket, since it has been granted from the public exchequer to benefit the common consumers. Therefore, the above claim of the Respondent is not correct and hence the same cannot be accepted.

32. The Respondent has further stated that the DGAP has investigated a different Deodorant "Affair (BS) 150 ml" for which no complaint has been filed instead of the Deodorant "Wild Stone Deo Chrome BX 120 ml" against which the complaint has been filed. Perusal of the Report of the DGAP shows that the above Deodorant has been examined as an illustration by

the DGAP to establish that the Respondent had not reduced the base prices after the rate reduction w.e.f. 15.11.2017. The DGAP has also investigated the Deodorant "Wild Stone Deo Chrome BX 120 ml" and therefore, the above contention of the Respondent is incorrect.

33. The Respondent has also claimed that as per Rule 129 (3) of the above Rules, the DGAP had not mentioned *"the description of the other goods or services"* other than "Wild Stone Deo Chrome BX 120 ml" Deodorant in his notice and hence he could not have investigated the other products. Perusal of the notice dated 08.04.2019 issued by the DGAP for initiating investigation shows that it no where stipulates that the investigation would be restricted to the above Deodorant only. Para 2 of the above notice clearly states that the Respondent was required to furnish his reply stating whether he admitted that the benefit of reduction in the rate of tax from 28% to 18% w.e.f. 15.11.2017 has not been passed on to the recipients by way of commensurate reduction in price and he should also suo moto determine the quantum of benefit not passed on. Vide para 4 of the notice the Respondent was also asked to furnish invoice wise details of all the outward taxable supplies of all the products made during the period from 01.10.2017 to 31.03.2019 and copies of GSTR-1 and 3B Returns for the above period. Therefore, it is apparent that the DGAP had duly put the Respondent on notice that he would be investigating all

the products which were being supplied by him and which had been impacted by the tax reduction. The DGAP could not have restricted his investigation to the above Deodorant only as he was legally bound to investigate all the products as per the provisions of Section 171 and Rule 129.

34. In this connection the Respondent has placed reliance on the following cases decided by this Authority:-

- ***Rishi Gupta v. M/s Flipkart Internet Pvt. Ltd. 2018 (7) TMI 1490.***
- ***Ankur Jain v. M/s Kunj Lub Marketing Pvt. Ltd. 2018 (10) TMI 510.***
- ***Sandeep Puri v. M/s Glenmark Pharmaceuticals Ltd. 2019 (10) TMI 934***

Perusal of the order passed in the case of ***Rishi Gupta v. M/s Flipkart Internet Pvt. Ltd.*** supra shows that in this case the Respondent was only an intermediately and he was not supplier of the goods and hence there was no ground to investigate all the products being supplied by him. In the cases of ***Ankur Jain v. M/s Kunj Lub Marketing Pvt. Ltd.*** and ***Sandeep Puri v. M/s Glenmark Pharmaceuticals Ltd.*** supra there was no evidence on record which could lead this Authority to order further investigation and hence the above cases are of no help to the Respondent.

35. The Respondent has also relied on the cases of ***State of Uttar Pradesh v. Singhara Singh*** **AIR 1964 SC 358** and ***Nazir Ahmad v. King Emperor*** **AIR 1936 PC 253**. However, it is respectfully submitted that the DGAP has acted completely in consonance with the provisions of Section 171 and Rule 129 and has also issued notice to the Respondent before initiating investigation and hence the above cases are not being relied upon.

36. The Respondent has further claimed that the DGAP could not have suo moto expanded the scope of investigation as only this Authority could do so in terms of Rule 133 (5a) inserted vide amendment dated 28.06.2017. In this connection it would be relevant to mention that under the provisions of Section 171 (2) quoted above this Authority had inherent power to examine all the products in respect of which benefit of tax reduction or ITC is to be passed on in terms of Section 171 (1) even before the amendment dated 28.06.2019 was brought. The above amendment only explains the provisions of Section 171 (2) further to make them more explicit. As mentioned above the DGAP as investigating arm of this Authority has mandate to investigate all infringements of the above Section as per the provisions of Rule 129 as well as the Office Order dated 12.06.2018. Therefore, the DGAP is bound to investigate all the products on which the rate of tax has been reduced and therefore, there is no question of his expanding the investigation suo moto. Hence, the above argument of the Respondent is not tenable.

37. The Respondent has also cited the judgements passed in the cases of ***Continental Commercial Corporation v. ITO* (1975) 100 ITR 170** and ***Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board* (2012) 7 SCC 462** in his support. In this connection it is submitted that the DGAP has mandate to investigate all the products in the case of which the rate of tax has been reduced in terms of Section 171 as well as Rule 129 and hence, the above cases are not applicable in the facts of the present case. The judgement passed by the Hon'ble High Court of Bombay in the case of M/s ***Hardcastle Restaurants Pvt. Ltd. v. Union of India* 2019 SCC Online Bom 3113** is based on distinguishable facts and hence the same cannot be relied upon in this case. The case of ***State of Jharkhand v. Ambay Cements (2005) 1 SCC 368*** also does not help the cause of the Respondent as the DGAP has conducted the investigation strictly as per the provisions of Section 171 read with Rule 129.

38. The Respondent has also quoted the case of ***Reckitt Benckiser India Pvt. Ltd. v. Union of India* 2019 (7) TMI 1135** in his support. However, it is submitted that no such order has been passed in the present case and hence the Respondent cannot claim any benefit of the same. In this regard, reference has also been made to the case of ***Northern Plastics Limited v. Hindustan Photo Films Mfg. Co. Ltd.* 1997 (91) ELT 502 (SC).** However, it is clear from the facts narrated above that this Authority as well as the DGAP have been given power to examine and investigate any infringement of

provisions of Section 171 of the above Act to ensure that the benefits of tax reduction and ITC are passed on to the consumers and the registered persons are not allowed to enrich themselves at the expense of the vulnerable customers. Keeping in view the level of consumer awareness in the society it would be preposterous to expect that an ordinary consumers would be able to know the names, HSN codes, the details of the Notifications vide which the tax rate was reduced and the benefit which is due to him in respect of all the 250 products which are being sold by the Respondent and to further file complaints by providing accurate and adequate evidence and hence the investigation carried out by DGAP on all the products of the Respondent cannot be faulted. The DGAP is otherwise also legally bound to investigate all such products in respect of which rate of tax has been reduced once it has come to his notice during the course of the investigation that the benefit of tax reduction has not been passed on. Hence, the law settled in the above case is not being relied upon.

39. The Respondent has also submitted that he has fully co-operated during the investigation and his this act should not be considered as acquiescence of the fact that the DGAP had jurisdictional power to investigate him in respect of all the products. In this connection it would be pertinent to mention that as has been mentioned above the DGAP has full legal sanction to investigate all the products being supplied by the Respondent on which rate of tax was reduced and the Respondent was duly aware of this fact due to which he has

voluntarily submitted himself to such investigation. It is only as an afterthought that he is raising objections on his jurisdiction when the DGAP has found him liable for violation of the provisions of Section 171. The Respondent cannot extricate himself from the consequences of the above violation once he has voluntarily submitted to the investigation by the DGAP.

40. The Respondent has also cited the judgements passed in the cases of ***CIT v. Dalipur Construction Pvt. Ltd.*** **Income Tax Appeal No. 45 of 2015 at Lucknow**, ***United Commercial Bank Limited v. Their Workmen AIR 1951 SC 230, Kiran Singh v. Chaman Paswan AIR 1954 SC 340 and Benarsi Silk Palace v. CIT (1964) 52 ITR 220 (All)*** in his support. However, as has been discussed above the DGAP has jurisdiction to investigate all the products on which the rate of tax was reduced w.e.f. 15.11.2017 and therefore, the law settled in the above cases does not help the Respondent.

41. The Respondent has vehemently contested that the Standing Committee was legally bound to examine the complaint dated 30.07.2018 filed by the Applicant No. 1 strictly within a period of two months in terms of Rule 128 of the Rules, however, it had taken 8 months to do so. Hence, the present proceedings launched against him were not maintainable. In this connection it would be appropriate to refer to the application filed by the Applicant No. 1 before the Standing Committee on Anti-Profiteering which has been placed on record by the Respondent as Annexure-1. Perusal of the application shows the complaint regarding not passing on of the

benefit of rate reduction from 28% to 18% w.e.f. 15.11.2017 was emailed by the Applicant No. 1 to the Standing Committee on 30.07.2018 by stating that "Attached please find GST profiteering complaint from the Anti-profiteering Circle against McNROE". This complaint was filed in the Form prescribed for filing such complaints in which address, mobile number, email id and details of the Voter Identity Card of the Applicant No. 1 and name of the Respondent was duly mentioned. The goods against which the complaint was filed was mentioned as "Wild Stone Deo Chrome BX 120 ml". It was also stated in the application that the Earlier Price/ Value per unit of the above product was Rs. 250.00, Present Price/ Value per unit was Rs. 250.00, Earlier MRP was Rs. 250.00 and Present MRP was 250.00. It was further stated that "After GST rates were reduced from 28% to 18% the MRP of this product remained same". It was also mentioned that the benefit of tax reduction had not been passed on. Additional information was also provided in the Form by stating that "The Respondent seems to have kept the same MRP of the product despite reduction in GST from 28% to 18%. The above complaint is received from a member of Local Circles. Local Circles is India's leading Community Social Media Platform". A copy of the complaint received from Sh. Anil Mehta, a member of the Local Circles mentioned above, was also attached with the email which stated as under:-

"Complaint against Deodorant manufacturers

I have received information from a friend at Big Bazaar that suggests that Deodorant manufacturers (Vini Cosmetics - maker of FOGG, Raymonds - maker of Park Avenue and Mcnroe maker of Wild Stone) have engaged in profiteering by not reducing MRPs.

Here is the evidence:

Vini Cosmetics shipped Fogg Deo Fougere BX 150 ml to Big Bazaar Inderlok on 9/11/17 under PO number 8114996814 with MRP 299, after GST rate reduction on Nov 15, 17 Vini Cosmetics shipped the same deo to Big Bazaar Inderlok under PO No. 8115259654 on 8/12/17 with MRP 299. Again on May 8, 2018 Vini Cosmetics shipped the same product to Big Bazaar Inderlok under PO Number 4517361778 with MRP 299, so basically Vini Cosmetics did not change the MRP despite GST rate reducing from 28 to 18% on Nov 15, 17.

Mcnroe shipped Wild Stone Deo Chrome BX 120 ml on 28/9/17 under PO number 8114615731 to Big Bazaar Inderlok with MRP 250, same product on 4/12/17 under PO number 8115262327 with MRP 250 and on 16/6/18 under PO number 4518224285 for MRP 250. Again, Monroe did not pass the benefit of GST rate reduction from 28% to 18% to the customer and kept MRP same.

Similarly, Raymond shipped Park Avenue After Shave Lotion Good Morning 50 ml on 8/11/17 to Big Bazaar Inderlok under PO 8114997697 with MRP 115, on 19/12/17 under PO

8115407972 with same MRP 115 and on 12/6/18 under PO 4518098598 with MRP 115. **I am sharing this in public interest to everyone knows why prices are not reducing after GST. None of these companies passed on the benefit of lower tax to consumer.**

Anti Profiteering authority must please book them. Big Bazaar Inderlok may be contacted for more details."

(Emphasis supplied)

42. In this connection it would be relevant to mention that this Authority in the case of M/s J. K. Helen Curtis Ltd. and another which is pending before this Authority, on the same complaint dated 30.07.2018 filed against M/s Raymonds Ltd. by the Applicant No. 1 had occasion to peruse the record of the meetings of the Standing Committee held on 07.08.2018 and 08.08.2018, when the present complaint made against the Respondent was also discussed in detail by the members of the Standing Committee comprising of Sh. O. P. Dadhich, Principal Commissioner, Customs (Preventive) Delhi, Sh. Himanshu Gupta Principal Commissioner SGST Delhi North and Sh. H. Rajesh Prasad Commissioner, SGST Delhi and the following remarks were recorded in the above proceedings at Sr. No. 22 of Annexure-3 in respect of the above application:-

"Return to the complainant for re-submitting with Pre & Post 15.11.2017 invoices showing the price".

43. It is also apparent from the record that the Applicant No. 1 vide his email dated 22.02.2019 addressed to the Standing Committee had stated that "Attached, please find 57 complaints that have been shared with you. Kindly advise status of these complaints as so far we have only received further information on one complaint in this list". The complaint made against the Respondent was mentioned at Sr. No. 3 of the attached Annexure. Meanwhile the Standing Committee had been reconstituted by the GST Council vide its OM dated 21.02.2019 under Rule 123 (1) of the CGST Rules, 2017. The above communication made by the Applicant No. 1 was discussed in detail by the Standing Committee comprising of S/Sh. H. Rajesh Prasad Commissioner, Department of Trade & Taxes, Govt. of NCT of Delhi, Amit Kumar Aggarwal, Excise & Taxation Commissioner, Govt. of Haryana, Sanjay Mangal, Commissioner Central Tax (Audit) and Pranesh Pathak, Commissioner Central Tax in its meeting held on 11.03.2019 and vide Sr. No. 26 of minutes of the meeting recorded in respect of the above complaint which was mentioned in Annexure-1C, it was decided to forward the same to the DGAP for investigation. It is also apparent from the perusal of the

minutes that the above complaint was treated to have been received in the month of February, 2019.

44. It is apparent from the above facts that the complaint made by the Applicant No. 1 vide his email dated 30.07.2018 had been returned by the Standing Committee to the Applicant No. 1 as per the minutes of the meetings of the Committee held on 07.08.2018 and 08.08.2018 and hence, the proceedings in respect of the above complaint had terminated w.e.f. 08.08.2019. It is further clear from the record that the above Applicant had made a fresh complaint to the Standing Committee vide his email dated 21.02.2019 which was considered by the above Committee in its meeting held on 11.03.2019 i.e. after a lapse of a period of 17 days which is well within the period of limitation of 2 months prescribed under Rule 128 (1) of the CGST Rules, 2017 and was referred to the DGAP for detailed investigation as per Rule 129 (1) of the above Rules. Therefore, the allegation of the Respondents that the above complaint was not recommended by the Standing Committee within the prescribed period of limitation is not correct and hence the same cannot be accepted.

45. The Respondent has also placed reliance on the judgements passed in the cases of ***Singh Enterprises v. CCE (2008) 3 SCC 70, CCE v. Hongo India (P) Limited 2009 (236) ELT 417 (SC), Amchong Tea Estate v. Union of India 2010 (257) ELT 3 (SC) and Simplex Infrastructure Limited v. Union of India***

(2019) 2 SCC 455 in his support. But since the complaint filed by the Applicant No. 1 has been referred by the Standing Committee well within the prescribed period of 2 months the law settled in the above cases cannot be relied upon.

46. The Respondent has also argued that the use of word *"shall"* in Rule 128 was mandatory to ensure that the taxpayers should not be asked to face enquiry after prolonged delay. It would be pertinent to mention here that as per the provisions of Section 171 the Respondent is legally bound to pass on the benefit of tax reduction and hence he is liable to be investigated till the date he does not pass the above benefit. The Respondent is labouring under the wrong impression that the limitation period of 2 months has been prescribed to screen him from the consequences of violation of the provisions of Section 171 whereas it is not so as the legislative intention is to ensure that the complaints filed by the consumers are disposed of expeditiously and they are not denied benefit of tax reduction due to laxity of the Standing Committee on Anti-Profiteering. The provision of recording reasons for granting extension of 1 month to the above Committee by this Authority has also been made keeping in view the above facts so that the Committee does not seek extension in routine and is also not granted such extension in routine. The above period of limitation can also not be mandatory as no consequences have been provided for not adhering to it in Rule 128. Therefore, the above contentions of

the Respondent are untenable and therefore, the investigation conducted by the DGAP is legally correct and the present proceedings are not void.

47. In this regard, the Respondent has made reference to the judgments passed in the cases of ***Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and others (2013) 12 SCC 649, State of Punjab v. Shreyans Industries Ltd. (2016) 4 SCC 769, Bharat Heavy Electricals Limited v. CCT (2006) 143 STC 10 (Kar), Thirumalai Chemicals v. Union of India (2011) 6 SCC 739*** and ***A. M. Ahamed & Co. v. Commissioner of Customs (Imports) Chennai 2014 (309) ELT 433 (Mad.).*** However, it is mentioned that the Standing Committee has not violated the period of limitation prescribed under Rule 128 (1) and hence the above cases do not support the case of the Respondent.

48. The Respondent has further argued that the CGST Act and the Rules made thereunder did not prescribe any procedure or mechanism for calculation of profiteering due to which the DGAP had arbitrarily adopted a methodology that best suited his motives. In this regard, it is submitted that the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC has been clearly mentioned in Section 171 (1) of the CGST Act, 2017 itself which states that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient*

by way of commensurate reduction in prices." It is clear from the perusal of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that the benefit of tax reduction or ITC has to be passed on by a registered dealer to his customers since it is a concession which has been granted from the public exchequer which cannot be misappropriated by a supplier. It also means that the above benefits are to be passed on each Stock Keeping Unit (SKU) or unit of construction to each buyer and in case they are not passed on, the profiteered amount has to be calculated for which investigation has to be conducted on all such impacted SKUs/units. These benefits can also not be passed on at the entity/organisation/branch level as the benefits have to be passed on to each recipient at each SKU/unit level. Further, the above Section mentions "any supply" which connotes each taxable supply made to each recipient thereby clearly indicating that a supplier cannot claim that he has passed on more benefit to one customer therefore he would pass less benefit to another customer than the benefit which is actually due to that customer. Each customer is entitled to receive the benefit of tax reduction or ITC on each SKU or unit purchased by him. The word "commensurate" mentioned in the above Section gives the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each SKU or unit based on the tax reduction as well as the existing base price of

the SKU or the additional ITC available. The computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from SKU to SKU or unit to unit and hence no fixed methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a recipient or for computation of the profiteered amount. However, to give further elaborate upon this legislative intent behind the law, this Authority has been empowered to determine the 'Procedure and Methodology' which has been done by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed formula which fits all the cases of profiteering can be set while determining such a "Methodology and Procedure" as the facts of each case are different. In one real estate project, date of start and completion of the project, price of the house/commercial unit, mode of payment of price, stage of completion of the project, rates of taxes, amount of ITC availed, total saleable area, area sold and the taxable turnover realised before and after the GST implementation would always be different than the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to another project. Therefore, no set parameters can be fixed for determining methodology to compute the benefit of additional ITC which would be required to be passed on to the buyers of

such units. Moreover this Authority under Rule 126 has power to 'determine' Methodology & Procedure and not to 'prescribe' it. However, fixation of commensurate price is purely a mathematical exercise which can be easily done by a supplier keeping in view the reduction in the rate of tax and his price before such reduction or the availability of additional ITC post implementation of GST. Further, the facts of the cases relating to the Fast Moving Consumer Goods (FMCGs), restaurants, construction and cinema houses are completely different and therefore, the mathematical methodology employed in the case of one sector cannot be applied in the other sector otherwise it would result in denial of the benefit to the eligible recipients. Moreover, both the above benefits have been granted by the Central as well as the State Governments by sacrificing their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and hence they have to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous and mandatory which truly reflect the intent of the Central and State legislatures. Therefore, the above contention of the Respondent is frivolous and hence the same cannot be accepted. The Respondent cannot deny the benefit of tax reduction to his customers on the above untenable ground as Section 171 provides clear cut methodology to compute both the above benefits.

6.3

49. The Respondent has also alleged that the DGAP had used his own methodology and procedure to determine the alleged profiteering amount which was illegal. In this connection it is mentioned that the DGAP has computed the amount of benefit which has been denied by the Respondent by using the methodology which has been approved by this Authority in all such cases and hence, the Respondent cannot claim that the DGAP has devised his own methodology and procedure.

50. The Respondent has further alleged that till date this Authority has failed to determine any Methodology and Procedure under Rule 126. However, as has been mentioned supra the 'Methodology & Procedure' to determine profiteered amount has already been provided in Section 171 (1) and hence, no Methodology & Procedure is required to be determined by this Authority separately. This Authority has already notified the 'Procedure and Methodology' vide its Notification dated 28.03.2018 under Rule 126 and not on 19.07.2018 as has been claimed by the Respondent which is available on its website. As discussed above computation of profiteering has to be done SKU and unit of construction wise and not invoice-wise, product-wise, business vertical-wise or state-wise etc. as every buyer has fundamental right to get the benefit which is due to him. It is also clear from the Explanation attached to Section 171 what is to be construed as the profiteered amount and

hence the Respondent should have no difficulty in computing and passing on the benefit of tax reduction.

51. The Respondent has also pleaded that in the absence of any guidelines in the statute or rules, the powers given to this Authority to determine methodology was a case of *"excessive delegation"* of powers. In this regard it would be relevant to mention that the Methodology & Procedure to determine profiteering is succinctly mentioned in Section 171 itself and hence there is no question of excessive delegation to this Authority. Rule 126 has been framed by the Central Government under Section 164 which has sanction of the Parliament and all the State Legislatures, on the recommendation of the GST Council which is a constitutional body and hence the delegation to frame Procedure & Methodology has been given to this Authority at several levels of scrutiny which cannot be termed as excessive. Moreover, such power is available to all the judicial, quasi-judicial and statutory bodies and hence no special favour has been shown to this Authority. Hence, the above plea of the Respondent is not tenable.

52. The Respondent has further pleaded that the issue of excessive delegation was also raised by the Advisor to the Chief Minister, Punjab as well as the Chief Economic Advisor in the 17th GST Council Meeting held on 18.06.2017. However, the issues raised by both the above officers have been found to be

incorrect as there is no excessive delegation to this Authority as has been explained above. The Respondent has also referred to the case of ***M/s Jubilant Foodworks Ltd. Case No. 4/219***. In this connection it would be appropriate to mention that there cannot be one formula for determining profiteering which can be applied in all cases and hence the findings recorded in the above case are correct. The principles for determination of injury, evidence of dumping and calculation of non-injurious price which have been provided under the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 cannot be applied in the case of anti-profiteering provisions as the fundamentals and basics of both are entirely different. The mechanism prescribed by the Australian Competition and Consumer Commission can also not be followed in India as the above Commission has power to regulate prices which is not the intention of Section 171 of the above Act. Accordingly, all the above pleadings have no merit and hence they cannot be considered.

53. The Respondent has also cited the cases of ***Commissioner of Central Excise and Customs Kerala v. Larsen and Toubro Limited (2016) 1 SCC 170*** and ***Commissioner of Income Tax Bangalore v. B. C. Srinivasa Shetty (1981) 2 SCC 460*** and stated that there was no machinery provision in the anti-profiteering measures and hence they could not be enforced.

On this aspect it is to be noted that no tax has been imposed under the above measures and hence the law settled in the above cases is not applicable. However, it would be relevant to mention here that Section 171 (2) of the CGST Act, 2017 and Rule 122, 123, 129 and 136 of the CGST Rules, 2017 have provided an elaborate machinery in the form of this Authority, the Standing and Screening Committees, the DGAP and a large number of field officers of the Central and the State Taxes to implement the anti-profiteering provisions. Therefore, the Respondent cannot allege that no machinery has been provided to implement the above measures.

54. The Respondent has also claimed that during the course of the investigation or even thereafter he was never put to notice or offered any reasoning through grant of a hearing or otherwise as to how the DGAP was going to derive profiteering. In this regard it is mentioned that the DGAP being an investigating agency has no power to grant opportunity of hearing to the Respondent. However, it is apparent from the Report dated 04.09.2019 of the DGAP that the Respondent was duly issued notice dated 08.04.2019 under Rule 129 (3) by the DGAP putting him on notice that he would be investigated for not passing on the benefit of tax reduction. The Respondent has been granted sufficient opportunity by this Authority to counter the findings of the DGAP during the course of the present proceedings and hence he should have no grievance on this

account. The Respondent has also placed reliance on the case of ***Automotive Tyre Manufacturers Association v. Designated Authority (2011) 2 SCC 258,*** in this regard, however, the above case is of no assistance to him as he has been given due notice by the DGAP.

55. The Respondent has further claimed that the DGAP has considered an exceedingly long period of investigation from 15.11.2017 to 31.03.2019 (nearly 1.5 years). In this regard it would be pertinent to refer to Section 171 (1) which provides that the benefit of tax reduction is required to be passed on by the Respondent which implies that the Respondent is liable to be investigated till the date he has not passed on the benefit of tax reduction. Since, the DGAP had received reference from the Standing Committee to launch investigation against the Respondent on 27.03.2019, he has rightly conducted investigation till 31.03.2019 as the Respondent has failed to provide proof of having passed on the benefit till that date. Had the Respondent passed on the benefit before the above date the DGAP would not have investigated him beyond that date. The Respondent cannot claim protection under Article 14 of the Constitution when he has violated the above Article himself by denying benefit of tax reduction to millions of customers. Accordingly, the law settled in the cases of ***Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors. (1981) 1 SCC 722, State of A. P. and another v. Nalla Raja Reddy and others***

AIR 1967 SC 1458 & Kunnathat Thathunni Moopil Nair etc. v. State of Kerala and another AIR 1961 SC 552 cannot be relied upon.

56. The Respondent has also contended that in the absence of any prescribed mechanism to compute the "profiteering" coupled with inexplicable prolonged investigation of over 16.5 months when many other investigations were between 2 to 4.5 months, clearly manifested arbitrariness. It would be relevant to mention here that in the cases bearing No. 20/2018, 02/2019, 59/2019, 46/2019, 14/2018 and 08/2018, decided by this Authority, in which the investigation was conducted for the period ranging between 2 months to 4.5 months, the period of investigation was limited to the period, when the complaint was received, as has been done in the present case. Had the Respondent passed on the benefit before 31.03.2019 he would have been investigated only till that date. No supplier can be investigated for the benefit which he is required to pass on in the future. Hence, the above contention of the Respondent is not tenable.

57. The respondent has further contended that earning profits through lawful means was not a sin and he could be held liable if he had earned profit by unlawful means. He has also cited the definitions given in Black's Law Dictionary, Shorter Oxford English Dictionary and Law Lexicon on profiteering. In this connection it would be appropriate to refer to the definition of

profiteered amount given in the Explanation attached to Section 171 which states as under:-

"Explanation : For the purposes of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of ITC to the recipient by way of commensurate reduction in the price of the goods or services or both."

58. Therefore, the definition of profiteering cited by the Respondent is not applicable as the definition of profiteered amount has been clearly given in the above Explanation and hence the above claim of the Respondent is not correct. Therefore, the law propounded in the cases of ***Commissioner of Income Tax Gujarat v. Vadilal Lallubhai AIR 1973 SC 1016*** and ***Indian Aluminium Company v. Kerala State Electricity Board (1975) 2 SCC 414*** is not applicable in the facts of the present case.

59. He has also stated that as per the audited financial statements for the FY 2017-18 and FY 2018-19, even the actual profits earned by the Respondent were significantly lower than the alleged amount of profiteering. If the contention of the DGAP that the Respondent had profiteered Rs. 21.94 Crore was genuine, it would mean that the Respondent would have

incurred huge losses of approximately Rs. 14.02 Crore. The above contention of the Respondent is far fetched as the earning of profit has no correlation with the profiteered amount. The profit earned depends upon the costs of the Respondent which can always be inflated by him whereas the profiteered amount pertains to the amount of tax reduction which has not been passed on by the Respondent. Further, the loss making concerns are also legally bound to pass on the benefit of tax reduction and they cannot appropriate the same against their losses. Therefore, the above claim of the Respondent is not tenable.

60. The Respondent has further stated that he had reduced the MRP of the complained Deodorant from Rs. 250/- to Rs. 230/- per unit which was precisely in line with the reduction in the tax rate. However, the above claim of the Respondent is not borne out from the computation of the profiteered amount done in the case of the above product and hence the claim made by the Respondent is incorrect. The Respondent has also mentioned the Report released by the Comptroller and Auditor General of India in June, 2010 in this regard. In this connection it would be relevant to mention that the contents of the Report are absolutely correct as it has been repeatedly found that the suppliers have not passed on the benefit of tax reduction in a large number of cases. The Respondent has also correctly cited the flier released by the **Central Board of Indirect Taxes &**

Customs and the case of ***Sandeep Puri v. M/s Johnson & Johnson 2019 (11) TMI 1084***, which make it abundantly clear that the objective of the anti-profiteering provisions is to protect the interests of the consumers therefore, it is responsibility of the anti-profiteering mechanism to ensure that the benefits of tax reduction and ITC are passed on to the unorganised, voiceless and vulnerable customers and the suppliers are not allowed to misappropriate them. However, there is no evidence to come to the conclusion that the Respondent has reduced his MRPs as was ruled by this Authority in the case of ***Pawan Sharma v. M/s Sharma Trading Company 2018 (9) TMI 625.***

61. The respondent has also submitted that he had passed on the entire benefit of reduction in the tax rate by way of reduction in MRPs which was also communicated to all his channel partners *vide* letters and emails dated 27.11.2017 and/or 28.11.2017 and sample invoices (Annexure-4 & 5). Perusal of Annexure-4 attached with his submissions dated 04.12.2019 shows that it mentions that the MRPs have been reduced w.e.f. 28.11.2017 as per the annexed list/circular however, the copies of the list/circular have not been attached which goes to show that the Respondent had not reduced the MRPs commensurately. It is also revealed that the Respondent has sent two of these emails on 11.10.2019 which further proves that the Respondent had taken no action to reduce his MRPs till 11.10.2019. Perusal of the copies on the invoices attached as Annexure-5 also does

not show what was the commensurate price which was to be charged by the Respondent on the complained product "Wild Stone Deo Chrome BX 120 ml" and the MRP of Rs. 230/- charged by the Respondent cannot be held to have been fixed after passing on the benefit of tax reduction as it has been established after investigation that the Respondent had not reduced the base price of the above product commensurately.

62. He has further submitted that no time limit was prescribed to reduce the prices and he could not be expected to do so overnight. In this connection it is pointed out that the Notification vide which the rate of tax was reduced had come in to force from 00.00 hours w.e.f. intervening night of 14/15.11.2017 and therefore, the prices were to be reduced from the above hour. The Respondent cannot be ignorant of the above notification and make the above claim. The Respondent should have faced no problem in reducing the prices on the SKUs which he had supplied w.e.f. 15.11.2017 as he was merely required to make changes in his software. Even if he had some problem he should have deposited the profiteered amount as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017 as has been done by several suppliers. However, the Respondent instead of maintaining the same base prices which were prevalent on 14.11.2017 had increased them during the intervening night of 14/15.11.2017. This uncanny increase in the base prices was made with the sole intention of denying the

benefit of tax reduction to the buyers. Hence, the above contention of the Respondent is frivolous and which cannot be accepted.

63. The Respondent has also averred that in terms of the legal maxim of *"Lex Non Cogit Ad Impossibilia"* applied by the Hon'ble Apex Court in the case of ***State of MP v. Narmada Bachao Andolan (2011) 7 SCC 639*** he could not be forced to perform an impossible act. However, keeping in view the observations made in the para above the above case does not come to the rescue of the Respondent as the Respondent was not required to do an impossible act.

64. The Respondent has further averred that he had reduced the MRPs of 5 other SKUs, sample invoices of which were attached by him as Annexure-6. Perusal of these invoices shows that they do not reflect the commensurate price which the Respondent could have charged on the basis of the tax reduction and hence no reliance can be placed on them.

65. The Respondent has also stated that he had increased the MRPs of the impacted goods only *w.e.f.* 15.03.2018 due to several factors *viz.* (a) rise in cost (b) response to the pricing strategy of the competitors and (c) change in season, among others. However, it is revealed from the record that the Respondent had not reduced his prices commensurately even once after 15.11.2017 and his prices had been more than the commensurate prices and he had further increased them w.e.f.

15.03.2018. This Authority has no mandate to look in to the costs of the Respondent but certainly has mandate to see that he passes the benefit of tax reduction which he has not done and hence the increase effected in the MRPs w.e.f. 15.03.2018 has to be considered as the profiteered amount. Accordingly, the cost sheet attached by the Respondent as Annexure-7 cannot be taken in to consideration. The reliance placed on the decision of this Authority in the case of ***Kumar Gandharv v. KRBL Ltd. 2018 SCC online NAA 6*** is misplaced as there was no reduction in the rate of tax in the above case and hence it did not attract the provisions of Section 171.

66. The Respondent has further stated that he had increased his prices keeping in view the price strategy of his competitors. He has also attached Annexure-8 in this regard. In this context it would be relevant to state that the Respondent is free to fix his prices however, he cannot refuse to pass on the benefit of tax reduction. Perusal of Annexure-8 shows no correlation with reduction in prices as per the tax reduction and hence the above Annexure cannot be relied upon.

67. The Respondent has also submitted that he was increasing his prices with the change in the season and hence he had increased them w.e.f. 15.03.2018. He has also attached Annexure-9 to support his above claim. As already discussed above the Respondent has full freedom to fix his prices however, he cannot appropriate the benefit of tax reduction.

Annexure-9 also does not establish that he has passed on the benefit of tax reduction and hence the above claim of the Respondent is not tenable.

68. The Respondent has further submitted that the provisions of Section 171 of the CGST Act could not restrict the right of the Respondent to increase prices. In this connection it would be pertinent to mention that the above Section does not provide for price regulation. The DGAP has only computed the profiteered amount the benefit of which the Respondent has not passed on to his customers. The DGAP has also not acted as a price regulator. He has neither examined the process of price fixation adopted by the Respondent nor asked him to fix his prices as per his directions and hence, there has been no infringement of fundamental right of the Respondent to decide his selling prices.

69. The Respondent has also contended that there were no guidelines regarding the period during which prices could not be revised. In this regard it is to be noted that the Respondent can fix his prices as per his own strategy however, he has not produced any evidence during the course of the present investigation which can prove that he has passed on the benefit of tax reduction till 31.03.2019 and therefore, any increase made in the prices by the Respondent amounts to profiteering. The Respondent cannot deny the benefit of tax reduction by taking shelter of Article 19 (1) (g) of the Constitution. The

Respondent has also placed reliance on the case of ***Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Limited & Ors. (2015) 9 SCC 209*** in this regard. Since, the DGAP has not interfered with the right of the Respondent to fix his prices the law settled in the above case is not being relied.

70. He has further contended that he had revised his base prices on account of margin realignment of his intermediaries in the normal course of his business and he has reduced his prices commensurately. He has also enclosed Annexure-10 in this regard. However, it is disclosed from the investigation that the Respondent has not reduced his prices commensurate with the tax reduction rather he had increased them due to the re-alignment and hence the above claim of the Respondent is not correct. Perusal of Annexure-10 dated 15.11.2017 shows that the Respondent had taken no time to reduce the margins of his dealers and retailers to increase his profits but he had not reduced the prices commensurately till 31.03.2019.

71. The Respondent has also argued that the law nowhere provided for doing a 'base price' comparison and it appeared that this practice of 'base price' comparison had been evolved *suo-moto* by the DGAP. It would be pertinent to mention here that Section 171 (1) requires that the Respondent should pass on the benefit of tax reduction from 28% to 18% w.e.f. 15.11.2017 which implies that he should have continued to charge the same base prices which he was charging on

14.11.2017 and should have charged 18% GST on them instead of 28% GST w.e.f. 15.11.2017. However, the Respondent had not done so and he had increased the base prices w.e.f. 15.11.2017 and then charged GST @18%. The above act of the Respondent amounts to denying the benefit of tax reduction. Therefore, to compute the profiteered amount the base price which was existing on 14.11.2017 was required to be compared with the base price which he had charged post rate reduction to ascertain whether the Respondent has passed on the benefit of tax reduction or not. Mere charging of GST @18% post rate reduction does not amount to passing on of the benefit when the base price has been increased to offset the benefit. Therefore, the comparison of the base prices made by the DGAP is correct. The present investigation shows that the Respondent had increased his base prices and therefore, any reduction in the MRPs which was not commensurate with the rate reduction does not amount to passing on of the benefit of such reduction. Hence, the contention of the Respondent made in this regard is not correct. He has also placed reliance on the decision of this Authority given in the case of the ***Kerala State Screening Committee on Anti-Profiteering v. Asian Paint Ltd. 2019 (20) GSTL 391 NAPA*** wherein this Authority had held that increase in the base price on account of reduction in discount offered from dealer's margin did not amount to profiteering. However, there is no evidence to the effect in this

case that the Respondent has increased his base prices due to withdrawal of the discount and hence the above case does not further the cause of the Respondent. Realignment of margins cannot be compared with the discounts as no dealer was bound to offer discounts from his margins and hence, the profiteered amount cannot be reduced by Rs. 2,73,07,915/- as has been claimed by the Respondent.

72. The Respondent has further argued that averaging of prices at pan India level was conceptually inappropriate. In this regard it would be relevant to mention that since the Respondent was charging different prices to his various customers there was no alternative except to compute average of these prices for comparison with the actual base prices post rate reduction to arrive at the conclusion whether the benefit of tax reduction had been passed by the Respondent or not. The Respondent has also compared the base prices prevalent at his Patna, Hissar and Thane Depots to prove his contention. However, the same is not correct as the Respondent was not charging different base prices to his customers solely taking in to account the locational issues. The sample invoices attached as Annexure-11 by the Respondent make no mention of the location of the Depot on the basis of which the base prices have been fixed and hence the same cannot be relied upon. The Respondent has not submitted details of supplies made by him Depot wise and hence he cannot claim that the profiteered amount should

be calculated depot wise. Hence, the profiteered amount cannot be reduced to Rs. 16,30,22,644/- (reduction by Rs. 5.64 Crore approximately).

73. The Respondent has also alleged that the DGAP has incorrectly included the Modern Trade Buyers in the General Trade Buyers due to which the profiteered amount has been wrongly computed. He has also supplied list of 10 such Modern Trade buyers which have been wrongly included in the General Trade buyers. However, perusal of the supplementary Report dated 27.02.2020 furnished by the DGAP shows that the respondent had himself included the above 10 Modern Trade buyers in the General Trade buyers and hence he cannot blame the DGAP on this ground. Therefore, the profiteered amount cannot be reduced by Rs. 13,22,335/- as per Annexure-12.

74. The Respondent has also alleged that the DGAP has ignored the negative values and resorted to 'zeroing' to compute higher profiteering which was used by the anti-dumping authorities in certain countries which was opposed by the Government of India before the WTO and vide *Report No.* ***WT/DS141/AB/R dated 1.3.2001 of the Appellate Body of WTO, regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India***, the stand of the Indian Government was accepted and it was held that the practice of 'netting off' should be applied and hence the above methodology was binding on the

DGAP while calculating 'profiteering'. The above contention of the Respondent is not correct as no netting off can be applied in the cases of profiteering as the benefit has to be passed on to each customer which has to be computed on each SKU. Netting off implies that the amount of benefit not passed on certain SKUs will be subtracted from the amount of benefit passed on other SKUs and the resultant amount shall be determined as the profiteered amount. If this methodology is applied the Respondent shall be entitled to subtract the amount of benefit which he has not passed on from the amount of benefit which he has claimed to have passed, which will result in complete denial of benefit to the customers who were entitled to receive it. Every recipient of goods or services is entitled to the benefit of tax rate reduction by way of reduced prices and Section 171 does not offer the Respondent to suo moto decide on any other modality to pass on the benefit of reduction in the rate of tax to his recipients. Therefore, any benefit of tax rate reduction passed on to a particular recipient or customer cannot be appropriated or adjusted against the benefit of tax rate reduction due to another recipient or customer. Hence, this methodology of 'netting off' cannot be applied in the present case as the customers have to be considered as individual beneficiaries and they cannot be compared with dumped goods and netted off. This Authority has also clarified in its various orders that the benefit cannot be computed at the product

service or the entity level as the benefit has to be passed on each supply of goods and services. Hence, the above contentions of the Respondent are not correct as the Respondent cannot apply the above methodology of netting off as has been approved in the above Report of the WTO as it would result in denial of benefit to the customers which would amount to violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution. Accordingly, the profiteered amount cannot be reduced by Rs. 2,52,84,303/- as per Annexure-13.

75. The Respondent has further alleged that the DGAP has wrongly included the sales made after 15.03.2018 in the profiteered amount. In this connection it is mentioned that the Respondent has not reduced his prices commensurately even once after the rate reduction was announced on 15.11.2017. Therefore, he has not passed on the benefit till 15.03.2019 and hence the sales made by the Respondent till the above date have been rightly considered by the DGAP for computation of profiteering as he is liable to be investigated for violation of Section 171 till the time he passes on the above benefit. Therefore, the above contention of the Respondent cannot be accepted. Accordingly, an amount of Rs. 8,40,67,476/- calculated as per Annexure-14 cannot be reduced from the profiteered amount.

76. The Respondent has further contended that the DGAP while calculating profiteering has incorrectly added the 18% amount

of GST which has been paid to the Government in the profiteered amount. In support of his claim, the Respondent has relied upon Section 76 (1) of the CGST Act, 2017. In this connection it would be appropriate to mention that the Respondent has not only collected excess base prices from the customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on these excess base prices which they should not have paid. By doing so the Respondent has defeated the very objective of both the Central as well as the State Governments which aimed to provide the benefit of rate reduction to the general public. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of tax reduction to his customers by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing goods from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. The above amount can also not be paid to the eligible buyers from the Consumer Welfare Funds as the Respondent has not deposited it in the above Fund. Therefore, the above contention of the Respondent is untenable and hence it cannot be

accepted. Accordingly, an amount of Rs. 33,484,248/- cannot be subtracted from the profiteered amount as per Annexure-15. In support of his above claim, the Respondent has relied upon the decision given by the Hon'ble Apex Court in the case of ***R. S. Joshi Sales Tax Officer Gujarat v. Ajit Mills Limited (1977) 4 SCC 98.*** However, keeping in view the facts of the present case the law settled in the above case cannot be relied upon.

77. The Respondent has also stated that he has increased his prices w.e.f. 15.03.2018 as a normal business decision taking into account various factors including rise in the cost of material, other direct and indirect costs and maintainability of brand equity etc. However, the DGAP had completely ignored such significant factors while determining the profiteering amount. As discussed supra the Respondent has not reduced his prices even once after the reduction in the rate of tax and has repeatedly increased them therefore, he has been rightly held liable for profiteering post 15.03.2018. Moreover, Section 171 is only concerned with passing on of the above benefit and not with the costs and hence in case its provisions have not been complied the Respondent has to be held accountable for profiteering. Accordingly, the above claim of the Respondent is incorrect. Therefore, the computation of total incremental cost of Rs. 20,68,82,274/- as per Annexure-16 cannot be taken into consideration.

78. The Respondent has further stated that during the period of investigation, he had sales returned of various products but the DGAP had failed to exclude such sales from the profiteered amount which were returned by the customers. Perusal of the supplementary Report dated 27.02.2020 submitted by the DGAP shows that the DGAP has duly considered the sales return data and recomputed the profiteered amount as Rs. 21,84,79,790/- instead of Rs. 21,94,96,828/- which was calculated by him vide his first Report dated 04.09.2019. Therefore, the grievance of the Respondent on this ground has been settled.

79. The Respondent has also contended that the DGAP has considered M/s KCHP Technologies Private Limited at par with other e-commerce distributors and has considered the average base prices which were applicable to other e-commerce distributors while computing the profiteered amout, however, the terms of trade with the KCHP were different than the other distributors. However, perusal of DGAP's Supplementary Report dated 27.02.2020 has revealed that during the investigation period, the Respondent had not made any such submissions in respect of M/s KCHP. Further, since the Respondent has supplied goods and services to M/s KCHP in the post-rate reduction regime as is evident from Annexure-17, without reducing his base prices, profiteering in this case has to be computed. Further, the above firm is not substantially

different than the other distributors of the Respondent except that it is also doing online promotion of the Respondent. Therefore, the above claim of the Respondent cannot be accepted.

80. The Respondent has further contended that the DGAP, while computing the profiteered amount, has ignored the discounts and freebies given to the recipients and the same should be reduced from the profiteered amount. The above contention of the Respondent is not correct because the investigation carried out by the DGAP reveals that the profiteering has been computed on the transaction value as per the provisions of Section 15 of the CGST Act, 2017 and all the discounts which do not form part of such value cannot be included in the price of the product. The Respondent has accepted that the discounts offered by him were in accordance with the general discount pattern which was being followed by him in the course of his business which every other supplier was also doing to promote his sales. Therefore, the above discounts and freebies cannot not be construed to have been given due to the GST rate reduction. Further, it is revealed from the DGAP's Report that the Respondent has not submitted the copies of credit notes as per the provisions of Section 15 (3) (b) of the CGST Act, 2017 and Rule 54 (1) (A) of the CGST Rules, 2017 and hence, the above claim of the Respondent cannot be accepted. In support of his above claim, the Respondent has relied upon the

judgements passed by the Hon'ble Supreme Court in the cases of ***Union of India v. Bombay Tyres International (P) Ltd. (2005) 3 SCC 787***, ***Maya Appliances Private Ltd. v. CCT (2018) 2 SCC 756*** and that of the Hon'ble Andhra Pradesh High Court in the case of ***Godavari Fertilizers and Chemicals Ltd. v. CCT (2004) 138 STC 133***. However, the above cases do not help the cause of the Respondent as the discounts given by the Respondent are not covered under the ambit of the above cases.

81. The Respondent has also pleaded that the methodology followed by the DGAP was inaccurate hence there was no profiteering as has been computed by him vide Scenario-1 and 2. Perusal of both the Scenarios shows that the Respondent has arbitrarily reduced the profiteered amount on account of negative profiteering, margin re-alignment, rise in cost, credit notes and freebies, sales made to M/s KCHP and party swapping which has not been allowed to him as per the detailed reasons given above. Therefore, the claims made by the Respondent on this ground are not tenable.

82. The Respondent vide his submissions dated 20.01.2020 has stated that a new vital fact had been brought to his notice by the DGAP in his supplementary Reports which stated that the present investigation was not started on the basis of the application dated 30.07.2018 but it was started on the basis of the application which was received in the month of February,

2019. The above fact was not mentioned by the DGAP in his notice or the Report and hence the present proceedings were not maintainable. However, perusal of the Notice dated 08.04.2019 issued by the DGAP to the Respondent under Rule 129 (3) of the CGST Rules, 2017 shows that the Respondent was duly informed that he was being investigated for not passing on the benefit of tax reduction which was announced vide Notification dated 14.11.2017 on the products being sold by him. He was also asked to submit the record of taxable supplies w.e.f. 01.11.2017 to 31.03.2019, price lists, sample copies of invoices and GSTR-1 and 3B Returns for the period from October, 2017 to March, 2019. Therefore, he was fully aware of the allegations levelled against him. There was no legal obligation on the DGAP to provide details of the proceedings which had taken place before the Standing Committee on Anti-Profiteering nor they were required to be mentioned in the above Notice or the Report furnished by the DGAP. The Respondent has been given full opportunity of defending himself during the course of the present proceedings on the allegations levelled against him and hence no prejudice has been caused to him. Since, the present investigation has been conducted by the DGAP in consonance with the provisions of Section 171 read with Rule 129 the current proceedings against the Respondent are maintainable.

83. The Respondent has also cited the judgements passed in the cases of ***CCE Bangalore v. Brindavan Beverages (P) Limited 2007 (213) E.L.T. 487 (SC), Shipli Enterprises v. CCE Allahabad 2017 (349) E.L.T. 308 (Tri.-All), Delta International Limited v. Commissioner of Customs 2012 (281) E.L.T. 400 (Cal.)*** and ***United Arab Shipping Agency Co. (I) P. Ltd. v. CC (Import) 2014 (310) E.L.T. 933 (Tri- Mumbai)*** in his support. However, since the Respondent was duly put to notice on the allegation of having not passed on the benefit of tax reduction the above cases are not being followed.

84. The Respondent has also requested to provide the following documents in his various submissions stating that since, he has not been supplied them, the present proceedings are not maintainable:-

- Date on which the complaint dated 30.07.2018 was returned by the Standing Committee.
- Copy of complaint filed in February 2019 along with its supporting evidences.
- Date on which the complaint was filed in the month of February 2019.
- Minutes of the meeting dated 11.03.2019 held by the Standing Committee on Anti-Profiteering.

In this connection it would be pertinent to mention that the sequence of events which has taken place in the context of the complaint which was originally lodged by the Applicant No. 1 on 30.07.2018 against the Respondent for not passing on the benefit of tax reduction w.e.f. 15.11.2017 has been mentioned in detail in the present order which shows that the Respondent was fully aware of the allegations levelled against him. The Respondent has also been given more than sufficient opportunity to rebut the above allegations and he has mounted vast evidence in his support. The above documents are not required to be supplied to the Respondent as they nowhere cause prejudice to the Respondent. The whole aim of the present proceedings is to examine whether the allegation that the Respondent has not passed on the benefit of tax reduction is correct or not which the Respondent has miserably failed to rebut and hence, the above contention of the Respondent is farfetched which cannot be accepted.

85. Based on the above facts the profiteered amount is determined as Rs. 21,84,79,790/- in terms of Rule 133 (1) of the CGST Rules, 2017, during the period from 15.11.2017 to 31.03.2019, as has been computed vide revised Annexure-12 by the DGAP. This Authority under Rule 133 (3) (a) of the CGST Rules, 2017 orders that the Respondent shall reduce his prices commensurately in terms of the above Rule. The Respondent is also directed to deposit an amount of Rs. 21,84,79,790/- in the CWF of the Central

and the concerned State Government, as the recipients are not identifiable, as per the provisions of Rule 133 (3) (c) of the above Rules alongwith 18% interest payable from the dates from which the above amount was realised by him from his recipients till the date of its deposit. The above amount shall be deposited within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned Commissioners CGST/SCST. The State/Union Territory wise amount of benefit to be deposited by the Respondent in the concerned CWF is as under:-

S. No.	Row Labels	State Code	General Trade	Modern Trade	E-Commerce trade	Final Profiteering
1	Andhra Pradesh	37	5227562	1121697	0	6349258
2	Arunachal Pradesh	12	194462	0	0	194462
3	Assam	18	7138419	636054	0	7774474
4	Bihar	10	5692599	621167	0	6313766
5	Chandigarh	4	573872	0	0	573872
6	Chhattisgarh	22	8545118	500829	0	9045947
7	Delhi	7	9732859	1983347	1660	11717866
8	Goa	30	597649	5219	0	602869
9	Gujarat	24	10112053	1753591	0	11865645
10	Haryana	6	4097845	1962477	1746235	7806556
11	Himachal Pradesh	2	1749130	793	0	1749923
12	Jammu and Kashmir	1	2153988	4953	0	2158941
13	Jharkhand	20	4515539	688505	0	5204044
14	Karnataka	29	5796479	1536896	0	7333376
15	Kerala	32	1208947	456132	0	1665079
16	Madhya Pradesh	23	24634011	516543	0	25150554
17	Maharashtra	27	19899548	7193605	1799	27094952
18	Manipur	14	382678	0	0	382678
19	Meghalaya	17	457750	0	0	457750
20	Mizoram	15	232524	0	0	232524
21	Nagaland	13	800496	0	0	800496
22	Odisha	21	11652717	1162048	0	12814765
23	Puducherry	34	88797	0	0	88797
24	Punjab	3	5719747	1315455	0	7035203

25	Rajasthan	8	13760615	1539037	0	15299652
26	Sikkim	11	319134	0	0	319134
27	Tamil Nadu	33	1750656	1103957	0	2854613
28	Telangana	36	3974706	2502476	0	6477183
29	Tripura	16	1095268	3409	0	1098677
30	Uttar Pradesh	9	22138663	1995031	0	24133694
31	Uttarakhand	5	2070786	75635	0	2146420
32	West Bengal	19	11384660	351961	0	11736621
Grand Total			**187,699,280**	**29,030,817**	**1,749,694**	**21,84,79,790**

86. It is evident from the above narration of facts that the Respondent has denied the benefit of tax reduction to the customers in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus profiteered as per the explanation attached to Section 171 of the above Act. Therefore, the Respondent is apparently liable for the imposition of penalty under Section 171 (3A) of the CGST Act, 2017. Therefore, a show cause notice be issued directing him to explain why the penalty prescribed under the above sub-Section should not be imposed on him.

87. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by this Authority is deposited in the CWFs of the Central and the State Governments as per the details given above. A Report in compliance of this order shall be submitted to this Authority by the concerned Commissioner within a period of 4 months from the date of receipt of this order.

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

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

O/C 6.3.2020

(A. K. Goel)
NAA, Secretary

F. No. 22011/NAA/75/McNROE/2019/1405-55 Date: 06.03.2020

Copy to:-

1. M/s McNROE Consumer Products Pvt Ltd, 3rd Floor, 16 N.S Road, Kolkata-700001.
2. Sh. Rahul Sharma, (M/s Local Circles India Pvt Ltd.), 2413, 4th Floor, Express Trade Tower-2, Sector-132, Noida-201301.
3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi.
4. Commissioner of Commercial Taxes, Office of The Chief Commissioner of State Tax, Eedupugallu, Krishna District, Andhra Pradesh.
5. Commissioner of Commercial Taxes, Department of Tax & Excise, Kar Bhawan, Itanagar, Arunachal Pradesh - 791 111

6. Commissioner of Commercial Taxes, Office of The Commissioner of Taxes, Government of Assam, Kar Bhawan, Ganeshpuri, Dispur, Guwahati - 781 006.
7. Commissioner of Commercial Taxes, Additional Commissioner (GST), Commercial Tax Department, Ground Floor, Vikas Bhawan, Baily Road, Patna – 800 001
8. Commissioner of Commercial Taxes, Commercial Tax, SGST Department, Behind Raj Bhawan, Civil Lines, Raipur - 492 001
9. Commissioner of Commercial Taxes, Office of Commissioner of Commercial Tax, Vikrikar Bhavan, Old High Court Building, Panji, Goa- 403 001
10. Commissioner of Commercial Taxes, C-5, Rajya Kar Bhavan, Near Times of India, Ashram Road, Ahmedabad.
11. Commissioner Of Commercial Taxes, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula- 134 151.
12. Commissioner of Commercial Taxes, Excise & Taxation Commissioner, Government of Himachal Pradesh, B-30, Sda Complex, Kasumpati, Shimla.
13. Commissioner of Commercial Taxes, Excise & Taxation Complex, Rail Head Jammu.
14. Commissioner of Commercial Taxes, Commercial Taxes Department, Project Bhawan, Dhurva, Ranchi- 834 004.
15. Commissioner of Commercial Taxes, Vanijya Therige Karyalaya, 1st Main Road, Gandhinagar, Bangalore- 560 009.
16. Commissioner of Commercial Taxes, Government Secretariat, Thiruvananthapuram -695001.
17. Commissioner of Commercial Taxes, Moti Bangla Compound, M.G. Road, Indore
18. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010
19. Commissioner of Commercial Taxes, Department of Taxes, Old Guwahati High Court Complex, North Aoc, Imphal West, Manipur - 795 001.

20. Commissioner of Commercial Taxes, Office of The Commissioner, GST & Cx Commissionerate, Morellow Compound, M.G.Road, Shillong- 793001.
21. Commissioner of Commercial Taxes, Office of The Commissioner Of State Tax, New Secretariat Complex, Aizawl – 796005.
22. Commissioner of Commercial Taxes, Office of The Commissioner of State Taxes, Dimapur, Nagaland - 797112.
23. Commissioner of Commercial Taxes, Office of The Commissioner of State Tax, Banijyakar Bhawan, Old Secretariat Compound, Cuttack - 753 001.
24. Commissioner of Commercial Taxes, Office Of Excise And Taxation Commissioner, Bhupindra Road, Patiala- 147 001
25. Commissioner of Commercial Taxes, Kar Bhavan, Ambedkar Circle, Jaipur, Rajasthan - 302 005.
26. Commissioner of Commercial Taxes, Sitco Building, Block-D, Above A.G. Office, Gangtok, East, Sikkim - 737 101.
27. Commissioner of Commercial Taxes, Papjm Building, Greams Road, Chennai – 600 006.
28. Commissioner of Commercial Taxes, O/O The Commissioner of State Tax, Ct Complex, Nampally Station Road, Hyderabad - 500 001.
29. Commissioner of Commercial Taxes, Office of The Commissioner of Taxes & Excise, Head of The Department, Revisional Authority, P.N. Complex, Gurkhabasti, Agartala - 799 006.
30. Commissioner of Commercial Taxes, Office Of The Commissioner, Commercial Tax, U.P. Commercial Tax Head Office Vibhuti Khand, Gomti Nagar, Lucknow (U.P)
31. Commissioner of Commercial Taxes, State Tax Department, Head Office Uttarakhand, Ring Road, Near Pulia No. 6, Natthanpur, Dehradun.

32. Commissioner of Commercial Taxes, 14, Beliaghata Road, Kolkata - 700 015.
33. Commissioner of Commercial Taxes, Deptt Of Trade & Taxes, Vyapar Bhavan, IP Estate, New Delhi-2 Pin: 110 002
34. Commissioner of Commercial Taxes, First Floor, 100 Feet Road, Ellapillaichavady, Pondicherry - 605 005.
35. Chief Commissioner of Central Goods & Services Tax, Bhopal Zone 48, Administrative Area, Arera Hills, Hoshangabad Road, Bhopal M.P. 462 011
36. Chief Commissioner of Central Goods & Service Tax C.R.Building Rajaswa Vihar, Bhubaneswar-751007
37. Chief Commissioner of Central Goods & Service Tax Chandigarh Zone C.R. Building, Plot No.19a, Sector17c, Chandigarh-160017
38. Chief Commissioner Central Goods & Service Tax , Cochin Zone C.R.Building, I.S.Press Road, Ernakulum Cochin682018
39. Chief Commissioner of Central Goods & Services Tax Delhi Zone C.R. Building, I.P. Estate, New Delhi110 109
40. Chief Commissioner of Central Goods & Service Tax, Hyderabad Zone GST Bhavan, I.B.Stadium Road, Basheer Bagh, Hyderabad 500 004
41. Chief Commissioner of Central Goods & Services Tax Jaipur Zone, New Central Revenue Building, Statue Circle, Jaipur 302 005
42. Chief Commissioner of Central Goods & Services Tax, Meerut Zone Opp. Ccs University,Mangal Pandey Nagar, Meerut-250 004.
43. Chief Commissioner of Central Goods & Services Tax, Mumbai Zone GST Building, 115 M.K. Road, Opp. Churchagate Station, Mumbai-400020
44. Chief Commissioner of Central Goods & Services Tax, Telangkhedi Road, Civil Lines, Nagpur 440001

45. Chief Commissioner of Central Goods & Services Tax Panchkula Sco 407408, Sector-8, Panchkula
46. Chief Commissioner of Central Goods & Services Tax, Pune Zone GST Bhawan Ice House, 41a, Sasoon Road, Opp. Wadia College, Pune411001
47. Chief Commissioner Of Central Goods & Services Tax, (Ranchi Zone) 1st Floor, C.R. Building, (Annex) Veer Chand Patel Path Patna, 800001
48. Chief Commissioner Of Central Goods & Services Tax, Shillong Zone North Eastern, 3rtd Floor, Crescens Building, MG Road, Shillong-793 001
49. Chief Commissioner of Central Goods & Services Tax, Vadodara Zone 2nd Floor, Central Excise Building, Race Course Circle, Vadodara 390 007
50. Chief Commissioner of Central Goods & Services Tax Visakhapatnam Zone GST Bhavan, Port Area, Visakhapatnam-530 035.
51. NAA website/Guard file.

A. K. GOEL, IRS
Secretary
National Anti-Profiteering Authority (GST)
DOR, Ministry of Finance, New Delhi