BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	14/2020
Date of Institution	12.09.2019
Date of Order	11.03.2020

In the matter of:

1. Deputy Commissioner of State Tax, E-901, 3rd Floor, GST Bhavan, Yervada, Pune-411006.
2. Director-General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Le Reve Pvt. Ltd., Ground Floor, Cooling Tower Cafe, Nirlon Knowledge Park, Off Western Express Highway, Pahadi Village, Mumbai-400063.

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 Applicant No. 1.
2. None for the Applicant No. 2.
3. Sh. Girish Gulsanlal Behel, Partner, Sh. Vishal Khandelwal & Sh. Amit Kumar Mittal, authorized representative for the Respondent.

ORDER

1. The Present Report dated 09.09.2019, received on 12.09.2019 by this Authority, has been furnished by the Applicant No. 2 i.e. the Director-General of Anti-Profiteering (DGAP), under Rule 129(6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that a reference was received from the Standing Committee on Anti Profiteering on 27.03.2019 recommending a detailed investigation in respect of an application, originally examined by the Maharashtra State Screening Committee on Anti-profiteering. The Applicant No. 1 has filed the application under Rule 128 of the CGST Rules 2017, alleging profiteering in respect of restaurant service supplied by the Respondent (Franchisee of M/s Subway Systems India Pvt. Ltd.). In the application, it was alleged that

despite the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017, the Respondent had not passed on the commensurate benefit since he had increased the base prices of his products. Records showed that the worksheet indicating the extent of profiteering sent by the Screening Committee was also received by the DGAP along with the above recommendation of the Standing Committee on 27.03.2019.

2. The DGAP in his report has stated that on receipt of the said reference from the Standing Committee on Anti-profiteering on 27.03.2019, a notice under Rule 129 was issued on 09.04.2019 (Annex-1), calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017, had not been passed on to 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 allowed to inspect the non-confidential evidence/information which formed the basis of the investigation from 15.04.2019 to 17.04.2019, which was not availed of by the Respondent.

3. The DGAP further stated that the period covered by the current investigation was from 15.11.2017 to 31.03.2019 and this Authority vide its Order dated 19.06.2019 (Annex-2), had extended the time limit to complete the investigation up to 26.09.2019, in terms of Rules 129(6) of the CGST Rules.

4. The DGAP further stated that in response to the notice dated 09.04.2019 and subsequent reminders, the Respondent has submitted replies vide letters/e-mails dated 05.05.2019 (Annex-3), 11.05.2019 (Annex-4), 21.05.2019 (Annex-5), 27.05.2019 (Annex-6), 17.06.2019 (Annex-7), 26.07.2019 (Annex-8), 05.08.2019 (Annex-9), 08.08.2019 (Annex-10), 19.08.2019 (Annex-11), 22.08.2019 (Annex-12), 23.08.2019 (Annex-13) and 26.08.2019 (Annex-14) whereby the Respondent has summited that he had availed Input Tax Credit (ITC) during the period July 2017 till 14.11.2017 and thereafter no ITC has been availed. Vide the aforementioned e-mails/letters, the Respondent submitted the following documents/information:

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

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

(c) Copies of Electronic Credit Ledger for the period July 2017 to March 2019.

(d) Copy of Tran-1 Return along with copies of ST-3 returns for the period April 2017 to June 2017

(e) Copies of sample sale invoices and purchase invoices.

(f) Price lists of the products.

(g) Monthly summary of item-wise sales for the period from October 2017 to March 2019.

(h) Details of ITC availed, utilized and reversed for the period July 2017 to 14th November 2017 by the Respondent.

5. Further, the DGAP has reported that in terms of Rule 130 of the CGST Rules, 2017, the Respondent had also been informed by the DGAP vide notice dated 09.04.2019 that if any information/documents provided by him were confidential, a non-confidential summary of such information/documents could be furnished by him. However, the Respondent did not classify his information/ documents as confidential, in terms of Rule 130 of the Rules.

6. The DGAP has also stated that the reference from the Standing Committee on Anti-Profiteering, the various replies of the Respondent and the documents/evidence on record had been carefully examined. The main issues for determination were whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the commensurate benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

7. The DGAP has further reported that the Central Government, on the recommendation of the GST Council, has reduced the GST rate on the restaurant service from 18% to 5% w.e.f. 15.11.2017 with the condition that the ITC on the goods and services used in supplying the service was not taken vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017. Since it was a

case of reduction in the rate of tax, it was important to examine the provisions of Section 171 of the CGST Act, 2017 to ascertain whether the present case was a case of profiteering or not. Section 171(1) reads as follows:- "*Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement of the above provision was abundantly clear that in the event of benefit of ITC or reduction in rate of tax, there must follow a commensurate reduction in the prices of the goods or services being supplied by a registered person and that the final price being changed for each supply had to be reduced commensurately with the extent of benefit and that there was no other legally tenable mode of passing on such benefit of rate reduction or ITC to the recipients/consumers.

8. The DGAP in his report has mentioned that the Respondent has been dealing with a total of 337 items while supplying restaurant services before and after 15.11.2017. On comparing the average selling prices as per details submitted by the Respondent for the period 01.07.2017 to 14.11.2017, and the prices post 15.11.2017, it was evident that 68 items supplied by him were launched in the post-rate reduction regime. He has been charging the lower GST rate of 5% on the increased base price of the other items, which confirmed that the tax amount was computed @ 18% before 15.11.2017 and @ 5% w.e.f. 15.11.2017. And because of this increase in base prices, the

cum-tax prices paid by the consumers were not reduced commensurately for all the items, despite the reduction in the GST rate. Therefore, the only remaining point for determination was whether the increase in base prices was solely on account of the denial of ITC.

9. The DGAP has also reported that the assessment of the impact of denial of ITC, which was an uncontested fact, required the determination of the ITC in respect of "restaurant service" as a percentage of the taxable turnover from the outward supply of "products" during the pre-GST rate reduction period. For instance, if the ITC in respect of restaurant service was 10% of the taxable turnover of a registrant till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the base price w.e.f. 15.11.2017, was up to 10%, then there would be no profiteering. However, if in the same example, the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017, was by 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Therefore, this exercise to work out the ITC in respect of restaurant service as a percentage of the taxable turnover of the products supplied during the pre-GST rate reduction period has to be carried out by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. It was done due to the reason that certain invoices as furnished by the Respondent for the period 01.11.2017 to 14.11.2017 actually pertained to the entire month of November-2017 and that no

reversal of ITC was done by the Respondent in respect of such invoices. Therefore, for the current investigation, the taxable turnover and ITC for the period 01.11.2017 to 14.11.2017 was excluded and not taken into account for the calculation of the percentage of ITC available to the Respondent.

10. The DGAP in his report has further stated that the ratio of ITC to the net taxable turnover had been taken for determining the impact of denial of ITC (which was available to the Respondent till 14.11.2017). As per the monthly GST Returns submitted by the Respondent, it was found that the ITC amounting to Rs. 2,99,442/- was available to him during the period July 2017 to October 2017 which was 8.01% of the net taxable turnover of restaurant service amounting to Rs. 37,34,976/- supplied during the same period. Further, with effect from 15.11.2017, the GST rate on restaurant service was reduced from 18% to 5% and hence, the said ITC was not available to the Respondent. A summary of the computation of ratio of ITC to the taxable turnover of the Respondent has been furnished by the DGAP as per Table-A below:-

Table-A **(Amount in Rs.)**

Particulars	Jul-17	Aug-17	Sept.-2017	Oct.-2017	Total
ITC Availed as per GSTR-3B (A)*	71,998	80,060	61,670	85,714	2,99,442
Total Outward Taxable Turnover as per GSTR-3B (B)	939124	904778	964595	926479	37,34,976
Ratio of Input Tax Credit to Net Outward Taxable Turnover (C)= (A/B)					8.01%

11. The DGAP has further reported that the analysis of the details of item-wise outward taxable supplies made during the period from 15.11.2017 to 31.03.2019, revealed that the base prices of different items supplied as a part of restaurant services to make up for the denial of ITC post-GST rate reduction had been increased by the Respondent. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period 15.11.2017 to 31.03.2019 were compared and it was established that the Respondent had increased the base prices by more than 8.01% i.e., by more than what was required to offset the impact of denial of ITC in respect of 248 items (out of total 316 items) sold during the same period and hence, the commensurate benefit of reduction in rate of tax from 18% to 5% had not been passed on to the customers. However, no profiteering was established regarding the remaining items on which there was either no increase in the base prices or the increase in base prices was less or equal to the denial of ITC, or they were new products launched by the Respondent.

12. The DGAP has also contended that the next issue to be examined was to determine the quantum of profiteering in this case and for this purpose, only those items where the increase in base prices was more than what was required to offset the impact of denial of ITC, had been considered. Based on the aforesaid reduction in the pre and post GST rates, the impact of denial of ITC and the details of outward supplies (other than

zero-rated, nil rated and exempted supplies) during the period 15.11.2017 to 31.03.2019, as per the product-wise sales registers reconciled with the GSTR-1 and GSTR-3B returns, the amount of net higher sale realization due to increase in the base prices of the service, despite the reduction in GST rate from 18% to 5% (with denial of input tax credit) or in other words, the profiteered amount came to Rs. 8,24,260/- (including GST on the base profiteered amount). The details of the computation have been furnished by the DGAP in the Annexure-16. The DGAP has also stated that the said services had been supplied by the Respondent in the State of Maharashtra only.

13. The DGAP has concluded that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling price or by way of not reducing the selling prices of the products commensurately, despite the reduction in GST rate from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent. The additional amount to the tune of Rs. 8,24,260/- had been realized from the recipients which included both the profiteered amount and GST on the said profiteered amount and hence, the provisions of Section 171(1) of the CGST Act, 2017 had been contravened by the Respondent in the present case.

14. The above Report was considered by this Authority in its sitting held on 17.09.2019 and it was decided to hear the Respondent on 07.10.2019. Sh. Girish Gulsanlal Behel, Partner, Sh. Vishal

Khandelwal & Sh. Amit Kumar Mittal, authorized representative represented the Respondent.

15. The Respondent vide his written submissions dated 01.11.2019 and 11.11.2019 has made the following submissions stating:-

a. That in all Subway outlets, Sub of the Day (SOTD) was one of the popular selling products and was priced at Rs. 110/- till 14.11 2017. i.e. before the change in GST rate from 18% to 5%. However, the DGAP had wrongly considered the base price of the few SOTD items as Rs.105/- instead of Rs. 110/-, which was applicable immediately before the change in the GST rate. This wrong consideration of base price should be corrected and the correct base price of Rs. 110/- should be taken for calculation of profiteering. Summary of the incorrect base price taken for the SOTD products has been furnished by the Respondent as detailed below:-

(Amount in Rs.)

SL	Item Name	Base Price (DGAP)	The month of Base Price taken by DGAP	Correct Base Price applicable on 14th Nov 2017	Sum of Total Profiteering (DGAP Working) A	Sum of Revised Profiteering after correct Base Price -B	Difference (A-B)
1	SOTD 6in Aloo Patty o	105	Aug'17	110	284.11	11.93	272.19
2	SOTD 6in Aloo Patty or	105	Aug'17	110	8,795.60	369.20	8,426.40
3	SOTD 6in Chatpata or	105	Aug'17	110	130.22	5.47	124.75
4	SOTD 6in Chatpata or Ck	105	Aug'17	110	4,800.29	201.49	4,598.80
5	SOTD 6in Ckn Slice or M	105	Aug'17	110	6,256.36	262.61	5,993.74
6	SOTD 6in Ckn Tik or Cor	105	Aug'17	110	9,772.23	410.19	9,362.04
7	SOTD 6in Corn Peas or	105	Aug'17	110	1,112.77	46.71	1,066.06
8	SOTD 6in Hara Bhara o	105	Aug'17	110	248.60	10.43	238.16

9	SOTD 6in Hara Bhara or	105	Aug'17	110	8,848.87	371.43	8,477.43
10	SOTD 6in Veg Shami or	105	Aug'17	110	71.03	2.98	68.05
11	SOTD 6in Veg Shami or C	105	Aug'17	110	710.28	29.81	680.46
					41,030.33	**1,722.26**	**39,308.08**

b. That the "Vegetarian Seekh kebab" product was launched in the month of Jan'18 and sold thereafter. The DGAP, while calculating the profiteered amount, had inadvertently taken the base price of this product as Rs. 40/-, which was based on the sales of a different product in the month of October-2017. Hence, this item needed to be removed from the calculation of profiteering. The summary of the products and impact has been reproduced by the Respondent as mentioned below:-

(Amount in Rs.)

Impact due to Vegetarian Seekh kebab			
Month	Total Profiteering Amount (DGAP Working)	Revised Profiteering	Difference due to Vegetarian Seekh kebab
7.Jan'18	497.45	0	497.45
8.Feb'18	1,788.44	0	1,788.44
9.Mar'18	1,126.72	0	1,126.72
1.Apr'18	1,021.72	0	1,021.72
2.May'18	1,277.09	0	1,277.09
3.Jun'18	478.91	0	478.91
4.Jul'18	1,924.90	0	1,924.90
5.Aug'18	2,718.44	0	2,718.44
6.Sept'18	1,455.27	0	1,455.27
7.Oct'18	2,399.17	0	2,399.17
8.Nov'18	1,441.36	0	1,441.36
9.Dec'18	1,924.90	0	1,924.90
10.Jan'19	1,450.63	0	1,450.63
11.Feb'19	1,984.54	0	1,984.54
12.Mar'19	1,664.90	0	1,664.90
	23,154.44	0	23,154.44

c. That the DGAP while calculating the profiteered amount, erroneously added a 5% notional amount without providing any rationale for such addition. This amount appeared to had been added due to GST, which had been collected from the customers and deposited with the Government of India with his monthly GST returns. Hence, the additional 5% amount of Rs. 39.250/- should be removed from the profiteered amount.

d. That as per franchise agreement, he was required to pay 8% on net sales towards royalty and 4.5% towards advertisement charges to M/s Subway Systems India Private Limited along with GST@12% on royalty amount & 18% on advertisement expenses. Basis of calculation of royalty and advertisement charge was net taxable sales. Therefore, post 14.11.2017, the cost of royalty had been increased by 1.769%. However, the DGAP while calculating profiteering had considered the base price of the products without considering the increase in royalty expenses which was directly calculated based on net sales and the same did not come under the purview of ITC loss. Hence, it should be reduced from the calculated profiteered amount. The Respondent has reproduced the calculation of the increase in royalty as mentioned below:-

(Amount in Rs.)

Particulars	Before 15.11.2017 (A)	Post 15.11.2017(B)	Impact
Basic Price – sample for illustration	100	112.38	
Add: - GST@18%-before 14th Nov Add: - GST@5% Post 14th Nov	18	5.63	
Total Invoice Value	118	118	
Royalty Expenses @ 8% on Net Sale	8	8.99	
Add:- GST @ 12% on Royalty charged by Subway India	0.96	1.079	
Advertisement Expenses @ 4.5% on Net Sale	4.5	5.06	
Add: - GST@18% on advertisement charged by Subway India	0.81	0.91	
Total Invoice Value including GST	14.27	16.039	1.769%

e. That month-wise impact on profiteering amount has been furnished by the Respondent as mentioned below:-

(Amount in Rs.)

Month	Total Profiteering Amount (DGAP Working)	Revised Profiteering after royalty expenses adjustment	Difference due to Royalty Expenses adjustment
5.Nov'17	28,042.35	8,264.64	19,777.71
6.Dec'17	43,394.60	14,734.18	28,660.42
7.Jan'18	44,270.71	15,342.42	28,928.30
8.Feb'18	33,388.20	15,372.49	18,015.72
9.Mar'18	35,602.99	17,931.85	17,671.14
1.Apr'18	37,959.19	18,746.68	19,212.51
2.May'18	38,737.72	20,102.45	18,635.28
3.Jun'18	33,720.18	18,367.57	15,352.61
4.Jul'18	33,986.62	17,470.24	16,516.38
5.Aug'18	50,327.83	23,680.34	26,647.50
6.Sept'18	45,557.01	21,179.65	24,377.36
7.Oct'18	51,408.12	24,651.04	26,757.08
8.Nov'18	54,646.60	31,738.76	22,907.85
9.Dec'18	47,012.68	27,535.59	19,477.09
10.Jan'19	46,738.34	27,985.25	18,753.09
11.Feb'19	81,290.32	58,906.58	22,383.74
12.Mar'19	95,243.86	71,333.16	23,910.70
	801,327.35	433,342.87	367,984.48

f. That he has relied upon the case of Kumar Gandhrav vs. M/s KRBL Limited (Case Number 03/2018 dated 04-05-2018) passed by this Authority.

g. That post 14.11.2017, he was not allowed to avail ITC as per Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017. Therefore, for calculating base prices after change in rate of tax, loss of ITC on capital goods was required to be considered separately as he was allowed to take credit only for short period i.e. July 2017 to 14.11.2017 and the percentage of ITC calculated by DGAP in his report did not reflect complete one-year trend of ITC of the business during which the capital goods expenditure would have taken place. He had incurred total capital expenditure of Rs. 2,01,490/- inclusive of GST and total GST paid on capital expenditure was Rs. 30,677/- which was 0.25% of total sales turnover during the year 2018-19 and if this 0.25% loss of ITC on account of capital goods was considered and added in the base prices for comparison then profiteered amount should reduce by Rs. 37,703/-. The Respondent has also furnished the below details of capital goods purchased below:-

(Amount in Rs.)

Capital Goods ITC Impact			
Month	Total Impact on Profiteered Amount	Month	Total Impact on Profiteered Amount
Nov'17	1,339.08	Aug'18	2,569.01
Dec'17	2,091.02	Sept'18	2,316.25

Jan'18	2,167.95	Oct'18	2,603.73
Feb'18	2,180.42	Nov'18	2,335.81
Mar'18	2,373.09	Dec'18	1,879.74
Apr'18	2,558.19	Jan'19	1,960.90
May'18	2,553.05	Feb'19	2,096.84
June'18	2,243.89	Mar'19	2,094.35
July'18	2,339.41	-	-
Total	19,846.10		17,856.62
Gross Total			37,702.72

h. That the DGAP, while calculating the profiteered amount, did not consider the prices of products which have been reduced by him and considered the impact on the profiteered amount as zero instead of negative value. That he had incurred an amount of Rs. 1,00,374/- on account of reduction in prices of the products after rate reduction which had not been considered by DGAP while calculating the profiteered amount. Given the above, the calculated profiteered amount should be reduced further by Rs. 1,00,374/-. A monthly summary in respect of his above claim has been furnished by the Respondent as mentioned is below:-

(Amount in Rs.)

List of Items Prices has been reduced				
Item	Commensurate Base Price	Base Price	Reduction in Price	Total Impact on profiteered Amount
B.M.T. Sub	178.22	165.00	(13.22)	7.51
Bag Fee	5.40	5.00	(0.40)	7567.99
Bottled Juice	137.17	127.00	(10.17)	89.55
Can CanDrk	91.81	85.00	(6.81)	42742.74
ChatpataChanaPatty Sub	129.61	120.00	(9.61)	2.08
Cheese Add6in	20.35	18.84	(1.51)	4235.09
Cheese AddFt	37.80	35.00	(2.80)	3676.15
Chicken Tandoori Sub	172.82	160.00	(12.82)	4.16

ChknTikka Sub	172.82	160.00	(12.82)	1.39
Fresh Value Meal (IN)	77.34	71.61	(5.74)	25864.53
Lg Fountain Drink	64.81	60.00	(4.81)	137.94
Liquid Egg Add6in	32.40	30.00	(2.40)	15.33
Med Fountain Drink	59.41	55.00	(4.41)	632.21
Mexican Bean Patty Su	129.61	120.00	(9.61)	192.24
Mexican Bean Patty Sub	129.61	120.00	(9.61)	1.04
PaneerTikka Add6in	43.20	40.00	(3.20)	536.42
RO Delivery Fee	10.80	10.00	(0.80)	12069.45
Rst Chicken Sub	172.82	160.00	(12.82)	2.77
Small Fountain Drink	54.01	50.00	(4.01)	1187.79
SUBWAYItem BtlDrk	91.81	85.00	(6.81)	1249.94
Turkey Chicken Slice	324.03	300.00	(24.03)	153.26
Veggie Delite Sub	129.61	120.00	(9.61)	5.20
				100374.29

i. That the DGAP has not considered an amount of Rs. 1,18,000/- that had been incurred by him on account of items where the base prices were made zero under various kinds of sales promotion schemes such as free items to loyal customers, whole order discounts and BOGO offer. Therefore, the calculated profiteered amount should be reduced further by Rs. 1,18,000/-. Working in respect of the above claim has been furnished by the Respondent as has been mentioned below:-

(Amount in Rs.)

Summary of Free Items			
Month	Total Amount of Free Items	Month	Total Amount of Free Items
Nov'17	2,896.06	Aug'18	7,266.76
Dec'17	794.67	Sept'18	1,921.85
Jan'18	5,266.59	Oct'18	2,357.90
Feb'18	1,160.09	Nov'18	80,238.93
Mar'18	1,620.29	Dec'18	631.26
Apr'18	2,806.81	Jan'19	1,009.43
May'18	2,474.58	Feb'19	1,410.53
June'18	1,799.57	Mar'19	1,550.34

July'18	3,495.88	-	
Gross Total	22,314.54		96,387.01

j. That he was selling a few MRP based products like soft drinks and the GST rate applicable on some of these products was 28% plus 12% Cess. After 14.11.2017, the cost of goods sold had been increased because ITC to the tune of 28% (and 12% Cess) had been denied which had been charged by the vendor at the time of purchase. Therefore, MRP based products where tax incidence had been increased due to denial to ITC needed to be removed from the profiteered amount. The impact on the profiteered amount has been furnished by the Respondent as mentioned below:-

(Amount in Rs.)

MRP Products Impact			
Month	Total Impact on Profiteered Amount	Month	Total Impact on Profiteered Amount
Nov'17	1,235.16	Aug'18	1,846.52
Dec'17	2,225.82	Sept'18	1,464.67
Jan'18	2,378.06	Oct'18	2,502.86
Feb'18	2,410.07	Nov'18	1,610.61
Mar'18	2,166.70	Dec'18	1,692.52
Apr'18	2,622.82	Jan'19	2,127.45
May'18	2,408.48	Feb'19	1,728.50
June'18	2,451.45	Mar'19	2,170.07
July'18	1,536.08	-	
Gross Total	19,434.64		15,143.20

k. That as part of the franchise agreement, he needed to replace the store fixtures, machinery, equipment, etc. every 7 years. The renovation of the store was due in the month

of November-2019 and for a similar size store for renovation, he had got a quotation of Rs. 19,25,196/- exclusive of GST. If this GST amount paid to the vendor had been allocated over the 7 years it would come around .041% of the turnover. He has further stated that apart from the loss of ITC, depreciation cost would go up substantially in initial years of capital expenditure. Therefore, the profiteered amount should be reduced by Rs. 60,797/- based on the loss of ITC on capital goods.

l. That the DGAP while calculating the quantum of profiteering has considered sales up to the period from 15.11.2017 to 31.03.2019 i.e. almost 16 months. However, in the CGST Act, no period has been prescribed up to which registered person has to keep the base prices same so that anti-profiteering provision was not invoked. Also, as per the 'General Methodology and Procedure' notified through notification, the period of calculation of profiteered amount was not prescribed. While providing Restaurant Services he did not hold inventory for more than one week due to the perishable nature of the items. One of his main raw materials was vegetables and the price of vegetables were changing on a day to day basis. Various factors like competition pricing, long term strategies for market penetration, profit margin for sustaining in the market, life

cycle of the product, economic and social conditions, cost of the products and capital expenditure, inflation in manpower cost, general year on year inflation, etc. played an important role at the time of fixing the prices of the products. Therefore, the period considered for the calculation of profiteering amount should be around 4 months from the date of the rate change. Beyond that timeline, any price revisions should be purely considered as business decisions. Hence, the period of calculation of the profiteered amount in his case should be considered up to 31.03.2018.

m. That as per the DGAP's report, the profiteered amount was 4.95% of the net sales turnover. This impact was considered only for the SKUs which had a positive impact on profiteering amount. The other benefits to the customers, reductions in SKU rates, discounts, increase in royalty expenses and the capital goods purchased were not accounted for (as per several points highlighted earlier).

For February 2019 & March 2019, the profiteered amount calculated by DGAP was 8.83% & 10.15% of net sales turnover, respectively, which was higher than the average 4.95% calculated by DGAP. This was due to the fact that the prices in the month of January-2019 and February-2019 had been increased to account for several other

business factors. This factor had not been considered in DGAP's calculations and the profiteering was calculated based on the increased base prices in January 2019 and February 2019. This required that the period for the calculation of the profiteered amount should be reasonable.

n. That there were 67 Subway brand outlets operated by various franchisees in Mumbai itself and some of the stores were few meters away from his store. To keep the sanctity of the prices in the market and sustain in business he needed to maintain identical pricing as that of other Subway outlets in Mumbai. However, the interest of the customers had been kept in mind while arriving at the selling prices to be charged to the customers. The final impact on the customers was very minimal and, in some cases, even negative. He has also furnished below Table indicating the trend of past price revisions till the period of June-19:-

(Amount in Rs.)

Menu Product Name	Jul 17to Sep17	Aug17 to 14th Nov17(SOTD Increase)	Price After 14th Nov 17	Aug -18 (SOTD Increase)	Mar-19	Jun-19
SOTD	124	130	125	130	135	140
Western Egg & Cheese	130		130			
Chicken Ham, Egg & Cheese	130		130			
Veggie Delite	142		140		150	
Chatpata Chana Patty	142		140		150	
Mexican Patty	142		140		150	
Green Peas Patty	142		140		150	
Hara Bhara Kebab	142		140		150	

Veg Patty	159		160		170	
Aloo Patty	159		160		170	
Corn & Peas	159		160		170	
Veg Shammi	159		160		170	
Paneer Tikka	159		160		170	
Chicken Tikka	189		190		200	
Chicken Seekh	189		190		200	
Roasted Chicken	189		190		200	
Chicken Tandoori	189		190		200	
Chicken Slice	189		190		200	
Turkey	195		195		205	
Chicken Teriyaki	195		195		205	
Italian B.M.T.	195		195		205	
Tuna	195		195		205	
Turkey & Chicken Ham	195		195		205	
Subway Club	195		195		205	
Veggie Delite	201		205		210	
Chatpata Chana Patty	201		205		210	
Mexican Patty	201		205		210	
Green Peas Patty	201		205		210	
Hara Bhara Kebab	201		205		210	
Veg Patty	218		220		220	
Aloo Patty	218		220		220	
Corn & Peas	218		220		220	
Veg Shammi	218		220		220	
Paneer Tikka	218		220		220	
Chicken Tikka	242		240		240	
Chicken Seekh	242		240		240	
Roasted Chicken	242		240		240	
Chicken Tandoori	242		240		240	
Chicken Slice	242		240		240	
Turkey	254		250		250	
Chicken Teriyaki	254		250		250	
Italian B.M.T.	254		250		250	
Tuna	254		250		250	
Turkey & Chicken Ham	254		250		250	
Subway Club	254		250		250	
Veggie Delite	266		270		280	
Chatpata Chana Patty	266		270		280	
Mexican Patty	266		270		280	
Green Peas Patty	266		270		280	
Hara Bhara Kebab	266		270		280	
Veg Patty	289		295		305	
Aloo Patty	289		295		305	
Corn & Peas	289		295		305	
Veg Shammi	289		295		305	
Paneer Tikka	289		295		305	
Chicken Tikka	342		340		350	
Chicken Seekh	342		340		350	

Roasted Chicken	342		340		350	
Chicken Tandoori	342		340		350	
Chicken Slice	342		340		350	
Turkey	354		360		370	
Chicken Teriyaki	354		360		370	
Italian B.M.T.	354		360		370	
Tuna	354		360		370	
Turkey & Chicken Ham	354		360		370	
Subway Club	354		360		370	

o. That on the issue of Methodology and Procedure of calculating profiteering, several petitions were pending in various High Courts.

16. A supplementary report was sought from the DGAP on the issues raised by the Respondent vide his above-mentioned submissions dated 11.11.2019 and the DGAP vide his Report dated 06.12.2019 has stated:-

a. That the details of the period, from where the prices of the products has been arrived at, have been provided in column E of the base price sheet. The DGAP has elaborated on the steps taken for the determination of the base prices in the pre-rate reduction period. The base prices for the items supplied in the preceding period, as provided in the base price sheet had been taken into account while arriving at profiteering.

b. That the base price of the item "Vegetarian Seekh Kabab" was taken from the sales data from October 2017 (transaction ID 1/A-18653 dated 04.10.2017-Annexure 10) as submitted by the Respondent. The details of sales for

the above-said item were provided by the Respondent for the period before the rate reduction, therefore, the same was considered in the base price sheet and the base price of the product has been taken into consideration for determination of profiteering.

c. That it was the customer who bore the burden of increased base prices along with the GST amount charged by the Respondent, due to the increase in the base prices by more than the denial of ITC. Therefore, the same has been considered in the calculation of profiteering.

d. That the methodology adopted by the DGAP has been consistent over time and in all such cases.

e. That it was also found that the increase in base prices was more than what was required to offset the impact of denial of ITC and such additional quantum along with applicable GST was recommended in his report as profiteering in the past and the same has been approved by this Authority in all such cases of profiteering in the case of "Restaurant Services'. However, the submission of the Respondent gave insight into another fact which was hitherto not known and indicated that M/s Subway India Pvt. Ltd. (the franchisor) too had profiteered by charging royalty and advertisement expenses on the increased value of net taxable sales which was allowed only to the franchise

operators to offset impact of denial of ITC. Further, the sales prices were recommended by the franchisor, however, it was not involved in the purchase of goods/material or services for the supply of restaurant services and there was effectively no denial of ITC to it and collection of royalty and other charges on the increased base prices appeared to be resorting to profiteering. Investigation on this issue may be undertaken based on further directions either from the Standing Committee under Rule 129(1) of the CGST Rules or by this Authority under Rule 133(5) of the Rules.

f. That the additional cost of GST paid under Reverse Charge by the Respondent to M/s Subway India Private Limited on the increased amount of Royalty and Advertisement Expenses, was a point of law, which this Authority only was statutorily empowered to look into.

g. That the ITC accrued on account of purchase of capital goods for the period when the same was allowed to the Respondent, had already been accounted for calculating the ratio of denial of ITC. The Respondent was allowed to increase the base prices to offset the impact of denial of ITC. However, no benefit for loss of ITC on capital goods could be allowed to the Respondent that would have accrued in the future on expenses yet to be incurred on the date of the denial of ITC.

h. That the excess (more than commensurate) benefit passed on by the Respondent to some buyers/ recipients could not be claimed to have offset the higher prices charged by him from his other buyers/ recipients. Similarly, the excess benefit passed on by the Respondent in some instances, where the prices charged by the Respondent for certain supplies to some of his buyers/ recipients were zero, could also not be claimed to offset the excess price charged by him from other buyers/ recipients. Also, the zero prices charged by him in respect of certain supplies were for marketing and sales promotion purposes and not as compliance with the provisions of Section 171 of the Act, ibid.

i. That the impact of denial of ITC has already been accounted for in the computation of profiteering.

17. In response to the above supplementary report of the DGAP, The Respondent filed his submissions on 23.12.2019, wherein he contended as follows:-

a. That price of SOTD was increased to Rs 110/- from Rs. 105/- with effect from August 2017. Hence, to compute the profiteering, the price of SOTD should have been taken as Rs. 110/-, i.e. the price on 14 Nov 2017, notwithstanding the actual invoice price. This was against the principles of natural justice and amounted to price control, which was

contrary to the freedom of trade and business, granted under 19(1)(g) of the Constitution of India. He has relied upon the judgment passed in the case of Basant Industries V. Asst Collector of Customs 1996 (81) ELT 195 (SC) in this regard.

b. That single sale entry in respect of sale of "Vegetarian Seekh Kebab" shown in October 2017, was a result of a mistake by his staff and that too was as an add-on to the main item supplied under that invoice. The DGAP has failed to appreciate that the said product had been offered for sale regularly only in January 2018, i.e. in the post rate reduction period. He had furnished documentary evidence before the DGAP in support of his above claim and from the sales register furnished by him, it was verifiable that the said product had been continuously sold only after January 2018 and the single entry showing sale of "Vegetarian Seekh Kebab" was an anomaly and should have been ignored while calculating the profiteered amount.

c. That Rule 126 of CGST rules empowered this Authority to determine the methodology and procedure for computation pr profiteering; however, neither the GST Act nor the Rules or any related delegated legislation, prescribed the method of computation by which profiteering needed to be calculated; although this Authority has prescribed the general methodology and the procedure and notified it in

terms of Rule 126 of the CGST Rules, it did not prescribe any specific methodology to be adopted in the computation of profiteering amount.

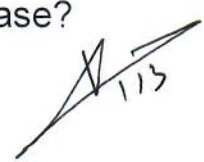
d. That he proposed to rely on the case of Commissioner of Income Tax Bangalore v. B. C. Srinivasa Setty 1981 2 SCC 460, wherein the Hon'ble Supreme Court has held that a charging section has to prescribe the method therefor, without which it became inapplicable and following the ratio thereof, in the absence of a statutorily prescribed methodology for calculation of profiteering, any such calculation became arbitrary and untenable.

e. That he wanted to rely on the dictionary meaning of the words "profiteer" and "profiteering" and submits that he has not profiteered.

18. We have carefully considered the Report of the DGAP, the submissions made by the Respondent and the Applicant placed on record. On examining the various submissions we find that the following issues need to be addressed:-

a. Whether the Respondent has passed on the commensurate benefit of reduction in the rate of tax to his customers?

b. Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 in this case?



19. Perusal of Section 171 of the CGST Act shows that it provides 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 ITCs 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."

20. In the context of deciding the present case, we observe that Section 171 of the CGST Act 2017 itself defines the term "profiteering" which means the amount determined on account of not passing on the benefit of reduction in the rate of tax on supply of goods and services or both or the benefit of Input Tax Credit to the recipient by way of commensurate reduction in the prices of the goods or services or both. We find it pertinent that Section 171 of the CGST Act 2017 provides that "profiteering" is to be computed in respect of each supply by a registered person. As per the above-said provisions, there is no connection between the term "profiteering" and "Profit". The scope of

profiteering is confined to the question whether the benefit accruing on account of reduction in the tax rate or the benefit of ITC as the case may be, has been passed on to the recipient/consumer or not. In the context of the same, some of the submissions made by the recipient, i.e. those relating to increase in cost on account of royalty, advertising charges and inflation has increased the cost of raw materials (green vegetables and other perishable items) do not have any ramification on the computation of the amount of profiteering. Further, it is pertinent to mention that Section 171 of the Act, ibid, mandates that profiteering has to be calculated on each supply/transaction and therefore it has to be calculated on each actual invoice/actual supply in the relevant period, comparing the prices mentioned therein with the prevailing base prices before the reduction in the tax rate/change in the availability of ITC. It is also pertinent that for the computation of profiteering, the actual transaction values of a product in the pre and post-tax rate reduction periods are compared. Hence, the actual pricing and the amount of profit/loss at the end of the supplier becomes irrelevant for the computation of profiteering. We also find it pertinent to mention that this Authority has no legislative mandate to fix the prices or the profit margins in respect of any supply (which are the rights of the supplier) and it is obligated by Section 171 of the CGST Act, 2017 to ensure that the benefit of the reduction in the rate of tax and/ or benefit of ITC (which is a

sacrifice of revenue from the kitty of Central and State Governments in a welfare state) is passed on to the recipients, and, if tracked down the entire value chain, to the end consumers. The welfare of the consumers who are voiceless, unorganized and scattered is the soul of this provision. This Authority has been working in the interest of consumers as the trade is bound to pass on the benefit of tax reduction and ITC which become available to him due to revenue sacrificed by the Government. This Authority does not, in any manner, interfere in the business decisions of the Respondent and hence the functioning of the Authority and the anti-profiteering machinery is within the confines of the four walls of the provisions of Section 171 of the CGST Act 2017 and in no way violate the tenets of Article 19 (1) (g) of the Constitution. Keeping the above observations in mind, we proceed to address the specific issues raised by the Applicants and the Respondent in the present case.

21. The Respondent has argued that the CGST Act and the Rules made thereunder did not prescribe any procedure or mechanism for calculation of profiteering as also the period of investigation, rendering the DGAP investigation arbitrary. In this regard, we observe that the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC has been mentioned in Section 171 (1) of the CGST Act, 2017 itself which states as follows:- "*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 supplier since it is a sacrifice granted from the public exchequer, which cannot be misappropriated by him. It also means that the above benefit is to be passed on each product to each buyer and in case it is not passed on, the profiteered amount has to be calculated for which investigation has to be conducted on all such impacted supplies made to each recipient, thereby clearly implying 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. In other words, each customer is entitled to receive the benefit of tax rate reduction or ITC on each product 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 product supplied based on the extent of tax reduction as also the existing base price of the product before such tax rate reduction. 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 product to product 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 further elaborate upon this legislative intent behind the law, this Authority has notified the 'Procedure and Methodology' 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 realized before and after the GST implementation would always be different from the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to 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 of the CGST Rules, has power to 'determine' Methodology & Procedure and not to 'prescribe' it. However, fixation of the commensurate price is purely a mathematical exercise that 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, the provisions of Section 171 (1), which are abundantly clear, unambiguous and mandatory, truly reflect the intent of the Central and State legislatures. The Respondent cannot deny the benefit of tax reduction to his customers on the above untenable ground as Section 171 provides a clear cut methodology to compute both the above benefits. It would also 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 provide the machinery to enforce the provisions of law 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. Hence, the above plea of the Respondent is not tenable.

22. The Respondent has contended that the computation of profiteering by the DGAP was flawed on various counts. One contention made before us was in respect of 'Sub of the Day' (SOTD) which was sold by him @ Rs. 110/- till 14.11.2017 but the base price of SOTD had been incorrectly mapped by the

DGAP to Rs. 105/- while working out the base price for the pre rate reduction period. However, the record of the case reveals that the Respondent, at no point in time, has furnished any invoice/ supply document that shows SOTD as an item supplied/ sold by him. Since no invoices mention SOTD as an item supplied, there is no ground for accepting Respondent's contention regarding SOTD. Further, we find that for computing the extent of profiteering, the DGAP has taken, as the basis, the product-wise average prices for the items supplied in the pre rate reduction period from the Respondent's invoices which the Respondent had himself submitted and not from any secondary data/ source. We also take note of the fact that the DGAP has compared the average pre rate reduction base prices with the actual post rate reduction prices of all the products supplied by the Respondent, including SOTD, due to the reasons that 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. Further, it was also not possible to compare the actual to actual base prices pre and post rate reduction (of SOTD or any other product) as the same buyer may have not purchased the very 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. Also, the Respondent has himself stated that he had charged different base prices to his customers for the same product on different days of any particular week/ month during the pre rate reduction period and therefore, the only alternative 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. Therefore we do not find any merit in the claim of the Respondent regarding the same.

23. The Respondent has further contended that one of the products, i.e. "Vegetarian Seekh kebab" was launched only in January 2018 and sold thereafter and hence there could be no profiteering in respect of the said product. In this regard, it is observed form the DGAP's supplementary report dated 06.12.2019, that the price of the said product has been culled out from Respondent's sales data for October 2017 (Transaction ID 1/A-18653 dated 4.10.2017) and mentioned in the Annexure-10 of DGAP Report. The details of the said transaction show that the Respondent has indeed supplied the product "Vegetarian Seekh kebab" on 4.10.2017 and the invoice shows the CGST and SGST amounts charged as Rs. 3.60/- each. Hence, it is clear to us that the said product has been sold by the Respondent in the pre-rate reduction period and this contention of the Respondent is untrue and unacceptable. We do not find any reason to interfere in the computation of profiteering by the DGAP on this ground.

24. The Respondent has also claimed that the DGAP, while calculating the profiteered amount, erroneously added a 5% notional amount without providing any rationale for such addition. This amount had been added due to GST, which had been collected from the customers and deposited with the Government of India with his monthly GST returns. Therefore, this addition of a further 5% amount should be removed and hence the profiteered amount be reduced appropriately. This contention of the Respondent is not correct because the provisions of Section 171 (1) and (2) of the CGST Act, 2017 mandate that the benefit of reduction in the tax rate is to be passed on to the recipients/ customers by way of commensurate reduction in price, which includes both, the base price and the tax paid. 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

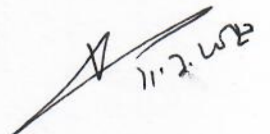
above Act as he has denied the benefit of tax reduction to his customers by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing goods from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes 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.

25. We find that the Respondent has also contended that as per his franchisee-franchisor agreement with his franchisor M/s Subway Systems India Private Ltd., he was under an obligation to pay 8% of his net sales towards royalty and 4.5% of his net sales towards advertisement charges to the franchisor and that post 14.11.2017, when the tax rate was reduced, his cost towards royalty and advertising charges had increased significantly but the same was not considered by the DGAP while calculating profiteering. Further, we find that the Respondent has similarly contended that he needed to replace the machines, equipment and store fixtures every 7 years as per his franchise- franchisor agreement and cost of such renovation needed to be considered in the computation of profiteering. In this connection, it would be appropriate to refer to the definition of the 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."

It is clear that an increase or decrease in costs of a supplier, which included costs such as royalty and advertisement charges or the costs towards the renovation of the store, has no ramification on the amount of profiteering which is computed in line with the provisions of Section 171 of the CGST Act. In case a supplier has not passed on the benefit of tax rate reduction by way of a commensurate reduction in prices in each of his supplies, anti-profiteering provisions will apply to him, irrespective of his costs or whether he makes profits or losses. In any case, the payments made by the Respondent on account of Royalty and Advertisement Charges are purely an internal agreement between the franchiser and the franchisee without any connection with the anti-profiteering provisions applicable to the franchisee, i.e. the Respondent. Hence, this contention of the Respondent is not accepted.

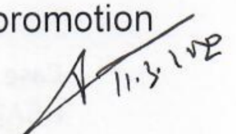


26. The Respondent has further contended that w.e.f 15.11.2017, ITC on inputs and capital goods stood denied to him vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017. Hence, for calculating the base prices after the reduction in the rate of tax with simultaneous denial of ITC, the loss on account of denial of ITC on capital goods ought to have been factored in the computation of profiteering by the DGAP since before 14.11.2017, he was allowed to take ITC on his purchases of capital goods. In the context of this contention of the Respondent, we find that the DGAP has already factored the fact of denial of ITC to the Respondent w.e.f. 15.11.2017 in the computation which is based on the comparison of ratios of the Total ITC available to the Net Taxable Turnover in the pre rate reduction regime with the post rate reduction regime. It is pertinent that for the pre rate-reduction period, ITC on capital goods, if any, availed by the Respondent, has already been accounted for in the computation. Hence, the contention of the Respondent is without any merit.

27. The Respondent has further claimed that in the case of certain products supplied by him after the tax rate reduction, he had reduced the prices more than commensurately, but this aspect has been ignored by the DGAP, in as much as the DGAP has not considered the negative values and instead taken them as zero, whereas the profiteering should have been netted off. In this context, we observe that no 'netting off' can be applied in the

case of profiteering, as the benefit that has to be passed on to each customer has to be necessarily computed on each product supplied. Zeroing or netting off, as demanded by the Respondent, would imply that the amount of benefit not passed on certain supplies (to certain customers/ recipients) would be subtracted from the amount of any excess (more than commensurate) benefit passed on other products and the resultant amount would be determined as the profiteered amount. If this flawed methodology is applied, the Respondent shall be entitled to subtract the amount of benefit which he has not passed on from the amount of such excess 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. It has to be kept in mind that every recipient/ customer is entitled to the benefit of the 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 that ought to accrue to another recipient or customer. Therefore, the contention of the Respondent is not accepted.

28. The Respondent has further claimed that he incurred a total cost of Rs. 1,18,000/- on account of items, where the base prices charged by him were 'zero' as per his various sales promotion



schemes to improve customer loyalty, but the same has not been considered by DGAP, despite it being nothing but a benefit passed on by him to the customers and that the said amount should not be considered as profiteered amount. In this context, we find it pertinent to mention that in those cases where the Respondent has not charged any price for the products supplied by him to his recipients/ customers, he has done so with the intent of increasing his overall sales and promoting customer loyalty and not to pass on the benefit of tax rate reduction in terms of Section 171 of the CGST Act, ibid, which requires that the benefit of tax reduction has to be commensurately passed on in respect of each supply made by a supplier and thus such benefit has to be passed on to each customer/ recipient and there can be no netting off. The legislative intent behind the anti-profiteering provision being that benefit has to be passed on for each supply, the passing on of any excess (more than commensurate) benefit to some customers cannot be claimed to offset the denial of benefit to other customers, wherein no benefit was passed on or where the benefit passed on was lesser than commensurate. Thus, such offsetting can not be permitted and hence we find no grounds to differ from the DGAP in the context of this issue. If such an offsetting was permitted, it would be detrimental to the interest of those customers/ recipients who had been denied commensurate benefit and hence the

contention of the Respondent relating to his charging "zero' price for certain supplies, is rejected as untenable.

29. The Respondent has further claimed that he was also supplying certain MRP based products, like soft drinks, where the tax rate was 28% plus 12% Cess in the pre-rate reduction as also the post rate reduction periods but after 14.11.2017, ITC to the tune of 28% GST and applicable cess stood denied to him, though he still had to pay the GST thereon at the time of purchase and as such, in respect of such MRP based products, where tax incidence on him had increased due to denial to ITC thereon, needed to be removed from the profiteered amount. We observe that this contention made by the Respondent is also fallacious as the aspect of denial of ITC in the post 14.11.2017 period has already been factored in the computation of profiteering wherein the percentage of the ITC available to the Net Taxable Turnover in the pre rate reduction regime has already been considered while calculating the effect of denial of such ITC. We find it pertinent that whereas the Respondent was allowed to increase the base prices of his products by 8.01% to set off the impact of denial of ITC, he increased the base prices of the items supplied by him, by more than 8.01% and hence he had indeed profiteered.

30. The Respondent has further contended that neither CGST Act nor the Methodology and Procedure notified by the Authority specify the period up to which a registered person has to keep

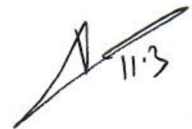
the base prices same to ensure that the anti-profiteering provisions are not invoked. Also, the period of investigation for the computation of the profiteered amount has not been specified anywhere. As a result, the investigation period, in this case, was from November-2017 to March-2019, i.e. almost 16 months, which was an unduly long period, considering that factors influencing business and pricing decisions, such as competition, pricing, profit margin, perishability of items, etc. did not remain static. Therefore, the period of calculation for profiteering should be kept shorter and as such be considered only up to 31.03.2018. In this context, we observe that in this case, while the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017, the Respondent increased the base prices of his products immediately thereafter and did not pass on the resultant benefit by a commensurate reduction in the prices of his supplies at any point of time till 31.03.2019. In other words, the violation of the provisions of Section 171 of the CGST Act 2017 has continued unabated in this case and the offence continues to date. The Respondent has nowhere produced any evidence to prove from which date the benefit was passed on by him. The fact that the Respondent has not complied with the law till 31.03.2019 implies that profiteering has to be computed for the entire period and hence we do not see any reason to accept this contention of the Respondent. We further observe that had the Respondent passed on the benefit before 31.03.2019, he would

have been investigated only till that date. Therefore, the period of investigation i.e. from 15.11.2017 to 31.03.2019 has been rightly taken by the DGAP.

31. The Respondent has also contended that he finds it inexplicable that the percentage profiteering vis-a-vis net sales turnover computed by the DGAP has sharply risen to 8.83% & 10.15% of net sales turnover for Feb 2019 and March 2019. In this context, we find that the record shows that the DGAP has only calculated the percentage impact of denial of ITC i.e. 8.01% (ratio of ITC available for the period from July-2017 to October-2017 to the Total Taxable Turnover for the same period) and the DGAP has not computed the percentage of the profiteered amount to the sales turnover or the month-wise percentage of profiteering. Hence we do not see any basis for this contention. While observing as above, we take note of the fact that the record shows that not only the Respondent had not passed on the benefit of tax rate reduction to his customers/ recipients he had also increased the prices of his products in January-2019 and February-2019. Since the offence on the part of the Respondent has continued, the price charged in excess over and above what he should have charged (after accounting for the passing on of commensurate benefit) has to be construed as the amount profiteered.

32. The Respondent has also contended that right to trade was a fundamental right guaranteed under Article 19(1)(g) of the

Constitution of India and the right to trade including the right to determine prices and such right which had been granted by the Constitution of India could not be taken away without any explicit authority under the Law. Therefore, this form of price control was a violation of Article 19(1)(g) of the Constitution of India. The contention of the Respondent is not correct as this Authority or the DGAP has not acted in any way as a price controller or regulator as they don't have the mandate to regulate the same. The Respondent is free to exercise his right to practice any profession or to carry on any occupation, trade or business, as per the provisions of Article 19 (1) (g) of the Constitution. He can also fix his prices and profit margins in respect of the supplies made by him. Under Section 171 this Authority has only been mandated to ensure that both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments are passed on to the end consumers who bear the burden of the tax. The intent of this provision is the welfare of the consumers who are voiceless, unorganized and vulnerable. This Authority is charged with the responsibility of ensuring that both the above benefits are passed on to the general public as per the provisions of Section 171 read with Rule 127 and 133 of the CGST Rules, 2017. This Authority has nowhere interfered with the business decisions of the Respondent and therefore, there is no violation of Article 19 (1) (g) of the Constitution.



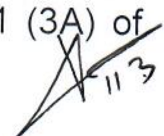
33. The Respondent has relied upon the case of *Shri Kumar Gandharv Vs KRBL Ltd*. Upon perusal of the above-mentioned order of this Authority, it is clear that no profiteering was determined in that case because it was not a case of tax rate reduction and on the contrary, the tax rate had actually risen on the subject goods from the 0% to 5% when GST was rolled out on 1.07.2017 and it was also not a case of net benefit of ITC. Therefore, the above-cited case does not help the Respondent.

34. The Respondent has also relied upon the judgment passed by the Hon'ble Supreme Court of India in the case of *Commissioner of Income Tax Bangalore vs. B. C. Srinivasa Setty 1981 2 SSC 460.* A perusal of the said decision shows that it does not come to the rescue of the Respondent as no tax has been imposed under Section 171 of the CGST Act, 2017 and hence no machinery is required to assess it.

35. The Respondent has also relied upon the judgment passed in the case of *M/s Basant Industries vs Asst. Collector of Customs 1996 (81) ELT 195 (SC).* Upon a perusal of the above-said judgment shows that in that case, the Hon'ble Supreme Court had decided on an issue of valuation in the context of taxation, in a matter which has no similarity with the case before us wherein the issue of profiteering has to be decided in accordance with the provisions of Section 171 of the CGST Act 2017. Therefore, the above-mentioned case is also found to be of no help to the Respondent.

36. Given our above findings and observations, in the present case, we determine the profiteered amount as Rs. 8,24,260/-, details of the computation of which are given in in Annexure-16 of the DGAP Report dated 09.09.2019. Accordingly, the Respondent is directed to reduce his prices commensurately, as indicated in the above mentioned Annexure, in terms of Rule 133 (3) (a) of the above Rules. The Respondent is also directed to deposit an amount of Rs. 8,24,260/- in two equal parts of Rs. 4,12,130/- each in the Central Consumer Welfare Fund and the and the Maharashtra State Government as per provisions of Rule 133 (3) (c) of the above Rules, since the recipients are not identifiable at this stage and since the supplies were affected in the state of Maharashtra. The above amounts shall be deposited along with 18% interest payable from the dates from which the above amount was realized by the Respondent from his recipients till the date of deposit in the Consumer Welfare Funds. The above amount of Rs. 8,24,260/-, along with applicable interest thereon, shall be deposited within 3 months of this order failing which it shall be recovered by the concerned SGST Commissioner.

37. Since it has been found that the Respondent has denied the benefit of tax reduction to his customers/ recipients in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and since he has resorted to profiteering, he has been found to have committed an offence under section 171 (3A) of

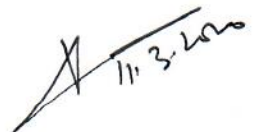


the CGST Act, 2017 and therefore, he is liable for the imposition of penalty under the provisions of the above Section. Accordingly, a notice be issued to him directing him to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

38. The Authority as per Rule 136 of the CGST Rules 2017 directs the jurisdictional 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 the Authority is deposited in the CWFs of the Central and the State Government of Maharashtra as per the details given above. A report in compliance of this order shall be submitted to this Authority by the Commissioners CGST /SGST within 4 months from the date of receipt of this order.

39. Further, the DGAP vide his Supplementary Report dated 09.12.2019 has reported that M/s Subway Systems India Pvt. Ltd. (SSIPL) had also profiteered by charging royalty and advertisement expenses on the increased value of net taxable sales which was allowed to the franchisee (in this case, the Respondent) to offset the impact of denial of ITC. Further, M/s SSIPL was recommending the sales price of the products to his franchisees but was not involved in the purchase of goods/material or services for the supply of restaurant services. Therefore, given the above, there was effectively no denial of ITC

to M/s SSIPL and it appeared to be resorting to profiteering by charging royalty and advertisement charges on the increased base price from the franchisee. Hence, the DGAP has sought directions to investigate the above-discussed issue, either from the Standing Committee under Rule 129(1) of the CGST Rules, 2017 or from this Authority under Rule 133(5) of the CGST Rules, 2017. In this regard, we observed that M/s SSIPL acts as a price monitoring authority for the products to be sold by the franchisee, provides his sale and purchase software to the franchisee and also charges royalty and advertisement charges on the increased base price charged by the franchisee. Therefore, this Authority finds no reason to differ with the finding of the DGAP that there may be chances of profiteering by M/s SSIPL in respect of charging of royalty and advertisement charges on the increased value of net taxable sales. Therefore, the Authority, in line with the provisions of Section 171(2) of the CGST Act, 2017 and as per the amended Rule 133 (5) (a) of the CGST Rules 2017 directs the DGAP to further examine M/s Subway Systems India Pvt. Ltd. for possible violations of the provisions of Section 171 of the CGST Act 2017 and to submit his report as per the provisions of Rule 133 (5) (b) of the CGST Rules, 2017 since there are adequate reasons to believe that M/s Subway Systems India Pvt. Ltd. may have profiteered by charging the royalty and advertisement charges on the increased net taxable sales.



40. A copy of this order be sent to the Applicants, the Respondent, Commissioners CGST/SGST free of cost for necessary action. File of the case be consigned after completion.

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy
11.3.20
(A.K.Goel)
Secretary, NAA

File No. 22011/ NAA/71/Le Reve /2019/1480-85 Dated: 11.03.2020
Copy To:-

1. M/s Le Reve Pvt Ltd., Ground Floor, Cooling Tower Cafe, Nirlon Knowledge Park, Off Western Express Highway, Pahadi Village, Mumbai-400063 to attend the hearing on stipulated date & time.
2. Deputy Commissioner of State Tax, E-901, 3rd Floor, GST Bhavan, Yervada, Pune-411006.
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-110001.
4. Chief Commissioner of Central Goods & Services Tax, Mumbai Zone GST Building, 115 M.K. Road, Opp. Churchagate Station, Mumbai-400020.
5. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010.
6. Guard File.

11.3
A. K. GOEL, IRS
Secretary
National Anti-Profiteering Authority (GST)
DOR, Ministry of Finance, New Delhi