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

Case No.	16/2020
Date of Institution	13.09.2019
Date of Order	12.03.2020

In the matter of:

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

Applicant

Versus

M/s Patanjali Ayurveda Ltd., Patanjali Food & Herbal Park, Village-Padartha, Laksar Road, Haridwar- 249 404.

Respondent

12-3-2020

Quorum: -

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

Present: -

1. None for the Applicant.
2. Sh. Y.D. Arya, CFO, Sh. Aayush Varshney, Manager, Sh. Manish Gaur, Smt. Purvi Asati and Smt. Disha, Advocates for the Respondent.

ORDER

1. This report dated 13.12.2018, had been received from the above Applicant i.e. the Directorate General of Anti-Profiteering (DGAP) after a detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received on 08.06.2018 by the above Applicant from the Standing Committee on Anti-profiteering, to conduct a detailed investigation under Rule 129 of the above Rules, in respect of the supplies made by the Respondent, to determine whether the benefit of reduction in the rate of GST from 28% to 18% w.e.f. 15.11.2017, had been passed on by the Respondent to the recipients. The DGAP in his report dated 13.12.2018 had stated that the Respondent did not pass

on the benefit of the reduction in the tax rates to his recipients by way of commensurate reduction in prices, in terms of Section 171 of the CGST Act, 2017. In the said report, the DGAP reported that the Respondent had contravened the provisions of Section 171(1) of the CGST Act, 2017.

2. This Authority, after analysis of the submissions placed on record, decided to accord hearing to the concerned parties. During the hearings held on 28.01.2019, 13.02.2019 and 13.03.2019, the Respondent had submitted that there were inconsistencies in the DGAPs calculation of profiteering as there were certain SKUs profiteering on which had been computed twice or thrice and in respect of 6 SKUs on which rate had been reduced from 18% to 12% the reduction had been considered from 18% from 12% by the DGAP.

3. This Authority, after considering the submissions of the Respondent, had found discrepancies in the report of the DGAP dated 13.12.2018 which are as mentioned below:-

   a. The Report had not covered all the SKU's which were impacted by the rate deduction in the period between 01.07.2017 and 14.02.2019.

   b. In the case of 6 SKU's, the calculation of profiteering was worked out on the incorrect rate reduction from 28% to 18%, whereas it should have been from 18% to 12%.

   c. There was Duplication/Triplication of the SKU's in the calculation of the amount of profiteering.

d. The report of the DGAP had not categorically confirmed that all the SKU's impacted by tax rate deduction post 01.07.2017 were properly investigated.

4. This Authority vide its order passed under Rule 133(4) dated 14.03.2019, directed the DGAP to again conduct a detailed investigation into the matter, after taking into consideration, the submissions made by him at the time of hearings before this Authority. It was also directed that there investigation should be specifically conducted by the DGAP into the aspects mentioned supra and thereafter a comprehensive report should be submitted to this Authority.

5. The DGAP, in compliance to the order dated 14.03.2019 submitted his report under Rule 133(4) on 13.09.2019 in which he stated that, a letter dated 01.04.2019 was sent to the Respondent calling for the sales data for the period from 15.11.2017 to 31.03.2019 for investigation. He also stated that the period covered during the investigation was from 15.11.2017 to 31.03.2019.In response to the said letter, the Respondent vide letters/e-mails dated 12.04.2019, 27.04.2019, 31.05.2019, 13.08.2019 and 12.09.2019submitted the following: -

a. GSTR-1 & GSTR-3B Returns for the period November, 2017 to March, 2019 for all the registrations held all over India.

b. Details of invoice-wise outward taxable supplies during the period November, 2017 to March, 2019 reconciled with GSTR-1 and GSTR-3B Returns.

c. Sample copies of invoices issued to the Respondent's dealers, pre and post 15.11.2017.

d. List of all the recipients along with their corresponding category.

6. The DGAP has claimed that at the time of submission of the earlier investigation report dated 13.12.2018, the Respondent had not submitted the sales data in the proper format. Accordingly, during the re-investigation the Respondent was asked to submit the data again which the Respondent submitted and the case had been reinvestigated again on the basis of fresh data submitted by the Respondent. The DGAP also stated that the main issues to be examined were whether the rate of GST on the goods supplied by the Respondent was reduced from 28% to 18% & 18% to12% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rates of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the Central Goods and Services Tax Act, 2017. It was observed by the DGAP 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 GST rate on a number of goods supplied by the Respondent from 28% to 18% & from 18% to 12% w.e.f. 15.11.2017, which has not been contested by the Respondent.

7. The DGAP also stated that it was important to examine Section 171 of the Central Goods and Services Tax Act, 2017 which governed the anti-

profiteering provisions under GST. Section 171(1) 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 legal requirement was abundantly clear that in the event of the benefit of input tax credit 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 input tax credit. This was the only legally prescribed mechanism to pass on the benefit of input tax credit or reduction in the rate of tax under the GST regime and there was no other method that a supplier could adopt to pass on such benefits.

8. The DGAP calculated profiteering of various SKU's, an example of the calculation, is given below:-

Table (Amount in Rupees)

Sl. No.	Description	Factors	Pre Rate Reduction (Before 14.11.2017)	Post Rate Reduction (From 15.11.2017)
1.	SKU Name	A	POPULAR DETERGENT POWDER 2KG	
2.	Category	B	SUPER DISTRIBUTER	
3.	Period	C	01.11.2017 to 14.11.2017	
4.	Total quantity of item sold	D	36744	
5.	Total taxable value	E	2176082.64	
6.	Average base price (without GST) per unit	F=E/D	59.22	
7.	GST Rate	G	28%	18%
8.	Commensurate Selling price (post Rate reduction)	H=G*1.18		69.88
7.	Invoice No.	I		0190000897
8.	Invoice Date	J		16.11.2017
9.	Total quantity (in the above invoice)	K		360
10.	Total Invoice Value	M		26150.69

11.	Actual Selling price (post rate reduction	N=M/K		72.64
12.	Difference (per unit profiteering)	O=N-H	**2.76**	
13	Final Profiteering	P=O*K	**993.60**	

From the above Table, the DGAP claimed that, the Respondent did not reduce the selling price of the "POPULAR DETERGENT POWDER 2KG", when the GST rate was reduced from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 and hence he profiteered an amount of Rs. 993.60/- on the above SKU in the abovementioned invoice and thus the benefit of reduction in GST rate was not passed on to the recipient by way of commensurate reduction in the price, in terms of Section 171 of the Central Goods and Services Tax Act, 2017. On the basis of the above calculation as illustrated above, profiteering in case of all impacted SKU's of the Respondent had also been arrived by the DGAP in a similar way.

9. The Respondent informed the DGAP that there were various categories of recipients in his supply chain, viz. Institutional buyers, Patanjali Group compaines, Others including Mega Stores, Vendors, Branches, Super Stockists, Distributors, Super Distributors, Super Stockist AASTHA, Scrap Dealers, buyers from Modern Trade, E-Commerce platforms, Bulk sale division, Dairy division, Swadeshi Smridhi Card (SSC), Canteen Service Company (CSC), Arogaya Kendras, Chikitsalayas, Central Police Canteen (CPC), Salt Distributors, Canteen Stores Department (CSD), Rice Distributors, other group companies, Jobworkers, etc.. Accordingly, the DGAP has done the calculations of profiteering category-wise.

10. The DGAP has also stated that from the invoices made available by the Respondent, it appeared to him that the Respondent had increased the base prices of the goods when the rate of GST was reduced from 28% to 18% & 18% to 12% w.e.f. 15.11.2017, so that 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 outward taxable supplies (other than zero rated, nil rated and exempted supplies) of all the products during the period 15.11.2017 to 31.03.2019, as furnished by the Respondent to the DGAP, 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% & 18% to 12% or in other words, the profiteered amount had been arrived by the DGAP as **Rs. 1,03,20,08,903/-** by comparing the actual invoice-wise base prices of impacted products sold during the period 15.11.2017 to 31.03.2019 with the commensurate price based on the average of the base price of such products sold during the period 01.11.2017 to 14.11.2017. The excess GST so collected from the recipients, was also included in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased base prices.

11. The DGAP submitted that the amount of profiteering by the Respondent on account of contravention of provisions of Section 171 of Central Goods and Services Tax Act, 2017 was **Rs. 1,03,20,08,903/-**. The place (State or Union Territory) of the supply-wise break-up of the total profiteered amount of **Rs. 1,03,20,08,903/-** as provided by the DGAP is furnished in the table below:-

Table **(Amount in Rs.)**

S. No	State	State Code	Final Profiteering
1	Jammu and Kashmir	1	53,47,508
2	Himachal Pradesh	2	1,24,56,405
3	Punjab	3	2,32,07,700
4	Chandigarh	4	61,938
5	Uttarakhand	5	2,50,51,281
6	Haryana	6	3,63,02,487
7	Delhi	7	3,81,72,977
8	Rajasthan	8	4,22,25,721
9	Uttar Pradesh	9	11,81,17,743
10	Bihar	10	7,31,39,702
11	Arunachal Pradesh	12	155
12	Tripura	16	1,83,332
13	Meghalaya	17	60,080
14	Assam	18	5,66,15,684
15	West Bengal	19	5,03,73,745
16	Jharkhand	20	1,75,32,536
17	Odisha	21	2,95,72,553
18	Chattisgarh	22	2,84,94,482
19	Madhya Pradesh	23	4,08,25,757
20	Gujarat	24	11,66,90,097
21	Maharashtra	27	11,50,84,171
22	Karnataka	29	10,44,98,397
23	Goa	30	29,75,030
24	Kerala	32	1,74,94,860
25	Tamil Nadu	33	3,39,54,374
26	Andaman & Nicobar Islands	35	8,08,144
27	Telangna	36	2,69,31,529
28	Andhra Pradesh	37	1,58,30,515
Total			**1,03,20,08,903**

12. After perusal of the DGAP's Report submitted under Rule 133(4), this Authority in its meeting held on 17.09.2019 decided to hear the Applicants and the Respondent on 04.10.2019 and accordingly notice was issued to all the interested parties. A Notice was also issued to the Respondent on 19.09.2019 asking him to reply why the Report dated 13.09.2019 furnished by the DGAP should not be accepted and his liability for profiteering under Section 171 of the CGST Act, 2017 should not be fixed. On the request of the Respondent hearing was adjourned to 16.10.2019. On behalf of the Applicant none appeared whereas the

Respondent was represented by Sh. Y.D. Arya, CFO, Sh. Aayush Varshney, Manager, Sh. Manish Gaur, Smt. Purvi Asati, and Smt. Disha, Advocates. Further hearings were held on 06.11.2019, 22.11.2019.

13. The Respondent filed submissions dated 16.10.2019, 06.11.2019, 22.11.2019 and 10.02.2020 and stated that the impugned proceedings initiated against him by this Authority under Section 171 of the CGST Act were not maintainable and therefore, should be dropped forthwith. Further, the DGAP's report based on such proceedings was also liable to be rejected.

14. The Respondent submitted that Section 171 of the CGST Act provided for the passing of benefit of input tax credit or reduction in the rate of tax on supply of goods or services to the recipients by way of commensurate reductions in prices and that a new clause (3A) as well as an explanation has been added to Section 171 of CGST Act vide which penalty has been prescribed in case profiteering was resorted to by a registered person. The explanation added to Section 171 of the CGST Act provided definition of the expression "profiteered" used in the said section in terms of non-passing of benefit of GST rate reduction to the recipient by way of commensurate reduction in the prices of goods or services or both.

15. He submitted that in the exercise of rule-making powers conferred under Section 164 read with Section 171(3) of the CGST Act, Chapter XV of the Central Goods and Services Tax Rules, 2017 has been notified by the Central Government vide Notification No. 03/2017-Central Tax dated 19.06.2017, which provided for rules with respect to anti-profiteering. Rule 122 of the CGST Rules provided for constitution

of this Authority, wherein it has been provided that the Authority shall consist of a Chairman and four Technical Members to be nominated by the Council, Rule 126 of the CGST Rules dealt with the power in the hands of this Authority to determine the Methodology and Procedure to be followed to determine whether Section 171 of the CGST Act has been contravened or not and in exercise of such power, this Authority has notified the Methodology and Procedure on its website on 19.07.2018.

16. Further, he mentioned that Rule 128 of the CGST Rules provided for the procedure to be adopted while examination of application by the Standing Committee and Screening Committee was conducted and from the above Rule, it was evident that an anti-profiteering investigation could be initiated only on receipt of a written application from an interested party, Commissioner or any other person. Thereafter, the Standing Committee was required to examine the accuracy and adequacy of the evidence provided in the application to determine whether there was *prima facie* evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices. Further, he claimed that the term 'interested party' has been defined in the explanation to Chapter XV as follows:-

"(c) "interested party" includes

a. suppliers of goods or services under the proceedings; and

b. recipients of goods or services under the proceedings;

c. any other person alleging, under sub-rule (1) of rule 128, that a registered person has not passed on the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices."

Rule 129 of the CGST Rules provided for the initiation and conduct of proceedings and it was clear that in case where the Standing Committee was satisfied that there was a *prima facie* evidence to show that the benefit of reduction of rate of tax has not been provided to the recipient, it would refer the matter to DGAP for a detailed investigation. Thereafter, the DGAP would conduct the investigation and would collect evidence for determining the contravention of Section 171 of the CGST Act. Before the initiation of an investigation by the DGAP, a notice was required to be sent to the interested party containing the requisite information. Further, the DGAP was required to provide evidence presented by one interested party to other interested parties, participating in the proceedings. Furthermore, the DGAP was required to furnish a report of his findings along with relevant records to this Authority after completion of the investigation.

17. He submitted that in the present case, from the minutes of the meeting, it was not clear as to how the Standing Committee had come to the conclusion that there was a prima facie evidence to show that the benefit of reduction in the rate of tax had not been provided to the recipients as it did not discuss the same. He also submitted that the DGAP had failed to provide him the evidence (if any) presented by the

complainant. He also claimed that natural justice was a concept of common law and represented higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency was required to follow while taking any decision adversely affecting the rights of a private individual. Natural justice implied fairness, equity and equality. In this regard, the Respondent also cited the case of ***Canara Bank vs. Debasis Das (2003) 4 SCC 557***.

18. He further added that over the years through judicial interpretations, two rules have evolved representing the principles of natural justice. These rules constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice, which were shared in common by all men. The concept of principles of natural justice was enshrined in these two rules/pillars, that are:-

a) *Audi alteram partem* i.e. hear the other side or right to a fair hearing; and

b) *Nemo judex in causa sua* i.e. no person shall be judge in its own cause or the rule against bias.

c) A corollary has been deduced from the above two rules i.e. *qui aliquid statuerit, parte inaudita altera acquum licet dixerit, haud acquum fecerit*, meaning justice should not only be done but should manifestly be seen to be done.

The second principle i.e. no person shall be judge in its own cause has been explained in detail in the '**Commentary on the Constitution of**

India by Dr. D. D. Basu, 8th Edition, Volume 1, 2007' in the following words –

Another principle of natural justice is that no persons should be a judge of his own cause i.e. impartiality. 'Bias' may be defined as a pre-conceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction. It is in fact a condition of mind, which sways judgement and the judge is unable to exercise impartiality in a particular case. Bias may be generally defined as partiality or preference, which is not founded on reason and is actuated by self-interest – whether pecuniary or personal.

19. Further, he submitted that on 'bias', **Halsbury Laws of England** has stated as follows –

"*At common law the rule is applied in two broad categories of case: (1) where an adjudicator has either a direct pecuniary or proprietary interest in the outcome of the matter or case otherwise by reason of a direct personal interest be regarded as being a party to the action, and (2) where either by reason of a different forms of, interest or by reason of his conduct or behavior there is a 'real danger' of 'bias' on his part. In the former category an automatic and irrefutable, presumption is raised, in the latter category the test of apparent bias is satisfied. Even if the disqualifying effect of a pecuniary has been removed by statute, it is still material to consider whether the nature of that interest gives rise to a real danger of bias.*"

20. He submitted that the present proceedings were initiated against the Respondent by this Authority vide an email dated 22.02.2018 alleging that it was 'reported' to the Authority that the Respondent has not passed on the benefit of reduction in the rate of tax. He also submitted that neither the CGST Act, nor the CGST Rules empowered this Authority to initiate such proceedings. He added that as per Rule 128 of CGST Rules, in a proceeding initiated under Section 171 of the CGST Act, the first requirement was of a written complaint by an interested party or Commissioner or any other person. The term 'interested party' has further been defined under CGST Rules as a person who is either a supplier of goods or recipient of goods or any other person alleging non-passing of benefit under Section 171 of CGST Act. The phrase 'any other person' used in the definition of interested party as well as under rule 128 of CGST rules, has definitely widened the scope of party who could file a written complaint, but that scope could never push through the boundaries of principles of natural justice. In other words, the scope could be widened only until it was not violative of any of the principles/doctrines embedded in the Constitution of India.

21. He also submitted that the second pillar of principles of natural justice i.e. rules against bias provided that a person was barred from deciding any case in which he or she may be, or may fairly be suspected to be, biased, and this principle embodied the basic concept of impartiality, and applied to courts of law, tribunals and all those having the duty to act judicially. He submitted that in the instant case, the entire proceedings had started on the basis of the initiation done by the Authority and none of the recipients of the Respondent had filed a complaint to date. Moreover, it was also evident that any person who

has an interest in a proceeding could not be given the power to adjudicate that proceeding. Thus, this Authority could not be both a complainant as well as the adjudicator of that complaint. In this regard, the Respondent submitted that an element of bias against a supplier could be there in the mind of the complainant and this was why, independent statutory bodies were created to adjudicate a dispute. Accordingly, he submitted that the act of this Authority in the dual role of complainant and adjudicator violated the basic principles of natural justice. He also placed reliance on the observations made by Justice P. N. Bhagvati in the case of ***Ashok Kumar Yadav vs. State of Haryana 1985 4 (SCC) 417***.

22. He further placed reliance on the case of ***Hardcastle Restaurants Pvt. Ltd. vs. Union of India 2019 (10) TMI 864 (especially para Nos. 30 and 31)***, wherein the Hon'ble High Court had discussed the importance of fairness and transparency in the decision-making process and held that for a newly established Authority, fair decision making should be the guiding principle.

23. He further submitted that in the instant case, the complaint of non-passing of benefit of reduction in rate of tax to the recipients by the Respondent had been received by the Standing Committee from this Authority in terms of Rule 128 of the CGST Rules as was clear from the minutes of the meeting of the Standing Committee. Further, the Respondent was first contacted by this Authority with regard to this matter on 22.02.2018 vide an email from the Chairman of the Authority vide which the Respondent was requested to appear before the Authority in regard to the alleged profiteering by the Respondent. He also submitted that as was clear from the foregoing paragraphs, this

Authority could not be both the adjudicating authority as well as an interested party in the present case. Thus, the Authority was not legally correct in initiating the proceedings against the Respondent and the proceedings that were in violation of principles of natural justice were liable to be dropped.

24. He further submitted that this Authority and the DGAP were statutory authorities created under the provisions of the CGST Act and the CGST Rules made thereunder and they derived their powers and jurisdiction wholly and exclusively from these statutory provisions. Therefore, every action of this Authority and the DGAP must be in accordance with the powers and jurisdiction conferred upon them expressly under the statutory provisions only. It was settled legal position that statutory authorities, being creatures of statute, were bound by the statutory provisions and couldnot act either beyond or contrary to those provisions. He stated that it was imperative to note that neither the CGST Act nor the CGST Rules conferred any power either on this Authority or the DGAP to initiate investigation against any of the registered persons on their own motion i.e. *suo moto*. initiation of investigation or proceedings against any person *suo moto* had legal ramifications and hence must be specifically and statutorily provided for. He also submitted that as per Rule 129 of the CGST Rules, once the Standing/Screening Committee was satisfied that there was *prima-facie* evidence to show that the supplier had not passed on the benefit of reduction in the rate of tax on the supply of goods or services to the recipient by way of commensurate reduction in prices, it shall refer the matter to the DGAP for a detailed investigation. He argued that only thereafter, this Authority and the DGAP could act based on such

application and certainly not before that and it was settled legal position that where there was no conferment of *suo moto* power on the authority to initiate proceedings on its own motion, any such proceedings initiated by the authority were without any legal backing and hence deserve to be quashed. Since in the present case, the notice of investigation had been issued by the DGAP on the basis of suo moto direction issued by the Authority, the same was ex facie without jurisdiction and illegal and hence the investigation report furnished by the DGAP also had no legal basis. In this regard, reliance was placed on the case of ***Mohinder Singh vs. State 2013 SCC Online J&K 7 (especially para Nos. 31 and 40)***, wherein it was held that the authority was required to act within the four corners of the Act conferring power to it. Thus, he concluded that the Authority neither could take *suo moto* action against the Respondent nor could ask for any documents/information in this regard. In the instant case, the Authority has erred in taking *suo moto* action against the Respondent by providing a complaint of alleged profiteering by him to the Standing Committee as well as by asking the Respondent to appear before itself vide email dated 22.02.2018.

25. The Respondent also submitted that Rules 128 and 129 of the CGST Rules provide complete procedure to be followed for exercising jurisdiction and for initiating the proceedings against any registered person under Section 171 of the CGST Act. The complete step by step procedure as stated by the Respondent is mantioned below:-

a) The first step was the receipt of an application by either the Screening Committee or Standing Committee, from any

person/interested party/Commissioner alleging profiteering by any registered person.

b) The second step was the examination of such application along with the accompanying evidence by the Screening Committee or the Standing Committee to see whether there was *prima facie* evidence to support the allegation/claim of that person.

c) The third step was the satisfaction of the Standing Committee/Screening Committee that *prima facie* evidence was against the supplier regarding the non-passing of the benefit of reduction in the rate of tax on the supply of goods to the recipient by way of commensurate reduction in prices.

d) The fourth step was to refer the matter thereafter to the DGAP for a detailed investigation.

e) The fifth step was for the DGAP to issue a notice to the interested parties containing, inter alia, the information regarding the description of goods in respect of which proceedings have been initiated, summary of the statement of facts on which the allegations were based and the time limit allowed for furnishing the reply to said notice.

f) The sixth step was the conduct of investigation and collection of evidence by the DGAP which was necessary to determine whether the benefit of reduction in the rate of tax has been passed on to the recipient by way of commensurate reduction in prices.

g) The seventh step was for the DGAP to make available the evidence presented to it by one interested party to the other interested parties, participating in the proceedings.

h) The last step was the completion of the investigation and furnishing of the report by the DGAP of his findings along with relevant records to this Authority.

26. He also submitted that the above steps were mandatory statutory requirements prescribed in Rule 128 and 129 which must be followed by the Standing Committee/Screening Committee, the DGAP as well as this Authority. In this regard, he further stated that as per the above procedure, the receipt of a written application in the prescribed manner from an interested party or from a Commissioner or from any other person was the starting point for initiating proceedings under the said provision. In other words, proceedings under Section 171 of the CGST Act could commence against any registered person only when a written application alleging profiteering on the part of the registered person was received by the Standing Committee from anybody but, in the present case, no such application either in the prescribed form or in any other manner had been made by the interested party or any other person either to the Screening Committee or the Standing Committee alleging any profiteering against the Respondent. Neither the DGAP's report nor the notice in question referred to any such application or complaint by any interested party against the Respondent. Thus, he submitted that the very fundamental requirement which gave jurisdiction to this Authority to initiate proceedings against the Respondent was not

satisfied in the present case. Thus, the entire proceedings initiated against the Respondent were ex facie without jurisdiction and hence, liable to be quashed on this score itself.

27. He further submitted that, it was settled legal position that when the law required a particular thing to be done in a particular manner, it has to be done in that manner alone and all other manners of doing it were strictly prohibited. He stated that this principle had been applied and followed by the Hon'ble Apex Court consistently in a number of judgments. Relying upon The case of ***Nazir Ahmad vs. King Emperor LR 63 IA 372***, and applying the principles laid down in ***Taylor vs. Taylor (1876) 1 Ch.D 426,*** the Hon'ble Apex Court in ***State of Uttar Pradesh vs. Singhara Singh AIR 1964 SC 358,*** has held as under:-

> *"The rule adopted in Taylor v. Taylor [(1876) 1 Ch.D 426] is well recognized 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****."*

28. The Respondent claimed that, since the impugned proceedings were completely contrary to the aforesaid legal position, the same were liable to be dropped forthwith. He further submitted that Rule 129(5) of the CGST Rules provided that the DGAP was required to provide copies of the evidence presented by one interested party to the other interested

parties to the proceeding, but in the instant matter, the DGAP while providing the investigation report along with annexures thereto had failed to provide the copy of the complaint (if any) to the Respondent, which was supposedly the foundation of the present proceedings.

29. He stated that it was a settled principle of law that a person would be deprived of an opportunity to defend himself in case the copies of documents relied upon against him were not provided to him. In this regard, he placed reliance on the following case law:-

a) ***Kanwar Natwar Singh vs. Director of Enforcement*** **2010 (262) ELT 15 (SC)**

b) ***State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan*** **AIR 1961 SC 1623**

c) ***Rajam Industries Pvt. Ltd. vs. Addl. D. G., D.C.E.I. Chennai*** **2010 (255) ELT 161 (Mad.)**

d) ***Lekhraj vs. Commissioner of C. Ex. & S.T. Allahabad*** **2014 (310) ELT 381 (Tri. - Del.)**

30. The Respondent also submitted that as per Rule 128(1) of the Central Goods and Service Tax Rules, 2017, on receipt of an application, the Standing Committee shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there was *prima facie* evidence to support the claim of an applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by

way of commensurate reduction in prices. Rules 128 (1) of CGST Rules, as amended, provides that –

> *'(1) The Standing Committee shall, within a period of two months from the date of the receipt of a written application or within such extended period not exceeding a further period of one month for reasons to be recorded in writing as may be allowed by the Authority, in such form and manner as may be specified by it, from an interested party or from a Commissioner or any other person,* examine the accuracy and adequacy of the evidence provided in the application to determine whether there is prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices."

31. He stressed that on the basis of the aforementioned provision, it could be seen that the time limit for the Standing Committee to undertake the examination of accuracy and adequacy of evidence of an application was 2 months, extendable by a month. In the instant case, the complaint filed by the Applicant was dated 22.02.2018. The Standing Committee forwarded the application on 25.05.2018 (as per the date of minutes of the meeting) and that the 3 months period (2+1) had expired on 21.05.2018. The DGAP has received the complaint on 08.06.2018. Therefore, he submitted that there was a delay of over 4 days in forwarding the complaint to the DGAP for investigation. In the present

case, the application to the Standing Committee against the Respondent had been made by this Authority. This Authority could not be both, the adjudicating authority as well as the interested party as this amounted to violation of the principles of natural justice. Thus, in the present case, no application had been made by any interested party or Commissioner or any other person either to the Standing Committee or the Screening Committee making any allegation of profiteering by the Respondent herein and in the absence of any such application containing any allegations with or without evidence, obviously there had been no prima facie evidence against the Respondent in regard to non-passing of benefit of reduction in rate of tax to the recipient.

32. He submitted that the Standing Committee must not only refer to the *prima facie* evidence on the basis of which it reached the objective conclusion, but also provide the same to the person against whom the investigation was proposed by the Standing Committee to the DGAP. However, in the present case, the minutes of the meeting of the Standing Committee held on 25.05.2018 were silent on any *prima facie* evidence and to the contrary, Sr. No. IV of the minutes of the meeting referred to a 'complaint' against the Respondent. However, it summarily summed up in one line that there was *prima facie* evidence, without referring to any document, information, evidence, etc. The relevant portion of the minutes of the meeting of the Standing Committee held on 25.05.2018 is extracted below for ready reference:-

> *"IV. Annexure A-4:- The total 12 complaints, as mentioned in the Annexure have been described in the following manner:-*

(a) There are three complaints (mentioned at S. No. 8,9 and 10) received from National Anti-Profiteering Authority against M/s Mondelez India Foods Pvt. Ltd, M/s HP Printers and M/s Patanjali Ayurved Ltd. for not passing on the benefit of input credit or benefit of reduced tax rate to the consumer. The Committee found these complaints bring out prima facie case for investigation by the DG Safeguards therefore these are referred to DG Safeguards for further investigation."

33. Further, the Respondent has placed reliance on the case of ***Nand Kishore Naik vs. Sukti Dibya AIR 1953 Ori 240***, wherein it was held that "the use of the word 'prima facie' would indicate that there was no possibility of an alternative construction being put on the Act, for it was on the face of its prospective" and also placed reliance on the case of ***Martin Burn Ltd. v. R. N. Banerjee AIR 1958 SC 79 (especially para No. 27).*** He submitted that in the present case, when the complaint (if any) was not available with the Standing Committee, a mere reference by this Authority to the Standing Committee in regard to alleged profiteering by the Respondent would not constitute a complaint in terms of Rule 128 of CGST Rules. Further, the Standing Committee had erred in holding that there was a *prima facie* case that the benefit of reduction in the rate of tax had not been passed by the Respondent to the recipient and consequently it erred in referring the matter to the DGAP for further investigation.

34. The Respondent submitted that in the impugned proceedings initiated under Section 171 of the CGST Act, no show cause notice had been issued either by DGAP or this Authority to the Respondent and the

impugned proceedings were initiated on the basis of an email sent by this Authority to the Respondent vide which the Respondent was asked to appear before the Authority to have a preliminary discussion on the contravention of Section 171 of CGST Act by the Respondent. The Standing Committee on Anti-Profiteering, on analysis thereof, has forwarded the matter for detailed investigation to the DGAP.

35. Thereafter, correspondence between the Respondent and DGAP continued for several months and it culminated in the issuance of the DGAP's Report where he reached the conclusion that the Respondent was guilty of profiteering. Thereafter, the Respondent received a notice dated 19.09.2019 for personal hearing along with a copy of the DGAP's Report directing him to appear before this Authority on 16.10.2019. However, no show cause notice was ever issued to the Respondent either by the DGAP or the Authority. He submitted that a show cause notice formed the base of the principle of natural justice, audi alteram partem. In this regard, he placed reliance on the case of ***Canara Bank and Others vs. Debasis Das (supra)***, where the Hon'ble Supreme Court held that a notice apprised the party of the case it has to meet.

36. The Respondent also placed reliance on the case of ***Oryx Fisheries Private Limited vs. Union of India 2011 (266) E.L.T. 422 (SC) (especially para Nos. 28),*** wherein the Hon'ble Supreme Court held that a show cause notice was meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges and at the same time, the authorities must act with an open mind. The Respondent also placed reliance on the ruling of the Hon'ble Supreme Court in the case of ***Gorkha Security Services vs. Govt. (NCT of Delhi) (2014) 9 SCC 105 (especially para No. 21),***

wherein the Hon'ble Apex Court had discussed the necessity of issuance of a show cause notice along with its purpose. Further, he submitted that it was imperative that this Authority on its own website had provided for the 'Procedure and Methodology' to be followed by the Authority. Sl. No. 6 of the said procedure and methodology provided for adherence to the principles of natural justice by this Authority while exercising its functions and duties.

37. The Respondent also submitted that as per Rule 122 of the CGST rules, this Authority should consist of the following:-

i. A Chairman who has held a post equivalent to Secretary to Government of India and

ii. Four Technical Members who were or have been Commissioners of State Tax or Central Tax for at least a year.

38. He argued that it was imperative to note that the Commissioners of State Tax or Central Tax held an administrative position and there could not be said to have professional qualification of law along with experience in practicing the same. Thus, the Technical Members consisting of Commissioners of State Tax or Central Tax would not be able to interpret the law on a regular basis and adjudicate the cases properly. In this regard, he placed reliance on the case of ***Madras Bar Association vs. Union of India 2014 (308) ELT 209 (SC) (especially para Nos. 83, 84 and 85)***, wherein it had been held by the five-judge bench of the Hon'ble Supreme Court that aappointment of non-judicial members for undertaking the judicial/quasi-judicial functions might

constitute dilution and encroachment upon independence of judiciary and rule of law. Therefore, only a person possessing professional qualification of law with substantial experience in law should be appointed for undertaking the judicial/quasi-judicial functions.

39. He also placed reliance on the following cases wherein the requirement for a Judicial Member has been emphasized for discharging of judicial/quasi-judicial powers and it was held that persons who adjudicate upon such powers must have legal expertise, judicial experience and legal training.

a) ***Rojer Mathew vs. South Indian Bank Limited and Ors.*** **2018 (13) GSTL 129 (SC)**

b) ***Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited*** **(2016) 9 SCC 103**

c) ***L. Chandra Kumar vs. Union of India*** **(1997) 3 SCC 261**

d) ***R. K. Jain vs. Union of India*** **(1993) 4 SCC 119**

40. The Respondent also submitted that the DGAP's report, while computing the amount profiteered by the Respondent, suffered from arithmetic errors in terms of calculations being arrived at by using incorrect quantity of SKUs and incorrect rate of GST. The DGAP while calculating the profiteering amount had not considered the discount given by the Respondent to his customers by way of credit notes during the period 15.11.2017 to 06.12.2017.He also submitted that due to changes in the rate of tax w.e.f. 15.11.2017, it was not feasible for the Respondent to change the rate of tax of the inventories which were lying in the stock of channel partners on the same day itself and thus, the benefit of the reduction in tax has been passed on by the

Respondent by way of post supply discounts for a certain period in terms of Section 15 of the CGST Act by way of credit notes. The said point was brought to the notice of DGAP, however, the DGAP had not considered the same and had used the average base prices for the period 01.11.2017 to 14.11.2017 and compared the same to invoice-wise transaction value for calculating the profiteering amount. He has explained the calculation of profiteering made by the DGAP and him with respect to a particular invoice No. 3691038159 and the difference in profiteering arising thereon in detail as is shown below:-

Invoice No. 3691038159 and Credit Note No. 1360378 (enclosed as Exhibit-10)

a. Description of SKU is Kesh Kanti Hair Cleanser Natural 200 ML

b. Item Code of SKU is 1131

c. Quantity of SKU in the said invoice is 10800

d. Average base price during the period 01.11.2017 to 14.11.2017 (exclusive of GST) **(A)** = Rs. 47.07

e. Average base price during the period 01.112017 to 14.11.2017 (inclusive of GST) **(B)** = Rs. 47.07 + 18% of 47.07 = 55.5426 ≈ 55.54

f. Selling price as per the invoice (exclusive of tax) **(C)** = Rs. 51.30

g. Selling price as per the invoice (inclusive of GST) **(D)** = Rs. 51.30 + 18% of 51.30 = Rs. 60.53

h. Total discount as per the credit note = Rs. 64800

i. Discount per unit as per the credit note = Rs. 64800 / 10800 = Rs. 6

j. Actual Selling price considering the discount (inclusive of GST) **(D)** = Rs. 60.53 – Rs. 6 = Rs. 54.53

k. Alleged Profiteering per unit as per the DGAP **(E)** = Difference of Selling price calculated by DGAP (inclusive of GST) and Average base price during the period 01.112017 to 14.11.2017 (inclusive of GST) = (D) – (B) = Rs. 60.53 – 55.54 = Rs. 4.9914

l. Alleged Profiteering of 10800 units as per the DGAP **(F)** = E * 10800 = Rs. 4.9914 * 10800 = Rs. 53907.12

m. Profiteering per unit as per the invoice (if any) **(I)** = Difference of actual Selling price as per the invoice (inclusive of GST) and Average base price during the period 01.112017 to 14.11.2017 (inclusive of GST) = (D) – (B) = Rs. 54.53 – 55.54 = Rs. -1.01

n. Profiteering (if any) of 10800 units as per the invoice and credit note **(J)** = (I) * 10800 = Rs. -1.01* 10800 = Rs. -10908

o. Since, the profiteering (if any) as per the invoice and credit note is negative, hence, there was no profiteering and thus, the finding of DGAP of profiteering of Rs. 5108.928 with respect to this invoice is incorrect.

From the above, he contended that it was evident that had the DGAP considered the discount offered by way of credit notes while calculating the selling price (inclusive of GST) the amount of alleged profiteering would have reduced drastically. In this regard, he submitted the excel

sheet showing the invoice-wise difference in the profiteered amount calculated by the DGAP with that of profiteered amount, if any, as per the invoices (after considering the discount) along with copy of invoices and corresponding credit notes and calculated the total difference in alleged profiteered amount for all the invoices in respect to which the profiteering had been calculated on the basis of non-consideration of discount of Rs. 7,10,84,798.30/-. Thus, he claimed that the demand of alleged profiteered amount to the tune of Rs. 7,10,84,798.30/- was not sustainable and was liable to be dropped.

41. He submitted that the DGAP had further erred in calculating the alleged profiteering by not taking into consideration the discount given in terms of cashback scheme. He claimed that he had introduced 'Swadeshi Samridhi Card' Scheme ("hereinafter referred to as "**SSC scheme**"), from 2017 vide which the customers of the Respondent who had opted for the Scheme, received a top-up card through which the customers could buy the desired goods on the top-up value card along with extra cash back. As per the Scheme of the Respondent, every customer who recharged his card, got a certain amount as Swadeshi Nishta Cashback (hereinafter referred to as "**cashback**") as per the following terms:

Sl. No.	Top Up Amount	"Swadeshi Nishta" (Cashback)
1.	Upto Rs. 4000	5%
2.	Rs. 4001 and above	7%
* Maximum cash back in a month will be ₹ 355/-		
Note- Upper Limit of Balance in Card at any point of time is ₹ 50000/-		

42. He submitted that this cashback given by the Respondent to the customers on each recharge was a cost to him vide which the Respondent supplied a product at a price lower than the normal selling price. This cashback was nothing, but a form of discount given to the customers for using the SSC as a form of payment while buying the goods belonging to the Respondent. In order to explain this scheme, the following illustration was used by the Respondent- A customer purchases the SSC top-up of Rs. 4000/-. The customer now became eligible to the additional cash back of 5%. Thus, with this Card, he could buy goods worth Rs. 4200/-. Thus, this scheme was a way of discount which was extended to the customers at the time of purchase of the SSC top-up but the DGAP while calculating the profiteering amount failed to consider the cashback (discount) due to which, the profiteering calculated had been arrived at a higher side than the actual profiteering (if any). He reiterated that Section 15 of the CGST Act also allowed deduction in respect of the discount in order to arrive at the transaction value. Accordingly, he submitted that while taking the invoice value for the period of November 2017, the reduced/ discounted price should have been considered by the DGAP. In this regard, he placed reliance on his ledger vide which the total cashback (discount) given by the Respondent to his customers during the relevant period came to Rs. 37,29,90,605.55/-. He also submitted that the total turnover during the relevant period on which profiteering had been calculated by the DGAP should have been Rs. 7,47,49,36,345.94/- (derived after deducting cashback amount from total turnover) instead of Rs. 7,84,79,26,951.49/- as was considered in the investigation Report. Thus, from the above, he submitted that the DGAP had erred by not deducting the cashback

amount of Rs. 37,29,90,605.55/- from the total turnover of Rs. 7,84,79,26,951.49/- while calculating the profiteering amount and thus, the profiteering amount calculated by the DGAP came on the higher side.

43. He also submitted that the DGAP, while calculating the alleged profiteering, had erred in not taking into account the quantity of SKUs, which had been returned by the customers to the Respondent after their initial supply either on the strength of credit notes or through purchases by way of invoices. For example, in case of an invoice, vide which 400 units of a certain SKU were supplied, if 250 units were returned to the Respondent, either by issuance of a credit note or in terms of purchase by the Respondent, then the effective supply of that particular SKU in that invoice would be only 150 units. However, the DGAP had not considered the return of such 250 units, which were supplied back by the recipient to the Respondent, and has calculated the alleged profiteering with respect to to 400 units. He explained the calculation of profiteering by the DGAP and by the Respondent (if any) with respect to a particular invoice No. 190000931 and the difference in profiteering arising thereon in detail as is given below:-

Invoice No. 190000931 and Credit Note No. 170000099 (enclosed as Exhibit-14)

i. Description of SKU is Pristine Glass Cleaner 500 ML - T

ii. Item Code od SKU is 80981

iii. Quantity of SKU in the said invoice is 180 **(I)**

iv. Total Taxable amount as per the invoice (inclusive of GST) = Rs. 10197.32

v. Average base price during the period 01.11.2017 to 14.11.2017 (exclusive of GST) **(A)** = Rs. 44.26

vi. Average base price during the period 01.112017 to 14.11.2017 (inclusive of GST) **(B)** = Rs. 44.26 + 18% of 44.26 = Rs. 52.23

vii. Selling price calculated by DGAP (inclusive of GST) **(C)** = Total taxable amount in invoice / total units = Rs. 10197.32/I = Rs. 56.65

viii. Profiteering per unit as per the DGAP **(D)** = Difference of Selling price calculated by DGAP (inclusive of GST) and Average base price during the period 01.112017 to 14.11.2017 (inclusive of GST) = (C) – (B) = Rs. 56.65 – Rs. 52.23 = Rs. 4.43

ix. Profiteering of 180 units as per the DGAP **(F)** = (D) * (I) = Rs. 4.43 * 180 = Rs. 796.50

x. Credit Note No./ Return Invoice No. 170000099 dated 07.12.2017

xi. Quantity returned as per the credit note/return invoice = 180

xii. Effective quantity sold as per the invoice = O

xiii. Profiteering per unit (if any) as per the invoice **(H)** = 0

xiv. Profiteering of 180 units (if any) as per the invoice **(J)** = 0

xv. The difference in the profiteered amount calculated by DGAP and profiteered amount as per the invoice (if any) **(K)** = (F) – (J) =Rs.796.50 - 0 = Rs. 796.50

Thus, from the above, he submitted that the DGAP had inadvertently taken the quantity of SKUs as per the first invoice without considering the sales return data, as the base quantity in respect of a particular SKU while calculating the selling price (inclusive of GST) and thus, the alleged profiteering amount arrived at by DGAP was incorrect and needed to be recalculated. In this regard, he enclosed the excel sheet showing the invoice-wise difference in profiteered amount calculated by the DGAP with that of profiteered amount, if any, as per the invoices (after considering the sales returns) along with copies of credit notes and submitted that the total difference in alleged profiteered amount for all the invoices in respect to which the profiteering had been calculated on the basis of non-consideration of sales return made by way of credit notes came to Rs. 69,93,213/-. He submitted that it was pertinent to note that the number of units supplied by the Respondent would be reduced with incorporation of the cases of sales returned by way of credit notes. Thus, the computation of the alleged profiteered amount to the tune of Rs. 69,93,213/- was not sustainable and was liable to be dropped.

44. He also submitted that it was imperative to note that the total amount of sales returned made during the relevant period by way of purchases came to Rs. 1,08,31,05,673.23/-. He enclosed the excel sheet showing the same. Further, he submitted that the total turnover during the relevant period on which profiteering had been calculated by the DGAP was Rs. 784,79,26,951.49/-, which had been arrived at by summing up the sales value mentioned in each of the invoices with respect to which profiteering had been calculated. Thus, from the above, he submitted

that the DGAP had erred by not deducting the sales returned amount of Rs. 1,08,31,05,673.23/- from the total turnover of Rs. 7,84,79,26,951.49/-, while calculating the profiteering amount and thus the profiteering amount calculated by the DGAP was incorrect. He further submitted that it was pertinent to note that the number of units supplied by the Respondent would be reduced, if the cases of the goods returned by way of purchase by the Respondent from his recipients, had been incorporated. the amount of alleged profiteering calculated by the DGAP was incorrect and thus, needed to be revised.

45. He also submitted that the lack of judicial members in the Authority was violative of the principles of Natural Justice. In this regard, he has cited the following cases:-

- ***Madras Bar Association vs. Union of India 2014 (308) ELT 209 (SC)***
- ***Rojer Mathew vs. South Indian Bank Limited and Ors. 2018 (13) GSTL 129 (SC)***
- ***Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited (2016) 9 SCC 103***
- ***L. Chandra Kumar vs. Union of India (1997) 3 SCC 261***
- ***R.K. Jain vs. Union of India (1993) 4 SCC 119***
- ***Commissioner of Income Tax Bangalore vs. B.C. Srinivasa Setty (1981) 2 SCC 460***
- ***Eternit Everest Ltd. vs. UOI 1997 (89) E.L.T. 28 (Mad.)***

46. He submitted that the DGAP, while calculating the alleged profiteering, had erred by not taking into consideration the discounts given by way of

secondary and retailer schemes to the customers. In this regard, he stated that there were three kinds of schemes given by the Respondent to his customers, which are discussed in brief below:-

a) Primary Scheme – the discounts under this scheme were directly given to the Super Distributors (SD) on the invoices.

b) Secondary Scheme – the discounts under this scheme were given by the SD to the distributors at the time of further sale in addition to discount under the primary scheme and the said discount given by SD was thereafter, recovered from the Respondent.

c) Retailer Scheme – the discounts under this scheme were given by the distributors to the retailers in addition to discount under the primary and secondary schemes, which was recovered from the SDs, and thereafter recovered by the SDs from the Respondent.

Further, he submitted that there were following types of schemes under the secondary/retailer schemes:

1) QPS (Quality Purchase Scheme): Discount offer on buying specified quantity. Calculation under this scheme depends upon the Channel of the recipient i.e. if the scheme is offered to Distributor then the calculation will be as per the primary scheme and if it is offered to a retailer, then the calculation will be as per the secondary scheme.

2) Trade offer: It was also like QPS, but while the execution mechanism thereof differed from QPS in as much as the pay-out under this scheme was usually pre-defined and was not in the manner of a percentage discount. The offer may be given in the form of a scratch coupon (free gift articles) or as free additional items if a

particular minimum level of purchases was made by such retailers/ buyers/ recipients.

3) Liquidation scheme: Discount offer to retailer to sell off aging inventory. The calculation of this scheme was the same as the secondary scheme.

4) Paid visibilities: Discount offered to the retailer for providing space inside shop for visibility of product. Calculation of this scheme was same as secondary scheme.

5) Consumer offer: Discount offered to consumer, which were printed on consumer pack.

a. Price off: Discount offer in terms of reduction on MRP.

b. Combo packs: MRP reduction for consumer to purchase pre-defined bundle of products.

c. Free article: Additional article being offered to consumer on buying pre-defined quantity.

47. He submitted that it was imperative to note that the DGAP while calculating the profiteering amount had failed to consider the above discounts given through the secondary and retailer schemes due to which, the profiteering calculated had been arrived at a higher side than the actual profiteering (if any). He reiterated that the net invoice value of the goods would be reduced when such schemes were considered. In this regard, he placed reliance on the his ledger which he had enclosed with his submissions vide which the total discount given by him to his

customers during the relevant period by virtue of secondary and retailer schemes came to Rs. 15,12,63,538/-.

48. Further, he submitted that the total turnover during the relevant period on which profiteering had been calculated by the DGAP was Rs. 784,79,26,951.49/-, which had been arrived at by the sum of the sales value mentioned in each of the invoices in respect to which profiteering has been calculated. Thus, from the above, he submitted that it was evident that the DGAP had erred by not deducting the discount amount of Rs. 15,12,63,538/- from the total turnover of Rs. 784,79,26,951.49/- while calculating the profiteering amount and thus, the profiteering amount calculated by the DGAP was on a higher side.

49. He also submitted that the Respondent was required to pass on the benefit of tax rate reduction, if any, to his recipients, i.e. to super distributors and distributors etc., only, which was done by him as shown in Exhibit-14 in his submissions dt. 22.11.2019.

50. He submitted that the DGAP had calculated the profiteering by taking an average of the sale prices for each category of Respondent's customers for the period 01.11.2017 to 14.11.2017 and thereafter, compared the same with that of the sale prices mentioned in each of the invoice pertaining to the period 15.11.2017 to 31.03.2019. The Respondent submitted that the DGAP had erroneously used average sales realization during the month 01.11.2017 to 14.11.2017 for each of the impacted SKUs as a base price, for calculating the profiteering with respect to each of the categories of Respondent's customers. In this regard, he submitted that the average base price has been calculated by considering the discount given in each of the invoices during the said period of 01.11.2017 to 14.11.2017. Thus, the difference between the

average base price arrived at and the base price in the invoices pertaining to the relevant period was huge, which has led to rise in profiteering amount.

51. He submitted that the DGAP had compared SKU wise average net realization from 1.11.2017-14.11.2017 (prior to the rate reduction) with value mentioned in the invoices issued from 15.11.2017 to 31.03.2019 (subsequent to the rate reduction). The errors in this approach were visible from mere fact that if the comparable average prices during the period 1.11.2017- 14.11.2017 had been taken as a basis then the base prices during the period 15.11.2017 to 31.03.2019 should also had been taken in terms of average net realisation and thereafter, profiteering should have been calculated by comparing the both. Thus, firstly discounts given to the customers should be considered and then using weighted method, average should be derived. These two figures should be then compared to determine if the allegation of profiteering stood its ground, The DGAP had adopted an arbitrary approach- firstly while calculating the average base price for period 01.11.2017 to 14.11.2017, he had considered the discount given by the Respondent, however, while calculating the invoice prices for the period after 15.11.2017 discounts have been ignored. Secondly, average price had been taken for the period from 1.11.2017 to 14.11.2017 against the invoice value for the period after 15.11.2017.

52. Further, he submitted that the DGAP himself in various cases had taken the average net realisation during the period post 14.11.2017 as a basis for computing the profiteering by the assesses. In this regard, he placed reliance on the case of ***Kiran Chimirala vs. Jubilant Foodwork Ltd. 2019 (024) GSTL J43 (N.A.P.A.).*** In view of the above, he submitted

that the DGAP had erred firstly by taking the average net realization of the period 01.11.2017 to 14.11.2017 as a base price for calculating the profiteering and secondly, if the average net realisation of period 01.11.2017 to 14.11.2017 had been taken as a basis then the same should have been compared with average net realisation of the period 15.11.2017 to 31.03.2019 to arrive at profiteering amount.

53. He submitted that the CGST Act read with the CGST Rules did not provide the procedure and mechanism of determination and calculation of profiteering. In absence of the same, the calculation and methodology used in the impugned report was arbitrary and was in violation of principles of natural justice. He further submitted that Rule 126 of the CGST Rules contained provisions regarding the power to determine the methodology and procedure. As per Rule 126, this Authority has power to determine the methodology and procedure for determination as to whether the reduction in rate of tax on the supply of goods or services or the benefit of input tax credit has been passed on by the registered person to the recipients by way of commensurate reduction in prices and as on date, CGST Rules have not prescribed any procedure/ methodology/ formula/ modalities for determining/ calculating 'profiteering'. The 'Procedure and Methodology' issued on 19.07.2018 by this Authority only provided the procedure pertaining to investigation and hearing. However, no method/formula had been notified/prescribed pertaining to calculation of profiteering amount. There was no indication, as to how to conclude that there was profiteering due to change in rate of tax. Whether such computation should be done invoice-wise, product-wise, business vertical-wise or entity-wise, etc. Thus, in the absence of the same, there was lack of

transparency and the results could vary from case to case resulting in arbitrariness and violation of Article 14 of the Constitution of India.

54. In this regard, he made reference to the statutory provisions in other countries where GST is/was in place. In order to control rise in inflation on account of implementation of GST, the Malaysian Government introduced the 'Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profit) (Net Profit Margin) Regulations 2014, which provided for the mechanism to calculate whether any company has profiteered on account of GST or not. The anti-profiteering measures in Australia revolved around the 'Net Dollar Margin Rule' serving as the fundamental principle. These regulations have been set as barometers for calculating profiteering. He has also stated that In the case of ***Commissioner of Income Tax Bangalore vs. B. C. Srinivasa Setty (1981) 2 SCC 460***, the Hon'ble Supreme Court held that charging section was not attracted where corresponding computation provision was inapplicable. He also placed reliance on the case of ***Eternit Everest Ltd. vs. UOI 1997 (89) E.L.T. 28 (Mad.)***, where the Hon'ble Madras High Court had held that in absence of machinery provisions pertaining to determination and adjudication upon a claim or objection, the statutory provision would not be applicable. He also submitted that the Hon'ble Supreme Court in the case of ***Commissioner Central Excise and Customs Kerala v. Larsen and Toubro Limited (2016) 1 SCC 170,*** has held that where there was no machinery for assessment, the law being vague, it would not be open to the assessing authority to arbitrarily assess to tax the subject. It was further held that where the statute provided no procedural machinery for assessment or levy of tax or where it was confiscatory, the Court would

be justified in striking it down as unconstitutional. This judgment also referred to a long line of decisions where it has been held that imposition of tax in absence of prescribed machinery and prescribed procedure would partake the character of a purely administrative affair and could be challenged as contravening Article 19 (1) (f) of the Constitution of India. He also submitted that on the same analogy the determination of quantum of profiteering imposing liability on the Respondent has to be based on machinery provisions and the procedure, in the absence of which Section 171 of the CGST Act, becomes constitutionally invalid. He submitted that it was well settled in the taxation law that the absence of the method of computation of quantum of tax payable would result in the levy itself being declared as invalid. He also submitted that in the present case the Respondent had passed on the benefit of reduction in the rate of tax by way of commensurate reduction in prices as it was deemed fit by way of passing of discounts through schemes (in the absence of any methodology) and the same had not been considered by the DGAP.

55. He submitted that the alleged profiteering, if any, should be computed at the entity level and not on item (SKU) basis. In this regard, he referred to explanation attached to Section 171 of the CGST Act which is extracted 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 input tax credit to the*

recipient by way of commensurate reduction in the price of the goods or services or both."

56. He further submitted that the term 'profiteered' has been defined in the said explanation in terms of not passing of rate reduction by way of commensurate reduction in prices of goods or services or both. However, the said definition was not clear as to what constituted commensurate reduction. In this regard, he made reference to common parlance meaning of the term 'profiteering', and provided definitions of the term "Profiteer/Profiteering' from various dictionaries as below:-

a) **The Chambers Dictionary, Allied Chambers (India) Ltd., New Delhi**,

Profiteer is a person who takes advantage of an emergency to make exorbitant profits.

b) **The Collins Cobuild English Dictionary for Advanced Learners-Harper Collins Publication**,

Profiteering involves making large profits by charging high prices for goods that are hard to sell.

c) **Oxford English Reference Dictionary-Oxford University Press**,

Profiteer means to make or seek to make excessive profits, esp. illegally or in black market conditions.

57. On the basis of the aforementioned meanings, he submitted that only where an entity made exorbitant or large profits in an unlawful manner,

it could be referred to be a Profiteer. He submitted that from the reading of Section 171, it was clear that a registered person should pass on the benefit of reduction in rate of tax or input tax credit to the recipient by way of 'commensurate' reduction in prices. Thus, the section and the rule kept the registered person on one hand and the recipient on the another and it was to be found out whether the benefit has been passed on by 'commensurate' reduction in prices. He submitted that it was necessary to find interpretation of the term 'commensurate' appearing in Section 171, by which the reduction in rate of tax should be passed on to the recipient by reduction in prices. Further, such reduction must be exact/equal to the reduction in tax rate or benefit of input tax credit granted. However, the Legislature, in its own wisdom has qualified reduction by using the word 'commensurate'. In this regard, the Respondent referred to the following dictionary meanings of the word 'commensurate':-

- ***Random House Compact Unabridged Dictionary, Special Second Edition:***

  Having the same measure; of equal extent or duration. 2. Corresponding in amount, magnitude or degree…3. Proportionate, adequate. 4. Having a common measure

- ***The New International Webster's Comprehensive Dictionary of the English Language, Deluxe Encyclopaedic Edition***

Commensurable 2. In proper proportion; proportionate. 3. Sufficient for the purpose or occasion. 4. Adequate; of equal extent

- ***The Compact Edition of the Oxford English Dictionary***

  Having the same measure; of equal extent, duration or magnitude; 2. Of corresponding extent, magnitude, or degree; proportionate, adequate 3. Corresponding in nature; belonging to the same sphere or realm of things. 4. Characterized by a common measure

- **10th Ed., The Concise Oxford Dictionary**

  "corresponding in size or degree; in proportion"

- **Chambers 21st Century Dictionary**

  "1. in **equal** proportion to something, appropriate to it

  2. Equal in extent, quantity, etc. to something"

58. In view of the foregoing definitions, he submitted that the word commensurate would mean appropriate, adequate or proportionate. Therefore, to determine 'commensurate' benefit to be given to the recipient, reduction in price must necessarily be considered when he was examining a registered person as an entity and 'recipient' as a group and profiteering would always relate to the entity or registered person as a whole and not some truncated transactions. He submitted that the entire supply of goods impacted by the rate change, undertaken

by the registered person must be considered and then on comparison of reduction in the tax rate, it was to be determined whether profiteering has been undertaken by such registered person as an entity or not.

59. The Respondent further submitted that the DGAP, in his calculations had incorrectly applied a methodology similar to the 'zeroing methodology' which was used by anti-dumping authorities in certain countries like European Union (EU). According to the said methodology, while calculating the dumping margin only those SKUs were considered which were being dumped and those SKU's which were not being dumped were not considered. The Government of India had taken a stand against such methodology at the WTO and argued that while determining the dumping margin, all SKUs should be taken into consideration rather than only those which showed positive dumping. In this regard, he invited attention to ***Report No. WT/DS141/AB/R dated 1.3.2001 of the Appellate Body, WTO regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India***, in the above case, Indian exporters faced an anti-dumping action by EU and the exporters were exporting different varieties of bed linen to EU. In some cases, the exporters were exporting at positive dumping margin, wherein in many cases there was negative dumping margin, i.e., the export price was more than the normal value at which goods were sold in India. The European Commission applied their usual practice of not netting off the positive and negative dumping margins. In fact, they applied 'zero' (0) for negative dumping margins and cumulated only positive dumping margins and thereby arrive at higher dumping margins for Indian exporters. Government of India objected to this approach of European Commission and the matter was taken to the Dispute

Settlement Body of the World Trade Organisation which held in favour of Government of India. In an appeal filed by the EU before the Appellate Body, the Appellate Body held that the practice of not netting off of positive dumping margin and negative dumping margins was not correct. Thus, the Government of India succeeded before the WTO Appellate Body that positive and negative dumping margins must be taken together and therefore got lower dumping margin for Indian exporters. European Commission accepted the decision and revised dumping margin not only for bed linens cases but also for all other cases against India. He submitted that the position taken by the Government of India before the WTO forum, was binding on the DGAP in calculating the alleged 'profiteering'. While calculating profiteering the DGAP has taken a stand which was contrary to the stand taken by the Government of India before the WTO. The Respondent requested this Authority to follow the Government of India's position and allow 'netting off' in determining whether the Respondent had passed the benefit. He submitted that the Respondent had not undertaken any activity which tantamounted to 'profiteering'. In the absence of profiteering, he submitted that there was no occasion for the invocation of Section 171 of the CGST Act in the present case.

60. He further submitted that the DGAP while calculating the profiteering amount had not considered the change in rate of tax pre-GST and post-GST i.e. from 14.5% VAT to 28% GST and the change in prices thereof due to this change in rate of tax. Ideally, due to change in rate of tax from 14.5% to 28%, the base prices of the products should have been increased, however, in The case of the Respondent, the base prices had actually decreased and the Respondent has borne the loss with

respect to the same. However, the same has not been considered by the DGAP while calculating the alleged profiteering. He submitted that he had also borne the additional GST burden on those inventories which were lying with his channel partners as on 30.06.2017 and the same were cleared by the channel partners post-GST at the rate of 28%. This additional burden of GST that has been borne by the channel partners was recovered by them from the Respondent vide issuance of credit notes, however, the same has not been considered by the DGAP while calculating the alleged profiteering amount. He mentioned that the Respondent in toto has borne this additional GST burden of Rs. 48,59,41,402.35/- during the period of 2017-18 to 2018-19.

61. He submitted that the period covered under the present investigation was from 15.11.2017 to 31.03.2019, while the GST rate was reduced from 15.11.2017, there was no reason adduced by the DGAP as to the date of 31.03.2019 being reckoned for conducting the investigation. The Report was silent on the grounds or reasons based on which such period was selected by the DGAP for investigation. He further stressed that the period covered under investigation did not have any statutory basis. Based on the period taken as above, the alleged profiteering figures have been calculated upto the period of March 2019. However, the report was silent about the period until when the Respondent would be investigated for alleged profiteering, if any. This could lead to an inference that in the absence of any specified time period, an increase in the price, if any, undertaken by the Respondent would be considered as profiteering till the time Respondent was in business. It could even imply that in case if, in the future, the Respondent decided to increase

the prices of his goods (due to any commercial reason) it would attract anti-profiteering provisions.

62. The Respondent submitted that such exercise was contrary to the true intent and spirit of the anti- profiteering provisions contained in the CGST Act which by their very essence were transitionary in nature and therefore, could not be applied in perpetuity. Thus, he submitted that the manner in which the provisions pertaining to anti-profiteering were being applied by the DGAP in his report by arbitrarily selecting period of investigation and alleging profiteering has the effect of restricting the right of the Respondent to do business, a cherished fundamental right guaranteed by the Constitution of India. He has also claimed that as a supplier he had considered various factors like direct and indirect costs, demand & supply, customer perception, competition, product positioning, legal compliances, profit, etc. while determining the prices of his goods. He submitted that Respondent had not been able to pass on the increased cost to the recipients by way of an increase in prices due to the adoption of a longer period of investigation. He submitted that if the period of investigation was beyond a certain period, the effect of increased costs should be taken into account while calculating the alleged profiteering.

63. He further submitted that cost increases were relevant for the purpose of determination of profiteering. In this regard, he placed reliance on the case of ***S. Kumar Gandharv vs. KRBL Ltd. 2018-VIL-02-NAA***, wherein inflation as a factor has been accepted as a reason for a price increase by this Authority. Further, in the case of ***Hardcastle Restaurants Pvt. Ltd. 2018-VIL-11-NAA*** and in the case of ***NP Foods, 2018-VIL-08-NAA***, loss of input tax credit had been factored-in for

determination of net profiteering. According to the provisions of Section 171 of the CGST Act, this Authority was mandated to check if the benefit of reduction in GST rates or availability of input tax credit alone has been passed on. Therefore, the provision merely allowed evaluation of the passing of benefits during an increase in ITC and not reduction of ITC. Loss of input tax credit similarly resulted in an increase in costs. By allowing reduction of ITC to be set-off against the reduction in GST rates, this Authority has in effect allowed adjustment for the increase in costs. Therefore, he concluded that the investigation undertaken by the DGAP covering the period from 15.11.2017 to 31.03.2019, has the effect of placing an unlawful restraint on his fundamental right to carry on his business and was therefore violative of Article 19 (1) (g) of the Constitution of India. He submitted that the increase in costs should be taken into consideration for determination of the alleged profiteering (if any) as costs usually increased after every six months and accordingly, on the basis of market factors, he has been revising the prices of his product frequently. He further submitted that in case of one of his products, i.e. 'Saundarya Aloevera Gel', the MRP of the product was increased on 07.02.2019. While computing the profiteering, the DGAP has taken the average selling price of this product for the period from 01.11.2017 to 14.11.2017 and compared it with the price of the the said product as on 07.02.2019, which has a gap of 14 months. He further submitted that the amount of profiteering in respect of the sales of this product itself, has been worked out by the DGAP, as Rs. 3,87,13,966/-.

64. He submitted that frequent price increases were very common in the consumer goods industry. Keeping in mind the short shelf-life of the

products and their nature (necessity), the Respondent and his competitors undertook frequent price revisions of the product. It was reiterated that various factors played a decisive role in it. However, he submitted that the DGAP had not factored the reasons while computing the profiteering. Further, the increase in the cost of production of the product has also not been considered in his calculation. In this regard, the Respondent submitted that the costs of raw material, packing material, advertisement, transportation costs etc., were increasing during the period under investigation and hence, the Respondent was within its right to increase the prices of the products to pass on the cost increases to the customers. He submitted that such costs were very relevant for the determination of the prices of the products supplied by the Respondent. Such cost increases compeled a business to revise its prices and hence, were inextricably linked to pricing decisions.

65. In the instant case, he added that the DGAP had merely used mechanical approach of taking the average supply value of the product (for period 01.11.2017-14.11.2017) and compared the same with the invoice value (15.11.2017 to 31.03.2019). He further submitted that the DGAP has understood the provision of Section 171 incorrectly and has followed an incorrect approach to calculate the alleged profiteering. Thus, the demand in respect of alleged profiteering insofar as the same pertains to the price increases was not sustainable.

66. The Respondent submitted that while arriving at the total alleged profiteering amount, the DGAP had incorrectly added 18% to the alleged profiteered amount without adducing grounds as to why this amount has been added. This was evident from the DGAP's finding in Para 14 of the DGAP report wherein it has been stated that "the excess

GST so collected from the recipients, is also included in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased price". The Respondent submitted that such computation was *ab initio* incorrect, baseless and liable to be rejected and it was an undisputed fact that the amount charged as GST by the Respondent, has been duly deposited in the government account and hence this amount could not be made liable to be deposited in the Consumer Welfare Fund. He further stated that assuming, without admitting, that he had profiteered and GST had been collected thereon, then instead of him, the Government could transfer the amount equivalent to GST on the profiteered amount to the Consumer Welfare Fund. He added that the addition of 18% would have been correct if the case of the DGAP was that the amount has been collected and retained by the Respondent and not deposited with the Government.

67. He submitted that since the amount collected as GST by the Respondent from the recipient on the alleged profiteering amount had already been deposited with The Government and there has been no factual dispute on this aspect, addition of 18% GST to calculate the alleged profiteering amount was incorrect and was not sustainable and was liable to be rejected. In The light of the aforementioned discussion, the Respondent submitted that on re-computation of the alleged profiteering amount, after extending the benefit of cum-tax to him, the alleged profiteering amount should further be reduced by Rs. 15,55,47,176/-. The calculation w.r.t. the same is provided below:-

Work Sheet in respect of other states

Particulars	Selling price	Base price	Difference
Gross Amount excluding tax	6,08,06,06,883.22	5,38,61,20,961.19	69,44,85,922.03
GST at revised rates	1,09,27,53,917.63	96,82,12,602.49	12,45,41,315.13
Inclusive of tax amount	7,17,33,60,800.85	6,35,43,33,563.68	81,90,27,237.17

Uttarakhand State Working

Particulars	Selling price	Base price	Difference
Gross Amount excluding tax	1,76,73,20,068.27	1,58,90,34,225.45	17,82,85,842.82
GST at revised rates	30,88,46,906.49	27,78,41,046.06	3,10,05,860.43
Inclusive of tax amount	2,07,61,66,974.76	1,86,68,75,271.51	20,92,91,703.25

He submitted that, in the above Tables, profiteering was computed on the amount including tax. However, the increased tax amount of Rs. 12.45 crore and Rs. 3.10 crore had been deposited. Therefore, the profiteering amount should be reduced by **Rs. 15,55,47,176/-.**

68. He also submitted that in Para 11 of the DGAP's Report, he had given finding that the commensurate reduction in prices in terms of Section

171 of the CGST Act could only be in terms of money, so that the final price payable by a recipient got reduced commensurately with the reduction in the tax rate or benefit of ITC. Further, this was the only 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 that a supplier could adopt to pass on such benefits. In this regard, he submitted that the understanding of the DGAP was incorrect to this extent. The commensurate reduction was not restricted to the passing of benefit of tax rate reduction in monetary terms which was normally the price. Section 171 did not use the words 'pass on the benefit by reduction in price only'. The effect of commensurate reduction in price was extending the benefit to the recipient which had arisen due to tax rate reduction. Thus, what was pertinent to be seen was whether the objective of Section 171 was being achieved or not. If a recipient was extended the benefit in monetary or non-monetary form proportionate to the tax rate reduction, Section 171 was duly complied with in the strict sense. Price in this regard was the consideration paid or payable for the overall supply of a product. In light of the aforementioned submission, he contended that as per the Indian Contract Act, 1872, consideration included any act or abstinence. While consideration for the supply was generally measured in monetary terms, the same could also include non-monetary elements. Thus, price was not only what was reflected in the invoice. The monetary component may already be factored in the invoice price. However, the parties could also choose to settle the consideration partly in non-monetary terms. In the present case, the Respondent had reduced the prices by way of extension of promotion schemes and discounts. By these methods, the Respondent had

ensured full and total compliance with Section 171 and thus the finding of DGAP with respect to profiteering was incorrect. In this regard, he has placed reliance on the case of ***Ankit Kumar Bajoria vs. M/s. Hindustan Unilever Limited 2019 (21) GSTL J74 (N.A.A.)***, wherein this Authority has accepted the argument of grammage being a correct way, in terms of Section 171 of CGST Act, of passing of benefit of commensurate reduction in the rate of tax. Hence, the finding of the DGAP to the extent that commensurate reduction in prices in terms of Section 171 of the CGST Act could only be in terms of money was incorrect.

69. The Respondent had summarized the arithmetical errors made in the calculations, in the DGAP's report as is mentioned below:-

i. **Profiteering in terms of incorrect rate reduction from 28% to 18% instead of 18% to 12%** The DGAP while calculating the profiteering amount had considered the reduction of rate in terms of 28% to 18% rather than 18% to 12% with respect to 7 SKUs. Consequently, on rectification of this error, the alleged profiteered amount would be reduced by Rs. 35,16,943.76/-.

ii. **Profiteering calculated in terms of incorrect quantity (i.e. carton basis instead of unit basis).** In a substantial number of invoices, the alleged profiteering had been calculated by the DGAP by taking into account the quantity of SKUs in terms of cartons instead of units. Consequently, if rectified the alleged profiteered amount would be reduced by Rs. 1,12,50,512.83/-.

iii. **Profiteering calculated in terms of incorrect quantity (i.e. in terms of units of other SKUs).** In a number of invoices, the alleged profiteering for certain SKUs had been calculated by the DGAP by taking into account the number of other SKUs of the same invoice as the quantity of the SKU in question erroneously. Consequently, on rectification, the alleged profiteered amount would be reduced by Rs.18,38,45,259.36/-.

iv. **Discount given from 15.11.2017 to 06.12.2017 vide issuance of credit note not considered.** The DGAP while calculating the alleged profiteering amount has not considered the discounts given by the Respondent to his customers by way of credit notes issued during the period 15.11.2017 to 06.12.2017 which were in the nature of post supply discounts (Section 15 of CGST Act). If the discounts were considered, the alleged profiteering amount would be reduced by Rs. 7,10,84,798.30/-.

v. **Profiteering in terms of non-consideration of discounts given by way of cashback scheme.** The DGAP had erred in calculating the alleged profiteering by not taking into consideration the discount given in terms of cashback scheme. In this regard, he placed reliance on his ledger vide which the total cashback (discount) given by him to his customers during the relevant period came to Rs. 37,29,90,605.55/-. Further, he submitted that the total turnover during the relevant period on which profiteering had been calculated by the DGAP was Rs. 7,84,79,26,951.49/- as against Rs. 7,47,49,36,345.94/- (derived after deducting cashback amount from total turnover).

vi. **Profiteering in terms of non-consideration of sales return through credit note or through the purchase**

He submitted that the DGAP has calculated the alleged profiteering by not taking into account the quantity of SKUs which after their initial supply were supplied back to him by the customers either through the mode of issuance of credit notes or through purchase by him.

When sales return made through credit notes were considered, the alleged profiteering would be reduced by 1,01,82,942.94/-.

Further, when the sales return made through purchase were considered, the alleged profiteering would be reduced by Rs. 11,78,01,972.54/-.

vii. <u>Profiteering in terms of non-consideration of discounts given though secondary and retailer schemes</u>

He submitted that the DGAP while calculating the profiteering amount had failed to consider the discounts given vide the secondary and retailer schemes, which during the relevant period came to Rs. 15,12,63,538/- out of the total turnover of Rs. 784,79,26,951.49/- on which the profiteering was calculated by DGAP.

70. The above submissions of the Respondent were forwarded to the DGAP for his Report and the DGAP vide his Report dated 06.01.2020 has rectified some arithmetical errors and reported as under:-

I. **Profiteering in terms of incorrect rate reduction from 28% to 18% instead of 18% to 12%:-**

The DGAP stated that the Respondent had submitted the revised invoice sales data during the hearing before this Authority and as per this contention of the Respondent, profiteering has been revised by the DGAP.

II. **Profiteering calculated in terms of incorrect quantity (i.e. carton basis instead of unit base)**: -

In this regard, the DGAP stated that during the course of the investigation, the Respondent had mentioned the "Quantity" in both cartons and units/pieces. During the hearing held on 22.11.2019 before this Authority, the Respondent had submitted the "Quantity" in units/pieces. Accordingly, the DGAP has revised profiteering.

III. **Profiteering calculated in terms of incorrect quantity (i.e.in terms of units of other SKUs)**:-

The contention of the Respondent has been accepted and the DGAP has revised the profiteering amount.

IV. **Discount given during 15.11.2017 to 06.12.2017 vide issuance of credit notes not considered: -**

The said Credit Notes were verified by the DGAP and it was found by him that the credit notes were not issued as per Rule 53 (1A) of CGST Rules, 2017 i.e. Goods and Service Identification Number of the supplier, signature or digital signature of the supplier, nature of document, date of the corresponding invoice (s) or bill of supply were not mentioned in the credit notes. Hence, the DGAP has stated that the claim regarding the admissibility of these credit notes issued in compliance with Section 171 of the CGST Act was not sustainable.

V. **Profiteering in terms of non-consideration of discounts given by way of cashback scheme**:-

The DGAP stated that the cashback was given by the retailer to the final customer and not by the manufacturer to his distributers. Since

the investigation was being done against the manufacturer, no benefit of the cashback scheme could be given to the manufacturer.

VI. **Profiteering in terms of non-consideration of sales return through credit notes**: -

During the hearing held before this Authority on 22.11.2019, the Respondent had submitted the sales return data. The DGAP stated that the sales return information has been considered and the profiteering amount has been re-calculated.

VII. **Profiteering in terms of non-consideration of sales return through purchase: -**

In this regard, the DGAP stated that it was seen that the Respondent had given lump sum figure and details have been given for only 3 Invoices. Even in these Invoices, the corresponding reference of the original invoice by which these products were sold had not been given. Hence benefit could not be given to the Respondent.

VIII. **Profiteering in terms of non-consideration of discounts given though secondary and retailer schemes**: -

As per Section 15 (3) (b) of CGST Act, 2017 the value shall be transaction value but will not include any discount after the sale has been effected, if (i) such discount was given in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoice: & (ii) Input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply. Since the discount given through secondary and retailer scheme were not specifically linked to

relevant invoices, the benefit could not be given for the reduction in value. In any case, the other two conditions were also not satisfied.

71. The DGAP submitted that after rectification and consideration of new facts raised by the Respondent, the issue that remained was the determination and quantification of profiteering by the Respondent for failing to pass on the benefit of the reduction in the rate of GST on the goods supplied to his recipients, in terms of Section 171 of the Central Goods and Services Tax Act, 2017. From the invoices made available by the Respondent, it appeared to the DGAP that the Respondent increased the base prices of the goods when the rate of GST was reduced from 28% to 18% & 18% to 12% w.e.f. 15.11.2017, so that 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 outward taxable supplies (other than zero rated, nil rated and exempted supplies) of all the products during the period 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 price of the impacted goods, despite the reduction in the GST rate from 28% to 18% & 18% to 12% or in other words, the profiteered amount has been calculated by the DGAP as Rs. **75,08,64,019/-** and the said profiteered amount has been arrived at by the DGAP by comparing the actual invoice-wise base prices of impacted products sold during the period 15.11.2017 to 31.03.2019 with the commensurate price based on the average of the base price of such products sold during the period 01.011.2017 to 14.11.2017. The excess GST so collected from the recipients has also been included in the aforesaid profiteered amount

as the excess price collected from the recipients also included the GST charged on the increased base prices.The place (State or Union Territory) of the supply-wise break-up of the total profiteered amount of Rs. **75,08,64,019**/- is furnished in the Table below:

Table **Amount in Rs**

S.No	State Name	State Code	Final profiteering
1	JAMMU AND KASHMIR	1	49,67,133/-
2	HIMACHAL PRADESH	2	1,14,78,261/-
3	PUNJAB	3	1,95,79,263/-
4	CHANDIGARH	4	59,254/-
5	UTTARAKHAND	5	2,42,28,501/-
6	HARYANA	6	3,33,35,289/-
7	DELHI	7	3,33,57,375/-
8	RAJASTHAN	8	3,93,69,459/-
9	UTTAR PRADESH	9	10,65,05,367/-
10	BIHAR	10	5,25,82,483/-
11	ARUNACHAL PRADESH	12	155/-
12	TRIPURA	16	35,031/-
13	MEGHLAYA	17	7,126/-
14	ASSAM	18	1,95,25,832/-
15	WEST BENGAL	19	3,93,74,502/-
16	JHARKHAND	20	1,65,33,796/-
17	ODISHA	21	2,58,76,775/-
18	CHATTISGARH	22	2,26,43,709/-
19	MADHYA PRADESH	23	3,57,74,111/-
20	GUJARAT	24	5,38,81,902/-
21	MAHARASHTRA	27	9,55,47,656/-
22	KARNATAKA	29	5,08,06,578/-
23	GOA	30	26,32,131/-
24	KERALA	32	76,57,830/-
25	TAMIL NADU	33	2,15,35,149/-
26	PUDUCHERRY	34	1,239/-
27	ANDAMAN AND NICOBAR ISLANDS	35	7,45,902/-
28	TELANGANA	36	2,01,39,678/-
29	ANDHRA PRADESH (NEW)	37	1,26,82,532/-
	Total		**75,08,64,019/-**

The DGAP further stated that the Respondent's contention that the methodology adopted by the DGAP for calculating the profiteering was not correct and suffered from various flaws was not correct since this Authority was the statutory authority to determine methodology and procedure as per Rule 126 of CGST Rules, 2017 in exercise of its

powers given under section 164 of CGST Act, 2017. The DGAP only investigated the complaint on the basis of documents/ information submitted by the Respondent.

72. The DGAP further stated that the Respondent's statement that profiteering should have been calculated considering the change in the rate of tax pre and post-GST and change in prices thereof, when the tax burden increased from 14.5%VAT to 28% GST and there was no increase in the prices of impacted SKUs by him. The Respondent had also mentioned that due to the introduction of GST, he had to bear additional GST burden of Rs. 48,59,41,402/- due to the increase in the rate of tax from 14.5% in the pre-GST period to 28% when GST was rolled out. In reply to this, the DGAP mentioned that the CGST Act did not offer the supplier of goods or services, any flexibility to suo moto decide on any other mode of passing on the benefit of reduction in the rate of tax to the recipients. Therefore, not increasing the price in the event of an increase in the rate of tax from 14.5% under the Pre-GST regime to 28% under the GST regime, may be the business strategy of the Respondent and benefit on this account could accrue to the Respondent for the purpose of computation of profiteering which has to be calculated, taking the relevant date as 15.11.2019. Further, the amount of Rs. 48,59,41,402/- was received by the Respondent from the customers.

73. In respect of the Respondent's objection regarding period of investigation from 15.11.2017 to 31.03.2019, the DGAP stated that the Government, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017, reduced the tax rates from 28% to 18% on various

consumer goods, effective from 15.11.2017. A reference was received on 08.06.2018 from the Standing Committee on Anti-profiteering to conduct a detailed investigation against the Respondent. The investigation report was submitted to this Authority on 13.12.2018. Order No. 02/2019 was issued by this Authority on 14.03.2019 in respect of the Respondent. This Authority had extended the period for investigation upto March, 2019. Further, the revised investigation report was submitted to this Authority on 13.09.2019.

74. In respect of the Respondent's submissions that he was required to pass on the benefit of tax rate reduction to his recipients i.e. to super distributors and distributors etc., which was done by him and shown as Exhibit-14 in his submissions dt. 22.11.2019, the DGAP stated that first of all, after issuing of notice on 21.06.2018, on completion of seventeen months and even after submission of final investigation report to this Authority on 13.12.2018 and further revised report on 13.09.2019, it seemed like an afterthought of the Respondent. Never before he had submitted this kind of fact or even referred to it in his submissions. Further, DGAP reported that there was an email sent by abhuydaiestablishment@patanjaliayurved.org toabhuydaiestablishment @patanjaliayurved.org which was found to have been sent by the Respondent to himself and not to his distributors in which it was stated that the savings on account of reduced tax would be passed on by the Respondent. Therefore, it didn't hold any value for the purpose of profiteering. Further, it was also relevant that this e-mail only spelled out the intention of passing on the benefit but did not state whether the said benefit had actually been passed on.

75. A copy of the above report of the DGAP was also given to the Respondent and he was provided an opportunity of hearing on 27.01.2020, but the Respondent took adjournment and then another opportunity of hearing was granted to the Respondent on 10.02.2020, which the Respondent availed and made submissions dated 10.02.2020. In his submissions the Respondent reiterated his previous submissions and replied in the following manner in respect of some of the technical points:-

S. No	Grounds by Respondent in submissions dated 22.11.2019	DGAP's comments	Respondent's response to DGAP's comments
1.	There has been no profiteering by the Respondent and hence, the entire proceedings are illegal and liable to be dropped.	That the DGAP has conducted his investigation within the scope of Section 171 of the CGST Act, 2017, and has submitted his report basis for the information and documents submitted by the Respondent.	The Respondent claimed that vide this reply the DGAP has not made the combined computation of the factors stated by him in his submissions, rather made an un-related response to the contention of the Respondent, and if on introduction of GST he would have increased his prices vis-à-vis increase in tax rate from 14.5% to 28% and then reduce the prices vis-à-vis decrease in tax rate from 28% to 18%, then the prices at which the goods would have been sold would still be higher than the actual price charged by the Respondent. Thus, there was no profiteering as such done by him and thus, the end consumers did receive the benefit by virtue of no change in prices vis-à-vis changes

			in the rate of tax.
2.	The DGAP while calculating the alleged profiteering amount has failed to consider the discount given by the Respondent by way of cashback schemes.	That the cashback is given by the retailers to the final customer and not by the manufacturer (Respondent) to his distributors. Thus, the benefit of the cashback scheme could not be given to the Respondent.	The Respondent submitted that the observation of the DGAP was incorrect and without any basis, as the cashback scheme is a form of discount which an end consumer receives while buying goods from the Respondent through distributors/superdistributors/retailers etc. Thus, the said cashback amount was a cost for the Respondent and was borne by him.
3.	The DGAP while calculating the alleged profiteered amount has failed to consider the sales return made through purchase.	The Respondent with respect to his contention of sales return made through purchase had provided a lump sum amount and details with respect to only 3 invoices, which lacked the corresponding reference of the original sales invoice. Thus, the benefit of the same could not be given to the Respondent.	He submitted that the DGAP in his submissions had denied the benefit of sales return made through purchase on the ground of non-linkage of purchase invoices with that of the sales invoice. In this regard, he mentioned that the DGAP has nowhere disputed the fact of sales return made through purchases. Further, that the Respondent is the sole manufacturer of the disputed SKUs and thus, if any products which are similar to these SKUs are purchased by the Respondent, the said SKUs would be the SKUs manufactured by the Respondent and are returned to it though purchase, also in the case of sales return made through purchases is similar to a case wherein sales return was made through credit notes as the end result of both is same i.e. sales return. The only difference is in terms of the method of sales return.

4.	The DGAP while calculating the alleged profiteered amount has failed to consider the discount given by the Respondent through secondary and retailer schemes.	That the discounts given through secondary & retailer schemes were not specifically linked to invoices in question, thus, the benefit cannot be given for the reduction in value. Further, in terms of Section 15(3)(b) of CGST Act, the said discount didn't fulfil the twin conditions i.e. (i) such discount is not established in terms of an agreement entered into at or before the time of such supply and is not specifically linked to the relevant invoice; and (ii) ITC as is attributable to the discount on the basis of document issued by the supplier has not been reversed by the recipient of the supply.	He submitted that the discounts given by way of secondary and retailer schemes are not given directly on the invoices rather through credit notes. Furthermore, in regard to compliance in terms of Section 15(3)(b) of CGST Act, he submitted that the said secondary and retailer schemes were already in knowledge of the distributors/ super distributors at the time of sale of goods to them by the Respondent i.e. at the time of making the supply and thus, the said discount is established in terms of the agreement between the Respondent and his distributors at the time of supply. Moreover, for the claim of discount for the purpose of antiprofiteering there is no requirement that it should satisfy the provisions of GST. The only relevant thing is that benefit to the extent of the discount should be given to the purchaser.

76. This Authority has carefully considered the DGAP's Reports and the written submissions 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?

77. 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."

78. 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% and from 18% to 12% w.e.f. 15.11.2017.

79. It is also revealed that the DGAP vide his report dated 13.09.2019 has calculated the amount of net higher sales realization due to increase in the base prices of the impacted good, despite the reduction in the GST rate from 28% to 18% and from 18% to 12% as **Rs. 1,03,20,08,903/-.** The said profiteered amount has been arrived at by the DGAP by comparingthe actual invoice-wise base prices of impacted products sold during the period 15.11.2017 to 31.03.2019 with the average base prices of these products sold during the period 01.11.2017 to 14.11.2017. The excess GST so collected from the recipients has also been included by the DGAP in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased base prices. We also observe that the DGAP vide his report dated 06.01.2020 has revised the profiteering amount to **Rs. 75,08,64,019/-**after re-examining some of the contentions of the

Respondent and after rectifying the arithmetical errors in the computation of profiteering.

80. 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 reductions as the post rate reductions the benefit has to be legally passed on 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 based on the figures mentioned in his GSTR-3B Return which almost gives representation of actual base prices charged during the pre rate reduction period. 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.

81. The Respondent has contended that this Authority cannot suo moto initiate proceedings under Section 171 of the CGST Act, 2017 and the proceedings initiated were violative of the principles of the natural justice. In this connection, it would be pertinent to refer to Section 171 (2) of the CGST Act, 2017 which provides that, *"The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing 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."* Therefore, it is clear from the above Section that this Authority has suo moto power to examine all such cases of tax reductions where the benefit is required to be passed on. Further, Rule 127 (1) of the CGST Rules, 2017 defines the duty of the Authority as, *"to determine whether any 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;"*and Rule 127 (ii) of the CGST Rules, 2017 provides, *"to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;"* it is clear from the above Rules that whenever Government decides to sacrifice its revenue to reduce the prices of goods or services by way of reduction in tax rate or by allowing the input tax credit in favour of consumers, it is the duty of this Authority to ensure that the benefit of this sacrifice is passed on to the end consumer. Further, it would also be pertinent to

mention here that this Authority as per Para 9 of the 'Methodology & Procedure' notified by it on 28.03.2018, under the powers given to it under Rule 126 of the CGST Rules, 2017, has jurisdiction to take suo moto cognizance of the contravention of the provisions of Section 171 (1) of the CGST Act, 2017. The above Para states as, *"(9) The Authority may inquire into any alleged contravention of the provisions of Section 171 of the Central Goods & Services Tax Act, 2017 on its own motion or on receipt of information from any interested party as defined in Rule 137 (c), person, body, association or on a reference having been made to it by the Central Government or the State Government."* Therefore, it is clear that this Authority can suo moto examine the violation of the provisions of Section 171 of the CGST Act, 2017 or can direct the DGAP to launch investigation. In the instant case, under the powers granted to it under the above provisions, this Authority had asked the Respondent to intimate how he has passed on the benefit of GST rate reduction w.e.f. 15.11.2017, which was announced vide Notification No. 41/2017- Central Tax (Rate) dated 14.11.2017, to the customers as he was one of the largest suppliers of FMCGs and the Respondent vide his letter dated 23.04.2018, had submitted a list of 127 goods impacted by the GST rate reduction w.e.f. 15.11.2017 with his pre and post 15.11.2017 SD prices (Dealer's Price) and quantity of such goods sold during the period 15.11.2017 to 31.03.2018. In the said list, the post 15.11.2017 SD prices were found to be higher than the pre 15.11.2017 SD prices of most of the goods. Therefore, this Authority had suo moto decided to forward the Respondent's letter dated 23.04.2018 and the enclosures attached with it to the Standing Committee on Anti-Profiteering for taking necessary action under Rule

128 (1) of the CGST Rules, vide its letter dated 26.04.2018, as there were sufficient grounds to believe that the Respondent had apparently not passed on the benefit of tax rate reductions. Therefore, the claim of the Respondent that there was no information before the Standing Committee to take action is not correct. Further, Since, this Authority had referred to the matter on suo moto cognizance no complaint in the prescribed format APAF-1 was required to be filed. Hence, the reliance placed by the Respondent on the following cases does not hold good, considering the facts of the present case:-

- ***Canara Bank vs. Debasis Das (2003) 4 SCC 557***
- ***Ashok Kumar Yadav vs. State of Haryana 1985 4 (SCC) 417***
- ***Mohinder Singh vs. State 2013 SCC Online J&K 7***
- ***Taylor vs. Taylor (1876) 1 Ch.D 426,***
- ***State of Uttar Pradesh vs. Singhara Singh AIR 1964 SC 358***
- ***Kanwar Natwar Singh vs. Director of Enforcement 2010 (262) ELT 15 (SC)***
- ***State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan AIR 1961 SC 1623***
- ***Rajam Industries Pvt. Ltd. vs. Addl. D. G. D.C.E.I. Chennai 2010 (255) ELT 161 (Mad.)***
- ***Lekhraj vs. Commissioner of C. Ex. & S.T. Allahabad 2014 (310) ELT 381 (Tri. - Del.)***
- ***Nand Kishore Naik vs. Sukti Dibya AIR 1953 Ori 240***

82. In this regard, we would also like to place reliance on the recent order of the Hon'ble High Court of Delhi passed in the case of **M/s Nestle India Ltd. & Anr. V. Union of India & Ors.** (W.P.(C) 969/2020, wherein the Hon'ble High Court has held that:-

"We, however, make it clear that this interim order shall not come in the way of the National Anti Profiteering Authority in cases where it has suo moto taken action"

Therefore, all the contentions of the Respondent relating to suo-moto investigation being started by the Authority cannot be accepted.

83. The Respondent has argued that no Show Cause Notice was issued to him before the investigation started. However, this contention of the Respondent is baseless as it is observed that the DGAP had issued a notice dated 21.06.2018 (as per Annexure-3 of the DGAP report dated 13.12.2018) to the Respondent as per the provisions of Rule 129 (3) of the above Rules intimating him that he would be investigated whether he had passed on the benefit of tax rate reductions or not. Therefore, the Respondent had duly been issued show cause notice before initiation of the investigation by the DGAP. Further, during the course of investigation, the DGAP had been continuously interacting with the Respondent and had given ample opportunities to him for submission of the documents and other explanations/objections. The DGAP vide his investigation Report dated 13.12.2018 submitted to this Authority has thoroughly incorporated and explained all the objections raised by the Respondent. Further, this Authority, after receiving the investigation report, has also issued show cause notice dated 18.12.2018 to the Respondent and granted him full opportunity of hearing and for filing of written submissions. The Respondent was given six opportunities of hearing on 07.01.2019, 28.01.2019, 13.02.2019, 15.02.2019, 03.03.2019 and 13.03.2019 out of which he

has attended five hearings during which he has been heard at length. He has also filed his written submissions on 16.10.2019, 06.11.2019, 22.11.2019 and 10.02.2020 as per the provisions of Para 6 of the Methodology & Procedure framed by this Authority on 28.03.2018 read with Rule 133 (2) of the above Rules. Further, it was observed by this Authority that the Respondent had brought new facts to the notice of this Authority during the course of hearing. Therefore, the case was referred back to the DGAP by this Authority for further investigation vide Order dated 14.03.2019 under Rule 133(4) of the CGST Rule, 2017.The DGAP had re-investigated the case in light of fresh objections raised by the Respondent and revised the profiteering amount from Rs. 1,76,02,33,343/- to Rs. 1,03,20,08,903/- vide his revised investigation Report dated 13.09.2019. Accordingly, the Respondent was again served Show Cause Notice dated 19.09.2019 and granted full opportunity of hearing. The Respondent was again granted four opportunities of hearing on 04.10.2019, 16.10.2019, 06.11.2019 and 22.11.2019 out of which he has attended three hearings and has filed written submissions dated 16.10.2019, 06.11.2019 and 22.11.2019. All the submissions were supplied to the DGAP for clarification under Rule 133(2A). Accordingly, the DGAP has considered the fresh submissions filed by the Respondent and has again revised the profiteered amount from Rs. 1,03,20,08,903/- to Rs. 75,08,64,019/-. The Respondent was again given two more opportunities of hearing on 27.01.2020 and 10.02.2020 out of which he has attended the hearing held on 10.02.2020 and submitted that he has completed his submissions and objections. Therefore, it is evident from the chronological history of the proceedings that the Respondent

was given twelve opportunities of being heard wherein he has filed eight written submissions and the Authority has not only heard the Respondent in detail but has also considered all the submissions/objections raised by him in a fair and just manner. Further, the profiteering amount has been revised twice according to the fresh facts and submissions filed by the Respondent. It is evident from the above facts that full opportunity has been provided to the Respondent in the instant case and there has been no violation of the principle of *Audi Alteram Partem.* The contention of the Respondent that the legal maxim, *Nemo Judex in cause sua* applies in this case is baseless and cannot be accepted as this Authority has not investigated the present case itself as it has been done by the DGAP as per the provisions of Rule 129 of the CGST Rules, 2017. Further, the Respondent's citation of the cases of ***Oryx Fisheries Private Limited v. Union of India 2011 (266) E.L.T. 422 (S.C.)*** and ***Gorkha Security Services vs. Govt. (NCT of Delhi) (2014) 9 SCC 105*** in this respect does not hold good as he has been given ample opportunities of being heard and was served due notice before initiation of the present proceedings.

84. The Respondent has also contended that the lack of judicial members in the Authority was violative of the principles of Natural Justice. In this regard, it is mentioned that the contention of the Respondent is incorrect and it is submitted that this Authority has been constituted under Section 171 (2) of the CGST Act, 2017. The Parliament, the State Legislatures, the Central and the State Governments and the GST Council in their wisdom have not thought it fit to provide for a judicial member in this Authority. Such a member has also not been

provided in the other such Authorities like the TRAI or the Authorities on Advance Rulings on the Central Excise and the Goods and Services Tax. Hence, the allegations made by Respondent regarding the unconstitutionality of the Authority are wrong. Therefore, the following cases cited by the Respondent in this respect do not help him:-

- ***Madras Bar Association vs. Union of India 2014 (308) ELT 209 (SC)***
- ***Rojer Mathew vs. South Indian Bank Limited and Ors. 2018 (13) GSTL 129 (SC)***
- ***Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited (2016) 9 SCC 103***
- ***L. Chandra Kumar vs. Union of India (1997) 3 SCC 261***
- ***R. K. Jain vs. Union of India (1993) 4 SCC 119***
- ***Commissioner of Income Tax, Bangalore vs. B.C. Srinivasa Setty (1981) 2 SCC 460***
- ***Eternit Everest Ltd. vs. UOI 1997 (89) E.L.T. 28 (Mad.)***

85. 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.

86. The Respondent had submitted new factual information and submissions which could not be incorporated by the DGAP in his initial investigation Report. He had also pointed out some mathematical errors in the computation made by the DGAP in his Report. This Authority had taken cognizance of the submissions made by the Respondent and directed the DGAP to re-investigate the case in light of the submissions made by the Respondent. The DGAP has considered these submissions and rectified the errors vide his revised report dated 06.01.2020. Some of the submissions filed by the Respondent were not accepted by the DGAP as these submissions did not have merit. These contentions of the Respondent are discussed as below:-

Non-consideration of the discount given through cash back schemes- This contention of the Respondent cannot be accepted as Section 171 (1) of the CGST Act, 2017 clearly states that any benefit of reduction in rate of tax on any supply of goods or services or both shall be passed on to the recipients by way of commensurate reduction in the prices. Here, 'commensurate reduction in prices' implies that every supplier has to reduce the prices of goods or services or both keeping in view the reduction in the tax rate or the benefit of additional input tax credit. In the instant case, it is observed that 'cash back' schemes do not have any relation with the reduction in the tax rate and such schemes are being run by FMCG manufacturers for promotion of their sales. Therefore, this argument of the Respondent is not tenable. Further, it is clear from the DGAP's investigation Report that the Respondent has increased the base prices after rate reduction and did not reduce the MRPs of his products that shows that he has unlawfully pocketed the amount, which the Government had sacrificed for the welfare of the common consumers. Hence, the DGAP has rightly not given the benefit of the cash back scheme to the Respondent.

Non-consideration of Sales Return by way of Purchase – While investigating the matter, the DGAP has observed that the Respondent could not match the sales and return invoices hence he could not consider this submission of the Respondent. In this regard, it can be clearly seen from the submissions of the Respondent that there was no proper correlation between the return invoices and the sale invoices. Further, the Respondent could not prove that the

recipients had reversed the input tax credit in lieu of returned SKUs as claimed by the Respondent. Further, it is observed from the documents placed on record that the Respondent could not prove the sales returned in the manner prescribed under the CGST Act, during the course of investigation. Therefore, the benefit of returned SKUs merely on the basis of the claim of the Respondent cannot be allowed when there is no evidence that can help match the purchase invoices with the sales-return invoices and there is also no proof to the effect that the input tax credit in lieu of these sales-return invoices has been reversed at the recipient's end in the manner stipulated under Rule 42 of the CGST Rules, 2017.

Non-consideration of Secondary and Retailer Schemes – As per Section 15(3)(b) of CGST Act, 2017 the transaction value will not include any discount after the sale has been effected, if(i) such discount is not proved in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoice: & (ii) Input tax credit as is attributable to the discount on the basis of documents issued by the supplier has been reversed by the recipient of the supply. Since the discounts given through secondary & retailer scheme are not specifically linked to relevant invoices, the benefit could not be given on account of reduction in the tax rates. The invoices, for which profiteering has been calculated, do not satisfy above two conditions, hence, the benefit claimed, cannot be given to the Respondent.

87. The Respondent has contended that the profiteering should be calculated on recipients as a whole and not SKU wise. It is clear from

the perusal of the provision of Section 171 (1) of the CGST Act, 2017that 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. Therefore, the profiteering calculated SKU-wise is correct and the objection raised by the Respondent in this regard is not acceptable.

88. The Respondent has claimed that he has passed on the benefit of rate reduction to his recipients by sending the mails to his distributors to pass on the benefit to the consumers by reducing prices. However, as a manufacture the Respondent has not refixed the MRP's of his products as he was entirely responsible for fixing them as only he could fix, round off and print the MRPs per the provisions of Rule 6 of

the Legal Metrology (Packaged Commodities) Rules, 2011 which states as follows:-

"(m) 'retail sale price' means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and the price shall be printed on the package in the manner given below:

'Maximum or Max. retail price Rs. ...../ ₹.....inclusive of all taxes or in the form MRP Rs. ...../ ₹.....incl. of all taxes after taking into account the fraction of less than fifty paise to be rounded off to the preceding rupee and fraction of above 50 paise and upto 95 paise to the rounded off to fifty paise."

The Respondent was also required to stamp or re-sticker or reprint the MRPs on all the SKUs on which rate of tax was reduced in terms of the letter written by the Ministry of Consumer Affairs, Food and Public Distribution, Govt. of India on 16.11.2017which reads as follows: -

"WM-10 (31)/2017

Government of India

Ministry of Consumer Affairs, Food and Public Distribution

Department of Consumer Affairs

Legal Metrology Division

Krishi Bhawan, New Delhi

Dated: 16.11.2017

To,

The Controller of Legal Metrology,

All States/ UTS

Subject: Labelling of MRP of pre-packaged commodities due to reduction in GST-reg.

Reference is invited to this office letter No. WM-10 (31)/2017 dated 29.9.2017 regarding declaration of MRP on unsold stock of pre-packaged commodities manufactured/packed/Imported prior to 1st July 2017. Subsequent to that, Government has reduced the rates of GST on certain specified items. Consequent upon that, permission is hereby granted under sub-rule (3) of rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011, to affix an additional sticker or stamping or online printing for declaring the reduced MRP on the pre-packaged commodity. In this case also, the earlier Labelling/ Sticker of MRP will continue to be visible.

Further, this relaxation will also be applicable in the case of unsold stocks manufactured/packed imported after 1st July, 2017 where the MRP would reduce due to reduction in the rate of GST post 1st July, 2017. This order would be applicable upto 31st December, 2017

Yours faithfully

(B. N. Dixit)

Director of Legal Metrology

Tel: 01123389489 / Fax. -011-23385322

Email: dirwm-ca@nic.in

Copy to: All Industries/ Industry Associations/ Stake Holders

89. However, it is apparent from one of the E-Mail (enclosed as Annexure-6 of the submissions dated 10.02.2020) that the Respondent had not complied with the above Rule and the letter and had not reduced and fixed the MRPs on the impacted SKUs and shifted his responsibility to the distributors and retailers who had continued to sell his products at the pre rate reduction MRPs. Therefore, it is clear that the Respondent has not passed on the benefit of rate reduction to the consumers and has committed violation of the provisions of Section 171 (1) of the above Act.

90. The Respondent has also argued that the additional burden borne by the Respondent as the GST paid by him on the profiteering amount has not been considered. 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 above, 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 them 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 CWFs as the Respondent has not deposited it in the above Fund. Therefore, the above contention of the Respondent is untenable and hence they cannot be accepted.

91. 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 1.3.2001of 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. Hence, this contention of the Respondent is not in line with the spirit of law and cannot be accepted.

92. The Respondent has contended that the profiteering amount, if any should not be credited to the CWF, but should be given back to his

consumers. In this regard, letter and spirit of Anti-Profiteering law is to passed on the benefit to end consumers. Therefore, it is clear from the Section 171 of the CGST Act, 2017 that whenever Government reduces the tax rate on any product, the intention behind it to benefit the end consumers of the product. In the instant case, it is not possible to trace each and every consumer of the product which is manufactured by the Respondent. Therefore, to prove the legislative intent of the law, profiteered amount must be used for the welfare of the consumers and it must be deposited in the Consumer Welfare Fund in the absence of passing on the benefit to the actual consumers of the products. Hence, this contention of the Respondent does not hold good and cannot be accepted.

93. The Respondent has also placed reliance on the case of ***Commissioner Central Excise and Customs Kerala versus Larsen and Toubro Limited (2016) 1 SCC 170*** tosubstantiate his point that no machinery has been prescribed under the anti-profiteering provisions. 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, to enforce the Anti-profiteering measures, as provided under Section 171 (2) of the above Act, this Authority has been established to determine whether both the above benefits have been passed on or not to the consumers. Under Rule 123 Standing and Screening Committees on Anti-Profiteering have been constituted to examine the accuracy and adequacy of the evidence to prima facie establish whether the above benefits have not been passed. As per Rule 129 of the CGST Rules, 2017 office of DGAP has been created and empowered to investigate the complaints

alleging non passing of the above benefits on the recommendation of the Standing Committee on Anti-Profiteering. Vide Rule 127 this Authority has been assigned the duty of determining whether these benefits have been passed on or not, to identify the registered person who has not passed on the above benefits, to provide relief to the affected consumers, get the profiteered amount returned or deposited and impose penalties. Under Rule 133 this Authority has been empowered to determine the above benefits, grant them to the eligible recipients, get the profiteered amount deposited and impose penalties. Under Section 171 (3A) of the CGST Act, 2017 read with Rule 133 (3) (d) & (e)) of the above Rules, this Authority has been given power to impose penalty on the registered persons and cancel their registration who do not pass on the above benefits. Under Rule 136 this Authority can get its orders monitored through the tax authorities of the Central or the State Governments. Hence, there is more than the adequate machinery required to implement the Anti-Profiteering measures and therefore, the Respondent cannot allege that no machinery has been provided to implement the above measures.

94. The Respondent has also contended that the time period taken by the DGAP for investigation was arbitrary. 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. The Respondent has failed to provide proof of having passed on the benefit till 31.03.2019. On this issue it would be relevant to mention that the DGAP has conducted the investigation from 15.11.2017 when the tax rate was

reduced till 31.03.2019 when he had started the investigation during which he had found that the Respondent had not reduced his prices due to rate reductions till the above 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.

95. The Respondent 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."

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.

96. The Respondent has further argued that the methodology adopted by the DGAP for calculating profiteering is not correct. In this connection it

is mentioned that the DGAP has computed the amount of benefit which has been denied by the Respondent by rightly comparing the average of the base price of the products sold during the period 01.11.2017 to 14.11.2017 with the actual invoice-wise base prices of the impacted products sold during the period 15.11.2017 to 31.03.2019. The above methodology has been approved by this Authority in all such cases and hence, the Respondent cannot claim that the DGAP has adopted incorrect methodology and procedure.

97. The Respondent has also claimed that the pricing of products depended on a number of commercial factors. In this connection it would be pertinent to mention that the provisions of Section 171 (1) of the above Act required the Respondent to pass on the benefit of tax reduction to the consumers only and have no mandate to look in to fixing of prices of the products which the Respondent was free to fix. If there was any increase in his costs the Respondent should have increased his prices before 15.11.2017, however, it cannot be accepted that his costs had increased on the intervening night of 14.11.2017/15.11.2017 when the rate reduction had happened which had forced him to increase his prices exactly equal to the reduction in the rate of such tax. Such an uncanny coincidence is unheard off and hence there is no doubt that the Respondent has increased his prices for appropriating the benefit of tax reduction with the intention of denying the above benefit to the consumers. The Respondent has referred to case of ***Kumar Gandharv vs. KRBL Ltd. 2018-VIL-02-NAA***, wherein he has claimed that inflation has been accepted as a reason for price increase by this Authority however, the same is not correct as the rate of tax was increased in this case and not reduced.

Further, he has relied on the case of ***Hardcastle Restaurants Pvt. Ltd. 2018-VIL-11-NAA*** and ***NP Foods 2018-VIL-08-NAA*** and it has been stated that the loss of input tax credit has been factored-in for determination of net profiteering. In this context, it is pertinent to mention that in the above cases the benefit of ITC was denied by the Government with reduction in the rate of tax, therefore to calculate the commensurate benefit, the benefit of ITC loss was taken into consideration. However, in the instant case, no such benefit of ITC has been denied to the Respondent as it is only a case of reduction of tax rates, and hence the Respondent is liable to reduce the prices of his products by way of commensurate reduction in prices as per the provisions of Section 171(1) of the CGST Act, 2017. Therefore, the facts of the cases referred by the Respondent are different from his case and hence, they cannot help him.

98. The Respondent has also argued that he had to bear loss with the introduction of GST, as rates were increased and he did not increase his prices. In this regard, it is mentioned that Section 171(1) of the CGST Act, 2017 is very clear which requires to reduce the prices with the reduction in rate of tax commensurately. The Respondent had no restriction on increasing his prices when the rates of tax were increased and it was solely his business call not to increase them. However, he cannot deny the benefit of tax reduction on this ground.

99. The respondent has contended that the investigation is violative of Article 19(1)(g) of the constitution of India. The contention of the Respondent made in this regard is not correct as this Aurhority or the DGAP has not acted in any way as price controller or regulator as they do not have the mandate to regulate the same. The Respondent is

absolutely free to exercise his right to practise 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 tax. The intent of this provision is the welfare of the consumers who are voiceless, unorganised and vulnerable. This Authority is charged with the responsibility of ensuring that the 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 or the DGAP has nowhere interfered with the business decisions of the Respondent and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

100. Based on the above facts the profiteered amount is determined as **Rs. 75,08,64,019/-** as per the provisions of Rule 133 (1) of the above Rules as has been computed vide Revised Annexure-8 of the Report dated 06.01.2020. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. The Respondent is also directed to deposit an amount of **Rs. 75,08,64,019/-** 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 the Respondent 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 in the concerned CWF is as under:-

Table **Amount in Rs**

S.No.	State Name	State Code	Final profiteering
1	JAMMU AND KASHMIR	1	49,67,133/-
2	HIMACHAL PRADESH	2	1,14,78,261/-
3	PUNJAB	3	1,95,79,263/-
4	CHANDIGARH	4	59,254/-
5	UTTARAKHAND	5	2,42,28,501/-
6	HARYANA	6	3,33,35,289/-
7	DELHI	7	3,33,57,375/-
8	RAJASTHAN	8	3,93,69,459/-
9	UTTAR PRADESH	9	10,65,05,367/-
10	BIHAR	10	5,25,82,483/-
11	ARUNACHAL PRADESH	12	155/-
12	TRIPURA	16	35,031/-
13	MEGHLAYA	17	7,126/-
14	ASSAM	18	1,95,25,832/-
15	WEST BENGAL	19	3,93,74,502/-
16	JHARKHAND	20	1,65,33,796/-
17	ODISHA	21	2,58,76,775/-
18	CHATTISGARH	22	2,26,43,709/-
19	MADHYA PRADESH	23	3,57,74,111/-
20	GUJARAT	24	5,38,81,902/-
21	MAHARASHTRA	27	9,55,47,656/-
22	KARNATAKA	29	5,08,06,578/-
23	GOA	30	26,32,131/-
24	KERALA	32	76,57,830/-
25	TAMIL NADU	33	2,15,35,149/-
26	PUDUCHERRY	34	1,239/-
27	ANDAMAN AND NICOBAR ISLANDS	35	7,45,902/-
28	TELANGANA	36	2,01,39,678/-
29	ANDHRA PRADESH (NEW)	37	1,26,82,532/-
	Total		**75,08,64,019/-**

101. 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, he 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.

102. 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. The concerned Commissioner shall submit a report in compliance of this order to this Authority within a period of 4 months from the date of receipt of this order.

103. 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/-
(Dr. B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy

12.3.2020

(A. K. Goel)
NAA, Secretary

F. No. 22011/NAA/127/Patanjali/2018 Date: 12.03.2020

Copy to:-

1. M/s Patanjali Ayurved Ltd., Patanjali Food & Herbal Park Village-Padartha, Laksar Road, Haridwar-249404, Uttarkhand-247663.
2. 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.
3. Commissioner of commercial Taxes, office of the chief Commissioner of state Tax, eedupugallu, krishna district, Andhra Pradesh.
4. Commissioner of commercial Taxes, Department of Tax & Excise, kar bhawan, itanagar, Arunachal Pradesh - 791 111
5. Commissioner of commercial Taxes, office of the Commissioner of Taxes, Government of Assam, kar bhawan, ganeshpuri, dispur, Guwahati - 781 006.
6. Commissioner of commercial Taxes, additional Commissioner (GST), commercial Tax Department, ground floor, vikas bhawan, baily road, Patna – 800 001
7. Commissioner of commercial Taxes, commercial Tax, SGST Department, behind raj bhawan, civil lines, Raipur - 492 001
8. Commissioner of commercial Taxes, office of Commissioner of commercial Tax, vikrikar bhavan, old high court building, panji, Goa- 403 001
9. Commissioner of commercial Taxes, c-5, Rajya kar bhavan, near times of India, ashram road, Ahmedabad.
10. Commissioner of commercial Taxes, vanijya bhavan, plot no. 1-3, sector-5, panchkula. Pin - 134 151.
11. Commissioner of commercial Taxes, Excise & Taxation Commissioner, Government of Himachal Pradesh, b-30, sda complex, kasumpati, Shimla.
12. Commissioner of commercial Taxes, Excise & Taxation complex, rail head Jammu.
13. Commissioner of commercial Taxes, commercial Taxes Department, project bhawan, dhurva, Ranchi- 834 004.
14. Commissioner of commercial Taxes, vanijya therige karyalaya, 1st main road, Gandhinagar, Bangalore- 560 009
15. Commissioner of commercial Taxes, Government secretariat, Thiruvananthapuram -695001.
16. Commissioner of commercial Taxes, Moti Bangla compound, m.g. Road, Indore

1C3

17. Commissioner of commercial Taxes, GST bhavan, mazgaon, Mumbai- 400 010
18. Commissioner of commercial Taxes, office of the Commissioner, GST & cx Commissionerate, morellow compound, m.g.road, shillong- 793001.
19. Commissioner of commercial Taxes, office of the Commissioner of state Tax, banijyakar bhawan, old secretariat compound, cuttack - 753 001.
20. Commissioner of commercial Taxes, office of Excise and Taxation Commissioner, bhupindra road, patiala- 147 001
21. Commissioner of commercial Taxes, kar bhavan, ambedkar circle, jaipur, rajasthan - 302 005.
22. Commissioner of commercial Taxes, sitco building, block-d, above a.g. Office, gangtok, east, sikkim - 737 101.
23. Commissioner of commercial Taxes, papjm building, greams road, chennai – 600 006.
24. Commissioner of commercial Taxes, o/o the Commissioner of state Tax, ct complex, nampally station road, hyderabad - 500 001.
25. Commissioner of commercial Taxes, office of the Commissioner of Taxes & Excise, head of the Department, revisional authority, p.n. Complex, gurkhabasti, agartala - 799 006.
26. Commissioner of commercial Taxes, office of the Commissioner, commercial Tax, u.p. Commercial Tax head office vibhuti khand, gomti nagar, lucknow (u.p)
27. Commissioner of commercial Taxes, state Tax Department, head office uttarakhand, ring road, near pulia no. 6, natthanpur, dehradun.
28. Commissioner of commercial Taxes, 14, beliaghata road, kolkata - 700 015.
29. Commissioner of commercial Taxes, deptt of trade & Taxes, vyapar bhavan, ip estate, new delhi-2 pin: 110 002
30. Commissioner of commercial Taxes, first floor, 100 feet road, ellapillaichavady, pondicherry - 605 005.
31. Chief Commissioner of central Goods & Services Tax, Bhopal zone 48, administrative area, arera hills, hoshangabad road, Bhopal M.P. 462 011
32. Chief Commissioner of central Goods & service Tax c.r.building rajaswa vihar, bhubaneswar-751007
33. Chief Commissioner of central Goods & service Tax Chandigarh zone C.R. Building, plot no.19a, sector17c, chandigarh-160017
34. Chief Commissioner central Goods & service Tax , cochin zone C.R.building, i.s.press road, Ernakulum cochin682018

35. Chief Commissioner of central Goods & Services Tax Delhi zone C.R. Building, I.P. Estate, new delhi110 109
36. Chief Commissioner of central Goods & service Tax, Hyderabad zone GST bhavan, I.B.stadium road, basheer bagh, Hyderabad 500 004
37. Chief Commissioner of central Goods & Services Tax Jaipur zone, new central revenue building, statue circle, Jaipur 302 005
38. Chief Commissioner of central Goods & Services Tax, Meerut zone opp. Ccs university,mangal pandey nagar, meerut-250 004.
39. Chief Commissioner of central Goods & Services Tax, Mumbai zone GST building, 115 m.k. Road, opp. Churchagate station, mumbai-400020
40. Chief Commissioner of central Goods & Services Tax, Telangkhedi road, civil lines, Nagpur 440001
41. Chief Commissioner of central Goods & Services Tax Panchkula sco 407408, sector-8, Panchkula
42. Chief Commissioner of central Goods & Services Tax, Pune zone GST bhawan ice house, 41a, sasoon road, opp. Wadia college, pune411001
43. Chief Commissioner of central Goods & Services Tax, (Ranchi zone) 1st floor, C.R. Building, (annex) veer chand patel path Patna, 800001
44. Chief Commissioner of central Goods & Services Tax, Shillong zone north eastern, 3rtd floor, crescens building, MG Road, shillong-793 001
45. Chief Commissioner of central Goods & Services Tax, Vadodara zone 2nd floor, central Excise building, race course circle, Vadodara 390 007
46. Chief Commissioner of central Goods & Services Tax Visakhapatnam zone GST Bhavan, port area, visakhapatnam530 035.
47. NAA website/Guard file.

12.3.2020

(A. K. Goel)
Secretary, NAA

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