BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	36/2020
Date of Institution	27.12.2019
Date of Order	06.07.2020

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 Neeva Foods Pvt. Ltd., Shop No. 1, Mayfair 14, Ground Floor, Chandavarkar Road, Borivali West, Mumbai-400092.

Respondent

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. Vishal Khandelwal and Sh. Amit Kumar, Authorized Representatives for the Respondent.

ORDER

1. The present Report dated 27.12.2019 has been furnished by the Director General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received by the DGAP from the Standing Committee on Anti-Profiteering on 28.06.2019 recommending a detailed investigation in respect of an application, originally examined by the Maharashtra State Screening Committee on Anti-profiteering under Rule 128 (2) of the CGST Rules 2017, alleging profiteering in respect of restaurant service supplied by the Respondent (Franchisee of M/s Subway India Pvt. Ltd.). In the application, it was alleged that despite reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017, the Respondent had not passed on the commensurate benefit of tax reduction as he had increased the base prices of his products. A summary sheet of the extent of profiteering was prepared by the State Tax Officer, Mumbai which was also enclosed with the recommendation of the Standing

Committee. On receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 (3) was issued on 10.07.2017 by the DGAP, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017, had not been passed on to his recipients by way of commensurate reduction in prices and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents. The Respondent was also allowed to inspect the relied upon non-confidential evidence/information which formed the basis of the investigation between 17.07.2019 and 19.07.2019, which was however not availed of by the Respondent.

2. The DGAP has reported that the period covered by the current investigation was from 15.11.2017 to 30.06.2019.

3. The DGAP has also reported that in response to the notice dated 10.07.2019 and subsequent reminders, the Respondent has submitted his replies vide his letters/e-mails dated 22.07.2019, 15.09.2019, 27.09.2019, 09.10.2019, 11.11.2019, 18.11.2019, 28.11.2019, 29.11.2019, 03.12.2019, 09.12.2019 and 24.12.2019, whereby the Respondent has submitted:-

   a) That as per his working, ITC amounting to Rs. 4,21,385/- was available to him during the period from 01.07.207 to 14.11.2017, which came to approx. 10%. The increase in

prices was only commensurate to the loss/denial of ITC which was earlier permitted in terms of capital nature/assets purchased and other purchases/expenses during the year. Therefore, by doing so, he has passed benefit on the pricing of goods to the extent which covered the loss of denial of ITC w.e.f. 15.11.2017.

b) That he had migrated to a new POS hardware on 12.07.2017 and any data before that was available only in txt format, conversion of which was not possible.

c) That there was no closing stock of material remaining as on 14.11.2017 on which ITC was claimed earlier and hence, there wasn't any reversal of credits of ITC on closing stock on 14.11.2017.

4. Vide the aforementioned e-mails/letters, the Respondent submitted the following documents/information:-

(a) Copies of GSTR-1 and GSTR-3B Returns for the period from July 2017 to June 2019.

(b) Sales Details for the period from August, 2017 to June, 2019.

(c) Price List of products (pre and post 15.11.2017).

(d) Copies of Electronic Credit Ledger for the period from July 2017 to June 2019.

(e) ITC Register for the period from July, 2017 to November, 2017.

5. The DGAP has further reported that in terms of Rule 130 of the CGST Rules 2017, the Respondent had been informed by the DGAP vide notice dated 11.04.2019 that if any information/documents provided by him were confidential, a non-confidential summary of such information/documents could be furnished by him. However, the Respondent did not classify any of the information/documents provided by him as confidential, in terms of Rule 130 of the Rules, ibid.

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

7. The DGAP has further stated that the GST rate on the restaurant service has been reduced from 18% to 5% w.e.f. 15.11.2017 along with the condition that no ITC on the goods and services used in supplying the service would be available to the Respondent, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017. Since it was a case of reduction in the rate of tax, it was important to examine the provisions of Section 171 (1)

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

8. The DGAP has also submitted that the Respondent was dealing with a total of 183 items while supplying restaurant service before 15.11.2017. Whereas, he was dealing with a total of 351 items during the period from 15.11.2017 to 30.06.2019. The DGAP has compared the average selling prices as per the details submitted by the Respondent for the period from 01.08.2017 to 14.11.2017 with the actual selling prices post rate reduction i.e. w.e.f. 15.11.2017 and found that though the tax amount was computed @ 18% prior to 15.11.2017 and @ 5% w.e.f. 15.11.2017 in respect of 152 items but the Respondent has increased the base prices and the cum-tax prices paid by the consumers and the prices were not reduced commensurately, inspite of the reduction in the GST rate. Therefore, the only remaining point for

determination was whether the increase in the base prices was solely on account of the denial of ITC.

9. The DGAP has further submitted that the assessment of the impact of denial of ITC which was an uncontested fact, required determination of the ITC in respect of "restaurant service", as a percentage of the taxable turnover from the outward supply of "products", made during the pre-rate reduction period. For instance, if the ITC in respect of restaurant service was 10% of the taxable turnover of a registered person till 14.11.2017 (which became unavailable to him w.e.f. 15.11.2017) and if the increase in the base prices w.e.f. 15.11.2017 was less than 10%, then this would not be a case of profiteering. However, if the increase in the base prices w.e.f. 15.11.2017 was by a margin of 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Therefore, this exercise to work out ITC in respect of restaurant service as a percentage of the taxable turnover from the products supplied during the pre-GST rate reduction period had to be carried out, though by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. The DGAP has done this because there was no reversal of ITC on the closing stock of inputs/input services and capital goods as on 14.11.2017 by the Respondent, which was required under the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the CGST Rules, 2017.

10. The DGAP in his Report has also intimated that the ratio of ITC to the Net Taxable Turnover has been taken as the basis for determining the impact of denial of ITC that was available till 31.10.2017. The DGAP has found that the ITC amounting to Rs. 3,58,05/- was available during the period from July 2017 to October 2017 which worked out to be 9.19% of Net Taxable Turnover of the Respondent from the restaurant service supplies amounting to Rs. 38,98,737/- during the same period. Further, with effect from 15.11.2017, the rate of tax on restaurant service was reduced from 18% to 5% and no ITC was available to the Respondent. A summary of the computation of the ratio of ITC to the taxable turnover as furnished by the DGAP is given in Table-A below:-

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

Particulars	Jul.-17	Aug.-17	Sept.-2017	Oct.-2017	Total
ITC Availed as per GSTR-3B (A)	85539	78228	100185	94353	358305
Total Outward Taxable Turnover as per GSTR-3B (B)	971773	911712	954179	1061073	3898737
Percentage of Ratio of Input Tax Credit to Net Outward Taxable Turnover (C)= (A/B*100)					**9.19%**

11. The DGAP has further intimated that the analysis of the details of the item-wise outward taxable supplies made during the post-rate reduction period from 15.11.2017 to 31.03.2019 revealed that the base prices of 152 items supplied by the Respondent have been increased by the Respondent, presumably, to offset

denial of ITC. The pre and post rate reduction prices of the items sold by the Respondent during the period from 01.07.2017 to 14.11.2017 (Pre-GST rate reduction) and from 15.11.2017 to 30.06.2019 (Post-GST rate reduction) were compared and it was found that the Respondent has increased the base prices of the products supplied by him by more than what was required to offset the impact of denial of ITC in respect of 152 items sold during the same period and hence, the commensurate benefit of reduction in the rate of tax from 18% to 5% has not been passed on. The DGAP has also found that there was no profiteering in respect of the remaining items on which there was either no increase in base prices or the increase in the base prices was less or equal to the denial of ITC or these were new products launched post rate reduction.

12. The DGAP has also stated that only those items, where the increase in the base prices was more than what was required to offset the impact of denial of ITC were considered and the calculation of the profiteered amount was carried out following the above principle. For example, as per invoice No. 1/A-16229 dated 15.11.2017, in the case for item "6" Veggie Delite Sub" the extent of profiteering was worked out as per the procedure mentioned in Table-B below:-

Table–B **(Amount in Rs.)**

Name of the item (A)	6" Veggie Delite Sub
Total quantity sold during 01.11.2017 to 14.11.2017 (B)	478
Sum of taxable value during 01.11.2017 to 14.11.2017 (C)	51600
Average base price during 01.11.2017 to 14.11.2017 (D=C/B)	107.95
Base price with denial of input tax credit @9.19% (E=D*1.0919)	117.87
GST @ 5% (F= E*5%)	5.89
Commensurate price to be charged w.e.f. 15.11.2017 (G=E+F)	123.76
Selling price per unit as per Invoice No. 1/A-16229 dated 15.11.2017	140
Total profiteering (I=H-G)	16.24

13. The DGAP has further stated that based on the aforesaid pre and post rate reduction prices of the products; the impact of denial of ITC; and the details of outward supplies (other than zero-rated, nil rated and exempted supplies) during the period from 15.11.2017 to 30.06.2019, the amount of net higher sales realization due to increase in the base prices of the service supplied after netting off the impact of denial of ITC or in other words, the profiteered amount worked out to be Rs. 41,93,431/- including the GST on the base profiteered amount for the period of investigation, which was detailed in Annexure-14 of his Report. It was also stated that the service has been supplied by the Respondent in the State of Maharashtra only.

14. The DGAP has also claimed that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling prices or by way of not reducing the

selling prices of the products commensurately, despite the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent and the extent of profiteering was Rs. 41,93,431/- (inclusive of GST). Thus the provisions of Section 171 (1) of the CGST Act, 2017 have been contravened by the Respondent in the present case.

15. The above Report of the DGAP was considered by this Authority in its sitting held on 31.12.2019 and it was decided to hear the Respondent on 17.01.2019. Sh. Vishal Khandelwal and Sh. Amit Kumar, Authorized representatives, represented the Respondent.

16. The Respondent vide his written submissions dated 13.02.2020 has made the following submissions:-

a. **Discounted Average Base Rate taken in DGAP Calculation Report:-** That the average price during the period from 01.11.2017 to 14.11.2017 has been compared by the DGAP with the actual price post GST rate reduction which was arbitrary and no uniformity had been maintained. All Subway franchisees across India were offering 50% discount on all the products on a single day every year as part of business promotion. The Respondent had offered this scheme on 03.11.2017 however, The DGAP while calculating the average price has considered all the sales including the discounted sales which had been made on 03.11.2017. Due to inclusion of the discounted

sales in the calculation of the average price, huge difference has come as compared to the actual base price and accordingly the profiteered amount has been wrongly calculated. If the 50% discount was offered on 16.11.2017 instead of 03.11.2017, then the average price would have been same as actual base price and accordingly loss of ITC would have been computed on the actual base price only and there would be substantial reduction in the profiteered amount as compared to the profiteered amount calculated by the DGAP. The impact of discounted sales on 03.11.2017 and 16.11.2017 has been illustrated by the Respondent as under:-

Product Name: - Aloo Patty Sub (12")

Base Price: - Rs. 245 excluding taxes on or before 14.11.2017

Total Qty sold till 01.11.2017 to 14.11.2017 - 48 Nos

Total Qty sold post GST Rate reduction: - 1597 Nos

Total sales realization considering discounted sales on 03.1.2017- Rs. 11,025/-.

Case 1: -Actual discount offered on 03.11.2017 (Invoice copy attached as Annexure-1)

SL.	Product Name	Total Qty	Total Sales Realization	Average Price	Loss of ITC@9.91%	Total Commensurate Price
1	Aloo Patty Sub (12")	48	INR 11025	INR-229.69	INR-22.76	INR 252.45

Case 2: -Suppose if same discount was offered on 16.11.2017 instead of 03.11.2017

SL.	Product Name	Total Qty	Total Sales Realization	Average Price	Loss of ITC@9.91%	Total Commensurate Price
1	Aloo Patty Sub (12'')	48	INR 11760	INR-245	INR-24.28	INR 269.28

Impact sheet due to inclusion of discounted sales

Average Price if discount offered on 03rd Nov 2017-(A)	Average Price if discount offered on 16th Nov 2017-(B)	Difference=(A-B)	Total Qty	Total Impact
INR-252.45	INR-269.28	INR-16.83	1597 Nos	INR-26877.51

b. That as per the above calculations, there was a difference of Rs. 26,877.51/- in the profiteered amount due to inclusion of discounted sales while calculating the average price on a single product.

c. That it was very common in restaurant business to offer discretionary discounts to the customers and these discounts largely depended on market practices but all discounts were discretionary depending upon the sales, inventory position, competitor strategy, market penetration, customers loyalty or other similar factors. Giving discount was a norm in this competitive world and depended on various factors. It was the right of the business to decide quantum of discount and the period that needed to be given to sustain in the competitive markets and attract more customers. The business was also having right to

withdraw the discounts and other promotional offers anytime and there was no rule governing that any deal or discount could not be withdrawn until expiry of the specified time period. The DGAP has completely ignored that the discount was given under special circumstance only and average price had been calculated based on total sales including the discounted sales as well as the normal sales during the period from 01.11.2017 to 14.11.2017. Therefore, the average base price should be calculated only on the basis of normal sales made during the period from 01.11.2017 to 14.11.2017 or pre- GST rate reduction average price should be compared with the post GST rate reduction average price so that basis of comparison was the same.

d. That the weighted average prices for 45 items have been calculated based on the sales in the month of September and October 2017, where the DGAP could not find details of the sales made during the period from 01.11.2017 to 14.11.2017. Therefore, instead of taking an uniform period for all the products in the pre-GST rate reduction period, the DGAP has taken different periods for different products without providing any reasonable explanation. The DGAP has also ignored the fact that the prices have been revised before change in the rate, although there were no sales of these items during the period starting from 01.11.2017 to

14.11.2017. Therefore, base price as on 15.11.2017 should be considered for calculating the profiteering amount.

e. **Profiteering amount should be calculating up to the next price revision after post GST rate reduction, considering that after GST rate reduction any change of price is due to the business/commercial reasons only:-** That the DGAP has calculated the profiteered amount of Rs. 41,93,431/- starting from 15.11.2017 till June, 2019 for 20 months and all the price revisions made after 15.11.2017 have been considered as part of the profiteered amount. He has completely ignored that the Respondent has right to increase his prices on account of various reasons other than tax which were also required to be considered for fixing the product prices.

f. That the alleged profiteered amount has substantiality increased as compared to the total turnover during the period from February 2019 to June 2019 because in the month of February 2019, there was revision in the product prices to meet out the general inflation and other expenses. Before February 2019, the profiteered percentage was 11.51% of the turnover, however, in the months starting from February 2019 to June 2019, the profiteered percentage was 14.70% of the turnover i.e. there was almost increase of 3% as compared to the other

periods. He has also submitted month wise comparison Chart as under:-

Month wise comparison chart

Profiteering Analysis month-wise							
Month	**Total Profiteering Amount**	**Total Turnover**	**% of Profiteering amount verus Total Turnover**	**Month**	**Total Profiteering Amount**	**Total Turnover**	**% of Profiteering amount verus Total Turnover**
Nov'17	73,629.96	617,434.00	11.93%	Sept'18	203,764.83	1,742,899.00	11.69%
Dec'17	143,750.03	1,235,230.00	11.64%	Oct'18	206,096.55	1,781,202.00	11.57%
Jan'18	164,515.18	1,415,219.00	11.62%	Nov'18	221,920.89	1,913,762.00	11.60%
Feb'18	164,408.31	1,413,259.00	11.63%	Dec'18	204,524.50	1,834,799.00	11.15%
Mar'18	185,840.86	1,620,084.00	11.47%	Jan'19	210,726.67	1,865,386.00	11.30%
Apr-18	185,993.62	1,612,909.00	11.53%	Feb'19	**247,078.98**	**1,705,693.25**	**14.49%**
May'18	190,958.57	1,661,807.00	11.49%	Mar'19	**318,995.91**	**2,166,383.75**	**14.72%**
June'18	184,908.68	1,603,735.00	11.53%	Apr'19	**304,301.53**	**2,040,997.50**	**14.91%**
July'18	197,353.63	1,720,139.00	11.47%	May'19	**304,779.21**	**2,067,848.75**	**14.74%**
Aug'18	191,993.77	1,677,538.00	11.44%	Jun'19	**287,889.74**	**1,964,176.50**	**14.66%**
Total	**1,683,352.61**	**14,577,354.00**			**2,510,078.83**	**19,083,147.75**	
Total Profiteering Amount		4,193,431.44					
Total Turnover		33,660,501.75					
% Turnover		**12.45%**					

g. That Right to trade was a fundamental right guaranteed under Article 19 (1) (g) of the Constitution of India and the right to trade included the right to determine prices which could not be taken away without any explicit authority under the Law. The base sale price of the complained product was not controlled under any legislation or the Essential Commodities Act or the CGST Act and the Rules. Therefore, this form of price control was a violation of Article 19 (1) (g) of the Constitution of India.

h. That he had increased his prices after a lapse of a substantial time period of approx. 15 months from the date

of rate reduction to meet out the general inflation and other business related expenditure. The DGAP was working like a price controlling authority and there were no guidelines in the statute itself that prescribed the mechanism to be followed by the business for revision of the prices and up to what period prices of products should not be increased. Therefore the profiteered amount should not be calculated on the increased price of the products if price have been increased by him after considerable time gap, considering the legal and settled fact that fixation of prices was fundamental right of the business and there were no rules/regulations prescribed under the law for increasing the product prices after the rate reduction.

i. **5% additional GST amount added on profiteered amount should be removed:-** The GST of 5% which has been paid to the Government was based on the base price charged to the customers. Since, according to the DGAP the base price should have been reduced accordingly, the GST amount payable should also be less than as compared to the actual GST amount collected from the customers. However, the GST amount collected on the increased base price from the customers has been already deposited with the Government of India along with monthly tax liability Therefore, the addition of 5% GST amount was required to be removed and the profiteered amount should

be recovered from the Governments. The profiteered amount should also be reduced by Rs. 1,99,687/-. Montlh-wise summary of the same has been furnished by the Respondent in the below mentioned Table:-

Impact due to Inclusion of GST Amount			(Amount in Rs.)
Month	**Profiteered Amount as per DGAP Report-(A)**	**GST Amount Included in Profiteered Amount-(B)**	**Profiteered Amount excluding GST=(C=A-B)**
Nov'17	73,629.96	3,506.18	70,123.77
Dec'17	1,43,750.02	6,845.24	1,36,904.78
Jan'18	1,64,515.18	7,834.05	1,56,681.12
Feb'18	1,64,408.31	7,828.96	1,56,579.34
Mar'18	1,85,840.85	8.849.56	1,76,991.29
Apr'18	1,85,993.61	8,856.83	1,77,136.77
May'18	1.90,958.57	9.093.26	1,81865.30
Jun'18	1,84,908.68	8,805.17	1,76,103.50
Jul'18	1,97,353.62	9,397.79	1,87,955.83
Aug'18	1,91,993.76	9,142.56	1,82,851.20
Sept'18	2,03,764.83	9,703.08	1,94,061.74
Oct'18	2,06,096.55	9,814.12	1,96,282.43
Nov'18	2,21,920.89	10,567.66	2,11,353.23
Dec'18	2.04.524.50	9,739.26	1,94,785.24
Jan'19	2,10,726.67	10,034.60	2,00,692.07
Feb'19	2,47,078.98	11,765.66	2,35,513.32
Mar'19	3,18,995.90	15,190.28	3,03,805.62
Apr'19	3,04,301.53	14,490.54	2,89,810.98
May'19	3,04,779.20	14,513.29	2,90,265.91
June'19	2,87,889.74	13,709.03	2,74,810.70
	41,93,431.44	**1,99,687.21**	**39,93,744.23**

j. **Increase in royalty expense paid to Subway India Private Limited @1.769% should be considered in calculation of base price after rate reduction :-** That As per the franchise agreement, the Respondent was under legal obligation to pay 8% on net sales towards royalty and 4.5% towards advertisement charges to M/s Subway

India Systems Private Limited (SSIPL). The royalty and tax Invoices had been issued by M/s SSIPL after charging GST @12% on royalty amount and 18% on advertisement expenses. The basis of calculation of the royalty and advertisement charges was net taxable sales. Post 14.11.2017 i.e. after the rate reduction, his cost of royalty has increased by 1.769%. Calculation of increase in the royalty has been furnished in the below mentioned Table:-

(Amount in Rs.)

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

k. That the DGAP while calculating the profiteering amount, has considered the base prices of the products without considering the increase in the royalty expenses which was directly calculated on the basis of net sales. This did

not come under the purview of ITC loss. Due to this increase in royalty expenses, impact on profiteered amount was Rs. 4,09,897/- and it should be reduced while calculating the profiteered amount.

I. The Respondent has also relied upon the decision of this Authority given in the case of ***Kumar Gandhrav v. M/s KRBL Limited*** (Case Number 03/2018 dated 04.05.2018) wherein increase in the purchase price/cost of goods has been accepted by this Authority while determining the profiteered amount. He has also reproduced relevant Para 7 of the above said Order as under:-

"It is also revealed from the perusal of the tax Invoices submitted by the Respondent that there was an increase in the purchase price of paddy in the year 2017 as compared to its price during the year 2016 which constitutes major part of the cost of the above product.....

Therefore, due to the imposition of the GST on the above product as well as the increase in the purchase price of the paddy there does not appear to be denial of benefit of ITC as has been alleged by the applicant as there has been no net benefit of ITC available to the Respondent which could be passed on to the consumers."

The Respondent has also furnished month wise impact of royalty amount as per the Table given below:-

Impact due to Royalty Expenses			(Amount in Rs.)
Month	Total Profiteering Amount (DGAP Working)	Revised Profiteering after royalty expenses adjustment	Difference due to Royalty Expenses adjustment
Nov'17	73,629.96	65,693.89	7,936.07
Dec'17	1,43,750.02	1,28,073.57	15,676.45
Jan'18	1,64,515.18	1,46,731.62	17,783.55
Feb'18	1,64,408.31	1,46,702.11	17,706.19
Mar'18	1,85,840.85	1,65,913.26	19,927.59
Apr'18	1,85,993.61	1,65,996.83	19,996.78
May'18	1,90,958.57	1,70,595.99	20,362.57
Jun'18	1,84,908.68	1,65,464.96	19,443.72
Jul'18	1,97,353.62	1,76,234.94	21,118.68
Aug'18	1,91,993.76	1,71,387.32	20,606.44
Sept'18	2,03,764.83	1,81,872.58	21,892.24
Oct'18	2,06,096.55	1,83,912.91	22,183.63
Nov'18	2,21,920.89	1,99,099.07	22,821.81
Dec'18	2,04,524.50	1,83,045.74	21,478.76
Jan'19	2,10,726.67	1,88,710.38	22,016.28
Feb'19	2,47,078.98	2,26,416.49	20,662.49
Mar'19	3,18,995.90	2,92,551.94	26,443.96
Apr'19	3,04,301.53	2,79,730.22	24,571.31
May'19	3,04,779.20	2,80,464.54	24,314.66
Jun'19	2,87,889.74	2,64,935.85	22,953.88
	41,93,431.44	37,83,534.28	4,09,897.15

m. **Increase in delivery expense paid to Online E-Commerce Platforms should be considered in calculation of base price after rate reduction:-** That the online aggregators have given a large customer base to the restaurants over and above the already existing dining-out facility. Considering the above benefit the Respondent had started working with the aggregators like Swiggy and Uber Eats etc. from January 2018 onwards and under the service agreement with the aggregators he was paying 12-15% service fee for delivery of the products to them. The Respondent's online sales as compared to

his total sales were around 45% due to change in the business model. Without online delivery facility there was minimal chance of getting the orders from the customers. During the subject period, the Respondent had paid Rs. 20,09,314/- as delivery fee including the GST amount of Rs. 3,06,505/-. ITC of Rs. 3,06,505/- has not been considered while calculating loss of ITC because at that time he was not selling through the online platforms. Therefore, delivery fee inclusive of GST needed to be considered while calculating the profiteering amount. The Respondent has furnished month wise details of online sales and service fee in the below mentioned Table:-

Details of Online sales and delivery expenses with GST Amount						
Month	**Total Sales**	**Swiggy Sales**	**Uber Sales**	**Total Online Sales**	**Service Fee**	**GST@18% on Service Fee**
Jan'18	1,415,219.00	346,610.00		346,610.00	43,326.25	7,798.73
Feb'18	1,413,259.00	441,635.00		441,635.00	55,204.38	9,936.79
March'18	1,620,084.00	506,755.00		506,755.00	63,344.38	11,401.99
April'18	1,612,909.00	521,730.00		521,730.00	65,216.25	11,738.93
May'18	1,661,807.00	574,513.00		574,513.00	71,814.13	12,926.54
June'18	1,603,735.00	557,088.00		557,088.00	69,636.00	12,534.48
July'18	1,720,319.00	652,157.00		652,157.00	81,519.63	14,673.53
Aug'18	1,677,538.00	663,301.00		663,301.00	82,912.63	14,924.27
Sept'18	1,742,899.00	728,839.00		728,839.00	91,104.88	16,398.88
Oct'18	1,781,202.00	818,158.00		818,158.00	102,269.75	18,408.56
Nov'18	1,913,762.00	772,131.00		772,131.00	96,516.38	17,372.95
Dec'18	1,834,799.00	689,216.00	123,309.00	812,525.00	101,565.63	18,281.81
Jan'19	1,865,386.00	548,058.00	374,883.00	922,941.00	115,367.63	20,766.17
Feb'19	1,705,693.00	525,450.00	295,095.00	820,545.00	102,568.13	18,462.26
March'19	2,166,384.00	649,619.00	509,380.00	1,158,999.00	144,874.88	26,077.48
April'19	2,040,988.00	566,032.00	410,884.00	976,916.00	122,114.50	21,980.61
May'19	2,062,848.00	635,336.00	528,801.00	1,164,137.00	145,517.13	26,193.08
June'19	1,964,176.00	683,236.00	500,248.00	1,183,484.00	147,935.50	26,628.39
	31,803,007.00	**10,879,864.00**	**2,742,600.00**	**13,622,464.00**	**1,702,808.00**	**306,505.44**

n. **Impact on the Profiteered amount due to reduction in Base price of the products post GST rate should be considered:-** That the DGAP has incorrectly applied a methodology similar to the "zeroing methodology" which was used by the anti-dumping authorities in certain countries like European Union (EU). The Government of India had taken a stand against such methodology at the World Trade Organisation (WTO) and argued that while determining the dumping margins, all SKUs should be taken in to consideration rather than only those which showed positive dumping. In the Report WT/DS141/AB/R dated 01.03.2001 of the Appellate Body of the WTO regarding Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India in which Indian exporters faced an anti-dumping action by the EU as the exporters were exporting different varieties of bed linen to the EU, the Government of India had objected to this approach of the European Commission and the matter was taken to the Dispute Settlement Body of the WTO which held in favour of Government of India. In the Appeal filed by the EU before the Appellate Body, the Appellate Body held that practice of not netting off positive dumping margins and negative dumping margins was not correct. In the present case, the Respondent on few products had not only

passed the benefits by reduction in the tax rate but had also reduced the basic prices further and incurred substantial losses. The DGAP while calculating profiteered amount, had not considered the prices of products which has been reduced by him and considered the impact on the profiteered amount as zero instead of negative value. However, the column named "Difference in Value %" in the DGAP working file (File name "Total" in annexure 14 of DGAP report) clearly showed the negative % for the impacted line items. Total amount of these impacted negative line items was Rs. 2,28,863/- which has been incurred by the Respondent on account of reduction in prices of the products after rate reduction which has not been considered by the DGAP while calculating profiteered amount and therefore, the profiteered amount should be reduced further by Rs. 2,28,863/-. The Respondent has furnished the details of the items in respect of which the base prices have been reduced post 14th November, 2017 in the Table given below:-

Impact on Profiteered amount due to reduction in prices							(Amount in Rs.)	
Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per our Calculation	Difference	Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per our Calculation	Difference	Total Impact
Nov'17	0.00	(433.05)	433.05	Sept'18	0.00	(9,175.35)	9175.35	9,608.40
Dec'17	0.00	(2,650.22)	2,650.22	Oct'18	0.00	(21,688.81)	21,688.81	24,339.03
Jan'18	0.00	(2,104.59)	2,104.59	Nov'18	0.00	(32,547.00)	32,547.00	34,651.59
Feb'18	0.00	(3,895.94)	3,895.94	Dec'18	0.00	(31,191.95)	31,191.95	35,087.89
Mar'18	0.00	(4,129.25)	4,129.55	Jan'19	0.00	(26,211.22)	26,211.22	30,340.77

Apr-18	0.00	(3,234.69)	3,234.69	Feb'19	0.00	(15,508.19)	15,508.19	18,742.88
May'18	0.00	(5,235.82)	5,235.82	Mar'19	0.00	(13,167.17)	13,167.17	18,402.99
June'18	0.00	(4,489.02)	4,489.02	Apr'19	0.00	(14,149.01)	14,149	18,638.02
July'18	0.00	(6,055.53)	6,055.83	May'19	0.00	(12,442.69)	12,442.69	18,498.52
Aug'18	0.00	(8,152.25)	8152.25	Jun'19	0.00	(12,400.69)	12,400.69	20,552.94
Total	**0.00**	**(40,380.41)**	**40,380.41**		**0.00**	**-1,88,483**	**1,88,483**	**2,28,862**

o. **Benefits passed to the customers where price is zero should be considered appropriately:-** That he has incurred total amount of Rs. 2,94,749/- on account of items where zero base prices were charged under various kind of sale promotion schemes such as free items to loyal customers etc. The DGAP has not considered these benefits while calculating the profiteered amount as this was also a benefit passed on to the customers. Therefore, the calculated profiteered amount should be reduced further by Rs. 2,94,749/-. The Respondent has furnished the product wise summary as has been mentioned in the Table given below:-

Details of Free Items with Impact

SL	Item Name	Total Impact Value of Free Items	SL	Item Name	Total Impact Value of Free Items	Total Impact
1	500ml Iced Tea BtlDrk	100.00	14	Corn&Peas Sub	27,680.00	27,780.00
2	Aloo Patty Sub	8,160.00	15	HaraBharaKabab Sub	5,880.00	14,040.00
3	B.M.T. Sub	1,950.00	16	Mexican Bean Patty Sub	27,580.00	29,530.00
4	ChatpataChanaPatty Sub	1,120.00	17	PaneerTikka Sub	14,880.00	16,000.00
5	Chicken Koftas Sub	36,860.00	18	Rst Chicken Salad	480.00	37,340.00
6	Chicken Slice Sub	34,390.00	19	Rst Chicken Sub	4,940.00	39,330.00
7	Chicken Tandoori Sub	50,540.00	20	Small Fountain Drink	480.00	51,020.00

8	Chicken Teriyaki Salad	250.00	21	Subway Club Sub	1,365.00	1,615.00
9	Chicken Teriyaki Sub	26,715.00	22	Tuna Sub	1,365.00	28,080.00
10	Chickn Strips Wrap	85.00	23	Veggie Delite Salad	205.00	290.00
11	Chips	54.00	24	Veggie Delite Sub	13,720.00	13,774.00
12	ChknTikka Sub	7,790.00	25	Veggie Patty Sub	3,520.00	11,310.00
13	Cookie	160.00	26	VegShammi Sub	24,480.00	24,640.00
		168,174.00			**126,575.00**	**294,749.00**

p. That he was also providing similar whole order discounts and BOGO (Buy one get one free) offers.

q. **MRP based product where denial of ITC is much higher in comparison with average ITC:-** That he was selling few MRP based products like soft drinks and the GST rate applicable on some of these products was 28% plus 12% Cess. After 14.11.2017, the cost of goods sold had increased because ITC on 28% GST and 12% Cess was not available to him which had been charged by the vendors at the time of purchase. Therefore, the MRP based products where tax incidence had increased due to denial to ITC needed to be removed from the profiteered amount.

r. **Calculation of profiteered amount should be up to March 31st 2018:-** That Section 171of the CGST Act as well as Rule 129 of the CGST Rules, 2017 and the General Methodology and Procedure prescribed by this Authority has not prescribed any time frame for considering whether the Respondent has passed on the

"commensurate reduction in the price of goods" to the recipients. In the restaurant service he wasn't holding inventory for more than one week due to perishable nature of the items. One of the main raw materials was vegetables and prices of these kept changing on day to day basis. Pricing of products was a complex exercise and they were not priced individually and in a free market, several other factors like competition's pricing, long term strategies for market penetration, profit margin for sustaining in the market, life cycle of the product, economic and social conditions, cost of the products, capital expenditure, inflation in man power cost and general year on year inflation etc. played an important role at the time of fixing of the prices of the products. The GST law was introduced in July 2017 and the statue did not prescribe any method of computation by which the profiteering amount could be computed. Tax for the restaurant service has been changed within a short period of 4 months i.e. with effect from 15.11.2017. The impact of change should be considered only for a certain specific period. In the present case, considering the nature of the business, the period for the calculation of profiteering amount should be around 4 months i.e. up to March 2018 from the date of rate change or till any change in prices after 15.11.2017 considering that revision of prices of the

products post GST rate reduction was purely due to business reasons.

s. **Considered approach should be adopted and request to drop the proceedings:-** That there were 67 Subway brand outlets in Mumbai itself and some of the stores were few meters away from the store of the Respondent. To keep sanity of the price in the market and sustain in the business the Respondent needed to maintain identical pricing as that of other Subway outlets in Mumbai. However, interest of the consumers has been kept in mind while fixing the selling prices. As per the pricing details of some of the important products during the 18% GST and then during 5% GST it could be noticed that the final impact to the customer was very minimal and, in some cases, even negative.

t. That various petitions were pending in the High Courts in which the petitioners had raised important issues regarding constitutional validity of the anti-profiteering provisions along with computation method/procedures adopted by this Authority for calculating profiteering amount. These included ***WP (C) 378 of 2019 (Hindustan Unilever Ltd. v. Union of India), WP (C) 2347 of 2019 (Jubilant Food works Ltd. v. Union of India) and WP (C) 4213/2019 (Abbott Healthcare v. Union of India)***. Hence, the proceeding should be stayed till the time the

issue of constitutional validity and computation methodology was settled by the courts.

17. Supplementary Report was sought from the DGAP on the various submissions made by the Respondent. In response, the DGAP has furnished the following reply:-

    a. Para 1:- That the Respondent has not specifically mentioned the discount (50%) in sales data/information provided during the investigation for the period from 01.11.2017 to 14.11.2017 which was required under Section 15 (3) of the CGST Act, 2017. The Respondent had simply declared the reduced rate (discounted) as taxable value in the sales data submitted by him during the investigation. Moreover, this fact was not mentioned by the Respondent in his written submissions made before the DGAP. Therefore, the discounted prices on a specific day were considered as normal price for arriving at the base price before rate reduction.

    b. Para 2:- That after examining the reference, the Standing Committee on Anti-profiteering had decided to refer the matter to the DGAP for a detailed investigation which was received in his office on 28.06.2019. Accordingly, notice under Rule 129 of the CGST Rules, 2017 was issued on 10.07.2019. Based on the facts and circumstances of the case, the investigation was carried out covering the period from 15.11.2017 to 30.06.2019 which was a reasonable

period of time. Further, the legislative intent behind Section 171 of the CGST Act, 2017, was to pass on the benefit of tax rate reduction by way of commensurate reduction in prices. In other words, every recipient of goods or services has to get the due benefit from the supplier. Every supplier in the supply chain was legally required to pass on the benefit of tax rate reduction by maintaining the base price and charging GST at the reduced rate on such base price. Every supplier of goods and services was free to increase the price of his supply depending upon the various components affecting the cost of production/supply. But under the provisions of the Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with reduction in the rate of tax, the cum-tax selling price would remain unchanged. Therefore, there wasn't any violation of Article 19 (1) (g) of the Constitution of India as the DGAP has not attempted to examine or question the base prices as Section 171 did not mandate control over the prices of the goods or services as they were to be determined by the supplier. Section 171 only mandated that any reduction in the rate of the tax or the benefit of ITC which accrued to a supplier must be passed on to the consumers as both were the concessions given by the Government and the suppliers were not entitled to appropriate them. Such

benefits must go to the consumers and in case they were not identifiable, the amount so collected by the suppliers was required to be deposited in the Consumer Welfare Fund (CWF). The DGAP's investigation has not examined the cost component included in the base price. It has only added the denial of ITC to the pre rate reduction base price. Hence, Section 171 of the CGST Act, 2017 was neither controlling the prices nor was violative of Article 19 (1) (g) of the Constitution of India.

c. Para 3:- That the price included both the basic price and the tax charged on it. Therefore, any excess amount collected from the recipients, even in the form of tax, must be returned to the recipients. In case, the recipients were not identifiable, the said amount was required to be deposited in the CWF. By increasing the base price, the Respondent has forced his customers/recipients to pay extra tax which they were not liable to pay. Therefore, it was clear that the amount of extra tax (GST) on the increased base prices was an amount paid by the customers/recipients which they were not supposed to pay. If any supplier has charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively deposited in the CWF, regardless of whether such extra tax collected from the recipient has been

deposited in the Government account or not. Besides, any extra tax returned to the recipients by the supplier by issuing credit notes could be declared in the Returns filed by such supplier and his tax liability would stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, the option was always open to the Respondent to return the tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent.

d. Para 4:- That as per the franchise agreement, the royalty expenses and advertisement charges were fixed at certain percentage of the net sales. These expenses were being paid by the Respondent before the rate reduction and the same were being paid by the him after rate reduction also. Hence there appeared to be no increase in the expenses as there was no increase in the percentage which was fixed as per the franchise agreement. Moreover, in respect of GST paid by the Respondent on these expenses, he was availing ITC of the same before rate reduction but after rate reduction, the Respondent could not avail the ITC of the same in terms of Notification No. 46/2017 -Central Tax (Rate) dated 14.11.2017. Therefore, this impact of denial of ITC has duly been considered and accordingly ratio of ITC to Net Outward Taxable Turnover was calculated and the Respondent could have increased the

base prices by that extent during the post GST rate reduction period i.e. from 15.11.2017 onwards, in order to negate the impact of ITC denial. Therefore, the benefit of ITC loss has been given to the Respondent. Further, the case of M/s KRBL was different as the pre-GST rate of tax was nil and for the first time tax rate of 5% was imposed on the impugned product.

e. Para 5:- That during the investigation, the Respondent did not make any such submission. Therefore, in absence of any documentary evidence, this claim of the Respondent was not acceptable at this point of time.

f. Para 6:- That the contention of the Respondent that impact on the profiteered amount due to reduction in base prices of the products post GST rate reduction should be considered, was incorrect. Section 171 of the CGST Act, 2017 which governed the anti-profiteering provisions under GST, required that in the event of a benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously be in terms of money only, so that the final price payable by a consumer got reduced. The statute did not force the supplier to reduce the price more than the actual required commensurate reduction. There could be many marketing strategies or other promotional schemes which might compel the Respondent to reduce the prices

of products more than the actual requirement. The Respondent was always at liberty to reduce the prices of his products up to any extent and bear the loss but this loss could not be appropriated with the due benefit of rate reduction available to the recipients or customers of the other products where the prices were not reduced commensurately by the Respondent. Hence, profiteering under the provisions of Section 171 of the CGST Act, 2017 was to be quantified on the products where prices were not reduced commensurately.

g. Para 7:- That under the provisions of Section 171 of the CGST Act, 2017 read with Rule 129 of the CGST Rules, 2017, the legal requirement was abundantly clear that in the event of a benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously be in terms of money only, so that the final price payable by a consumer got reduced. Thus, under the provisions of Section 171 of the CGST Act, 2017, every recipient of goods or services was entitled to get his/her due share of benefit. In case one recipient got more benefit from the supplier than the commensurate benefit, the statute did not allow the supplier to reduce the benefit due to another recipient to that extent. In other words, the benefit of rate reduction passed on to one customer in excess to the

commensurate benefit could not be appropriated with the benefit due to other customers. Therefore, the Respondent's contention was beyond the scope of Section 171 of the CGST Act, 2017.

h. Para 8:- That the MRP was the maximum price at which goods could be sold in retail. The value of transaction between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the MRP. Therefore, regardless of whether MRP was marked on the product or not, the pre and post tax rate reduction transaction values were compared to determine profiteering. There was no significance of MRP in establishing profiteering. The total impact of ITC denial which included the loss of ITC in respect of MRP goods also, has been duly considered and accordingly ratio of ITC to Net Outward Taxable Turnover has been calculated for the pre rate reduction period and hence the claim of the Respondent has no significance at this point of time.

i. Para 9:- That based on the facts and circumstances of this case, the investigation was carried out covering the period from 15.11.2017 to 30.06.2019.

18. The Respondent, vide his submissions dated 01.06.2020 sent through e-mail dated 01.06.2020, has filed his contentions against the above Supplementary Report of the DGAP. Upon perusal of the submissions dated 01.06.2020 made by the

Respondent, it is observed that he has reiterated the issues mentioned in his earlier submissions dated 13.02.2020. Apart from the submissions dated 13.02.2020, the Respondent has made the following additional submissions:-

The proceedings were without jurisdiction and barred by Limitation:- That the Maharashtra State Screening Committee had forwarded the complaint to the Standing Committee on Anti-Profiteering vide its letter dated 21.02.2019 for further action. Hence for the purpose of Rule 128 (1) of the CGST Rules, 2017, the date of receipt of the written complaint by the Standing Committee was 21.02.2019. The Standing Committee had examined and referred the written compliant for investigation by the DGAP in its meeting held on 15.05.2019. Therefore, it was very clear that the Standing Committee did not consider the written complaint with the period of limitation prescribed under Rule 128 (1) of the CGST Rules. The Standing Committee could not start investigation under Rule 129 of CGST Rules beyond the period of limitation. In the present case, the limitation for the Standing Committee to examine the online written complaint had expired on 20.04.2019. Hence the investigation of the issue by the Standing Committee was beyond the Statutory period of limitation as prescribed under Rule 128 (1) of CGST Rules.

19. We have carefully considered the all the Reports furnished by the DGAP, the submissions made by the Respondent and the other material placed on record. On examining the various submissions we find that the following issues need to be addressed:-

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

b. Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 committed by the Respondent?

20. It is revealed from the record that the Respondent is running a restaurant as franchisee of M/s Subway India Private Limited in Mumbai and is supplying various food products to the customers. It is also revealed from the plain reading of Section 171 (1) of the CGST Act, 2017 that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from record that there has been a reduction in the rate of tax from 18% to 5% w.e.f. 15.11.2017, on the restaurant service being supplied by the Respondent, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 without benefit

of ITC. Therefore, the Respondent is liable to pass on the benefit of tax reduction to his customers in terms of Section 171 (1) of the above Act. It is also apparent that the present investigation has been carried out w.e.f. 15.11.2017 to 30.06.2019.

21. It is also evident that the Respondent has been dealing with a total of 351 items during the period from 15.11.2017 to 30.06.2019. Upon comparing the average selling prices as per the details submitted by the Respondent for the period from 01.08.2017 to 14.11.2017 and the actual selling prices post rate reduction w.e.f. 15.11.2017 to 30.06.2017 the DGAP has reported that the GST rate of 5% has been charged w.e.f. 15.11.2017 however the base prices of 152 products have been increased more than their commensurate prices w.e.f. 15.11.2017 which established that because of the increase in the base prices the cum-tax prices paid by the consumers were not reduced commensurately, inspite of the reduction in the GST rate.

22. While comparing the average pre rate reduction base prices with the post rate reduction actual base prices the DGAP has duly taken in to account the impact of denial of ITC in respect of the "restaurant service" being supplied by the Respondent as a percentage of the taxable turnover from the outward supply of the products made during the pre-GST rate reduction period by taking into consideration the period from 01.07.2017

to 31.10.2017 and not up to 14.11.2017. This has been done because there was no reversal of ITC on the closing stock of inputs/input services and capital goods as on 14.11.2017 made by the Respondent as per the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the above Rules. Accordingly, the ratio of ITC to the net taxable turnover has been taken for determining the impact of denial of ITC which was available to the Respondent till 31.10.2017. As per the record ITC amounting to ₹3,58,305/- was available to the Respondent during the period from July, 2017 to October, 2017 which was approximately 9.19% of the net taxable turnover of the restaurant service amounting to ₹38,98,737/- supplied during the same period, as has been shown in Table-A supra. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent.

23. It is further revealed from the analysis of the details of item-wise outward taxable supplies made during the period from 15.11.2017 to 31.03.2019 that the Respondent had increased the base prices of 152 items supplied as a part of restaurant service to make up for the denial of ITC post GST rate reduction. The pre and post GST rate reduction prices of the items sold during the period from 01.08.2017 to 14.11.2017 (Pre-GST rate reduction) and 15.11.2017 to 30.06.2019 (Post-GST rate reduction) have been compared and it has been

found that the Respondent has increased the base prices by more than 9.19% i.e. by more than what was required to offset the impact of denial of ITC in respect of 152 items sold during the above period. Thus, it is apparent that the Respondent has resorted to profiteering as the commensurate benefit of reduction in the rate of tax from 18% to 5% has not been passed on by him. However, there was no profiteering in respect of the remaining items on which there was either no increase in the base prices or the increase in base prices was less or equal to the denial of ITC or these were new products launched post-GST rate reduction.

24. On the basis of the aforesaid pre and post reduction GST rates, the impact of denial of ITC and the details of outward supplies (other than zero rated, nil rated and exempted supplies) during the period from 15.11.2017 to 30.06.2019, the amount of net higher sale realization due to increase in the base prices of the products, despite the reduction in the GST rate from 18% to 5% with denial of ITC or the profiteered amount has come to **₹41,93,431/-** including the GST on the base profiteered amount. The details of the computation have been given by the DGAP in **Annexure-14** of his Report.

25. The methodology adopted by the DGAP for computation of the profiteered amount by comparing the average base prices of the products in respect of which the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017 without benefit of ITC with

the actual post rate reduction base prices of these products appears to be correct, reasonable, justifiable and in consonance with the provisions of Section 171 of the CGST Act, 2017 as it was not possible to compare the actual base prices prevalent during the pre and the post GST rate reduction periods due to the reasons that the Respondent was (i) selling his products at different rates to different customers based on the various factors such as sales, inventory position, competitor's strategy, market penetration and customer loyalty (ii) the same customer may not have purchased the same product during the pre and the post rate reduction periods and (iii) a customer may have purchased a particular product during the pre rate reduction period and may not have purchased it in the post rate reduction period or vice versa and (iv) the average base prices computed for a period of 14 days w.e.f. 01.11.2017 to 14.11.2017 or for the previous months provide highly representative and justifiable comparable average base prices. On the basis of the average pre rate reduction base prices the commensurate base prices have been computed by adding denial of ITC of 9.19% and compared with the invoice wise actual base prices of the products as is evident from Table-B supra. However, the average pre rate reduction base prices were required to be compared with the actual post rate reduction base prices as the benefit is required to be passed on each product to each

customer. In case average to average base prices are compared for both the periods, the customers who have purchased the products on the base prices which were more than the commensurate base prices, would not get the benefit of tax reduction. Such a comparison would be against the provisions of Section 171 as well as Article 14 of the Constitution which require that each customer has to be passed on the benefit of tax reduction on each purchase made by him.

26. The Respondent has vehemently argued that the DGAP while calculating the average pre rate reduction base prices has considered all the sales including the discounted sales which had been made on 03.11.2017 due to which huge difference has come as compared to the actual base prices. The contention of the Respondent is not correct as the average base prices of the products have been arrived at by dividing the total quantity supplied with the total taxable value charged post discount. Therefore, the computation done by the DGAP is based on the transaction value as per the provisions of Section 15 of the CGST Act, 2017 which reads as under:-

"The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where

the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."

Further, Section 15 (3) (a) of the above Act also provides that the value of the supply shall not include any discount which was given before or at the time of the supply if such discount had been duly recorded in the invoice issued in respect of such supply and thus, the GST was chargeable on the actual transaction value after excluding any discount (conditional as well as unconditional) and therefore, actual transaction value has been rightly considered by the DGAP for computation of profiteering. Discounted sales made on a single day on 03.11.2017 have no effect on the average base prices as has been claimed by the Respondent as discounts do not form part of the transaction value which has been compared with the post rate reduction transaction value for arriving at the profiteered amount. The benefit of tax reduction can also not be passed though discounts as it can be passed only by way of commensurate reduction in the prices. The Respondent has himself submitted that the discounts offered by him were given due to various factors following the general market practices in the course of his business, which every other similar franchisee was also giving to promote his sales and hence, they cannot be considered while computing the average or the actual base prices. The Respondent has also alleged that on

45 items the average base prices have been computed on the basis of September and October, 2017 prices. Since, there were no sales of these items made during the period from 01.11.2017 to 14.11.2017 and the Respondent had sold these products in the post rate reduction period their base prices have been correctly computed on the basis of the above two months to compute the profiteered amount. Therefore, the average base prices have been correctly calculated by the DGAP and all the claims made by the Respondent in this regard are fallacious and cannot be accepted.

27. The Respondent has also contended that the DGAP has considered all the price revisions made after 15.11.2017 as a part of profiteered amount and has ignored the fact that a businessman has right to increase his prices on account of various reasons other than tax. It is pertinent to mention here that the scope of profiteering, as per Section 171 of the CGST Act, 2017, is confined to the question of whether the benefit accruing on account of rate reduction has been passed on to the recipients or not. It is apparent from the above facts that the Respondent could have raised his pre rate reduction prices by 9.19% to offset the impact of denial of ITC but it has been found that he had increased them more than the permissible limit. Therefore, the Respondent has failed to pass on the benefit of tax reduction. The Respondent has not produced any evidence during the course of the investigation that the

price rise effected by him was commensurate with the tax reduction. He has further claimed to have increased his prices in February 2019 on account of inflation although at no stage between the period w.e.f. 01.11.2017 till 30.06.2019 he has produced any reliable evidence to show that he has passed on the benefit of tax reduction commensurately. Therefore, the DGAP has rightly computed the profiteered amount. Hence, the above contention of the Respondent is not tenable.

28. The Respondent has further contended that right to trade was a fundamental right guaranteed under Article 19 (1) (g) of the Constitution of India and the right to trade included the right to determine prices which could not be taken away without any explicit authority under the law. Therefore, this form of price control was a violation of Article 19 (1) (g) of the Constitution of India. In this connection it would be relevant to mention that the Respondent has full right to fix his prices under Article 19 (1) (g) of the Constitution but he has no right to appropriate the benefit of tax reduction under the garb of the above right. The DGAP has not acted in any way as a price controlling authority as he does not have the mandate to do so. Under Section 171 read with Rule 129 of the above Rules the DGAP has only been mandated to investigate whether 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 have been passed on to the end consumers

who bear the burden of the tax. The intent of this provision is the welfare of the consumers who are voiceless, unorganized and vulnerable. The DGAP has nowhere interfered with the pricing decisions of the Respondent and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

29. The Respondent has also claimed that the DGAP while calculating the profiteered amount has erroneously added 5% notional amount on account of GST which has been collected from the customers and deposited with the Government of India with the monthly GST returns. This contention of the Respondent is not correct because the provisions of Section 171 (1) and (2) of the CGST Act, 2017 require that the benefit of reduction in the tax rate is to be passed on to the recipients/ customers by way of commensurate reduction in price, which includes both the base price and the tax. The Respondent has not only collected excess base prices from the customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on these excess base prices which they should not have paid. By doing so, the Respondent has defeated the very objective of both the Central as well as the State Government which aimed to provide the benefit of rate reduction to the general public. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in

contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of tax reduction to his customers by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing food items 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 recovered from the Government as it is required to be deposited in the CWFs of the Central and the State Government. Therefore, the above amount has been correctly included in the profiteered amount by the DGAP and therefore, the contention of the Respondent is untenable and hence it cannot be accepted.

30. The Respondent has further contended that the franchisor i.e. M/s Subway India Pvt. Ltd. was charging 8% and 4.5% totalling 12.5% Royalty and Advertisement Charges on his net sales on which GST @ 12% and 18% was also being charged and after 01.07.2017 his royalty cost has directly increased by 1.769% which has not been considered by the DGAP. In this connection it would be appropriate to mention that there has been no change in the rates of royalty and advertisement charges in the post rate reduction period and hence, they have no impact on the base prices of the Respondent. These charges were already built in the base prices during the pre

rate reduction period and hence, they cannot be added again in the base prices. The Respondent has already been given the benefit of denial of ITC on both the above expenses during the computatation of the profiteered amount as no profiteered amount has been calculated on the prices which included increase upto 9.19% due to denial of benefit of ITC. Moreover, these charges are also bound to increase as the Respondent has increased his base prices by more than the permissible limit of 9.19% which he cannot claim to exclude from the profiteered amount. Therefore, the above claim of the Respondent cannot be accepted.

31. The Respondent has also relied upon the decision of this Authority given in the case of ***Kumar Gandhrav v. M/s KRBL Limited (Case Number 03/2018 dated 04.05.2018)*** to support his case. In this context, it is pertinent to mention that in the above case no benefit of increase in the cost was given. Instead, the rate of tax had been increased from 0% to 5% on the product and hence the provisions of Section 171 (1) were not applicable as there was no tax reduction. Therefore, the facts of the above case are different from this case and hence, they cannot help the Respondent.

32. The Respondent has also averred that during the period of investigation he has paid Rs. 20,09,314/- as delivery fee including GST of Rs. 3,06,505/- to the Online E-commerce platforms through which he was selling his products which has

not been taken in to account by the DGAP while computing the base prices. In this respect it would be appropriate to mention that the payment of delivery fee including the GST has no connection with the base prices as the Respondent has admitted increase of 45% in his sales due to the use of the E-commerce platforms which has resulted in his earning more profit. Had the Respondent not earned profit on these sales there was no reason for him to pay them service fee. There is also no question of including the hypothetical ITC on the GST which would have been available to the Respondent in the post rate reduction period while calculating the pre rate reduction average base prices as the Respondent was not making supplies through the above platforms during the pre rate reduction period. The above claim of the Respondent is frivolous and hence, it cannot be accepted.

33. The Respondent has further averred that the DGAP while calculating the profiteered amount has incorrectly applied a methodology similar to the 'zeroing methodology'. In this regard, we observe that no 'netting off' can be applied in the cases of profiteering, as the benefit of tax rate reduction has to be passed on to each customer on each product supplied by a registered person. Netting off, as demanded by the Respondent, would imply that the amount of benefit not passed on certain supplies to certain customers/ recipients would be subtracted from the amount of any excess (more

than commensurate) benefit passed on other products and the resultant amount would be determined as the profiteered amount. If this flawed methodology is applied the Respondent would be entitled to deduct the amount of benefit which he has not passed on from the amount of such excess benefit which he has claimed to have passed on which will result in complete denial of benefit to the customers who were entitled to receive it. It has to be kept in mind that every recipient/ customer is entitled to the benefit of the tax rate reduction by way of reduced prices and Section 171 does not offer the Respondent to suo moto decide on any other modality to pass on the benefit of reduction in the rate of tax to his recipients. Therefore, any benefit of tax rate reduction passed on to a particular recipient or customer cannot be adjusted against the benefit of tax rate reduction that ought to accrue to another recipient or customer. Therefore, the above contention of the Respondent is not tenable.

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

Government was accepted and it was held that the practice of 'netting off' should be applied and hence the above methodology was binding on the DGAP while calculating profiteering. The above contention of the Respondent is not correct as no netting off can be applied in the cases of profiteering as the benefit has to be passed on to each customer which has to be computed on each product. 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 is not correct as the Respondent cannot insist on applying 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.

35. The Respondent has also stated that he has incurred total amount of Rs. 2,94,749/- on account of the items where base prices were made zero under various kind of sale promotion schemes such as free items to loyal customers and Buy One Get One (BOGO) offers. In this connection it is mentioned that Section 171 of the CGST Act, 2017 requires passing of the

benefit of tax reduction by commensurate reduction in prices only and therefore, the Respondent cannot claim to pass on the benefit through the promotional schemes. The above schemes have been offered by the Respondent to increase his sales in the normal course of his business which do not constitute passing on of the benefit. The Respondent cannot pass on the benefit as per his own convenience as he is legally bound to pass on the above benefit through price reduction only. Hence, the above contention of the Respondent is untenable and therefore, the total amount of Rs. 2,94,749/- claimed to have been passed on as benefit of tax reduction through various schemes cannot be reduced from the profiteered amount.

36. The Respondent has also contended that he was selling few MRP based products and the GST applicable on some of these products was 28% plus 12% Cess. After rate reduction, he was not able to avail the ITC on such items. Therefore, the MRP based products where tax incidence has been increased due to the denial of ITC needed to be removed from the profiteered amount. In this regard, we find no ground to deviate from the submissions of the DGAP that the MRP was the maximum price at which the goods could be sold in retail. The value of transaction between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the MRP. Therefore, to determine the profiteering in

respect of the MRP based items, the pre and post rate reduction transaction values were compared by the DGAP, regardless of whether the MRP was marked on the product or not. The DGAP has arrived at the profiteered amount by calculating the total impact of ITC denial which included the loss of ITC in respect of the MRP based items also. Therefore, MPR has no impact on the computation of the profiteered amount. Hence, the above plea of the Respondent is not maintainable.

37. The Respondent has further contended that the CGST Act, 2017, the CGST Rules, 2017 and the Methodology and Procedure notified by this Authority did not prescribe the period up to which profiteered amount is to be calculated. Therefore, keeping in mind the perishable nature of the items and various other factors the profiteered amount should be restricted up to March, 2018. In this context, we observe that while the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017, the Respondent had increased the base prices of his products immediately w.e.f. 15.11.2017 and had taken no steps to pass on the resultant benefit of tax reduction by commensurate reduction in the prices of his supplies at any point of time till 30.06.2019. In other words, the violation of the provisions of Section 171 of the CGST Act 2017 has continued unabated in this case and the offence continues till date. The Respondent has not produced any evidence to prove from

which date the benefit was passed on by him. The fact that the Respondent has not complied with the law till 30.06.2019 requires that the profiteering is computed for the entire period and hence we do not see any reason to accept this contention of the Respondent. We further observe that had the Respondent passed on the benefit before 30.06.2019, he would have been investigated only till that date. Therefore, the period of investigation from 15.11.2017 to 30.06.2019 has been rightly taken by the DGAP for computation of the profiteered amount.

38. The Respondent has further argued that the CGST Act, 2017 did not prescribe any method of computation by which profiteered amount could be calculated. The above contention of the Respondent is frivolous as the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC or computation of the profiteered amount has been outlined in Section 171 (1) of the CGST Act, 2017 itself which provides 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 plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is ordered by the Central or the State Governments or a registered supplier avails benefit of additional ITC the same

have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their tax revenue. It also provides that the above benefits are to be passed on any supply i.e. on each Stock Keeping Unit (SKU) of each product or unit of construction or service to every buyer and in case they are not passed on, the quantum of denial of these benefit or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such SKUs/units/services by the DGAP. What would be the 'profiteered amount' has been clearly defined in Sub-Section 171 (3A) and the explanation attached to Section 171. These benefits can also not be passed on at the entity/organisation/branch/invoice/product/ business vertical level as they have to be passed on to each and every buyer at each SKU/unit/service level by treating them equally. The above provision also mentions "any supply" which connotes each taxable supply made to each recipient thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer on a particular product therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer, on another product. Each customer is entitled to receive the benefit of tax reduction or ITC on each SKU or unit or service purchased by him subject to his eligibility. The term "commensurate" mentioned in the above Sub-Section provides the extent of

benefit to be passed on by way of reduction in the price which has to be computed in respect of each SKU or unit or service based on the pre rate reduction price and the rate of tax reduction or the additional ITC which has become available to a registered person. The legislature has deliberately not used the word 'equal' or 'equivalent' in this Section and used the word 'Commensurate' as it had no intention that it should be used to denote proportionality and adequacy. The benefit of additional ITC would depend on the comparison of the ITC/CENVAT which was available to a builder in the pre-GST period with the ITC available to him in the post GST period w.e.f. 01.07.2017. Similarly, the benefit of tax reduction would depend upon the pre rate reduction price and quantum of reduction in the rate of tax from the date of its notification. 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 or service to service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer. Similarly, computation of the profiteered amount is also a mathematical exercise which can be done by any person who has elementary knowledge of accounts and mathematics. However, to further explain the legislative intent behind the above provision, this Authority has been authorised to

determine the 'Procedure and Methodology' which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed formula, in respect of all the Sectors or the goods or the services, can be set for passing on the above benefits or for computation of the profiteered amount, as the facts of each case are different. In the case of one real estate project, date of start and completion of the project, price of the flat/shop, mode of payment of price or instalments, stage of completion of the project, rates of taxes pre and post GST implementation, amount of CENVAT and ITC availed/available, total saleable area, area sold and the taxable turnover received before and after the GST implementation would always be different from the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to the other project. Therefore, no set procedure or methodology can be framed for determining the benefit of additional ITC which has to be passed on to the buyers of the units. Moreover, this Authority under Rule 126 of the CGST Rules, 2017 has been empowered to 'determine' Methodology & Procedure and not to 'prescribe' it. Similarly, the facts of the cases relating to the sectors of Fast Moving Consumer Goods (FMCG), restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology adopted in the case of one

sector cannot be applied in the other sector. Moreover, both the above benefits have been given by the Central as well as the State Governments as a special concession out of 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 therefore, they are bound to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous, mandatory and legally enforceable. The above provisions also reflect that the true intent behind the above provisions, made by the Central and the State legislatures in their respective GST Acts is to pass on the above benefits to the common buyers who bear the burden of tax and who are unorganised, voiceless and vulnerable. The Respondent is trying to deliberately mislead by claiming that he was required to carry out highly complex and exhaustive mathematical computations for passing on the benefit of tax reduction which he could not do in the absence of the procedure framed under the above Act. However, no such elaborate computation was required to be carried out as the Respondent was to maintain the base price of the product which he was charging as on 14.11.2017 and then add 9.19% of the base price on the base price on account of denial of ITC and charge GST @5% w.e.f. 15.11.2017. Instead of doing that he has raised his prices by adding more than 9.19% of the base prices as is evident from Table-B supra. The average base price of the product

mentioned in the above Table was Rs. 107.95 which could have been raised to Rs. 117.87 by adding denial of ITC to the extent of 9.19%. After adding GST @ 5% amounting to Rs. 5.89 the Respondent was required to sell it at the commensurate price of Rs. 123.76 w.e.f. 15.11.2017. However, he had sold the above product at Rs. 140/- and hence, he has profiteered to the extent of Rs. 16.24. It is clear from the above that no procedure or elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of tax reduction. The Respondent cannot deny the benefit of tax reduction to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of tax reduction and the profiteered amount. Therefore, the above plea of the Respondent is untenable and hence it cannot be accepted.

39. The Respondent has also claimed that the pricing of products depended on several commercial factors which were required to be taken in to account while computing the profiteered amount. In this connection, it would be pertinent to mention that the provisions of Section 171 (1) and (2) of the above Act require the Respondent to pass on the benefit of tax reduction to the consumers only and have no mandate to look into fixing of prices of the products which the Respondent is free to fix. 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 or more then the reduction in the rate of 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 to deny the above benefit to his customers. Therefore, the above claim of the Respondent cannot be accepted.

40. The Respondent has also argued that the Maharashtra State Screening Committee had forwarded the complaint to the Standing Committee on Anti-Profiteering vide letter dated 21.02.2019 for further action. The Standing Committee had examined and referred the complaint for investigation by the DGAP in its meeting held on 15.05.2019. However, in the present case, the time limit of 2 months within which the Standing Committee was to examine the online complaint had expired on 20.04.2019. Hence, the investigation of the issue by the Standing Committee was beyond the statutory period of limitation as prescribed under the Rule 128 (1) of CGST Rules. Perusal of the record shows that the Maharashtra State Screening Committee on Anti-Profiteering had wrongly forwarded the complaint to the DGAP vide its letter No. F. No. V/GST(Audit-II) Pro-AP/2/2017/918 dated 21.02.2019 which was further sent by the DGAP to the Standing Committee on Anti-Profiteering vide his letter No F. No. D-

22011/AP/12/2017/Pt-5/835 dated 08.04.2019. The Standing Committee had considered the above complaint in its meeting held on 15.05.2019 and forwarded it to the DGAP for detailed investigation within the period of 2 months as has been prescribed under Rule 128 (1) of the above Rules. Hence, the above contention of the Respondent in incorrect and therefore, it cannot be accepted.

41. The Respondent has further argued that various writ petitions have been filed challenging the orders passed by this Authority. These included ***WP (C) 378 of 2019 (Hindustan Unilever Ltd. v. Union of India), WP (C) 2347 of 2019 (Jubilant Food works Ltd. v. Union of India) and WP (C) 4213/2019 (Abbott Healthcare v. Union of India)*** in which the constitutional validity and computation methodology has been challenged and hence, the present proceedings should be kept pending till the above issues are settled. In this context, it would be relevant to mention that the Hon'ble High Court of Delhi has not directed this Authority to stop the proceedings in respect of the present case. Therefore, the present proceedings cannot be kept pending as they are to be completed within the prescribed period. Therefore, the above contention raised by the Respondent is not maintainable.

42. Based on the above facts the profiteered amount is determined as Rs. 41,93,431/- as has been computed in Annexure-14 of the DGAP's Report dated 27.12.2019.

Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. Further, since the recipients of the benefit, as determined, are not identifiable, the Respondent is directed to deposit an amount of Rs. 41,93,431/- in two equal parts of Rs. 20,96,715.50/- each in the Central Consumer Welfare Fund and the Maharashtra State Consumer Welfare Fund as per the provisions of Rule 133 (3) (c) of the CGST Rules 2017, along with interest payable @ 18% to be calculated from the dates on which the above amount was realized by the Respondent from his recipients till the date of its deposit. The above amount of Rs. 41,93,431/- shall be deposited, as specified above, within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned CGST/SGST Commissioners.

43. 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 he has thus resorted to profiteering. Hence, he has committed an offence under section 171 (3A) of the CGST Act, 2017 and therefore, he is liable to penal action under the provisions of the above Section. Accordingly, a notice be issued to him directing him to explain why the penalty prescribed under Section 171 (3A) of

the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

44. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST Maharashtra 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 Maharashtra State Government as per the details given above. A report in compliance of this order shall be submitted to this Authority by the concerned Commissioner within a period of 4 months from the date of receipt of this order.

45. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report from the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 27.12.2019 the order was to be passed on or before 26.04.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date due to *force majeure*. Accordingly, this order is being passed today in terms of the Notification No. 55/2020-Central Tax dated 27.06.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect

Taxes & Customs under Section 168 A of the CGST Act, 2017.

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

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

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

6.7.20
(A.K Goel)
NAA, Secretary

File No. 22011/NAA/121/NEEVA/2020 3526-3570 Date:- 06.07.2020

Copy To:-

1. M/s Neeva Foods Pvt. Ltd., Shop No. 1, Mayfair 14, Ground Floor, Chandavarkar Road, Borivali West, Mumbai-400092.
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-110001.
3. Chief Commissioner of Central Goods & Services Tax, Mumbai Zone GST Building, 115 M.K. Road, Opp. Churchagate Station, Mumbai-400020
4. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010.
5. Guard File.

6.7
A. K. GOEL
SECRETARY, NAA