

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

Case No. : **15/2018**
Date of Institution : **31-08-2018**
Date of Order : **28-11-2018**

In the matter of:

1. Crown Express Dental Lab, 2nd floor, 201, Sumati Vihar Complex, Near Jail Chowk, Ranchi-834001.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes and Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Theco India Private Limited, Office No. D, Shroff Orchards, Old No.-78, New No.-44, New Avadi Road, Kilpauk, Chennai-600010.

Respondent

Quorum:

1. Sh. B. N. Sharma, Chairman
2. Sh. J. C. Chauhan, Technical Member
3. Ms. R. Bhagyadevi, Technical Member

Present:-

1. Dr. Archana Singh and Sh. Vijay Pandey, Associate for the Applicant No. 1
2. Sh. Anwar Ali T. P., Additional Commissioner for the Applicant No. 2.
3. Sh. George Abraham and Sh. Amish Jain, Directors for the Respondent.

ORDER

1. This investigation Report dated 30.08.2018 has been received from the Applicant No. 2 i.e. Director General of Anti-Profiteering (here-in-after referred to as the DGAP) on 31.08.2018 under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The facts of the present case, in brief, are that the Standing Committee on Anti-profiteering had recommended an investigation on an application dated 06.02.2018 (Annexure-2) filed by the Applicant No. 1 relating to the purchase of (i) Lava CNC 240 Milling Machine with accessories and (ii) Lava Materials Approved Sintering Furnace D664 (here-in-after referred to as the items), under Rule 128 of the CGST Rules, 2017, against the above Respondent. The Applicant No. 1 had stated in his application that he had purchased the above two items from the Respondent which were imported from Germany. The above Applicant had also stated that though the Respondent had quoted price of Rs. 59,06,000/- with additional 2% Central Sales Tax (CST) and 2% freight as per his quotation dated 28.11.2016 (Annexure-3), he was asked to pay an amount of Rs. 71,08,462/- vide Tax Invoice dated 06.09.2017 (Annexure-4), which included IGST @18%, amounting to Rs. 10,84,341.60/-. The Applicant No. 1 has alleged that after the implementation of the GST, a number of taxes viz. CST, Counter Veiling Duty (CVD) and Special Additional Duty (SAD) had been subsumed in the IGST but the Respondent had charged 18% IGST on Rs. 59,06,000/- which was the selling price as per the quotation dated 28.11.2016 and which included CVD and SAD etc.

which had been merged in the IGST and hence he had been denied the benefit of Input Tax Credit (ITC) by the Respondent and therefore, action should be taken against him.

2. The said Application was examined by the Standing Committee on Anti-profiteering and was referred to the DGAP vide its minutes of the meeting dated 25.05.2018 for detailed investigation under Rule 129 (1) of the CGST Rules, 2017.
3. The DGAP had called upon the Respondent vide his notice dated 18.06.2018 to submit his reply on the allegations leveled by the Applicant No. 1 and also to suo-moto determine the quantum of benefit which had not been passed by the Respondent on account of the ITC. The Respondent was also asked to furnish documents and evidence in support of his reply. The DGAP has informed that the Respondent in his replies dated 29.06.2018 (Anexure-10) and 17.07.2018 (Annexure-11) had denied the allegations leveled by the Applicant No. 1. The DGAP has also informed that the Respondent had also submitted the details of the base price and the duties, taxes and CVD of both the items vide Annexures-12 & 13 to prove that after the coming into force of the GST, the Customs Duty was reduced to 7.5% the benefit of which had been given to the Applicant by him. The Respondent had further submitted that the above Applicant had wrongly claimed that the net price paid for the above items had increased due to levy of IGST as it could be availed as ITC by him and a CNC240 Milling Machine priced at Rs. 48.5 lakh, would effectively cost the Applicant No. 1 Rs. 45.5 lakh, amounting to benefit of Rs. 3 lakh on account of ITC. The DGAP has further

informed that the Respondent has also claimed that he had sold the Sintering Furnace D664 for the first time and had extended an additional discount combo offer of approx. Rs. 13 lakhs in the Lava Frames supplied by him if there was any adverse effect due to GST and the Applicant had agreed to these terms. The DGAP has also stated that the Respondent had further claimed that the invoices were issued after the implementation of the GST and he proposed to cover the extra cost to be paid by the above Applicant due to IGST through the additional supply of Lava Frames to him. The DGAP has further stated that the Respondent has intimated that he had imported and sold both the items after the GST was implemented and he had not claimed any transitional benefit on them.

4. The DGAP has also submitted that the Respondent had informed there had been an increase in the taxable value of 240CNC Milling Machine w.e.f. January, 2017, as was apparent from the invoice (Annex- 14) of Poon Dental Lab who had bought the same on 27.01.2017, however, no invoice was available for the Sintering Furnace D664 as it was supplied for the first time by the Respondent. The DGAP has further submitted that the Respondent had maintained that the above Applicant had agreed to the terms of the sale. The DGAP has also intimated that the Respondent had claimed that his quotation clearly mentioned that he required an advance of Rs. 30 Lakhs against which he would consider the order as confirmed and this amount was paid by the above Applicant in several installments (Annex-15) and the complete amount was received only on 22.06.2017 when he had intimated the above Applicant that the

GST was about to be implemented and he would convey the final price only after the GST had been implemented. The DGAP has further intimated that the Respondent had pleaded that he told the Applicant that he could claim full refund of the advance if he so desired and he had supplied the goods only after an agreement with the above Applicant (Annex-16). The DGAP has also intimated that the Respondent had stated that he had given more than 5 months to the above Applicant to pay the GST amount of Rs. 10.84 lakhs, although he had paid the same to the Government.

5. The DGAP after having investigated the submissions made by the Respondent had found that the Respondent had given a quotation on 28.11.2016 for a total amount of Rs. 59,06,000/- plus 2% Freight and 2% CST against C-Form, for both the items to the above Applicant which showed that the total amount which was to be paid by the above Applicant, was as under:-

Description	Price (in Rs.)
Lava Mill CNC 240 and accessories (A)	44,66,000/-
Lava Materials approved Sintering Furnace D664 (B)	14,40,000/-
Total price (C=A+B)	59,06,000/-
Freight (D= 2% of 'C' above)	1,18,120/-
Price (including Freight = C+D)	60,24,120/-
Plus CST (2%)	

6. The DGAP has also intimated that as against the above quoted price the invoice for the above items was issued on 06.09.2017, as under:-

Description	Price (in Rs.)
Lava Mill CNC 240 and accessories (A)	45,55,320/-
Lava Materials approved Sintering Furnace D664 (B)	14,68,800/-
Total price (C=A+B)	60,24,120/-
IGST (18%)	10,84,342/-
Price (including Tax)	71,08,462/-

7. The DGAP has also stated that had the import of the above items been made prior to the implementation of GST the Respondent was required to pay Countervailing Duty (CVD) @ 12.5% and Special Additional Duty (SAD) @ 4% and he would have got refund of the SAD upon the sale of these items but he could not have claimed credit of the CVD which would have formed part of the cost of the above items. The DGAP has further stated that the import of the above items had been made vide Bill of Entries No. 3050858 dated 31.08.2018 and No. 2990028 dated 25.08.2017 (Annex-17 and 18), after coming into force of the GST when the CVD and SAD were subsumed in the IGST and hence the entire amount of IGST@ 18% paid at the time of import was available as ITC to the Respondent. Therefore, the DGAP has maintained that the Respondent should have reduced the base price to the extent of the CVD that was no longer to be paid as well as to the extent of the IGST the credit of which was available to him. The DGAP has concluded that the invoice dated 06.09.2017 on which IGST@18% was charged proved that the base price of the above items had remained the same, i.e., Rs. 60,24,120/- as per the quotation dated 28.11.2016 and the base price was not reduced to the extent of CVD that was not to be paid after the implementation of the GST.
8. The DGAP has also provided a detailed comparison of the taxes and duties which were payable before and after the implementation of GST and stated after the perusal of the Bill of Entry No. 3050858 dated 31.08.2018, it was apparent that the taxable value of the

product "Lava CNC 240 Milling Machine" on which CVD @ 12.5% would have been required to be paid was Rs. 22,15,844/- and for the Bill of Entry No. 2990028 dated 25.08.2018, the taxable value of the product "Sintering Furnace D664" on which CVD @ 12.5% was required to be paid would have been Rs. 10,25,411/- and hence, the Respondent would have been liable to pay CVD at 12.5% amounting to Rs. 2,76,980/- for the item "Lava CNC 240 Milling Machine" and Rs. 1,28,176/- for the item "Sintering Furnace D664" without getting benefit of ITC. The DGAP has also stated that since the import had taken place after coming in to force of the GST, the Respondent was not required to pay CVD. Thus, the taxable value should have been reduced by Rs. 2,76,980/- from the amount of Rs. 45,55,320/- for the "Lava CNC 240 Milling Machine" and it should have been reduced by Rs. 1,28,176/- from the amount of Rs. 14,68,800/- for the "Sintering Furnace D664" and the base price should have been Rs. 42,78,340/- for the "Lava CNC 240 Milling Machine" and Rs. 13,40,624/- for the "Sintering Furnance D664". The commensurate prices of the products "Lava CNC 240 Milling Machine" and Sintering Furnace D664" inclusive of GST at 18% should have been Rs. 50,48,441/- and Rs. 15,81,936/- respectively. Therefore, The DGAP has concluded that the total price to be charged from the Applicant No.1 should have been Rs. 66,30,377/- instead of Rs. 71,08,462/- and hence the total amount of profiteering done by the Respondent in the case of supplies made to the Applicant No.1 was Rs. 4,78,085/-.

9. The above report was considered by the Authority in its meeting held on 12.09.2018 and it was decided to hear the Applicant No. 1 and the Respondent on 26.09.2018.
10. The hearing was held on 26.09.2018, wherein the Applicant No. 1 was represented by Dr. Archana Singh and Sh. Vijay Pandey; Applicant No. 2 was represented by Sh. Anwar Ali T.P., Additional Commissioner and on behalf of the Respondent Sh. George Abraham and Sh. Amish Jain, Directors appeared. The Applicant No. 1 stated that he had purchased the above two items from the Respondent based on the quotation dated 28.11.2016 having taxable value of Rs. 60,24,120/-, however, after much delay the products were received with the tax invoice amounting to Rs. 71,08,462/- on 06.09.2017. The Applicant No. 1 contended that since taxes such as CVD and SAD had been subsumed under the IGST, the resultant price should have been less than the amount charged. The Applicant No. 1 also submitted that he had filed the complaint on 06.02.2018 before State-level Screening Committee of Jharkhand after the price was not reduced by the Respondent.
11. The Respondent contended through his written submissions dated 25.09.2018 that the additional costs relating to the Accessories and Lava materials which were supplied as a combo offer to the above Applicant had not been considered while arriving at the purchase cost and the amount of profiteering. He has also contended that had the price of additional products supplied along with the above machinery, had been taken in to account the same would have amounted to

approximately Rs. 13 lakhs out of which cost of Rs. 6 Lakhs was borne by him.

12. The Respondent also objected to the non-consideration of the CST paid by the Respondent on the above items as the Applicant No. 1 was based in Ranchi and any sale prior to the GST attracted CST @ 2 %, which amounted to an additional Cost, for which no credit was available as per the provisions of the CST Act, 1956. The Respondent has also contended that the DGAP had failed to consider the 2 % CST component of Rs. 1,20,482/- while working out the amount of profiteering. The Respondent has also contended that he had not indulged in Profiteering and the amount of Rs. 4,78,085/- inclusive of GST @ 18% amounting to Rs. 79,928/- calculated by the DGAP was incorrect.
13. We have carefully considered the material placed before us as well as the submissions made by the Respondent and find that the Respondent has vehemently argued that he had supplied additional material to the above Applicant costing about Rs. 13 Lakhs and borne an amount of Rs. 6 Lakhs out of the above amount which had not been taken in to consideration by the DGAP. In this connection it is revealed that there is no mention of the Combo Offer either in the quotations dated 28.11.2016 supplied by the Respondent to the above Applicant nor there is any mention of the same in the tax invoice. Moreover, any discount offered by the Respondent was from his own resources and therefore, the same cannot be considered as part of the taxable value and hence the contention of the Respondent made in this behalf cannot be accepted. The Respondent has also

claimed that the amount of CST of Rs. 1,20,482/- paid by him for which no ITC was available had not been taken in to consideration while calculating the profiteered amount. In this connection it is quite clear that both the above items were supplied vide tax invoice dated 06.09.2017 when the GST had come in to force and the CST had been subsumed in it. Therefore, there is no question of payment of CST by the Respondent and hence the argument advanced by the Respondent in this behalf is not maintainable. The Respondent has also claimed that the price of 240CNC Milling Machine had increased in the month of January, 2017 which was communicated to the above Applicant and he had agreed that the Machine may be supplied to him on the increased price. However, there is no evidence on record to prove the above claim of the Respondent. Neither he had submitted fresh quotation to the above Applicant nor he had sent any communication to him in this regard and hence the above claim is not tenable.

14. We have also found that the Respondent has wrongly charged higher price from the Applicant No. 1 as he should have reduced the base price to the extent of CVD (at 12.5%) which was chargeable on the amount mentioned in the quotation dated 28.11.2016 since in the period prior to GST no CENVAT credit was available for the CVD paid on the import of the goods whereas in the post GST period no CVD was charged instead IGST was charged on the import of goods which was available as ITC to the Respondent while supplying goods to the above Applicant. Hence the price offered prior to implementation of GST has to be reduced by the amount of CVD paid

in order to neutralise the impact of ITC now available to the Respondent.

15. We further find that since the actual import of the above items has taken place after the implementation of the GST at a time when the leviable taxes, i.e. the CVD and the CST, had already been replaced by IGST and also since the ITC available to the Respondent was equal to the entire amount of IGST paid at the time of actual import, the Respondent ought to have reduced the base price to the extent of the CVD that was no longer to be paid as well as to the extent of the IGST whose credit was now available to him. The Respondent has himself admitted during the course of the hearing that he had not deposited the amount of the CVD collected by him from the above Applicant on both the items in the Govt. accounts and therefore, he was bound to reduce the price by the amount of CVD. We find it prudent to refer to the tables below for ascertaining the quantum of profiteering in the subject supplies:-

Table-A

Pre-GST import scenario				Post-GST (As charged)			
CNC 240 Milling Machine (in Rs.)		D664 Sintering Furnace (in Rs.)	Total	CNC 240 Milling Machine (in Rs.)		D664 Sintering Furnace (in Rs.)	Total
Taxable value at the time of import (A)	22,15,844	10,25,411	32,41,255				
CVD@12.5% of taxable value at the time of import (B)	2,76,980	1,28,176	4,05,156				
Base Price Charged By The Respondent (C)	45,55,320	14,68,800	60,24,120	Base price	45,55,320	14,68,800	60,24,120
CST Charged (2% Of C)	91,106	29,376	1,20,482	IGST Charged (18%)	8,19,958	2,64,384	1084342
Total price to be charged	46,46,426	14,98,176	61,44,602	Total price actually charged	53,75,278	17,33,184	71,08,462

Table-B

Pre-GST(what should have been)				Post-GST (what should have been)			
CNC 240 Milling Machine (in Rs.)		D664 Sintering Furnace (in Rs.)	Total	CNC 240 Milling Machine (in Rs.)	D664 Sintering Furnace (in Rs.)	Total	
Taxable import value (A)	22,15,844	10,25,411	32,41,255				
CVD@12.5% chargeable at the time of import (B)	2,76,980	1,28,176	4,05,156				
Base Price Charged By The Respondent (C)	45,55,320	14,68,800	60,24,120	Commensurate base price (D=C-B)	42,78,340	13,40,624	56,18,964
CST Charged (2% Of C)	91,106	29,376	1,20,482	IGST Charged (18%) (E=D x 0.18)	7,70,101	2,41,312	10,11,413
Total price to be charged	46,46,426	14,98,176	61,44,602	Total price to be charged	50,48,441	15,81,936	66,30,377

We therefore conclude that the amount profiteered by the Respondent in respect of supply of CNC240 Milling Machine is Rs. 53,75,278 - Rs. 50,48,441= Rs. 3,26,837/- whereas the amount profiteered in respect of D664 Sintering Furnace is Rs. 17,33,184 - Rs. 15, 81,936= Rs. 1,51,248. Therefore, we determine the total Profiteered amount to be Rs. 4,78,085 (Rs. 3,26,837 + Rs. 1,51,248= Rs .4,78,085).

16. As is evident from the narration of the facts mentioned above, the Respondent has charged more than the actual base price and hence there is no doubt in our minds that the Respondent has profiteered at the expense of the Applicant No. 1 in respect of the subject supplies made by him and has thus violated the provisions of Section 171 of

the Act ibid and has therefore rendered himself liable to penal action in line with the provisions of Section 122 of the CGST Act, 2017 apart from his liability to refund the above profiteered amount along with the applicable interest in terms of the provisions of the CGST Rules, 2017.

17. Accordingly, the Respondent is directed to reduce the sale price of the above items immediately commensurate to the reduction in the price due to ITC of erstwhile chargeable CVD which is now available in the form of IGST and pass on this benefit to his customers. He is also directed to refund an amount of Rs. 4,78,085/- along with interest @ 18% to the Applicant No. 1 from the date when this amount was realised by him till the date of refund. The above amount shall be refunded within a period of 3 months by the Respondent from the date of receipt of this order failing which the same shall be recovered by the DGAP as per the provisions of the CGST Act, 2017 and shall be refunded as has been directed vide this order.
18. We have also carefully considered the issue of imposition of penalty on the Respondent as the allegation of profiteering has been duly established against him. It is clear from the facts of the present case that the Respondent was fully aware of the GST provisions and availability of ITC on account of IGST charged on import of goods. He was also fully aware of the provisions of Section 171 of the above Act whereby he was bound to pass on the benefit arising due to ITC availability on import of the above product. However, the Respondent has deliberately acted in defiance of the above law and hence he is guilty of the conduct which is contumacious and dishonest. He has

further acted in conscious disregard of the obligation which was cast upon him by the law, by issuing incorrect invoice in which the base price was deliberately not reduced by the amount of CVD, SAD and CST chargeable under erstwhile scenario which is now chargeable as IGST in the GST regime and is available as ITC benefit and thus he had denied the benefit of reduction in the price granted vide IGST provisions to his customers. Accordingly he has committed an offence under Section 122 (1) (i) of the CGST Act, 2017.

19. It is also revealed from the record that the notice regarding imposition of penalty has already been issued to the Respondent on 11.09.2018. However, the Respondent has not furnished any reply or advanced any arguments on the quantum of penalty to be imposed on him. Keeping in view the principles of natural justice, opportunity of being heard has to be given to the Respondent before the penalty is imposed. Hence fresh notice be given to him to explain why penalty should not be imposed on him.
20. Further, as elaborated above, it is clear that the Respondent did not pass on the benefit arising out of the increased ITC in the case of the subject transaction. We feel that the possibility of the Respondent having profited and thus unfairly benefited in the similar manner, in case of the other supplies affected by him to other customers, cannot be ruled out. Thus, in the interest of justice to the customers, we unequivocally opine that a fresh investigation by the DGAP covering all products supplied by the Respondent, within the confines of Section 171 of the CGST Act, is merited to unearth and quantify the benefit that the Respondent has failed to pass on to his

 25/11

customers. The DGAP is therefore directed to initiate investigation against the Respondent in this regard.

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

-Sd-

(B. N. Sharma)
Chairman



-Sd-

(J. C. Chauhan)
Technical Member

-Sd-

(R. Bhagyadevi)
Technical Member

Certified copy

(A.K.Goel)
Secretary NAA

F.No.22011/NAA/70/Theco/2018 / 1976

Dated: 29.11.2018

Copy to:-

1. M/s Theco India Private Limited, Office No. D, Shroff Orchards, Old No.-78, New No.-44, New Avadi Road, Kilpauk, Chennai-600010
2. Crown Express Dental Lab, 2nd floor, 201, Sumati Vihar Complex, Near Jail Chowk, Ranchi-834001
3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001
4. NAA website.
5. Guard File.