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

Case No.	:	16/2018
Date of Institution	:	10.09.2018
Date of Order	:	06.12.2018

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 J. P. and Sons, S-35, GF, Bapu Park, Kotla Mubarakpur, New Delhi-110003.

Respondent

Quorum:-

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

Present:-

1. Sh. Akshat Aggarwal, Assistant Commissioner and Sh. Bhupender Goyal, Assistant Director (Costs) for the Applicant.
2. Sh. Ankit Khandelwal, Proprietor and Sh. Anand Kumar Garg for the Respondent.

ORDER

1. This report dated 31.07.2018, has been received from the Director General of Anti-Profiteering (DGAP) under Rule 129 (6) of the Central Goods and Service Tax (CGST) Rules, 2017. The brief facts of the present case are that the Standing Committee vide the minutes of it's meeting dated 13.04.2018 had requested the DGAP to initiate investigation under Rule 129 (1) of the CGST Rules, 2017 on the allegation that the Respondent had not passed on the benefit of tax reduction from 28% to 18%, granted by the Central and the State Governments w.e.f. 15.11.2017 by maintaining the same Maximum Retail Prices (MRPs) which he was charging before the above date, in case of the two products namely (i) Johnson & Johnson Baby Shampoo 100 ml. and (ii) Johnson & Johnson Baby Powder 200 Gms. (here-in-after referred to as the products). It was also alleged that instead of reduction, the base prices of the above two products were increased on 15.11.2017 and thus the Respondent had indulged in profiteering in contravention of the provisions of Section

171 of the CGST Act, 2017 and hence appropriate action should be taken against him. In this connection, the details of 2 Tax Invoices issued by the Respondent in respect of the above two products were also enclosed by the DGAP with his Report as under:-

S. No.	Invoice No. and Date	Description of Products	Base Price (Rs.)	Rate of GST	Price Charged Inclusive of GST (Rs.)
1.	JJGST1707093 12.10.2017	Baby Shampoo 100 ml.	57.24	28%	73.27
		Baby Powder 200 Gms.	80.82	28%	103.45
2.	JJGST1709322 16.11.2017	Baby Shampoo 100 ml.	62.10	18%	73.28
		Baby Powder 200 Gms.	87.67	18%	103.45

2. The DGAP had called upon the Respondent to submit his reply on the allegations levelled above and also to suo moto determine the quantum of benefit which he had not passed on during the period between 15.11.2017 to 31.03.2018 on the above products. The Respondent was also requested to provide a copy of the audited Balance Sheet, GST Returns, Tran-1 Returns and the details of the outward taxable supplies etc.

3. The Respondent had submitted replies to the notice issued by the DGAP on 24.05.2018 vide his letters dated 08.06.2018 and 22.06.2018. The DGAP has informed that the Central Government on the recommendations of the GST Council had reduced the GST rate on the above products from 28% to 18% w.e.f. 15.11.2017 vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 in

consequence of which the Respondent was required to sell the above goods on the base prices which were being charged by him before 15.11.2017 and levy GST @18% so that the benefit of reduction in the rate of tax could be passed on to the customers. The DGAP has also observed that the Respondent had contended that he was a Distributor of M/s Johnson & Johnson Pvt. Ltd. (J & J) and the software which he was using for billing was provided and fully controlled by J & J and he couldn't make any modifications in the billing software and he had sold the above products on the MRPs which were uploaded in the software. The DGAP has further informed that the Respondent had also contended that the GST rate was reduced w.e.f. 15.11.2017 but J & J had taken 3 to 4 days to make necessary changes in the billing software. The Respondent had also claimed that he had not charged more than the MRPs mentioned on the products. The Respondent had also stated that the invoices dated 12.10.2017 and 16.11.2017 were issued prior to the updation of software by J & J and hence he could not charge the reduced prices.

4. The DGAP has also intimated that during the investigation it had been observed that the Respondent was required to sell the above products at the base prices which were prevalent before 15.11.2017 and he should have charged GST @ 18% on such base prices to pass on the benefit of reduction in the rate of tax from 28% to 18% w.e.f. 15.11.2017. He has further intimated that since the Respondent was a supplier registered under the CGST/SGST Act, 2017 vide GSTI No. 07AWPPK4876R1ZC, he was legally bound to

pass on the benefit of reduction in the rate of GST to his customers immediately w.e.f. 15.11.2017.

5. The DGAP has also submitted that by increasing the base prices of the above products and having maintained the pre-GST rate reduction MRPs, the benefit of GST rate reduction was not passed on to the customers by the Respondent.

6. The DGAP has also stated that from the Price Lists submitted by the Respondent, it was revealed that he had raised the base prices of both the above products during the period between 15.11.2017 to 18.11.2017. He has also informed that the base price of Baby Shampoo 100 ml. was increased from Rs. 57.24/- to Rs. 62.10/- and the same was increased in respect of Baby Powder 200 Gms., from Rs. 80.82/- to Rs. 87.67/-.

7. The DGAP has also observed that during the period from 19.11.2017 to 31.03.2018, the Respondent had re-fixed the base price of Baby Powder 200 Gms. from Rs. 80.82/- to Rs. 86.21/- which was slightly lower than the price prevalent between 15.11.2017 to 18.11.2017 and the base price of Baby Shampoo 100 ml. was re-fixed from Rs. 57.24/- to Rs. 58.44/- which was also slightly lower than the price between 15.11.2017 to 18.11.2017, however, still both the base prices were not commensurate with the reduction in the rate of tax and were higher than what they should have been.

8. The DGAP has further stated that after analysing the entire outward supplies made by the Respondent, it had been observed that during the period w.e.f. 15.11.2017 to 31.03.2018, the Respondent had sold 223 products comprising of 32 HSN codes out of which 134 products

comprising of 14 HSN codes were affected by the reduction in the rate of GST from 28% to 18% w.e.f. 15.11.2017, the details of which have been mentioned in Annexure-8 by the DGAP. The DGAP has further observed that out of the above 134 products impacted by reduction in the rate of GST, 11 products were not supplied during the period between 01.11.2017 to 14.11.2017. He has also informed that out of the above 11 products, the prices for calculating the profiteered amount in the case of 9 products had been taken from the price list submitted by the Respondent whereas 2 products had been launched in December, 2017. The DGAP has further informed that in the case of rest 123 products, it was observed that the base prices of 121 products were increased after 15.11.2017 and in the case of 2 products, the base prices were reduced after 15.11.2017. Therefore the DGAP has concluded that in respect of the above 130 products, supplied by the Respondent during the period between 15.11.2017 to 31.03.2018, the amount of profiteering came to Rs. 5,01,646/- on account of increase in their base prices.

9. The above Report was considered by the Authority in its sitting held on 03.08.2018 and it was decided to hear the interested parties. The Applicant was represented by Sh. Akshat Aggarwal, Assistant Commissioner and Sh. Bhupender Goyal, Assistant Director (Costs). The Respondent was represented by Sh. Ankit Khandelwal, Proprietor and Shri Anand Kumar Garg.

10. The Respondent had filed his written submissions on 20.08.2018, 24.08.2018, 25.08.2018 and 06.09.2018. Vide his submissions dated 20.08.2018, the Respondent had supplied a copy

of the 'Distributor Agreement' executed by him with J & J. The Respondent had submitted that as per the above agreement, he was appointed as Retail Distribution Stockist (RDS) by J & J and he was bound by the terms of this agreement to use the software 'Wave' which included the Manual, any associated software components, any media, any printed materials other than the Manual, and any online or electronic documentation. He has also claimed that the contract also required him not to use the above software in case he did not agree to the terms of the above agreement. The Respondent has also maintained that the contract stated that the ownership of the licensed software at all times would be with J & J. He has further alleged that through this agreement, he had been given a very limited right of using the software solely for the business of the above company and take prior consent of the concerned officer in case he wanted to use this software for any other business. He has also claimed that the title and full ownership rights of the above software were with J & J and he was required to handover the above software to J & J in case of termination of the agreement. Therefore, he has claimed that once the base prices had been increased by J & J with effect from 15.11.2017 in the software, he had no option except to charge these prices and therefore, he was not liable for profiteering. He had also supplied copies of the invoices issued by J & J to him to establish that the base prices had been changed by the above Company with effect from 15.11.2017 and hence he was bound to charge the increased prices as per the terms of the above agreement.

6.12.18

11. In his submissions dated 24.08.2018, the Respondent has stated that the DGAP had wrongly calculated his excess margins on the total sales from the period w.e.f. 15.11.2017 to 31.03.2018 without considering his purchases which he had made after 14.11.2017 on the increased base prices for all the products as per the updated billing software provided by the above Company. Vide his submissions dated 25.08.2018, he had produced the list of MRPs and the Tax Invoices which he had issued to his customers after 15.11.2017 to prove that he had charged the same base prices which were fixed by the above company and had also charged tax at the rate of 18%.

12. The Respondent has also filed further submissions on 06.09.2018 in which he has stated that he had deposited the due tax which he had charged from the customers at the rate of 18% and had not misused the Input Tax Credit (ITC) availed off as had been calculated by the DGAP. He has further added that he was only an intermediatory between the Company and the customers and was ready to pay the difference of tax if any but no penalty should be imposed since the circumstances were beyond his control and he had no intention to retain the profit on revised rates. He has further submitted that the calculation of the profiteered amount should be done on the stock which was lying on 14.11.2017 only, instead of the total sales made from 15.11.2017 to 31.03.2018. The Respondent has also submitted that as per the calculation sheet prepared by him on the basis of the stock lying on 14.11.2017, the profiteered amount came out to be Rs. 47,333.03/- only.

13. Clarification was sought from the DGAP on the issues raised by the Respondent in respect of the submissions dated 06.09.2018 made by the Respondent. The DGAP vide his reply dated 10.09.2018 has intimated that the issues raised by the Respondent had already been covered in the Investigation Report itself.

14. During the course of the proceedings, J & J was also issued notice asking it to clarify the claims made by the Respondent in respect of the control on the software and increase in the base prices made by it after 14.11.2017.

15. J & J vide it's submissions dated 28.09.2018 stated that it had in fact reduced the base prices after reduction in the rate of tax from 28% to 18%. It had also submitted the details of the base prices, tax and the invoice prices from J & J to the Distributor, from the Distributor to the Retailer and from the Retailer to the consumer upto 14.11. 2017, and from 17.11.2017 onwards as per the table given below:-

JB Powder 200 Gms. Monsoon						
Particulars	J&J to Distributor		Distributor to Retailer		Retailer to consumer	
	Upto 14th November 2017	17th November onwards	Upto 14th November 2017	17th November onwards	Upto 14th November 2017	17th November onwards
Base Price	74.76	79.74	80.82	86.21	93.75	100.00
Tax	20.93	14.35	22.63	15.52	26.25	18.00
Invoice Price	95.69	94.09	103.45	101.72	120.00	118.00

JB NMT Shampoo (TBP) 100 ml.						
Particulars	J&J to Distributor		Distributor to Retailer		Retailer to consumer	
	Upto 14th November 2017	17th November onwards	Upto 14th November 2017	17th November onwards	Upto 14th November 2017	17th November onwards
Base Price	52.95	54.06	57.25	58.45	66.41	67.80
Tax	14.83	9.73	16.03	10.52	18.59	12.20
Invoice Price	67.78	63.79	73.28	68.97	85.00	80.00

16. We have carefully considered the material placed before us and it has been revealed that the Central Govt. vide Notification No. 41/2017- Central Tax (Rate) dated 14.11.2017 had reduced the rate of GST from 28% to 18% in respect of the above two products with effect from 15.11.2017, the benefit of which was required to be passed on to the recipients by the Respondent as per the provisions of Section 171 of the above Act. It has further been revealed from the perusal of the Tax Invoices dated 12.10.2017 and 16.11.2017 that the Respondent had increased the base price of Baby Shampoo 100 ml. from Rs. 57.24/-, which he was charging before the rate reduction till 14.11.2017 to Rs. 62.10/- w.e.f. 15.11.2017 i.e. by Rs. 4.86/- per item resulting in the base price of Rs. 73.28/- which it was charging before 15.11.2017. Similarly in the case of Baby Powder 200 Gms., the base price was increased from Rs. 80.82/- to Rs. 87.67/- i.e. by Rs. 6.85/- per piece to maintain the same price of Rs. 103.45/- which was prevalent before 15.11.2017. Therefore, there is no doubt that the Respondent had increased the base prices of the above products w.e.f. 15.11.2017 by the amount shown above, whereas he was

required not to increase them and after charging GST @ 18%, he was legally bound to charge the reduced prices so as to pass on the benefit of reduced tax rate to his customers and hence he has indulged in profiteering.

17. It is also revealed from the perusal of Annexure-8 submitted by the DGAP that between the period w.e.f. 15.11.2017 to 31.03.2018, the Respondent had sold 223 products manufactured by J & J out of which rate of tax was reduced in respect of 134 products from 28% to 18% w.e.f. 15.11.2017. It is further revealed that out of the above 134 products, 11 products were not supplied during the period between 01.11.2017 to 14.11.2017 and hence for calculating the profiteered amount in respect of 9 products, the prices had been taken from the price list submitted by the Respondent whereas 2 products had been launched in the month of December, 2017. It is also apparent from the record that in respect of the rest 123 products, the base prices of 121 products were increased after 15.11.2017 and in the case of remaining 2 products, the base prices were reduced after 15.11.2017. Therefore, it is clear from the above Annexure that the Respondent had increased the base prices of 130 products which were supplied by him during the period between 15.11.2017 to 31.03.2018 and by doing so he had resorted to profiteering to the tune of Rs. 5,01,646/- on account of increase in their base prices. Thus, it is established that the Respondent had acted in contravention of the provisions of Section 171 of the CGST Act, 2017 and had not passed on the benefit to his customers by commensurate reduction in the prices of these products. Accordingly, the amount of profiteering made by the Respondent is

determined as Rs. 5,01,646/- as per the provisions of Rule 133 (1) of the CGST Rules, 2017.

18. The Respondent has vehemently argued that he had no control on the fixing of the base prices as well as the MRPs as both of them were fixed by J & J through the software which he was bound to follow as per the terms of the agreement executed by him with the above Company. However, it is apparent from the record that the Respondent is duly registered under the CGST/SGST Act, 2017 and he was hence bound to follow the Notification dated 14.11.2017 mentioned above vide which the rate of GST was reduced from 28% to 18% on 130 products which he was selling. He cannot escape the legal obligation which was imposed upon him by the above Notification by shifting his accountability on this ground. The Respondent has himself admitted during the course of the hearing that he was aware that he was required to pass on the benefit of the reduced rate of tax to his customers and therefore also he cannot deny his legal liability. The Respondent has also not produced any evidence to show that he had made any correspondence with J & J to inform it that he was bound to reduce the prices due to reduction in the rate of tax and J & J should either not increase the base prices or compensate him for the benefit he was bound to pass on to his customers, therefore, it is quite apparent that he had deliberately charged the enhanced prices with an intention to pocket the amount which he was bound to pass on to the recipients. Therefore, the above contention of the appellant cannot be accepted.

19. It is also apparent from the perusal of Annexure-8 that the DGAP has correctly calculated the amount of profiteering by taking in to account all the supplies made by the Respondent w.e.f. 15.11.2017 to 31.03.2018. Inspite of the claim made by the Respondent that he had purchased the goods on the increased prices from J & J after 14.11.2017 there is no denying the fact that he had charged the prices which he could not have charged in view of the reduction in the rate of tax. Mere charging of the tax @ 18% after 15.11.2017 cannot be construed to have resulted in passing on of the benefit when the base prices had been deliberately increased. Hence, this contention of the Respondent is not tenable and cannot be accepted.

20. The Respondent has also submitted that the amount of profiteering should be calculated on the basis of the stock which was lying with him as on 14.11.2017 instead of the sales made between 15.11.2017 to 31.03.2018 and therefore, the total amount of profiteering would be Rs. 47,333.03/-. However, this argument of the Respondent is fallacious as he had made illegal profit on all the supplies which he had made w.e.f. 15.11.2017 to 31.03.2018 as he had charged increased prices on all the 130 products although he was bound not to do so as per the Notification dated 14.11.2017. Hence the amount of profiteering calculated by the DGAP is correct.

21. The Respondent has also claimed that he had deposited the due tax and had not misused the ITC and he was willing to pay the balance tax if any and no penalty should be imposed on him. However, it is apparent from the record that the Respondent had increased the base prices illegally and also forced his customers to pay additional GST on

the increased prices otherwise there would have been further reduction in the prices and hence he has acted in violation of the provisions of Section 171 of the above Act.

22. J & J through it's submissions dated 28.09.2018 has claimed that it had reduced the basic prices on all it's products including the above 2 products w.e.f. 15.11.2017 and had charged the reduced prices from it's distributors who had further charged the reduced prices from the retailers and who had resultantly sold it's products to the consumers on the reduced MRPs. However, this contention of J & J is not correct as per the details supplied by it and hence the same cannot be accepted.

23. Accordingly, the Respondent is directed to reduce the prices of all the above products as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017 by making commensurate reduction in their prices keeping in view the reduction in the rate of tax so that the benefit is passed on to the recipients. The Respondent is also directed to deposit the profiteered amount of Rs. 5,01,646/- along with the interest to be calculated @ 18% from the date when the above amount was collected by him from his customers till the above amount is deposited. Since the recipients in this case are not identifiable the DGAP is directed to get the amount of profiteering of Rs. 5,01,646/- along with interest deposited from the Respondent in the Consumer Welfare Fund of the Central and the concerned State Govt. as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017. The above amount shall be deposited 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 deposited as has been directed vide this order. Since the present investigation in to the issue of not passing on the benefit of reduction in the rate of tax by the Respondent has been conducted w.e.f. 15.11.2017 to 31.03.2018 only, the DGAP is directed to further investigate the quantum of profiteering which the Respondent has made thereafter and submit his report accordingly.

24. It is also established from the above facts that the Respondent had issued incorrect invoices while selling all the above products to his customers as he had not correctly shown the basic prices which he should have legally charged from them. The Respondent had also compelled them to pay additional GST on the increased prices through the incorrect tax invoices which would have otherwise resulted in further benefit to the customers which he had failed to pass on. It is also established from the record that the Respondent has deliberately and consciously acted in contravention of the provisions of the CGST Act, 2017 by issuing incorrect invoices which is an offence under Section 122 (1) (i) of the above Act and hence he is liable for imposition of penalty under the above Section read with Rule 133 (3) (d) of the CGST Rules, 2017. Although notice for imposition of penalty has already been issued to the Respondent on 29.08.2018 however, no formal oral or written submissions have been filed by the Respondent on the quantum of penalty. Therefore, keeping in view the principles of natural justice it would be appropriate to issue fresh notice asking him to explain why penalty should not be imposed on him for the above offence.

25. A copy of this order be sent to the Applicant 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

6/12/18

(A.K.Goel)
Secretary NAA

F.No.22011/NAA/60/JPSons /2018/1023-1027 Dated: 06.12.2018

Copy to:-

1. M/s J. P. and Sons, S-35, GF, Bapu Park, Kotla Mubarakpur, New Delhi-110003.
2. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
3. Commissioner, Department of Trade & Taxes Govt. of NCT of Delhi, Vyapar Bhawan, IP Estate, New Delhi - 110002
4. NAA website.
5. Guard File.

O/C