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

Case No.	37/2019
Date of Institution	15.03.2019
Date of Order	12.06.2019

In the matter of:

1. Shri Navneet Gupta, email- canavneetgupta@ymail.com.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Bharti Telemedia Pvt Ltd, Airtel Centre, Plot No. 16, Udyog Vihar, Phase-IV, Gurgaon- 122015, Haryana.

Respondent

Quorum:-

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

ORDER

1. The present Report dated 13.03.2019, has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The facts of the case are that an application dated 27.11.2017 was filed before the Standing Committee on Anti-profiteering under Rule 128 of the CGST Rules, 2017, by the Applicant No. 1, against the Direct To Home (DTH) industry in general stating that the tax incidence on DTH services prior to GST implementation was subjected to Entertainment Tax which ranged between 10% to 25% in various States, in addition to 15% Service Tax, whereas on introduction of GST, the tax rate came down to 18%. However, the Applicant No. 1 stated that the benefit of this reduction in the rate of tax was not passed on to the consumers by the DTH operators when the GST was introduced w.e.f. 01.07.2017. Thus, it was alleged that the Respondent had indulged in profiteering in contravention of the provisions of Section 171 of CGST Act, 2017.

2. The above reference was examined by the Standing Committee on Anti-Profiteering and was further referred to the DGAP vide minutes of its meeting dated 20.12.2017 for detailed investigations under Rule 129 (1) of the CGST Rules, 2017.

3. The DGAP vide his report dated 13.03.2019 has stated that after scrutiny of complaint made by the above Applicant, it was observed

that the complaint did not contain any evidence of profiteering and the allegation was too general in nature which was directed against all the DTH operators and no meaningful investigation could be conducted in the matter. Thus, the DGAP vide its letter dated 29.01.2018, requested the Standing Committee to reconsider its decision to refer the said application to the DGAP for detailed investigation, as no investigation could be conducted in the absence of documentary evidence.

4. The Standing Committee on Anti-profiteering, in its meeting held on 09.02.2018, decided to return the complaint to DGAP for investigation, with the following observation:-

> "*The committee has been cognizant of the fact that the invoices evidencing details of an actual transaction were not available before the Committee. But the Committee still approved the complaint for the investigation because the Committee was of the opinion that the complaints pertain to sectors in which goods are sold on printed prices, hence, the Standing Committee felt that the printed price is sufficient evidence to conduct an investigation of profiteering by these suppliers.*"

5. The DGAP re-examined the complaint and sent a report to this Authority under Rule 129(6) of the Rules dated 14.03.2018 stating that the complaint was too general in nature without any documentary evidence and it was directed against the DTH industry as a whole and no specific supplier was mentioned by the Applicant No. 1 against whom investigation could be initiated.

6. The Authority, vide its letter dated 25.03.2018, conveyed that the DGAP's investigation was not exhaustive and needed to be conducted in a more comprehensive manner. The DGAP vide his letter dated 11.04.2018 conveyed the reasons to the Authority, as to why no investigation could be carried out and also the limitations inherent in the complaint. The DGAP further added that as per Rule 128 and Rule 129 of the CGST Rules, 2017, Anti-profiteering investigation could only be initiated if it was based on a written application supported by the evidence. In the absence of a specific complaint and necessary evidence, it could not have been possible for the Standing committee to form a "prima facie satisfaction" regarding the existence of profiteering, which was the legal pre-requisite for referring a complaint/application to DGAP for conducting a detailed investigation. The DGAP also requested the Authority to give "reasons to be recorded in writing", in terms of Rule 133(4) of the Rules, so that he could initiate fresh/further investigation.

7. The Authority, after considering the DGAP's report dated 14.03.2018 returned the complaint back to the DGAP, vide order No. 2/2018 dated 24.04.2018 under Rule 133(4) of the Rules, after recording that since the complaint had been received through an e-mail, the DGAP should have made efforts to contact the above Applicant and ask him to submit evidence in support of his allegation and the opportunity of personal hearing should have been given to the Applicant No. 1, in accordance with the principles of natural justice. The Authority further observed that as the DTH operators were known and identifiable, they could have been summoned during the investigation to ascertain

the veracity of the allegations made against them, as it involved larger public interest.

8. The DGAP vide emails dated 08.05.2018, 21.05.2018 and 18.07.2018 requested the above Applicant to submit specific details regarding his allegations.

9. The above Applicant, vide his e-mail dated 21.07.2018 submitted that his complaint pertained to all the leading DTH operators in the country. The above Applicant also added that he had no pre-GST invoice to substantiate the claim of reduction in the rate of tax in the post-GST era, as evidence of profiteering. However, he mentioned that in the pre-GST period, he was a customer of Airtel Digital TV and he had subscribed to a plan of ₹299 per month and post-GST, he had switched to another DTH operator.

10. The DGAP vide his e-mails dated 25.07.2018 and 02.08.2018 further requested the above Applicant to provide some basic information such as the subscriber ID, package details, break-up of the package into base price and taxes, pre and post-GST.

11. The Applicant No. 1, vide his e-mail dated 04.08.2018 submitted the details of an Airtel Digital TV subscription, in the name of Sh. Vijendar Kumar, Samman Bazar, Bhogal, New Delhi. The Applicant also submitted that the package namely "Value Prime" subscribed by Sh. Vijendar Kumar was priced at ₹299/- (inclusive of taxes) before implementation of GST which remained the same post-GST as well. The above Applicant didn't provide any break-up of the base price and the taxes in the pre and post-GST periods or any invoice.

12. The DGAP has further stated that in the pre-GST era, the burden of taxation was 15% Service Tax plus Entertainment Tax levied by the States. The DGAP, vide his notice dated 16.08.2018, called upon the Respondent to reply as to whether he admitted that he had contravened the provisions of Section 171 of the CGST Act, 2017 by keeping the price of the DTH packs unchanged after implementation of GST w.e.f. 01.07.2017. He was also asked to suo moto determine the quantum of profiteering, if any and indicate the same in his reply to the Notice. He was also given an opportunity to inspect the evidences/information submitted by the above Applicant on 22.08.2018 or 24.08.2018.

13. The period covered by the DGAP during the current investigation is from 01.07.2017 to 30.06.2018.

14. The Respondent, vide his letter dated 29.08.2019 intimated that though the notice was addressed to M/s Bharti Airtel Ltd. which was the parent company, the DTH services were provided by the Respondent and not the parent company. The Respondent vide his letters and e-mails dated 06.09.2018, 14.09.2018, 19.09.2018, 14.11.2018, and 21.12.2018 submitted the ST-3 returns for the period April, 2016 to June, 2017 and CENVAT Credit Register for F.Y. 2016-17, Copy of Annual Financial Statement for F.Y. 2016.17, sample sale invoices raised on distributors for the period prior to GST implementation and post-GST implementation along with details of applicable tax rates, pre-GST and post-GST, GSTR-1 and GSTR-3B returns and Electronic Credit Ledger for the period July, 2017 to

June, 2018, Tran-1 for the period July, 2017 and Entertainment Tax returns for the period April, 2016 to June, 2017 were also supplied.

15. The Respondent further submitted the requisite documents but categorically denied the allegation of profiteering and objected that initiation and conduct of proceedings in his case was not in accordance with the prescribed Rules and requested to drop the proceedings. The Respondent also contested the procedure followed by the Standing Committee in recommending investigation in the present case on the following grounds:-

- The recommendation of the Standing Committee was not based on the recommendation of any Screening Committee and accordingly, procedure under Rules 128(1) of the Rules was not followed.

- The complainant had not provided any evidence in support of the allegation of profiteering.

- The Standing Committee had not examined the accuracy and adequacy of the evidence provided in the application, to determine whether there was prima facie evidence to support the claim of the Applicant and applicability of Section 171 of the Act.

- No opportunity of being heard was afforded to the Respondent by the Standing Committee.

16. The Respondent further added that the above Applicant had quoted wrong details of some random subscriber to lodge a frivolous complaint and there was nothing on record to substantiate that the above Applicant and the subscriber whose details were furnished, were connected to each other in any manner. Besides, no invoice or other supporting documents showing change in the rate of tax or change in the input tax credit had been submitted by the above Applicant to attract the provisions of Section 171 of the Act. He also submitted that the Applicant No. 1 had also not produced any evidence as was required in Anti-profiteering Application Form (APAF-1), such as: Actual price/value charged per unit in terms of number of Channels (package) offer, pre-GST, Actual price/value charged per unit in terms of number of Channels (package) offer, post-GST, Comparative per unit actual price/value of like goods/services charged by other suppliers and details of break-up of actual amount of tax charged pre-GST and post GST.

17. The Respondent also contested that the Applicant was not his subscriber and he had made a complaint citing the details of another subscriber Sh. Vijendar Kumar and the details provided regarding the DTH plan for the said subscriber were different from that in the Respondent's records. He also added that contrary to the above Applicant's submission that he had subscribed to the 'Value Prime'

plan, the Respondent's records showed another plan, i.e., 'My Plan' as his subscribed plan. The two were different plans with different values and features.

18. The Respondent also cited the precedence of outcome in similar complaint's of profiteering settled in the case of Raman Khaira & another Vs. M/s Yum Restaurants Pvt. Ltd. in Case No. 11/2018 on 29.10.2018, vide which the application was dismissed for Applicant's failure to furnish requisite evidence of profiteering to initiate the investigation. Also, in the case of rss342786@tatamotors.com & another Vs. M/s Amway India Enterprises Pvt. Ltd. in Case No. 12/2018 decided on 29.10.2018, the Authority had dropped the proceedings due to the Applicant's failure to furnish any evidence in support of his allegation of profiteering, in the form of invoices of pre-GST and post-GST periods. The Respondent also contended that as per Rule 129 of the Rules, only if the Standing Committee was satisfied that there was a prima facie evidence to show that the supplier had not passed on the benefit of reduction in the rate of tax or the benefit of input tax credit to the recipients by the way of commensurate reduction in prices, it could refer the application to the DGAP for detailed investigation. But, in the present case, the provisions of Rule 128 were not followed in referring this complaint for investigation, since no evidence was available to be examined for its accuracy and adequacy.

19. The Respondent further added that as laid down in Rule 126 of the Rules, no methodology and procedure had been published by the Authority for determination of profiteering. So, the proceedings should

be dropped forthwith. The Respondent also submitted that Section 171 of the CGST Act, 2017 could be invoked only in the following two instances:

- Where there is any reduction in the rate of tax, and

- Where there is benefit of input tax credit.

But in the present case, there had been no reduction in the rate of tax on the services supplied by him after implementation of GST and thus, the question of passing on the benefit did not arise.

20. The Respondent further added that the Entertainment Tax was neither allowed as input tax credit in the pre-GST regime, nor was it permitted as a credit in the GST regime. He also added that prior to introduction of GST, when Entertainment Tax was introduced in some States, the levy of Entertainment Tax on the DTH services was protested against and the burden of such tax paid by the Respondent was borne by him and no change in the price charged from the consumer was effected by the Respondent on account of introduction of Entertainment Tax and the cost of Entertainment Tax was absorbed by the Respondent himself and it was not recovered from the consumers. He further added that the matter of levy of Entertainment Tax was also under litigation and presently subjudice before the Supreme Court.

21. The Respondent also submitted that the requisite details were being provided by him without prejudice to his right to challenge the legal validity of the proceedings or contest the allegation of profiteering. He further submitted that post-GST implementation, he had taken

several initiatives to provide additional value to his customers and provided the following examples of a few such initiatives:

- Content strengthening in existing packages:- The Respondent had added content to the existing packages of the consumers without charging anything extra for it.

- Higher discounts to customers on annual packs:- The Respondent submitted that he offered greater value to the consumers by increasing the discount percentage in annual plans.

- Lowering the pricing of secondary connections:- The Respondent contended that he had lowered the monthly rentals for secondary connections for lower value base packs.

- Launching of Rs. 199 pack with "Hindi Entertainment":- The Respondent had strengthened the entry level pack of ₹199 by giving the consumers complete hindi entertainment including movies content, which was earlier available in packages starting from ₹ 285.

- Launch of Unlimited Dhamaka Pack (UDP) :- By launching the UDP, the Respondent had significantly lowered the entry level price of the consumers to ₹ 75 per month in which consumers not only got the free to air (FTA) channels but also got top 4 Hindi GEC content.

  He further added that the summary of benefits given to his customers after implementation of GST, was intimated to them and also communicated through his website.

22. The Respondent also contended that as the products (Package Content) themselves were different in the pre-GST and post-GST

periods, the transitions were different in terms of benefit, having significant change in the overall value received by the customers and hence, application of anti-profiteering provisions in his case was not feasible and that on an average, he had been increasing the customer pack prices once in every six months, but upon introduction of GST, he had decided not to increase the prices of packs till December, 2017, to pass on the possible benefit due to the transition to the GST and price revision exercise was undertaken by the Respondent only in December, 2017 and then in July, 2018.

23. The DGAP in his report observed that the main issues for determination were whether there was benefit of reduction in the rate of tax on the supply of DTH services by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so, whether the Respondent had passed on such benefits to the recipients in terms of Section 171 of the Act. The DGAP also noted the contention of the Respondent that the referral of his case to the DGAP by the Standing Committee on Anti-profiteering was not maintainable for the reason that the application/complaint was not supported by any evidence of profiteering and submitted that he was under statutory obligation to conduct an investigation and submit report of his findings to the Authority, in terms of Rule 129 (6) of the Rules. The DGAP further added that the Respondent, vide his letter dated 21.12.2018, had submitted copies of invoices raised by him on his distributors prior to and post levy of Entertainment Tax, as well as post-GST, to substantiate his claim that he bore the burden of the Entertainment Tax and did not pass it on to his distributors. Also, the Respondent

provided copies of screenshots of his web-portal wherein he had publicised the incremental value offered to his customers by way of additional content at no extra cost across various plans on account of GST implementation.

24. The DGAP has also intimated that in the invoices raised by the Respondent on his distributors and the end-users, no Entertainment Tax was levied and the only tax liability on the end-user was that of Service Tax. The Respondent had also submitted that he had sent SMS to all their customers to convey that additional channels were being added to their packs with effect from 04.07.2017 and also informed them about the increase in channels/content, post implementation of GST. The DGAP has further intimated that the Respondent claimed that the packages provided by him were uniformly priced across the country, whereas structure of Entertainment Tax varied from State to State, with specific rate in some States, ad valorem in some other States and even no Entertainment Tax in some States. Moreover, there was variation in the rate of tax for normal and commercial subscribers. In the invoices raised by the Respondent, only Service Tax, as applicable at the material time, was charged and no Entertainment Tax was charged.

25. The DGAP has also submitted that the Respondent had also contended that depending upon the packages subscribed for, the nature of the active subscriber and supplementary channels opted for, the effective pricing of a plan was a variable figure which couldnot be compared for two different points of time, even for the same subscriber. The Respondent had also provided details of the

channels and the value of the content being added to the existing packages on account of GST. The DGAP has thus submitted that, even if the name of a particular package had remained the same along with the cum-tax price, it was not possible to compare the price of the old package with that of the new one. The DGAP has further intimated that no correlation between the pricing of packages and Entertainment Tax for any State in the pre-GST era could be made on account of the fact that the Entertainment Tax structure varied from State to State and that such Entertainment Tax, even if paid by the Respondent, was not charged/recovered from his customers. The DGAP has further added that the prices of the packages charged by the Respondent in the pre-GST era from all his customers across the country were the same and were inclusive of only Service Tax. Prior to introduction of GST, the effective rate of Service Tax was 15% (14% Service Tax + 0.5% Swachh Bharat Cess + 0.5% Krishi Kalyan Cess) on all the packages, which was increased to 18% on introduction of GST w.e.f. from 01.07.2017. The DGAP has also contended that the above Applicant had failed to submit any invoice to support his allegation that the burden of Entertainment Tax was passed on by the Respondent to the recipients and negate the claim of the Respondent that the Entertainment Tax was cost to the Respondent and was not charged/recovered from the recipients.

26. The DGAP has thus found that the allegation that on introduction of GST w.e.f. 01.07.2017, the reduction in rate of tax did not result in commensurate reduction in the price of DTH packages was not correct as there was an increase in the rate of tax charged from the

recipients from 15% in the pre-GST era to 18% in the post-GST era. Notwithstanding the issue of change in the content of the package in the post-GST era, the invoices issued by the Respondent revealed that he had kept the prices of the packages unchanged.

27. The above report was considered by the Authority in its sitting held on 19.03.2019 and it was decided that the above Applicant should be asked to appear before the Authority on 04.04.2019, however, the Applicant No. 1 did not appear. Two more opportunities were offered to the above Applicant to appear before the Authority on 24.04.2019 and on 16.05.2019, but he has not appeared. The Standing Committee was also granted opportunity for representation on 16.05.2019 but no one appeared on behalf of the Standing Committee also.

28. The Applicant, vide his email dated 24.04.2019 submitted to the Authority that he agreed with the DGAP report and that the present case be disposed off.

29. We have carefully examined the DGAP's Report and the documents placed on record and find that the following issues are required to be settled in the present case :-

I. Whether there was reduction in the rate of tax on the product in question after implementation of GST i.e. w.e.f. 01.07.2017?

II. Whether any benefit of reduction in the rate of tax was to be passed on?

30. The above Applicant had claimed in his application that the rate of tax had decreased from 35% (20% Entertainment Tax and 15% Service Tax) in the pre GST era to 18% in the post GST era. The Applicant was offered 3 opportunities to substantiate his above allegation but he did not avail of those opportunities. It is also to be noted that the Applicant vide his letter dated 21.07.2018 has stated that he did not have any pre GST invoice to substantiate his claim. However, it is apparent from the perusal of the record that in fact the rate of GST was increased from 15% to 18% w.e.f. 01.07.2017 and since there had been no reduction in the rate of tax, the provisions of Section 171 of CGST Act, 2017 have not been violated by the Respondent.

31. It is also revealed from the record that the Applicant was not a subscriber of the Respondent and he had filed the present complaint on the basis of the plan chosen by another subscriber, Sh. Vijender Kumar. The details of the plan given by the above applicant also do not match with the plan adopted by him as he had not subscribed to the 'Value Prime' plan but had subscribed to a different plan called 'My Plan' and these above mentioned two plans had different values and features and they could not be compared. Therefore, the allegations made by the Applicant No. 1 has not been established.

32. It is further found from the record that the Entertainment Tax was neither allowed as ITC in pre GST era nor has been allowed in the GST era, and that the cost of the entertainment tax was borne by the Respondent himself as is clear from the invoices produced by him.

Accordingly, there is no ground to believe the contention of the above Applicant as no benefit of ITC has accrued to the Respondent which was required to be passed on.

33. It is also apparent that the plans and packages post GST had been changed and thus, there were no comparable prices for the old packages with that of the new ones and the prices of the packages charged by the Respondent in the pre GST era from all his customers across the country were the same and were inclusive of only Service Tax @15% (14% service tax + 0.5% SBC + 0.5% KKC), and hence the allegation made by the above Applicant is not established, that he had charged more price post implementation of GST.

34. In view of the above facts, it is evident that there is no evidence to prove that the Respondent had charged more price in the GST era and not passed on the benefit of tax reduction, as the tax rate had increased from 15% to 18%. Further, the above Applicant had also not availed the opportunities of hearings to establish his case. Therefore, the Authority is of the view that the DGAP has rightly submitted that the allegation of profiteering is not established in the present case.

35. It is also clear from the above that due to non-availability of cogent and reliable evidence, the provisions of Section 171 of the CGST Act, 2017 are not attracted and hence there is no merit in the application filed by the above Applicant. Accordingly the same is dismissed as being not maintainable.

36. A copy of this order 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

Certified copy

12.6.19

(A. K. Goel)
Secretary, NAA

Sd/-
(R. Bhagyadevi)
Technical Member

Sd/-
(Amand Shah)
Technical Member

File No. 22011/NAA/18/Bharti/2019 Dated: 12.06.2019

Copy to:-

1. Shri Navneet Gupta, email- canavneetgupta@ymail.com.
2. M/s Bharti Telemedia Pvt Ltd, Airtel Centre, Plot No. 16, Udyog Vihar, Phase-IV, Gurgaon- 122015, Haryana.
3. Director General Anti-Profiteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. NAA Website/Guard File.