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

Case No.	77/2019
Date of Institution	24.06.2019
Date of Order	23.12.2019

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 Johnson & Johnson Private Limited, L.B.S. Marg, Mulund (W), Mumbai-400080.

Respondent

Quorum:-

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

Present:-

1. Nonefor the Applicant.
2. Sh. Hardeep Singh Lamba, Associate Director (Tax), Smt. Hitashree K., Tax Manager, Sh. Tarun Gulati, Sh. Shashi Mathews and Sh. Vasu Nigam, Advocates for the Respondent.

ORDER

1. This Report dated 24.06.2019 has been received from the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are thata reference was received by the DGAP from the Standing Committee on Anti-Profiteering on 07.01.2019 for conducting investigation under Rule 129 (1) of the above Rules against the Respondent in which it was alleged that the Respondent had not passed on the benefit of reduction in the rate of GST on the products being supplied by him, when the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017.

2. The DGAP had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 15.01.2019 to the Respondent, to submit his reply as to whether he admitted that the benefit of reduction in the GST rate w.e.f. 15.11.2017, had not been passed on to the 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 documents in support of his reply. The Respondent was also afforded an opportunity to inspect the non-confidential evidences/information which formed the basis of the said Notice, during the period 21.01.2019 to 23.01.2019, which the Respondent had availed and inspected the documents on 23.01.2019.

3. The DGAP has also mentioned that the time period of the present investigation was from 15.11.2017 to 31.12.2018.He has also sought extension of time to complete the investigation from this Authority, which was granted to him till 06.07.2019 in terms of Rule 129 (6) of the above Rules vide order dated 19.03.2019.

4. The DGAP has also stated that the Respondent replied to his Notice vide letters/e-mails dated 28.01.2019 (Annexure-4 of the DGAP's Report), 04.02.2019 (Annexure-5),08.02.2019 (Annexure-6), 21.02.2019 (Annexure-7), 22.02.2019 (Annexure-8), 06.03.2019 (Annexure-9), 07.05.2019 (Annexure-10) and 31.05.2019 (Annexure-11 of the DGAP's Report). The reply of the Respondent as informed by the DGAP in his report was as follows:-

a. Consequent to the GST rate reduction w.e.f. 15.11.2017, a communication regarding the reduction in prices to becharged from the distributors and reduction in MRPs was shared with the distributors/consumers. The method of reduction both in case of stock-in-hand as on 15.11.2017 and fresh purchases, was also communicated to the distributors/consumers. The Respondent further submitted that though he had issued guidelines to the downstream trade to ensure compliance with the anti-profiteering provisions,

hisdistributors were independent assessees who were subjected to GST compliance independently.

b. The Respondentalso submitted that in the absence of any guidelines to compute and pass on the benefit of GST rate reduction by way of commensurate reduction in prices, he had discharged his statutory obligation through various methods.

5. The DGAP has further stated that the Respondent submitted the following documents/information:-

a) GSTR-1 & GSTR-3B Returns for the period from July, 2017 to December, 2018 for all his registrations all over India.

b) Details of invoice-wise outward taxable supplies during the period from July, 2017 to December, 2018.

c) Price Lists (Pre and Post November, 2017) for all the products, specifically indicating the SKUs impacted by GST rate reduction w.e.f. 15.11.2017.

d) Sample copies of invoices issued to his dealers, pre and post 15.11.2017.

6.The DGAP has also observed thatthe Central Government, on the recommendation of the GST Council, had reduced the GST rate on theproducts supplied by the Respondent from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017which has also not been contested by the Respondent.

7. The DGAP has also submitted that as regards the amount of profiteering made in the present case, perusal of the invoices made available by the Respondent indicated that he had increased the base prices of the

impugned products when the rate of GST was reduced from 28% to 18% w.e.f. 15.011.2017. On the basis of aforesaid pre and post-reduction GST rates and the details of outward taxable supplies (other than zero rated, nil rated and exempted supplies) of the impugned products during the period from 15.11.2017 to 31.12.2018, as furnished by the Respondent to the DGAP, the DGAP has concluded that the amount of net higher sales realization due to increase in the base prices of the impacted products, despite the reduction in the GST rate from 28% to 18% or in other words, the profiteered amount came to Rs. 2,30,40,74,132/-. The DGAP has also claimed that the profiteered amount has been arrived at by comparing the average of the base prices of the impugned products sold during the period from 01.11.2017 to 14.11.2017, with the actual invoice-wise base prices of the products sold during the period from 15.11.2017 to 31.12.2018. The reference base prices of the products which were not sold during the period from 01.11.2017 to 14.11.2017, were taken from the sales data for the period from July, 2017 to October, 2017 and the price list submitted by the Respondent to the DGAP. The excess GST so collected from the recipients, was also included in the aforesaid profiteered amount by the DGAP as the excess price collected from the recipients also included the GST charged on the increased base prices.

8. The DGAP has computed the State or Union Territory wise details of the total profiteered amount of Rs. 230,40,74,132/- which are furnished in the Table below:-

Table

S. No.	State Code	State	Profiteered Amount (Rs.)
1	02	Himachal Pradesh	33,02,17,775
2	03	Punjab	8,47,46,490
3	05	Uttarakhand	1,23,42,666
4	06	Haryana	2,08,76,240
5	07	Delhi	9,66,05,932
6	08	Rajasthan	3,27,78,720
7	09	Uttar Pradesh	54,05,98,573
8	10	Bihar	7,38,65,910
9	18	Assam	8,44,00,366
10	19	West Bengal	15,31,51,571
11	20	Jharkhand	2,85,72,596
12	21	Orissa	3,86,09,317
13	22	Chhattisgarh	71,047
14	23	Madhya Pradesh	3,04,91,758
15	24	Gujarat	4,64,65,155
16	27	Maharashtra	41,36,41,031
17	29	Karnataka	11,74,23,349
18	32	Kerala	1,76,04,638
19	33	Tamil Nadu	8,57,12,789
20	36	Telengana	5,72,57,528
21	37	Andrapradesh(New)	3,86,40,679
	Grand Total		**2,30,40,74,132/-**

9. The DGAP has also contended that from the details furnished in **Annexure-13**of his report, it appeared that the base prices of the products under investigation were indeed increased post GST rate reduction w.e.f. 15.11.2017. Thus, by increasing the base prices of the products subsequent to the reduction in the GST rate, the commensurate benefit of reduction in the GST rate from 28% to 18%, was not passed on to the recipients.

10. After perusal of the DGAP's Report, this Authority in its meeting held on 02.07.2019 decided to hear the Applicant and the Respondent on 17.07.2019. A noticewas issued to the Respondent on 02.07.2019 asking him to reply why the Report dated 24.06.2019 furnished by the DGAP should not be accepted and his liability for profiteering under

Section 171 of the CGST Act, 2017 should not be fixed. He was also asked to explain why penal provisions should not be invoked against him under Section 29, 122-127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST Rules, 2017. On the request of the Respondent hearing date was adjourned to 05.08.2019. On behalf of the Applicant none appearedduring the course of the hearings and the Respondent was represented bySh. Hardeep Singh Lamba, Associate Director (Tax), Smt. Hitashree K., Tax Manager, Sh. Tarun Gulati, Sh. Shashi Mathews and Sh. Vasu Nigam, Advocates. The hearing fixed on 17.07.2019 was postponed to 05.08.2019 on the request of the Respondent who hadappeared on this date and filed his submissions. The next hearing was fixed on 23.08.2019 however, the Respondent had sought adjournment. Hearing was held on 04.09.2019 during which the Respondent had filed additional submissions. The Respondent had further filed his submissions on 03.10.2019.

11. The Respondent in his submissions dated 05.08.2019 has submitted thathewas primarily engaged in the manufacturing and selling of various goods, consumer healthcare products, medical devices and pharmaceutical products in India and he has been present in India for almost 70 years and has pan-India operations covering over 22 States. Hewas supplyingthe products across markets through various distribution channels, which could be broadly categorised as under:-

    a. <u>General Trade:</u> This distribution channel included wholesale distributors across all States. He sold his products to the

wholesale distributors who sold them to retailers or other channel partners and approximately 80% of the sales were made to this category.

b. Institutional Trade: Hospitals and medium and large institutions formed part of this channel. Sales to outlets operated by the Canteen Stores Department (CSD) were also covered under this channel.

c. Key/ Modern Trade: Large retail chains formed part of this channel which included various e-commerce operators. Prices to these recipients were negotiated independently which may vary from each other even in relation to the same products.

d. Others: Sales not forming part of the above channels.

e. Exports: Sales which were by way of exports to entities outside India.

12. He has also submitted that the DGAP's investigation has not been initiated in compliance with Rule 128 of the CGST Rules and was without jurisdiction as in the present case, there was no complaint / written application on the basis of which the present proceedings have been initiated. He has further submitted that the present proceedings have been initiated on the basis of a *suo moto* reference made vide letter dated 09.10.2018 from the Secretary of this Authority to the Standing Committee on Anti-Profiteering.He has also stated that there was no written application in the prescribed format, namely, Form APAF-1 on the basis of which the Standing Committee had

examined the present matter and forwarded the same to the DGAP for investigation.

13. The Respondent has also referred to the Order dated 19.07.2019 passed by the Hon'ble Delhi High Court in the case of **Reckitt Benckiser v. Union of India WP (C) 7743/2019** wherein with respect to products not complained of, the Hon'ble High Court had given limited interim relief to the extent that the petitioner therein was not required to give the information to the DGAP. Therefore, the absence of a complaint was fatal to the present proceedings and as such, the present proceedings were completely without jurisdiction and deserved to be dropped.

14. The Respondent has also claimed that the only requirement under Section 171 (1) of the CGST Act was that the benefit of any tax rate reduction / benefit of ITC should be passed on to the recipient by way of a *"commensurate reduction in prices"* and It ought to be noted that the statute did not prescribe any method of computation by which amount of profiteering could be computed. He has further claimed that in terms of Section 171 (3) of the CGST Act, it was provided that the Authority *"shall exercise such powers and discharge such functions as may be prescribed"*. Section 2(87) of the CGST Act defined the word *'prescribed'* to mean as prescribed by the CGST Rules on the recommendations of the GST Council. Therefore, this Authority can discharge only such functions and exercise such powers as are specifically mentioned in the CGST Rules.

15. The Respondent has also contended that the pricing of products was a complex exercise and products were usually not priced individually and in isolation at a unit level and in a free market, several considerations such as those of demand and supply, fixed and variable costs, prices of raw materials, logistics, product range, product mix, supplier's position in the market, entity level operational costs, market situation, inflation, consumer segments, costs and benefits at the entity level, division level, and product category level were all influencers of any pricing decision and hence, the cost of taxes was only one of the elements which determined the final price.

16. Hehas further contended that the prices at which products were sold to a distributor depended of which product channel it was a part of. Moreover, prices to a distributor would also depend on the offtake by such distributor, negotiation by sales teams, etc. and that the same product might have different prices when sold to different product channels even though the printed MRP was the same for each product at the retail channels. He referred to the following extract from Annexure-13 of the DGAP's Report to support his above claim:-

S. No. reference of "Mar18 Profiteering" sheet of Annexure 13	Product Description	Base price to Distributor per piece	MRPper piece (Post 15 November 2017)
1106	JB Oil 100ml Monsoon - B	65.52	94
3208	JB Oil 100ml Monsoon – B	66.32	94
7808	JB Oil 100ml Monsoon – B	63.52	94
1096	JB Lotion 100 ml-B TBP	55.76	80

8774	JB Lotion 100 ml-B TBP	54.06	80
77273	JB Lotion 100 ml-B TBP	58.45	80

From the above Table, the Respondent has submitted that each of the products sold by himwere sold at different prices to different persons in the trade and no single price could be fixed for a product in the trade stream. He has also made reference to the judgment of the Hon'ble Supreme Court passed in the case of **Basant Industries v. Asst. Collector of Customs 1996 (81) ELT 195 (SC)** wherein it was categorically noted that *"it is a matter of common knowledge that a price which is offered by a supplier to an old customer may be different from a price which the same supplier offers to a totally new customer."*

17. He has also argued that the fixation of price being a commercial exercise, a business minded approach was necessary to interpret the provisions of law, especially when the Legislature has not given any defined guidelines on how to compute profiteering. In this regard, he has quoted the principle of '*commercial expediency*'which was well recognised by the Hon'ble Supreme Court of India under which it has been held that it was the businessman who has to decide how to conduct his business and it was not the domain of the tax authorities to sit in judgment on the manner in which the business was to be conducted. Reliance in this regard was placed on the decisions of the Hon'ble Supreme Court given in the cases of **S.A. Builders Ltd. v. CIT(Appeals) (2007) 1 SCC 781** and **Hero Cycles (Pvt.) Ltd. v. CIT**

(2015) 16 SCC 359 where the principle of 'commercial expediency' has been reiterated. Accordingly, he has claimed that fixing of an ideal selling price common for all categories of sales was not proper as the products continued to be sold through different categories which could not be averaged. He has further claimed that the actual prices could not be ignored and hence presumptive calculations based on the averages were not prescribed under the law.

18. He has furtherargued that he was not afforded opportunity to present his own methodology as per which pricing of his products was arrived at and to explain the transactions entered into between him and his recipients i.e., distributors and other partners, no personal hearing or an opportunity to explain his case or give alternative data was granted to him prior to issuance of the Report by the DGAP even after request.The Respondent has also alleged that the DGAP had computed profiteering arbitrarily on a methodology which was not prescribed either under the CGST Act or the CGST Rules.Themethodology adopted by him was also not allowed to be explained even though he had made specific request to explain the implications of the data and the methodology adopted by him. He has also contended that it was well-settled that granting of opportunity of hearing was an integral part of the principles of natural justice. He has also cited the judgment of the Hon'ble Supreme Court passed in the case of **Dharampal Satyapal Ltd. v. Dy. Commissioner of C. Ex. 2015 (320) ELT 3 (SC)** wherein the Hon'ble Supreme Court had observed that even in administrative actions, where the decision of the authority may result in civil consequences, a hearing before

taking a decision was necessary. He has also relied on the case of **Escorts Farms Ltd. v. Commissioner (2004) 4 SCC 281**in which the Hon'ble Supreme Court has held that *"Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory procedure and violation of rules of natural justice"*. He has also made reference to the judgment of the Hon'ble Delhi High Court passed in the case of **CCE v. SG Engineers 2015 (322) ELT 204 (Del.)** wherein it was held that where the order did not notice the relevant facts, it was a cryptic order without any reasons and such an order was not sustainable for violation of principles of natural justice. Accordingly, he has pleaded that the entire proceedings were in contravention of the settled principle of *audi alteram partem* and violation of the principles of natural justice.

19. He has also submitted that the approach adopted by the DGAP in the Report wascompletely arbitrary and there was no uniformity in the mechanism adopted by the DGAP while examining allegations of profiteering. He has further submitted that the DGAP had followed an inconsistent and an imbalanced approach while conducting the present investigation. He has also argued that as per his own investigation with respect to the rate reduction made under Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018, the DGAP had separated CSD and non-CSD supplies,however, in the present case, the DGAP has made no such distinction and has clubbed the supplies made to all the product distribution channels, including CSD and non-CSD channels, into a common group while computing the pre-rate reduction prices and compared the same

withthe post-rate reduction prices, which showed clear arbitrariness wherein the same investigating agency was adopting different methodologies in similar cases without any reasonable justification.

20. He has further argued that with respect to the rate reduction annoucedvide Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018, the DGAP had considered a post rate reduction period of approximately 65 days, whereas, in the present investigation, the period post the rate reduction has been taken as 411 days and hence, the different approaches adopted by the DGAP were *ex facie* arbitrary and confiscatory, more so when it were for the same Respondent.

21. He has also alleged that there wereseveral flaws and inconsistencies in the methodology adopted by the DGAP to compute the alleged profiteering.In the absence of a prescribed methodology it was an arbitrary exercise of power by the DGAP.He has further alleged that the DGAP has calculated total profiteering of Rs.230,40,74,132/- on the products sold by him by considering product descriptions as the base. A total of 494 product descriptions have been analysed by the DGAP to arrive at the alleged profiteered amount and out of these 494 product descriptions, the DGAP has calculated nil profiteering on 188 product descriptions. He has also stated that the DGAP has incorrectly considered only those instances where there was an alleged positive profiteering andhe has ignored instances where he has passed on excess benefit which was more than the commensurate benefit.He has further stated that in such cases, the DGAP has considered the profiteering as 'NIL' whereas in the cases

where he has sold products to his customers at a price lower than the alleged ideal selling price, the DGAP should have taken those instances in to account while computing the total amount of the alleged profiteering.

22. He has also contended that the DGAP has erred in including the amount of excess GST collected on the supply of products in the total amount of profiteering as per Para 12 of his Report on the ground that the excess price collected from the recipients also included the GST charged on the increased base price. He has also mentioned that the DGAP has computed an amount of Rs.35,14,68,936/- as excess recovered GST which has been deposited with the Government and hence, no recovery of this amount can be made from him,therefore, the total profiteering calculated at Rs.230,40,74,132/- should be reduced by Rs.35,14,68,936/-. He has further contended that since the GST was collected by the Central as well as the State Governments and the Consumer Welfare Funds (CWFs) are also maintained by them hence, the profiteered amount should be recovered from the above Governments and paid to the recipients who were identifiable.

23. TheRespondent has also claimed that the DGAP has also included the stock transfer transactions while computing the alleged profiteering which was erroneous and unsustainable as such transactions have taken place between different offices / depots / warehouses of the Respondent in different States which have obtained separate registrations in such States and there could not be question of profiteering in case of such supplies. He has also stated

that there could be two scenarios in the case of stock transfer transactions:-

i. After stock transfer the goods were supplied to the Respondent's recipients and the said transactions have already been included in the turnover on which profiteering has been calculated by the DGAP and if such stock transfer transactions were also separately included while computing profiteering it would lead to double counting of profiteering with respect to the same products.

ii. If such goods were not supplied to the recipients after stock transfer during the period considered in the Report, such transactions wouldbe beyond the scope of the investigation period in the present case.

24. The Respondenthas also submitted that DGAP's finding of profiteering with respect to stock transferswas directly contrary to the DGAP's own interpretation of Section 171 of the CGST Act as given in Para 11 of his Report in which he has stated that there must be a commensurate reduction in the prices of goods or services and such reduction could only be in terms of money so that the final price payable by a recipient got reduced. He has further submitted that in the case of stock transfers no monetary consideration was paid by the recipients as they were merely different offices / depots / warehouses of the Respondentand hence, there was no question of passing on any commensurate benefit of rate reduction in terms of money and hence, such transfers could not be included in the profiteered amount.

25. The Respondent has also averred that the stock transfer transactions were undertaken by him merely to facilitate the supply of products across the country and such transactions were not considered as 'sale',however, under the GST regime, these transactions have been deemed to be 'supply' under Section 7 of the CGST Act read with S. No. 2 of Schedule I of the CGST Act, and if they were included in the DGAP's computation of the alleged profiteering, the same transaction would be considered twice and, accordingly, profiteering would also be calculated twice.Therefore, hehas submitted that the DGAP has included the above transactions in computing the alleged profiteering which was incorrect, erroneous and liable to be set aside.

26. He has further averred that the valuation of such stock transactions was determined differently from supply transactions between unrelated persons and that the valuation of stock transfer transactions was not determined on an actual basis but it was determined in terms of the deeming provisions made under Rule 28 of the CGST Rules which provides as follows:-

*"**28. Value of supply of goods or services or both between distinct or related persons, other than through an agent.-** The value of the supply of goods or services or both between distinct persons as specified in sub-section (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall-*

(a) be the open market value of such supply;

(b) if the open market value is not available, be the value of supply of goods or services of like kind and quality;

(c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order:

Provided that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person:

Provided further that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services."

27. On the basis of the above Rule, the Respondent has submitted that he has adopted the valuation mechanism prescribed in the second proviso to Rule 28 of the above Rulesand, accordingly, he has adopted notional value for his stock transfer transactions which was 70% of the price charged for such goods. He has further stated that any determination under Section 171 of the CGST Act couldonly be based on actual prices and considering that the stock transfer transactions have taken place at a notional value and not at actual prices, for such supplies the prices at which stock transactions have taken place were not relevant for the purposes of examining profiteering under Section 171 of the

CGST Act. He has also claimed that the DGAP has alleged profiteering of Rs.95.86 Crore with respect to stock transfer transactions which was contrary to the statutory provision of Section 171. He has also stated that out of the total profiteering calculated at Rs.230,40,74,132/- an amount of Rs.81,24,04,813/- after giving adjustment of excess tax paid to the Government ought to be out rightly dropped.

28. The Respondent has also contended thatafterthe perusal of Annexure-13 of the DGAP'sReport, hehas observed that the DGAP has adopted product descriptions as the criterion for comparing the prices of products prior to and after the GST rate reduction and accordingly, he has compared the prices of products with common product descriptions to compute the alleged profiteering. However, in the case of 79 product descriptions, the DGAP has adopted alternate product descriptions without any reasonable justification and once the DGAP has adopted product descriptions as the basis to compare prices of products prior to and after GST rate reduction, he could not adopt alternate product descriptions and calculate profiteering as it wouldamount to comparing incomparable products with each other. He has further contended that the reliance placed on alternate product descriptions was incorrect and the DGAP ought to have made comparison at the SKU level asit would be an accurate comparison instead of comparing products for which the pricing was different. He has also submitted that he was

adoptingdifferent product descriptions when the product was sold in different channels and therefore, comparing one product description with an alternate product description was grossly incorrect and has resulted in skewed calculations.

29. Hehas also submitted that in case of 16 product descriptions, the DGAP has compared completely different products as the products considered prior to GST rate reduction have a different chemical composition from the products considered after the GST rate reduction. Details of such productshave been provided by the Respondent as is given below:-

S. No.	Product adopted for comparison by DGAP in the post-rate reduction period (New product introduced after 15.11.2017)	Product adopted by DGAP in the pre-rate reduction period	Date of introduction of the new product	Amount of alleged profiteering liability (INR)
1.	Johnson's Baby Cream 100gm BMR	JB Cream 100 g CSD -B TBP	09-01-2018	9,75,05,449/-
2.	Johnson's Baby Cream 30gm BMR	JB Cream 30 g -B TBP	09-01-2018	1,76,55,996/-
3.	Johnson's Baby Lotion 100 ml BMR	JB Lotion 100 ml- B TBP	18-12-2017	1,71,92,311/-
4.	Johnson's Baby Lotion 200 ml BMR	JB Lotion 200 ml- B TBP	18-12-2017	1,64,87,724/-
5.	Johnson's Baby Cream 50gm BMR	JB Cream 50g - B TBP	09-01-2018	1,62,06,332/-
6.	JB No More Tears Shampoo 100 ml BMR	JB NMT Shampoo (TBP) 100 ml – B	18-12-2017	1,44,49,936/-
7.	JB No More Tears Shampoo 200 ml BMR	JB NMT Shampoo (TBP) 200 ml - B	11-01-2018	1,08,67,375/-

8.	Johnson's Baby Lotion 500 ml BMR Ecom	JB Lotion 500 ml Pump Pack TBP	14-06-2018	15,43,051/-
9.	Johnson's Baby Lotion 50 ml BMR	JB Lotion 50 ml(TBP) - Sample – B	18-12-2017	14,54,334/-
10.	Johnson's Baby Lotion 500 ml BMR	JB Lotion 500 ml Pump Pack TBP	19-02-2018	3,74,025/-
11.	JB Lotion 500ml + JB Cream 50g Free BMR	JB Lotion 500ml + JB Cream 50g Free – B	09-01-2018	2,27,296/-
12.	JB TTT 500 + JB Lotion 100 ml Free BMR	JB TTT Wash 500ml + JBL 100 Free – B	09-01-2018	1,77,372/-
13.	JB Lotion 500 ml BMR SAPR – Alliance	JB Lotion 500 ml Pump Pack TBP	17-08-2018	1,689/-
14.	Johnson's Baby Lotion 200 ml BMRm	JB Lotion 200 ml- B TBP	18-12-2017	1,007/-
15.	Johnson's Baby Lotion 100ml BMR	JB Lotion 100 ml- B TBP	18-12-2017	544/-
16.	Johnson's Baby Lotion 50 ml (Sample) BMR	JB Lotion 50 ml(TBP) - Sample - B	18-12-2017	305/-
Total amount of alleged profiteering (INR)				**19,41,44,747/-**

30. Hehas further submitted that it was clear from the above Table that the above products have different chemical compositions and were completely different products which could not be compared with each other and the products considered after the rate reduction were new products which have been launched in the market for the first time after 14.11.2017 and therefore, there could not be any profiteering on the products which were introduced for the first time after rate reduction. Hehas also pleaded that it has been a practice by the

DGAP to not include new products while computing profiteering under Section 171. In this regard, he has also made reference to the Order dated 22.01.2019 passed by this Authority in the case of **DGAP v. Satya Enterprises, Case No. 3/2019** wherein it was held that newly introduced products were not be considered for the computation of profiteering by the DGAP. He has also enclosed sample photographs of some of these products to highlight the difference in their chemical composition to establish that the products selected by the DGAP were incomparable. Accordingly, hehas submitted that the profiteering amount of Rs.19,41,44,747/- calculated on these 16 product descriptions ought to be excluded as the same pertained to completely new products introduced after 15.11.2017.

31. The Respondent has also stated that the DGAP has wrongly compared the weighted average prices in the pre-GST rate reduction period to the actual prices in the post-GST rate reduction periodwhich was based on flawed methodology and there was no justification for comparing the average base prices from one period to the actual selling pricesmentioned in individual invoices from a different period. Hehas further stated that the reference prices for comparison must necessarily be computed based on the same methodology as any other calculation would be skewed and incorrect and accordingly, if actual prices were adopted in the post-GST rate reduction period, actual prices should be considered for the pre reduction period as well.

32. He has also argued that the weighted average prices in the pre-GST rate reduction period could not have been compared to the actual

prices in the post-GST rate reduction period and submitted that the calculation of the weighted average base prices in the pre-rate reduction itself was flawed and erroneous on various grounds as has been explained by him below:-

i. Insofar as the computation of weighted average prices in the pre-GST rate reduction period includedthe stock transactions, the same was erroneous as suchstock transfer transactions could not be taken into account as such supplies were valued on a notional basis in terms of Rule 28 of the CGST Rules and were not based on the actual prices. As the goods which were stock transferred were thereafter supplied by the branch office/depots/warehouses to the recipients, the DGAP has calculated the alleged profiteering on the same goods.

ii. The period of 411 days was an extraordinarily long period for profiteering to be calculated and that the DGAP was proceeding on the basis that the Respondent was not entitled to increase his prices over a period of time andby doing so the DGAP has failed to appreciate that the businesses reviewed their prices from time to time.

iii. The period taken for calculating the weighted average base prices in the pre-GST rate reduction period was erroneous. As per Para 12 of the Report, where the DGAP could not find the sales of certain product descriptions during the period from 01.11.2017 to 14.11.2017, the DGAP has calculated weighted average base prices by considering the preceding months. Accordingly, where the DGAP could not find sales of certain product descriptions in the period from

01.11.2017 to 14.11.2017, the DGAP has proceeded to the month of September or October 2017. Therefore, instead of taking a uniform period for all the product descriptions in the pre-GST rate reduction period, the DGAP has taken different periods for different product descriptions without providing any reasonable or justifiable explanation. If the average of base prices of a common group of product descriptions was being computed, it was imperative that the time period taken to calculate such average base pricesshould be uniform for all the product descriptions. Otherwise, the average base price for a set of product descriptions wherein varying time periods have been considered shall be incomparable.

33. The Respondent has also submitted that while computing the weighted average price, the DGAP has considered a carton as a single unit irrespective of the number of pieces in it whereas a carton was not a standard size and the number of pieces sold in a carton of a particular product description to one recipient might be different from the number of pieces sold in a carton of the same product description to another recipient. Insofar as the weighted average base price of the same product description sold in cartons to different recipients has been computed together, the same was erroneous asit did not take into account that cartons did not contain a fixed number of products. Besides creating inconsistencies due to the varying time periods taken for averaging the base prices of the products sold prior to the rate reduction,the said time period was also not sufficient to accommodate fluctuations in market conditions.

34. He has further submitted that the DGAP has failed to appreciate that different factors at different points in time affected the costing and pricing of a product and therefore, no straightjacket formula could be used for either arriving at a base price or for calculating profiteering. The DGAP has also failed to appreciate that various factors have contributed to increase in costs incurred by him and it was an admitted fact that the pricing of products was dependent on the expenses incurred by him and therefore, increase in expenses and increase in costs has to be considered.

35. The Respondent has also claimed that with respect to various variants of Powder sold by him, the same were being manufactured at two locations, in Baddi (Himachal Pradesh) and Mulund (Maharashtra). On an average, the effective tax cost of manufacture and sale of these Products (i.e. Excise Duty and VAT) was approximately 17.97% and there was an additional cost of 2% on account of loss of CENVAT credit of Excise Duty which was not available to him at his manufacturing unit at Baddi,therefore, there was a total tax cost (including loss of ITC) of approximately 20%. He has further claimed that after the commencement of GST, hehad undertaken change in the packaging of these variants of Powder products which has led to a further escalation in costs by approximately 4% as packaging constituted approximately 90% of the cost of the overall product in case of Powder. After the tax rate reduction while the rate of GST has come down from 28% to 18%, hehas reduced the prices of Powder products after taking into account the above mentioned costs, including tax costs as well as non-tax costs. He has herefore,

submitted that the DGAP has erred as the above mentioned tax as well as non-tax costs have not been taken into account whiledetermining whether he has passed on the commensurate benefit of tax rate reduction. He has also submitted that an amount of Rs.30,86,81,503/- which has been alleged to have been profiteered with respect to these variants of Powder products was incorrect.

36. He has also contended that the DGAP has failed to appreciate that the pricing of 'Baby Wipes' has been determined on completely different principles and the same could not be computed on the methodology adopted for other products. Hehas further contended that 'Baby Wipes' were procured from third-party vendors who were manufacturing these products in Baddi and were taking the benefit of area-based exemption from payment of Excise Duty and the same was taken into account while charging prices from him, by the above vendors andaccordingly, a relatively lower prices were charged to him and he, further, had factored in the same prices while determining his own prices andthe effective tax cost to him was approximately 13.87%. He has also argued that under the GST regime, the area-based exemption available to manufacturing facilities in Baddi was removed and an uniform 28% rate of GST was imposed on all the supplies which has resulted in increase in the tax cost of the third-party vendors and correspondingly, his cost.However, in line with the Government mandate, hehas not increased the prices of Baby Wipes and absorbed the burden of the additional tax cost.

37. The Respondent has also submitted that when the GST rate was reduced to 18% he had factored in this additional cost while

determining the commensurate benefit of tax reduction that had to be passed in terms of the Exemption Notification in the case of Baby Wipes. He has further submitted that since the price of Baby Wipes was determined factoring in the tax cost at 13.87%, there was no requirement of further reduction in prices when the GST rate was reduced from 28% to 18% and therefore, the profiteering liability of Rs.10,84,91,611/- in respect of Baby Wipes was incorrect.

38. He has also claimed that the DGAP ought to have considered the additional costs that had been incurred by him during the implementation of GST and the transition from the earlier tax regime to an altogether new tax regime.As per the DGAP's own report, he has mentioned that a total of 494 product descriptions were impacted by the rate reduction due to which he was burdened with various additional costs, including change in the IT systems, marketing costs and operating costs etc. He has further claimed that hehas absorbed such increased tax costs not only during the implementation of the GST but also during the present rate reduction. He has also submitted that there were also certain additional costs which he had to bear on a regular basis, including inflation related increase in costs of raw materials, ingredients and services etc. which were factored in while determining the prices of the products, which the DGAP has not considered.

39. The Respondent has also argued that he was importing two finished products viz. Neutrogena and Aveeno line of products and the rate of Basic Customs Duty (BCD) on these products was increased from 10% to 20% w.e.f. 02.02.2018 vide Clause 101 (a) of the Finance Bill,

2018. Being non-creditable in nature, this increased BCD has resulted in increase in the cost of imported products for him which he has not passed on to his customers from 02.02.2018 to August 2018 and the additional duty burden was absorbed by him.

40. The Respondent has further argued that the DGAP has failed to consider that pricing of products sold by the Medical Division was determined on the negotiations with respect to each independent supply and, therefore, the same could not be compared with each other and hence, the pricing to the distributors as well as the MRP was illusory.

41. The Respondent has also claimed that he has carried out his own computations which disclosed that he has passed on more than the commensurate benefit of tax rate reduction in terms of Section 171 of the CGST Act. The Respondent has further claimed that in the sales details submitted by him to the DGAP for May 2018, there were certain errors in the quantities supplied on account of a technical glitch,therefore, while making computations as per his own methodology, he has considered the actual quantities which were higher than those submitted earlier to the DGAP. He has also stated that in the absence of any prescribed methodology any methodology which was compliant with the provisions of Section 171 should be accepted and the Respondent could not be judged on the basis of the methodology prescribed by the DGAP for the first time. The Respondent has further stated that he has adopted a bona fide and reasonable methodology and passed on more benefit than what he was required to pass on.

42. He has also submitted that as per his methodology, he has taken the price of a particular product description sold to a particular customer in the last invoice prior to 15.11.2018 as the base price prior to 15.11.2018 i.e. the date from which GST rate reduction came into effect. Where such a price was not available till 01.07.2017 i.e. the date of commencement of GST, he has resorted to the price available in the price list as on 14.11.2017, whichwas justifiable because if the price had already been increased/decreased prior to the GST rate reduction, there was no rationale of creating an artificial price by resorting to an average base price as has been done by the DGAP. This was also reasonable as the price after the GST rate reduction must be compared to the last prevailing price prior to such rate reduction and once the pre-rate reduction price was determined in the manner explained above, hehas factored in certain costs which he has borne at the time of commencement of the GST with effect from 30.06.2017, while computing the commensurate benefit required to be passed on.

43. He has further submitted that the net indirect tax costs on the products supplied by him were lower prior to the introduction of GST. After the GST was increased, all products covered under the present investigation saw an increase in the tax costs,however, hehad continued to bear the losses of the increased tax costs. He has also claimed that he was committed to the intention of the Government and the GST Council that the public should not be burdened due to the increase in tax rates and therefore, even though he was suffering increased losses due to the increased tax rate, he had not changed his

prices and accordingly, at the time of rate reduction he had factored in these losses and, accordingly, passed on the benefit of tax rate reduction to his recipients. Thereafter, he has computed the ideal base prices which he could have fixed for his products after the commencement of GST, considering the higher rate of GST. He has further claimed that these ideal base prices has been calculated by adding the increased tax costswhich he had incurred at the time of commencement of the GST to the actual base prices of the products prior to the tax rate reduction. He has also contended that he has then compared the ideal base price of a particular product description in the pre-rate reduction period to the actual selling prices of the said product description supplied to the same customer in each of the invoices after the GST rate reduction for the following periods to compute profiteering:-

15.11.2017 to 31.03.2018;

15.11.2017 to 31.07.2018; and

15.11.2017 to 31.12.2018.

44. He has further contended that this exercise for each of the product descriptions was carried out for computing profiteering at the product description level for each of the customers and the profiteering was calculated accordingly.He has also stated that he haspassed on benefit in excess of the commensurate benefit required to be passed on by him under Section 171 of the CGST Act as was evident from Annexure-13 filed by him with his submissions.

45. He has further stated thatAnti-Profiteering provisions were in the nature of anti-abuse provisions which could not be construed in a manner that restricted the right of a citizen to carry on trade freely in terms of Article 19(1)(g), also it waswell settled that the right to reasonable profit was a part of right to trade and any methodology prescribed under Section 171 which was part of a taxing statute could not be *dehors* a reasonable profit that might be earned by an enterprise. He has also contended that the DGAP has erred in adopting a notional base price without considering any of the relevant factors including the tax incidence prior to implementation of GST and has acted in an arbitrary manner.He has further contended that by way of Section 171, there was no intention of the Government to move away from the free price market principles to an administered price mechanism aspresently the economy was primarily following the principles of a market / liberal economy where prices were determined by market forces. He has also alleged that neither the Constitutional provisions nor the CGST Act empowered the DGAP to get into the realm of price fixation as the aim of Section 171 of the CGST Act was not to fix prices but to prevent profiteering. He has further alleged that by computing profiteering at the product description level without considering his costs the DGAP has resorted to price administration. He has also claimed that mere rate reduction would not result in price reduction without considering increase in costs and the business of a registered dealer was required to be seen as a whole for the provisions of Section 171.

46. He has also submitted that the term 'profiteering' has been defined in **Black's Law Dictionary**, which was relied upon by the Hon'ble

Supreme Court in the case of**Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697, 774** was definedas *"taking advantage of unusual or exceptional circumstances to make excessive profits"* and that it was well settled that the right to reasonable profit was a part of right to trade and any methodology prescribed under Section 171 could not be *dehors* a reasonable profit that may be earned or costs incurred by an enterprise. He further submitted that the MRP only indicated a price above which the goods could not be sold and it could not be considered / assumed as the price realized by a person for all his sales andit was a general commercial practice to sell goods at price less than the MRP and thus any price arrived on the basis of the MRP alone was notional, not real, and could not form basis to determine "commensurate" reduction in price. He has also added that the DGAP has erred in adopting an average base price based on MRP without considering any of the relevant factors including the tax incidence prior to GST which interfered with the right to carry on trade and was violative of Article 19(1)(g) and Article 300A of the Constitution of India. He has also alleged that the DGAP has proceeded on the presumption that Section 171 was a consumer protection measure whereas it was a business regulation measure and it was right of a registered person to balance his GST benefits and losses with a view to pass on the benefit of rate reduction.

47. He has further contended that this Authority has not been empowered under the CGST Act to impose any penalties and that Section 171 of the CGST Act, which stipulated the statutory provisions in relation to

anti-profiteering, did not provide for imposition of any penalty. Hehas also submitted that in the absence of conferment of power on this Authority to take any penal action under the CGST Act, the Notice was not sustainable insofar as it sought to impose penalty on him. He has further submitted that the delegated legislation could only provide for procedural provisions and could not create substantive liabilities in the absence of a specific sanction by the provisions of the parent statute. In this regard, he has placed reliance on the judgment of the Hon'ble Supreme Court passed in the case of **Kunj Behari Lal & Ors. v. State of H.P. 2000 (3) SCC 40** wherein it was held that the legislature cannot create any substantive rights or obligations or disabilities through general rule making powers unless the same was specifically contemplated by the provisions of the statute under which such powers were exercised. He has also cited the case of **Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Limited (2015) 9 SCC 209**,in which it has been held that if on reading of the statute in entirety, a power did not flow, a delegated authority could not frame a regulation as that would not be in accord with the statutory provisions. He has also argued that since there was no deliberate defiance of law by the Respondent no penalty could be imposed as per the law settled in the case of **Hindustan Steel Ltd. v. State of Orissa 1978 (2) ELTJ 159 (SC).**

48. He has also submitted that the Notice has directed him to show cause as to why his registration under the CGST Act should not be cancelled.In this regard hehas submitted that Section 29(2)(a) of the CGST Act, provided that a proper officer might cancel the registration

if a registered person has contravened the provisions of the CGST Act or the CGST Rules. Rule 21 (c) of the CGST Rules provided that the registration granted to a person was liable to be cancelled if the said person violated the provisions of Section 171 of the CGST Act or the Rules made thereunder. Rule 133(3)(e) of the CGST Rules also provided that where the Authority determined that a registered person has not passed on the benefit of the reduction in the rate of tax on the supply of goods to the recipient by way of commensurate reduction in prices, the Authority may order cancellation of registration.He has further submitted that he has not violated the provisions of Section 171 and hence his registration could not be cancelled. He has also contended that he has also not violated the provisions of Section 122 to 127 of the CGST Act, 2017 and hence no penalty could be imposed on him.

49. The Respondent vide his submissions dated 04.09.2019 has submitted that hehas undertaken revision in prices of his products from time to time due to various factors, such as inflationary pressures, increase in the cost of raw materials, operational costs, marketing expenses and other miscellaneous expenses and stated that there was no question of looking at any trend for price change as price changes happened due to prevailing facts and circumstances.He has further submitted that it was difficult to trace the price revision trend at the SKU / product description level as the same may have changed in the past. He has also enclosed Annexure-2 stating that he has collated the MRP data at a Brand Combination level which included various SKUs. He has also

enclosed invoices of the key Brand Combinations vide Annexure-2A to substantiate the MRP mentioned in Annexure-2. He has also contended that the data provided in Annexure-2 plotted the MRP of the concerned Brand Combinations manufactured during the calendar Years 2013, 2014, 2015, 2016, 2017, 2018 and 2019 and in a majority of cases e.g. S. No. 1 of Annexure-2 which provided MRP data for one of the Brand Combinations, namely, "Clean & Clear FFW 100" showed that there was review of prices on a regular basis and wherever required, price revision was undertaken. He has further contended that in the calendar year 2017, there was a reduction in the MRP in the case of "Clean & Clear FFW 100" when the rate of GST was reduced from 28% to 18% in terms of Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017.To illustrate he has summarized the changes in the MRP of "Clean & Clear FFW 100" as below:-

MRP revision in "Clean & Clear FFW 100"			
Calendar Year	**MRP (INR)**	**Invoice No.**	**Invoice Date**
2015	99	514125366	27.11.2015
2016	110	528171066	25.02.2016
2017 (prior to GST rate reduction)	120	7001002028	28.09.2017
2017 (after GST rate reduction)	110	3603003957	29.12.2017
2018	117	2101003135	19.05.2018
2019	120	9002010047	18.01.2019

50. The Respondent has also submitted Annexure-3 enclosing photographs of his products to claim that the products compared by the DGAP pre and post reduction were different which could not be compared. He has also attached Annexure-4 to substantiate that the

Powder being manufactured in Baddi was different than the Powder being manufactured in Mulund and there was no tax benefit at Mulund and hence, the prices fixed could not be compared. The Respondent has also stated that he has enclosed the details of the profiteered amount as per his own calculations in Annexure-13 of his submissions dated 05.08.2019 which showed that he has passed more benefit than he was required to pass on.

51. The Respondent has also stated that the DGAP vide his e-mail dated 23.09.2019 had requested for the following information from the Respondent which was also called from the Respondent by this Authority vide order dated 24.09.2019:-

a) Copy of Notification vide which Basic Custom Duty has been increased for Neutrogena and Aveeno products from 10% to 20% w.e.f. 02.02.2018.

b) MRP and Base price (without tax) of products Neutrogena and Aveeno from July, 2017 to December, 2018.

c) Cycle of change in MRP of products Neutrogena and Aveeno from July, 2017 to December, 2018.

d) Total impact on cost of all products after Basic Customs Duty (BCD) was increased from 10% to 20% w.e.f. 02.02.2018 alongwith the Cost Accountant's Certificate.

e) Details of invoice-wise outward taxable supplies during the period from July, 2017 to December, 2018, duly reconciled with GST Returns in the format sent after separately mentioning various distribution channels.

f) Yearly price change cycle of all the products alongwith date and supporting invoices pre and post MRP revision.

52. The Respondent vide his submissions dated 03.10.2019 has submitted the following in response to the additional data asked for as above:-

a) That the rate of BCD for certain Aveeno and Neutrogena products was increased from 10% to 20% in terms of Clause 101 (a) read with the Second Schedule of the Finance Bill, 2018 w.e.f. 02.02.2019, a copy of the above Bill was attached by him as Annexure-2.

b) He has also provided an excel sheet in which the MRPs and base prices (without tax) of Neutrogena and Aveeno products from July 2017 to December 2018 werementioned at the product description level vide Annexure-3.

c) He has also submitted the MRP data for Neutrogena and Aveeno products from July 2017 to December 2018 at a Brand Combination level as per Annexure-4.He has also claimed that it was difficult to trace the price revision trend at an SKU / product description level as the same might have changed in the past. Accordingly, he has collated the MRP data at a Brand Combination level which included various SKUs within the said level.

d) He has further stated that he wasmaking supplies through various channels such as (i) General Trade (ii) Institutional Trade (iii) Key/Modern Trade (iv) others and (v) Exports and was in the

process of analysing the trade wise taxable supplies from July, 2017 to December, 2018 and getting the same certified from a Cost Accountant. Considering the nature of the information sought as well as the time required by the Cost Accountant to verify and certify the information, he requested that he may be granted a period of six (6) weeks to provide the said information.

e) He has also submitted that vide his submissions dated 04.09.20019 he has provided the MRP data of the key products at the Brand Combination level which was considered in the DGAP's Report dated 24.06.2019 alongwith the sample invoices. He has further submitted that he was in the process of preparing the said data for all the productswhich were under consideration in theabove Report dated 24.06.2019. As far as supporting invoices for the said price changes in case of all the products under consideration were concerned, he submitted that the invoices related to numerous Brand Combinations for a period of 7 years and incertain cases, the invoices hadbeen archived and hewas in the process of acquiring copies of the invoices from his warehouses at various locations across the country where such invoices have been archived.He requested that he may be granted a period of six (6) weeks to provide the said information.

53. The DGAP was also directed to file clarifications on the submissions made by the Respondent who vide his Report dated 26.11.2019 in respect of clubbing of the supplies made to all the product distribution channels, CSD and non-CSD supplies in a common group while computing the profiteering, during the course

of investigation, has stated that the Respondent has not submitted the details of all the distribution channels separately.

54. The DGAP has further stated that the profiteered amount has been arrived at by comparing the average of the base prices of the FMCGs products sold during the period from 01.11.2017 to 14.11.2017, with the actual invoice-wise base prices of such products sold during the period from 15.11.2017 to 31.12.2018. The reference base prices of the products which were not sold during the period from 01.11.2017 to 14.11.2017, were taken from the sales data for the period from July, 2017 to October, 2017 and the price list submitted by the Respondent. The excess GST so collected from the recipients, was also included in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased base price. Passing on of the excess benefit was not within the scope of investigation whichwas limited to the products where the commensurate benefit has not been passed on to the recipients. Excess benefit, if any passed on to one recipient, could not be the ground to deny such benefit to another.

55. The DGAP has also claimed that the Respondent has not provided the details of the stock transfers separately even after he was directed to do so by this Authority and hence his claim could not be considered. He has further claimed that the prices of the products have been compared with the similar products sold during the pre rate reduction period. He has also contended that the Respondent has not supplied the details of all the products separately mentioning

their SKU numbers in each transaction in support of his claim even after being asked to do so.

56. The DGAP has also claimed that Section 171 of the Central Goods and Services Tax Act, 2017 did not provide for any scope for adjustment of increase in cost and other additional expenses which were borne previously, against the benefit of reduced tax rate. The DGAP has further claimed that the Respondent has submitted that the base prices were increased to offset the increase in the operational costs, packing material and other services etc. which could not be accepted as such increase could not have happened overnight to exactly coincidewith the GST rate reduction w.e.f. 15.11.2017. The DGAP has further claimed that in his reply dated 03.10.2019 the Respondent has only submitted the copy of the Notification vide which BCD has been increased for the Neutrogena and Aveeno products from 10% to 20% w.e.f. 02.02.2018 and MRPs and Base prices (without tax) of products Neutrogena and Aveeno pre & post 02.02.2018 and cycle of change in MRPs of products Neutrogena and Aveeno from July, 2017 to December, 2018 to the NAA on 04.10.2019 but he has not submitted the details of supplies made to various distribution channels and other information in support of his claim.

57. We have carefully considered the Reportsfurnished by the DGAP and the submissions made by the Respondent and all other documents placed on recordand it is revealed that the Respondent ismanufacturing and selling consumer general products, healthcare products, medical devices and pharmaceutical products and is

operating in 22 States of India. It is also revealed that the Respondent is supplying his products through various distribution channels like (i) General Trade which included wholesale distributors and retailers(ii) Institutional Trade like hospitals andCSD (iii) Key/ Modern Trade which comprises oflarge retail chains and e-commerce operators(iv) Others,sales not forming part of the above channels and (v) Exports.

58. It is further revealed thatthe Central Government, on the recommendation of the GST Council, has reduced the GST rate on the products being supplied by the Respondent from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017 and hence, there is no dispute that the Respondent is required to pass on the benefit of above reduction in the rate of GST by commensurate reduction in prices of the products which he is admittedly supplying, as per the provisions of Section 171 (1) of the CGST Act, 2017. It is also apparent that the DGAP has calculated the profiteered amount or the amount the benefit of which has not been passed on by the Respondent due to increase in the base prices of the impacted goods or due to non commensurate reduction in the supplies made by the Respondent during the period from 01.07.2017 to 31.12.2018 as Rs. 2,30,40,74,132/- and this profiteered amount has been arrived at by the DGAP by comparing the average of the base prices of the impugned products sold during the period from 01.11.2017 to 14.11.2017 or the price list submitted by the Respondent, with the actual invoice-wise base prices of such products sold during the period from 15.11.2017 to 31.12.2018.

59. The Respondent has submitted that the DGAP's investigation has not been initiated in compliance with Rule 128 of the CGST Rules asthere was no written application.He has further submitted that the present proceedings have been initiated on the basis of a *suo moto* reference made vide letter dated 09.10.2018 by the Secretary of this Authority to the Standing Committee on Anti-Profiteering which was without jurisdiction.In this connection it would be relevant to mention that the Respondent was asked by this Authority to intimate how he has passed on the benefit of above rate reduction to the customers as he was one of the largest supplier of FMCGs and the Respondent videhis letters dated 24.08.2018, 07.09.2019 and 28.09.2018 (Annexure-4 of Respondent's submissions dated 05.08.2019) had intimated that he had passed on full benefit of tax reduction while selling his products to his distributors by reducing the MRPs, who were his recipients and he had not profiteered in contravention of the provisions of Section 171 of the above Act. He had also intimated that he had also informed his distributors and issued advertisements to inform the consumers about the price reduction. He had further intimated that affixing of stickers of reduced MRPs was not his responsibility and it was not possible to affix them as the Notification was issued in this regard only on 16.11.2017 and the whole process was time consuming and could not be taken immediately. He had also informed that once the product was sold he was not responsible for affixing stickers. He had also supplied the Stock Taking Unit (SKU) wise details of the pre and post rate reduction of MRPs which showed that in respect of some of the SKUs the reduction in the MRPs was not commensurate with the rate reduction which might

involve profiteering in terms of Section 171 of the CGST Act, 2017. Therefore, this Authority had suo moto decided to forward the letter dated 28.09.2018 and the enclosures attached with it to the Standing Committee on Anti-Profiteering to take necessary action under Rule 128 (1) of the CGST Rules, 128 vide its letter dated 09.10.2018 (Annexure-5 of submissions dated 05.08.2019). It would also be relevant to state here that this Authority as per Para 9 of the 'Methodology & Procedure' notified by it on 28.03.2018,under the powers given to it under Rule 126 of the CGST Rules, 2017,has jurisdiction to take suo moto cognizance of the contravention of the provisions of Section 171 (1) of the CGST Act, 2017. The above Para states as under:-

"(9). The Authority may inquire into any alleged contravention of the provisionsof Section 171 of the Central Goods & Services Tax Act, 2017 on its ownmotion or on receipt of information from any interested party as defined inRule 137 (c), person, body, association or on a reference having been made to itby the Central Government or the State Government."

60. Therefore, it is clear that on receiving the information from the Respondent which disclosed that the Respondent might have committed violation of the provisions of the above Section this Authority had referred the matter to the Standing Committee on Anti-Profiteering under Rule 128 (1) of the above Rules for ascertaining whether there was prima facie evidence to support the allegation of not passing on the benefit of tax reduction against the Respondent.

Therefore, the claim of the Respondent that there was no complaint before the Standing Committee to take action is not correct. Further, Since, this Authority had referred to the matter on suo moto cognizance no complaint in the prescribed format APAF-1 was required to be filed by it.

61. The Respondent has also referred to the Order dated 19.07.2019 passed by the Hon'ble Delhi High Court in the case of **Reckitt Benckiser v. Union of India WP (C) 7743/2019**(Annexure-14 of submissions dated 05.08.2019) wherein with respect to products not complained of, the Hon'ble High Court had given limited interim relief to the extent that the petitioner therein was not required to give the information to the DGAP.However, it is respectfully submitted that the above Order does not help the case of the Respondent since, the investigation in the case of the Respondent was required to be carried out in respect of all the SKUs which had been impacted due to rate reduction w.e.f. 15.11.2017 as the details of all such SKUs had been supplied by the Respondent himself to this Authority vide his above referred letters.Therefore, the DGAP has rightly carried out investigation in respect of all the impacted SKUs under Rule 129 (2) of the above Rules.

62. The Respondent has also claimed that the only requirement under Section 171 (1) was that the benefit of tax reduction should be passed on to the recipient by way of a *"commensurate reduction in prices"*however, the above Section had not prescribed any method of computation by which the profiteering can be computed. It would be appropriate to mention here that the provisions of Section 171 (1) of

the CGST Act, 2017 are absolutely clear in this regard which require that the Respondent was legally obliged to pass on the benefit of rate reduction by commensurate reduction in the prices which meant that he was required to compute the MRPs in respect of each SKU after the rate of tax had been reduced and show it on each SKU. The above computation is a simple mathematical calculation which needs no prescription either under the above Act or the Rules. However, the above mathematical computation or methodology for determination of the benefit of tax reduction has to be applied on case to case basis depending on the facts of each case and no one mathematical formula can be fixed for computing it. The mathematical methodology used in respect of the case where the rate of tax has been reduced and ITC not allowed cannot be applied in the case where the rate of tax has been reduced and ITC allowed. Similarly, the mathematical methodology applied in the case of FMCGs like the present case of the Respondent cannot be applied in the case of construction services. Even the mathematical methodology applied in two cases of FMCGs may be differentdue to the number of such goods and and the period during which the benefit of tax reduction has not been given. Therefore, no mathematical methodology is required to be fixed under the above Section to compute the benefit of tax reduction.

63. The Respondent has further claimed that as per Section 171 (3) of the Act this Authority *"shall exercise such powers and discharge such functions as may be prescribed"*. He has also stated that as per Section 2(87) of the CGST Act,the word *'prescribed'*shall mean as prescribed by the CGST Rules on the recommendations of the GST

Council. Therefore, this Authority could discharge only such functions and exercise such powers as were specifically mentioned in the CGST Rules. In this regard it would be worthwhile to mention that under Rule 126 of the CGST Rules, 2017 this Authority has been granted power to determine 'Methodology & Procedure' for determination whether the benefit of rate reduction or of ITC has been passed on by a registered person to the recipient or not,by the Central Government as per the provisions of Section 164 of the above Act which has approval of the Parliament. Rule 126 has further been framed on the recommendation of the GST Council which is a constitutional body created under the Constitution (One Hundred and First Amendment) Act, 2016. Therefore, the above power has both legislative sanction as well as incorporation in the CGST Act, 2017 and the CGST Rules, 2017. The delegation provided to this Authority under the above Section and Rule is clear, precise, unambiguous and necessary and is well within the provisions of the Constitution and therefore, it has been rightly conferred on this Authority. It would also be appropriate to mention here that this Authority has power to 'determine' the methodology and not to 'prescribe' it as per the provisions of the above Rule and therefore, no set prescription can be laid while computing profiteering.

64. The Respondent has also contended in his letter dated 28.09.2018 (Annexure-4 of Respondent's submissions dated 05.08.2019) that he has passed on full benefit of tax reduction through his distributors by reducing the MRPs and that affixing of stickers of MRPs was not his responsibility. However, as a manufacture the Respondent and not

the wholesale distributors or retailers, is entirely responsible for fixing the MRPs as only he can fix, round off and print the MRPs per the provisions of Rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011 which states as follows:-

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

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

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

"WM-10(31)/2017

Government of India

Ministry of Consumer Affairs, Food and Public Distribution

Department of Consumer Affairs

Legal Metrology Division

Krishi Bhawan, New Delhi

Dated: 16.11.2017

To,

The Controller of Legal Metrology,

All States/ UTS

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

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

Further, this relaxation will also be applicable in the case of unsold stocks manufactured/packed imported after 1st July, 2017 where the

MRP would reduce due to reduction in the rate of GST post 1st July, 2017.

This order would be applicable upto 31st December, 2017

Yours faithfully

(B. N. Dixit)

Director of Legal Metrology

Tel: 01123389489 / Fax.-011-23385322

Email: dirwm-ca@nic.in

Copy to: All Industries/ Industry Associations/ Stake Holders

66. However, it is apparent from the letter dated 28.09.2018 (Annexure-4) that the Respondent had not complied with the above letter and had not reduced and fixed the MRPs on the impacted SKUs and shifted his responsibility on the distributors and retailers who had continued to sell his products at the pre rate reduction prices. Therefore, it is clear that the Respondent has not passed on the benefit of rate reduction to the consumers and has committed violation of the provisions of Section 171 (1) of the above Act.

67. The Respondent has also contended that the pricing of products was a complex exercise and products were usually not priced individually and the cost of taxes was only one of the elements which determined the final prices. In this behalf it would be appropriate to mention that Section 171 (1) deals with passing on the benefit of tax reduction and

has no connection with the fixing of the prices which can be done by the Respondent as per his own methodologybut the Respondent cannot packet the benefit of tax reduction which has been granted by the Central and the State Governments out of their own tax revenue to the ordinary consumers and therefore, the Respondent is legally bound to demonstrate that he has passed on the above benefit by commensurate price reductions. The Respondent is also not required to pay the benefit from his own money and hence he should have no problem in passing on the same.

68. He has further contended that the prices at which the products were sold to a distributor depended of several factors and the same product might have different prices when sold through different product channels even though the printed MRP was the same for each product at the retail channels. He has also submitted a Chart to prove his contention. However, it is apparent from the Chart submitted by him that the MRP in respect of JB Oil 100ml Monsoon-B was Rs. 94/- whereas the base price varied from Rs. 65.52, Rs. 66.32 and Rs. 63.52 to the distributors. However, the above contention of the Respondent is fallacious as the benefit has ultimately to be passed on to the consumer and it does not matter what price was charged to the distributor. Any preferential price offered to a distributors would increase his profit but it would have no impact on passing on the benefit of tax reduction as the ultimate price to be paid by a customer remained the same.

69. The Respondent has also made reference to the judgment of the Hon'ble Supreme Court passed in the case of **Basant Industries v.**

Asst. Collector of Customs 1996 (81) ELT 195 (SC)and it is respectfully submitted that the law settled in the above case is not applicable in the present case as the ultimate price being charged by the Respondent from the customers was the same irrespective of the fact that he had charged different prices from his distributors for the same products which shows that the benefit of tax reduction stood on a different footing which was required to passed on to each customer on each SKU.

70. He has also argued that the fixation of prices was subject to principle of '*commercial expediency'*and it wasfor the businessman to decide how to conduct his business and not for the tax authorities to sit in judgment.In this regard it would be appropriate to mention that there is no issue in accepting the above principle but the Respondent does not have the liberty to appropriate the benefit of tax reduction. The Respondent has full liberty to fix prices but he is required to pass on the above benefit by commensurate price reductions as per the provisions of Section 171 (1) of the above Act.

71. Reliance in this regard was placed by the Respondent on the decisions of the Hon'ble Supreme Court given in the cases of **S.A. Builders Ltd. v. CIT(Appeals) (2007) 1 SCC 781** and **Hero Cycles (Pvt.) Ltd. v. CIT (2015) 16 SCC 359**based on which he has claimed that fixing of an ideal selling price common for all categories of sales was not proper as the products continued to be sold through different categories which could not be averaged. In this behalf it would be relevant to point out that the Respondent has himself computed the 'ideal Base price per unit for pre GST rate reduction period' in column

Lof Annexure-13 submitted by him through his submissions dated 05.08.2019 and compared it with the base price after rate reduction in column N of the above Annexure and therefore, he cannot cite the above cases in his favour.

72. The Respondent has also claimed that no personal hearing was granted to him by the DGAP. In this regard it is mentioned that the DGAP is not required to give opportunity of hearing to the Respondent as there is no such provision in the CGST Rules, 2017. However, the DGAP was required to issue notice to the Respondent as per the provisions of Rule 129 (3) of the above Rules which he has given on 15.01.2019 (Annexure-6 of Respondent's submissions dated 05.08.2018) and therefore, he has complied with the provisions of the above Rules. However, this Authority has granted him full opportunity of hearing during which the Respondent has been heard at length and he has also filed his written submissions on 05.08.2019, 04.09.2019 and 03.10.2019, as per the provisions of Para 6 the Methodology & Procedure framed by this Authority on 28.03.2018 read with Rule 133 (2) of the above Rules. Therefore, the Respondent cannot claim that he has been denied opportunity of hearing.

73. He has also cited the judgments of the Hon'ble Supreme Court passed in the cases of **Dharampal Satyapal Ltd. v. Dy. Commissioner of C. Ex. 2015 (320) ELT 3 (SC)**and **Escorts Farms Ltd. v. Commissioner, (2004) 4 SCC 281**in which the Hon'ble Supreme Court has held that opportunity of hearing could not be denied. However, it would be appropriate to submit here that the

Respondent has been afforded full opportunity of hearing and hence the above cases do not help his case. He has also made reference to the judgment of the Hon'ble Delhi High Court passed in the case of **CCE v. SG Engineers 2015 (322) ELT 204 (Del.).**However, as has been mentioned above the Respondent has been afforded due opportunity of defending himself and has been heard in detail hence there has been no violation of the principle of *audi alteram partem* and that of principles of natural justice.

74. The Respondent has also alleged that the DGAP had computed profiteering arbitrarily on a methodology which was not prescribed either under the CGST Act or the CGST Rules.As discussed supra no fixed mathematical methodology can be prescribed for computing the amount of benefit which is required to be passed on under the provisions of Section 171 (1) of the above Act as such computation will vary from case to case based on the facts. However, in the present case the DGAP has compared the average of the base prices of the products sold during the period from 01.11.2017 to 14.11.2017 with the actual invoice wise base prices of such products sold during the period from 15.11.2017 to 31.12.2018. The reference base prices of the products which were not sold during the period from 01.11.2017 to 14.11.2017 were taken from the sales data for the period from July 2017 to October 2017 and the price list submitted by the Respondent. The DGAP has computed the average base prices of the products on the basis of the details of the invoices and the price list submitted by the Respondent himself. He has also taken period of 14 days only to compute the average base prices so that it

is almost equal to the actual prices. Only in those cases where no sales of a product have been made during the period between 01.11.2017 to 14.11.2017 he has taken the sale prices from July 2017 to October 2017 or from the price list. The DGAP has also computed the average pre rate reduction prices as the Respondent was not selling his products on single base price and was charging different prices from different buyers. It was also not possible to compare the actual pre rate reduction prices with the post rate reduction prices for every customer as the same customer may not have bought the same goods during the pre and the post reduction periods.A customer may also not have purchased goods in the pre rate reduction period at all and may have bought them in the post reduction period or vice versa. The DGAP was required to compare the pre rate reduction prices with the actual post reduction prices as the benefit was required to be passed on to each buyer and it could not have been calculated by computing the average base prices post rate reduction. The above mathematical methodology adopted by the DGAP is logical, reasonable, correct and is in consonance with the provisions of Section 171 (1) of the CGST Act, 2017 and hence the same can be relied upon.

75. The Respondent has further alleged that the methodology adopted by him was not allowed to be explained.Perusal of the methodology adopted by the Respondent as per Annexure-13 of his submissions dated 05.08.2019 shows that he has taken in to consideration the price of a particular product description sold to a particular customer in the last invoice prior to 15.11.2017 as the base price prior to 15.11.2017

(i.e. the date from which GST rate reduction came into effect). Where such a price was not available till 01.07.2017 (i.e. the date of commencement of GST), he has taken the price available in the price list as on 14.11.2017 on the ground that if the price had already been increased/reduced prior to the GST rate reduction, there was no rationale of creating an artificial price by resorting to an average and the price after the GST rate reduction must be compared to the last prevailing price prior to such rate reduction. The Respondent after determining the pre reduction base price as has been stated above has factored in certain tax costs which hehad allegedly borne at the time of commencement of the GST with effect from 01.07.2017 while computing the commensurate benefit required to be passed on.The Respondent has also taken in to account the losses which he had allegedly incurred at the time of introduction of GST w.e.f. 01.07.2017. Thereafter, the Respondent has computed the ideal base price which he could have fixed for hisproducts after the commencement of GST, considering the higher rate of GST for the pre GST period. This ideal base price has been calculated by adding the increased tax cost at the time of commencement of GST to the actual base prices of the products prior to the tax rate reduction. The Respondent has thereafter compared this ideal base price of a particular product description in the pre-rate reduction period to the actual selling prices of the said product description supplied to the same customer in each of the invoices after the GST rate reduction for the following periods to compute profiteering:-

1. 15.11.2017 to 31.03.2018

2. 15.11.2017 to 31.07.2018

3. 15.11.2017 to 31.12.2018

76. It is clear from the above para that the Respondent has taken in to account the price of a particular product description sold to a particular customer in the last invoice prior to 15.11.2017 as the base price prior to 15.11.2017and where such a price was not available till 01.07.2017 he has taken the price available in the price list as on 14.11.2017. However, the Respondent has considered one invoice having the maximum base price for computing the base price whereas he should have taken average of the base prices which he had charged to his different customers making purchase from him through different channels. Taking the maximum base price from an invoice or from the price list has resulted in reducing the amount of benefit when compared with the post GST base price. the DGAP has computed the average pre rate reduction base prices after taking in to account all the invoices issued to different customers which gives more representative measure of the base prices than the prices computed by the Respondent. The Respondent has then added the tax costs and the losses which he had allegedly incurred at the time of the introduction of the GST w.e.f. 01.07.2017 and then arrived at the pre rate reduction ideal base prices. In this connection it would be relevant to mention that the Respondent has given no justification for adding tax costs. The Respondent could also not have added the alleged losses in the pre rate reduction base prices which he has stated to have incurred when the rate of GST was increased w.e.f. 01.07.2017. The above claim of the Respondent is incorrect as the GST rates were fixed after taking in to account the pre GST Central

and the State Tax rates and were almost equal to the tax rates which were prevalent during the pre GST period. In any case if the GST rates were more than the pre GST tax rates the Respondent had full liberty to increase his prices w.e.f. 01.07.2017. If he had not done so it was his own business call and he cannot deny benefit of tax reduction to the customers when the rate was reduced w.e.f. 15.11.2017. The Respondent had also not added the tax cost and the losses suffered by him in the prices of his products between the period from 01.07.2017 to 14.11.2017 and it is surprising to note that he has chosen to add them w.e.f. 15.11.2017 when he was required to reduce his prices commensurate with the tax reduction. Such increase in the base prices could not have happened over night to exactly coincide with the reduction in the tax rate w.e.f. 15.11.2017.The Respondent has then compared the base prices calculated by him for the pre rate reduction period with the actual prices post rate reduction for the periods w.e.f. 15.11.2017 to 31.03.2018, 15.11.2017 to 31.07.2018 and 15.11.2017 to 31.12.2018 however, he has not given any justification for considering the above three time periods. Accordingly, the Respondent has claimed that he has passed on excess benefit of Rs. 9,82,72,510/- during the period from 15.11.2017 to 31.12.2018 as per Annexure-13 prepared by him.

77. It is absolutely clear from the above that the Respondent has not commensurately reduced his prices but he has infact increased them by adding the tax costs and the losses w.e.f 15.11.2017 on the base prices which he was already charging on 14.11.2017 as is apparent from the perusal of column L and M of Annexure-13 submitted by

him. It is also clear that the Respondent has arbitrarily computed the pre rate reduction base prices of his products by taking in to consideration the highest selling base prices instead of the average base selling prices although he was admittedly selling his products to different customers at different prices. Therefore, it is absolutely clear that the Respondent had no intention of passing on of the above benefitand he has thus denied the benefit of tax reduction to his customers. Therefore, it is established that he has committed violation of the provisions of Section 171 (1) of the above Act. It is also established that the methodology adopted by the Respondent while computing the benefit of tax reduction was illogical, unreasonable, arbitrary, illegal and incorrect and hence the same cannot be accepted.

78. The Respondent has also submitted that the approach adopted by the DGAP in hisReport was completely arbitrary and there was no uniformity in the mechanism adopted by the DGAP while examining allegations of profiteering.However, it is clear from the facts mentioned above that infact the approach adopted by the Respondent while claiming to pass on the benefit of tax reduction was arbitrary and the approach of the DGAP was valid and correct.

79. He has also argued that the DGAP in one of his investigations has separated the CSD and non-CSD supplies while computing the benefit of tax reduction,however, in the present case, he had not done so. In this connection it would be relevant to mention that the Respondent had not furnished the channel wise details of the outward taxable supplies to the DGAP inspite of the specific request

made by the DGAP during the course of the investigation and hence there was no reason for him to separately consider the CSD and non CSD supplies. Therefore, the allegation made by the Respondent on this ground is baseless.

80. He has further argued that with respect to the rate reduction made vide Notification No. 19/2018-Central Tax (Rate) dated 26.07.2018, the DGAP had considered a post rate reduction period of approximately 65 days, whereas, in the present investigation, the period post rate reduction has been taken as 411 days and hence, the different approaches adopted by the DGAP were *ex facie* arbitrary when it was for the same Respondent. In this connection it would be appropriate to mention that the DGAP is required to compute the amount of profiteering till the benefit was not passed on. Since the DGAP had initiated the investigation vide his Notice dated 15.01.2019 (Annexure-6 of submissions dated 05.08.2019) he has rightly taken the period w.e.f. 15.11.2017 to 31.12.2018 and has found that the Respondent has not passed on the above benefit during the above period. In case the Respondent had passed on the benefit before 31.12.2018 the DGAP would not have extended the period of his investigation till the above date. Hence, the above objection of the Respondent is irrelevant.

81. The Respondent has also arguedthat the DGAP has calculated total profiteering of Rs.2,30,40,74,132/- and incorrectly considered only those products where there was positive profiteering andhe has ignored the instances where he has passed on excess benefit.In this connection the Respondent must realize that the Central and the

State Governments have reduced the rate of tax with the aim that the benefit of such reduction would be passed on to the ordinary consumer. This benefit is further required to be passed on each purchase made by a customer by commensurate reduction in the price. Therefore, every customer is entitled to the benefit and the Respondent has no discretion to pass it on certain products as per his own convenience and deny the same on certain other products. Any such discrimination exercised by the Respondent is hit by the provisions of Section 171 (1) of the above Act as well as Article 14 of the Constitution of India. Therefore, less benefit passed on one product cannot be set off against the excess benefit passed on another product. Hence, the profiteered amount has to be calculated on those products on which no benefit or less than commensurate benefit has been passed on. Accordingly, the above contention of the Respondent is farfetched and hence it cannot be accepted.

82. He has further argued that the DGAP has erred in including the amount of GST of Rs.35,14,68,936/- in the profiteered amount which has been deposited with the Government. In this connection it would be appropriate to mention that the Respondent has not only collected excess base prices from the customers which they were not required to pay due to 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 vary objective of both the above Governments which aimed to provide benefit of rate reduction to the general public. The Respondent was legally not required to collect the excess GST and

therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of tax reduction to them by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing goods from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. The above amount can also not be paid to the eligible buyers from the CWFs as the Respondent has not deposited it in the above Fund. Therefore, the above contentions of the Respondent are untenable and hence they cannot be accepted.

83. TheRespondent has also contended that the DGAP has wrongly included the stock transfer transactions in the profiteered amount. However, perusal of the Report dated 24.06.2019 as well as the supplementary Report dated 26.11.2019 furnished by the DGAP shows that the Respondent has not supplied the details of the stock transfer transactions and the amount involved in them to the DGAP. The Respondent was also directed by this Authority to supply details of the outward taxable supplies made by him during the period from July 2017 to December 2018 but he has failed to supply the same. Therefore, there was no evidence before the DGAP or this Authority to consider these transactions while computing the profiteered amount. The Respondent has also claimed that since no monetary consideration had been paid on such transactions no commensurate reduction could have been done. He has further claimed that in case

these transaction were taken in to account they would be counted twice in the profiteered amount. He has also quoted Rule 28 of the CGST Rules, 2017 to support his above arguments. However, as has been discussed above the Respondent has not supplied the details of such transactions and hence they cannot be taken in to account while computing the profiteered amount and accordingly an amount of Rs. Rs.95.86 Crore claimed to have been included in the profiteered amount on the stock transfer transactions cannot be reduced from the profiteered amount of Rs.2,30,40,74,132/-. The Respondent vide Annexure-15 of his submissions dated 05.08.2019 has also enclosed few sample tax invoices issued by him in respect of stock transfer transactions however, in the absence of the details which the Respondent was required to furnish to support his claim, the above invoices cannot be taken in to consideration. Therefore, the above arguments of the Respondent are devoid of any substance and hence the same deserve rejection.

84. The Respondent has further contended thatin the case of 79 product descriptions, the DGAP has adopted alternate product descriptions without any reasonable justification to compute profiteering. He has also attached list of 79 such product descriptions pre and post rate reduction as Annexure-16 with the profiteered amount. Perusal of the record shows that the Respondent had not supplied the details of all the impacted goods SKU wise inspite of his having been asked to do so by the DGAP and by this Authority vide its order dated 24.09.2019. Hence, the DGAP has compared the prices of similar products pre and post

rate reduction. The Respondent has also not supplied the SKU number wise details of his products while selling the same product through different channels which he was specifically asked to supply. The Respondent has also failed to produce any reliable evidence to prove his above claim during the present proceedings and hence mere attaching of a list cannot be relied upon unless he had submitted SKU number wise details of the products.

85. He has also submitted a list of 16 product descriptions claiming that the DGAP has compared completely different products as the products considered prior to GST rate reduction have a different chemical composition from the products considered after the GST rate reduction.In this connection it would be relevant to mention that the Respondent has not supplied the SKU number wise details of the above products during the course of the investigation or even when he was asked to do so by this Authority vide its order dated 24.09.2019. He has also not provided any evidence to prove that the chemical composition of the above 16 products was different and they were different products and were launched in the market for the first time after 14.11.2017. In the absence of cogent and reliable evidence the above contentions of the Respondent cannot be relied upon his mere assertion.

86. In this regard, the Respondent has also made reference to the Order dated 22.01.2019 passed by this Authority in the case of **DGAP v. Satya Enterprises, Case No. 3/2019** wherein it was held that newly introduced products were not considered for the computation of profiteering by the DGAP. He has also attached

photographs of the newly introduced products post 14.11.2017 vide Annexure-17 of his submissions dated 05.08.2019. However, perusal of these photographs does not show that these products were newly introduced in the post rate reduction period as the Respondent has not produced their production logs or copies of the record whereby he had decided to launch these new products with different chemical composition. Every new product launch needs a number of decisions to be taken before it is launched and in the absence of production of record of such decisions the claim made by the Respondent is not tenable. Accordingly, the profiteered amount of Rs.19,41,44,747/- calculated on these 16 product descriptions cannot be excluded from the total profiteered amount and the above case also does not help his cause.

87. The Respondent has also stated that the DGAP has wrongly compared the weighted average prices in the preGST rate reduction period to the actual prices in the postGST rate reduction period. However, as has been mentioned above the DGAP has correctly compared the weighted average prices pre rate reduction with the actual prices post rate reduction as the Respondent was selling one product at different rates therefore the weighted average price was required to be computed which has been correctly compared with the actual price post rate reduction as profiteered amount was required to be computed on each sale of the product so that the benefit of tax reduction is passed on to each customer. It was also not possible to compare the actual pre and post rate reduction prices as the same recipients had not

purchased the same products during the two periods and one recipient may not have bought any products from the Respondent either in the pre or the post rate reduction period. Hence, the above arguments of the Respondent are flawed and therefore, the same cannot be accepted.

88. He has also stated that since the weighted average prices included the stock transfer transactions the same were erroneous. In this regard it would be pertinent to mention that the Respondent had neither supplied the details of the stock transfer transactions during the investigation nor supplied them on the specific direction of this Authority given on 24.09.2019 and hence the above claim of the Respondent is incorrect.

89. The Respondent has further stated that the period of investigation of 411 days was extraordinarily long and the DGAP had proceeded on the assumption that the Respondent was not entitled to increase his prices over a period of time. On this issue it would be relevant to mention that the DGAP has conducted investigation from 15.11.2017 when the tax rate was reduced till 31.12.2018 when he had started the investigation after having received the complaint against the Respondent from the Standing Committee on Anti-Profiteering on 07.01.2019 during which he had found that the Respondent had not reduced his prices due to rate reduction till the above date. The Respondent had also not produced any evidence to show that he had increased his prices during the above period. Therefore, the DGAP has rightly taken the above

period for computing the profiteered amount and hence the contention of the Respondent made in this regard is not correct.

90. The Respondent has also alleged that while calculating the weighted average base prices in the pre-GST rate reduction period where the DGAP could not find the sales of certain product descriptions during the period from 01.11.2017 to 14.11.2017, he has considered the preceding months whichwas not uniform. However, the Respondent has not suggested any other method to calculate the pre rate reduction prices. It is apparent from the perusal of the Report dated 24.06.2019 filed by the DGAP that firstly he has taken the prices from the sales made by the Respondent during the period from 01.11.2017 to 14.11.2017 and in case they were not available he has taken the prices from the preceding months till 01.07.2017 or from the price list as on 14.11.2017. No uniform period could have been adopted by the DGAP while calculating the pre GST base prices as in respect of some of the products no sales had been made by the Respondent during the period between 01.11.2017 to 14.11.2017whereas he had increased the post rate reduction prices of these products and resorted to profiteering. Therefore, the process used by the DGAP was correct and reasonable and hence the same cannot be faulted with. There is also no question of accommodating the fluctuations in the market conditions during the period considered while calculating the pre rate reduction prices as the Respondent has not changed his prices during the above period on account of such fluctuations.

91. The Respondent has further alleged that while computing the weighted average price, the DGAP has considered a carton as a single unit irrespective of the number of pieces in it. The Respondent has not produced any evidence to substantiate his above claim and hence the same cannot be accepted.

92. He has also submitted that the DGAP has failed to appreciate that different factors at different points had affectedhis costs which had resulted in price increase. In this connection it would be pertinent to mention that the provisions of Section 171 (1) of the above Act required the Respondent to pass on the benefit of tax reduction to the consumers only and have no mandate to look in to fixing of prices of the products which the Respondent was free to fix. If there was any increase in his costs the Respondent should have increased his prices between the period from 01.07.2017 to 14.11.2017 however, it cannot be accepted that his costs had increased on the intervening night of 14/15.11.2017 when the rate reduction had happened which had forced him to increase his prices exactly equal to the reduction in the rate of such tax. Such anuncanny coincidence is unheard off and hence there is no doubt that the Respondent has increased his prices for appropriating the benefit of tax reduction with the intention of denying the above benefit to the consumers.

93. The Respondent has further submitted that Powder was being manufactured at two locations, in Baddi (Himachal Pradesh) and Mulund (Maharashtra) on whichExcise Duty and VAT was approximately 17.97% andthere was additional cost of 2% on

account of loss of CENVAT credit of Excise Duty, therefore, there was total tax cost of approximately 20%. He had also changed the packaging of Powder which hadincreased his costs by approximately 4%. After the tax rate reduction while the rate of GST has come down from 28% to 18%, hehas reduced the prices of Powder productsbutthe DGAP has not taken into account the above costs while determining the profiteered amount. However, perusal of the record shows that the Respondent has not produced any evidence to show that he has infact reduced his prices post rate reduction. On the other hand it is apparent from Annexure-13 submitted by the DGAP that the Respondent instead of reducing his prices has increased them and hence resorted to profiteering and has denied the benefit of such reduction. Therefore, an amount of Rs.30,86,81,503/- which has been profiteered by the Respondent in respect of the above product cannot be excluded from the profiteered amount. Hence all the claims made by the Respondent in this regard are not tenable.

94. He has also contended that the DGAP has failed to appreciate that the prices of the 'Baby Wipes' were determined after procuring them from the third-parties which were enjoying benefit of area-based exemption from payment of Excise Duty and accordingly, he had factored in the same while determining his own pricesas the effective tax cost was approximately 13.87%. He has also argued that under the GST regime, the area-based exemption was removed and an uniform 28% rate of GST was imposed which has increased his costs however, he has not increased his prices. In this connection it would be relevant to

mention that the Respondent has not produced any Notification issued by the Central or the Government of Himachal Pradesh which can show that the area-based exemption has been withdrawn by them w.e.f. 01.07.2017. On the other hand the Government of India in the Ministry of Industrial Policy and Promotion vide its Notification No. F. No. 10 (1)/2017-DBA-II/NER dated 05.10.2017 has continued to grant the area-based exemption to the eligible manufacturers in the State of Himachal Pradesh. There is also no evidence to suggest that the Respondent was charging less prices on the above product after taking in to account the area-based exemption which means that he was charging uniform price for the above product throughout all the States without taking in to account the area-based exemption. The Respondent has himself admitted in his submissions dated 05.08.2019 that he has not reduced the price of the above product when rate of tax was reduced on it from 28% to 18% w.e.f. 15.11.2017 and hence the DGAP has rightly computed the profiteered amount of Rs.10,84,91,611/- on the Baby Wipes. Therefore, the claim of the Respondent that he has passed on excess benefit of Rs. 4,40,98,185/- on the Baby Wipes as has been shown in Annexure-13 prepared by him is also incorrect. Based on the above reasons all the above claims made by the Respondent are frivolous and hence the same cannot be accepted.

95. The Respondent has also claimed that the DGAP ought to have considered the additional costs including change in IT systems, marketing costs, operating costs.Inflation,increase in the cost of raw materialsand ingredients and services etc. which were factored in

while determining the prices of the products, which the DGAP has not considered. As discussed above the provisions of Section 171 (1) of the above Act only require the DGAP to consider the effect of tax reduction on the prices and they do not ask for taking in to account the costs and hence the same were not required to be considered by the DGAP. The Respondent had also not suffered any losses due to increase in the rates of GST at the time of coming in to force of the GST or even if he has suffered them it was his own business call not to increase his prices.In case there was any increase in his costs the Respondent could have increased his prices on account of these costs any time between the period from 01.10.2017 to 14.11.2017 but he cannot claim that his costs had suddenly increased from 15.11.2017 when the rate reduction had become effective. Moreover, there could also not have been price increase in respect of the impacted products exactly equal to the amount of tax reduction. Therefore, it is apparent that the prices were not increased due to the above costs but they were increased to pocket the benefit which was to be passed on to the consumers.

96. The Respondent has also submitted that the DGAP has failed to consider that pricing of products sold by the Medical Division was determined on the negotiationshence the same could not be compared. In this regard it would be relevant to mention that the DGAP has compared the effect of tax reduction on the base prices which were to be charged after tax reduction with the actual prices which were charged post tax reduction and hence the methodology

applied by him in this regard is correct and the above objection of the Respondent is untenable.

97. The Respondent has further submitted that he has carried out his own computations which disclosed that he has passed on more than the commensurate benefit of tax rate reduction. However, perusal of Annure-13 vide which the Respondent has submitted details of the methodology while computing the benefit of tax reduction shows that the Respondent has arbitrarily chosen the highest base price of a product pre rate reduction and added tax costs in it and then compared it with the actual post tax price and came to the conclusion that he has passed on additional benefit of Rs. 9,82,72,510/- Crore. As mentioned supra the mathematical methodology adopted by the Respondent to compute the benefit of tax reduction is arbitrary, unreasonable, illegal and incorrect and hence the same cannot be accepted whereas the mathematical methodology employed by the DGAP is reasonable, legal and correct and therefore, the objections raised by the Respondent on this ground are frivolous.

98. He has also stated that the sales details submitted by him to the DGAP for May 2018, wereincorrect therefore, while making computations as per his methodology, he has corrected them. However, the Respondent has not submitted any such details during the course of the proceedings and hence the above claim of the Respondent could not be accepted.

99. He has further stated that in the absence of any prescribed methodology any methodology which was compliant with the

provisions of Section 171 should be accepted.As discussed above the methodology adopted by the Respondent is neither bonafide nor in consonance with the provisions of Section 171 (1) of the above Act and hence, the same cannot be accepted.

100. The Respondent has also claimed that the anti-profiteering provisions were in the nature of anti-abuse provisions which could not restrict the right to carry on trade freely in terms of Article 19(1)(g)and Article 300A of the Constitution of Indiaand earn reasonable profit. In this connection it would be pertinent to mention that the provisions of Section 171 (1) of the above Act require a registered person to pass on the benefit of tax reduction or additional ITC to the recipient by way of commensurate reduction in the prices on every supply of goods and service and they no where state that the above person shall fix his prices as directed under the above Section. This Authority in terms of Section 171 (2) is also required to ensure that both the above benefits are passed on however, it has no mandate to act as a price regulator or price controller. The Respondent is totally free to fix his prices and earn profit and he is only required to pass on the above benefit which have been given to him by the Central and the State Governments by sacrificing their own revenue which he cannot appropriate against his profits. Therefore, the above Section in not violative of the provisions of Article 19 (1) (g) and Article 300A of the Constitution of India, hence, the above claim of the Respondent is untenable.

101. He has also contended that the DGAP has erred in adopting a notional base price and there was no intention of the Government to move away from the free price market principles to an administered

price mechanism. He has also alleged that neither the Constitutional provisions nor the CGST Act empowered the DGAP to get into the realm of price fixation. As discussed in para supra it is abundantly clear that the provisions of Section 171 (1) are concerned only with passing of the above two benefit they in no way provide for administered prices. The DGAP has neither investigated how the prices were fixed by the Respondent nor he has asked him to fix his prices. He has only computed the benefit which the Respondent was required to pass on which he has not done. Therefore, the DGAP has acted in consonance with the duty assigned to him. Accordingly, all the above claims of the Respondent are irrelevant and hence the same cannot be considered.

102. He has also submitted that the term 'profiteering' has been defined in **Black's Law Dictionary**, which was relied upon by the Hon'ble Supreme Court in the case of**Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697** and definedas *"taking advantage of unusual or exceptional circumstances to make excessive profits."*and hence he was entitled to reasonable profit. In this regard it would be appropriate to refer to the Explanation attached to Section 171 of the above Act which states as under:-

"Explanation : For the purposes of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of ITC to the recipient by way of

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

Therefore, it is clear that the above Section speaks about passing on of the above two benefits only which has no connection with the definition given in the **Black's Law Dictionary**and hence it no where affects the right of the Respondent to earn profit.

103. He has further submitted that the MRP only indicated a price above which the goods could not be sold and could not form basis to determine "commensurate" reduction in price. In this regard it would be pertinent to state that the Respondent is legally required to fix the MRP as per the provisions of the Legal Metrology Act, 2009 under which he cannot sell his products at more than the MRP which includes the incidence of GST also. In case the rate of tax is reduced it would automatically result in reduction in the MRP and hence the commensurate price would have to be reflected in the MRP to be charged from a customer. Hence, the above argument of the Respondent cannot be accepted.

104. He has also added that the DGAP has proceeded on the wrong presumption that Section 171 was a consumer protection measure whereas it was a business regulation measure.It appears that the Respondent is labouring under a wrong impression that the above Section provides for regulation of business whereas its only aim is to the pass on both the benefits of tax reduction and ITC to the ultimate consumers by commensurate reduction in the prices. Both these benefits flow from the public exchequer and their focus is customer

and not the business. Therefore, the above contention of Respondent is incorrect.

105. The Respondent has also contended that this Authority has not been empowered under the CGST Act to impose any penalties. However, it would be appropriate to mention that Section 171 (3A) which is reproduced below provides power to this Authority toimpose penalty:-

"(3A) Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten percent of the amount profiteered:

Provided that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority."

106. The Respondent has also cited the judgement passed by the Hon'ble Supreme Court in the case of **Kunj Behari Lal & Ors. v. State of H.P. 2000 (3) SCC 40** wherein it was held that the legislature could not create any substantive rights or obligations or disabilities through general rule making powers unless the same was specifically contemplated by the provisions of the statute under which such powers were exercised. Since, the power to impose penalty has been prescribed under Section 171 (3A) of the CGST Act, 2017 itself hence the above case does not help the Respondent. He has also quoted the case of **Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Limited (2015) 9 SCC 209**,in which it has been

held that if on reading of the statute in entirety, a power did not flow, a delegated authority could not frame a regulation as that would not be in accord with the statutory provisions. Since, this Authority has been conferred power under the above Act to impose penalty the above case is not being followed. He has also argued that since there was no deliberate defiance of law by the Respondent no penalty could be imposed as per the law settled in the case of **Hindustan Steel Ltd. v. State of Orissa 1978 (2) ELTJ 159 (SC).** Since, the Respondent is still to be heard on the quantum of penalty after the present case is decided the above case cannot be relied upon at this stage.

107. The Respondent vide his submissions dated 04.09.2019 has stated that it was difficult to trace the price revision trends at the SKU / product description level as the same may have changed in the past. He has also enclosed Annexure-2 stating that he has collated the MRP data at theBrand Combination level which included various SKUs. He has also enclosed invoices of the key Brand Combinations vide Annexure-2A to substantiate the MRP mentioned in Annexure-2. Perusal of Annexure-2A shows that it gives the details of the MRPs for the year 2019, 2018, 2017 post rate reduction, 2017 pre rate reduction, 2016, 2015, 2014 and 2013 in respect of 75 Brand Combination levels whereas the Respondent was required to supply the MRPs at the SKU level of all the 498 impacted SKUs. The above Annexure also shows that the Respondent was charging less MRPs during the post GST period than the MRPs which were being charged by him during the pre GST period which is not borne out from the investigation carried out by the DGAP and computation of profiteered

amount of Rs. 2,30,40,74,132/-. It is also clear from Annexure-13 submitted by the Respondent with his submissions dated 05.08.2019 that the Respondent has kept his post rate reduction prices deliberately at the same level which he was charging during the pre rate reduction period or has even increased them as compared to the pre rate reduction prices. Hence, the claim of the Respondent that he was regularly increasing his prices in amethodical manner is not correct and hence neither Annexure-2 nor Annexure-2A can be relied upon.

108. The Respondent has also submitted Annexure-3 enclosing photographs of his 16 products to claim that the products compared by the DGAP pre and post reduction were different which could not be compared. However, the Respondent has not produced certificate from any competent agency to prove that thechemical composition of a product differed from another product due to which both the products could not be compared. The Respondent has even not produced his own production log records which could demonstrate that one product was chemically different from the other product. The Respondent has not also supplied the SKU wise details of all the impacted products during the course of the investigation or on the direction passed by this Authority on 24.09.2019 and hence there is no ground to claim that the above 16 products have been wrongly compared with the chemically different products. Therefore, the above contentions of the Respondent cannot be admitted on the basis of the photographs submitted by him.

109. He has also attached Annexure-4 to substantiate that the Powder and Baby Wipes being manufactured in Baddi were enjoying area-based benefit whereas the Powder being manufactured in Mulund was not enjoying such benefit and there was no tax benefit at Mulund and hence, the prices fixed in respect of the goods produced at these two location could not be compared. The Respondent has also stated that he has enclosed the details of the profiteered amount as per his own calculations in Annexure-13 of his submissions dated 05.08.2019 which showed that he has passed more benefit than he was required to pass on. However, as has already been discussed above the Respondent has failed to produce any evidence to show that he is not enjoying area based benefit at Baddi and he was charging less prices for the products being manufactured by him at Baddi. Perusal of Annexure-13 prepared by the DGAP shows that the Respondent has arbitrarily increased the prices of the Powder and Baby Wipes and has thus resorted to profiteering and hence the prices mentioned in Annexure-4 are hypothetical and incorrect and hence the same cannot be relied upon.

110. The Respondent wasasked by the DGAP vide his e-mail dated 23.09.2019 and this Authority vide its order dated 24.09.2019 tosubmit the following information so as to take in to consideration the objections raised by him during the course of the present proceedings:-

(i) Copy of the Notification vide which Basic Customs Duty (BCD) has been increased for Neutrogena and Aveeno line of products from 10% to 20% w.e.f. 02.02.2018.

(ii) MRP and Base price (without tax) of products Neutrogena and Aveeno from July, 2017 to December, 2018.

(iii) Cycle of change in MRP of products Neutrogena and Aveeno from July, 2017 to December, 2018.

(iv) Total impact on cost of all products after Basic Customs Duty was increased from 10% to 20% w.e.f. 02.02.2018 alongwith the Cost Accountant's Certificate.

(v) Details of invoice-wise outward taxable supplies during the period from July, 2017 to December, 2018, duly reconciled with GST Returns in the format sent by the DGAP, after separately mentioning various distribution channels.

(vi) Yearly price change cycle of all the products alongwith date and supporting invoices pre and post MRP revision.

111. The Respondent vide his submissions dated 03.10.2019 has submitted the following in response:-

(a) That the rate of BCD for certain Aveeno and Neutrogena products was increased from 10% to 20% in terms of Clause 101 (a) read with the Second Schedule of the Finance Bill, 2018 w.e.f. 02.02.2018, a copy of the above Bill has been attached by him as Annexure-2.

(b) He has also provided an excel sheet in which the MRPs and base prices (without tax) of Neutrogena and Aveeno products from July 2017 to December 2018 have been mentioned at the product description

level vide Annexure-3. However, the Respondent has not provided the SKU wise details of the above products. Moreover, the Respondent has also shown in the above Annexure that the MRPs of 42 products were changed in the months of June to December however, they were not changed in respect of the rest 8 products. Therefore, it is clear that although the rate of BCD was increased w.e.f. 02.02.2018 the prices were increased by him from the month of June 2018 only and in respect of 8 products they were not increased at all. The Respondent has also not shown what was the commensurate increase in the prices which he had made due to increase in the BCD by 10%. He has also not produced any evidence to show that the above increase was infact made. Therefore, it is apparent that there no evidence to prove that the increase in the BCD has resulted in increase in the MRPs as the increase claimed to have been made has not been made immediately after the BCD was increased.The increase was also not made on all the products w.e.f. 02.02.2018 and there was no increase in respect 8 products. Accordingly, the above claim of the Respondent cannot be relied upon.

(c) He has also submitted the MRP data for Neutrogena and Aveeno products from July 2017 to December 2018 at a Brand Combination level as per Annexure-

4. He has also claimed that it was difficult to trace the price revision trend at a SKU / product description level as the same might have changed in the past. Accordingly, he has collated the MRP data at a Brand Combination level which included various SKUs within the said level. Again the details of cycle of change in the MRPs have not been given SKU wise and the above Annexure also does not show any trend and hence the same cannot be considered.

(d) He has further stated that he was making supplies through various channels such as (i) General Trade (ii) Institutional Trade (iii) Key/Modern Trade (iv) others and (v) Exports and was in the process of analysing the trade wise taxable supplies from July, 2017 to December, 2018 and getting the same certified from a Cost Accountant. Considering the nature of the information sought as well as the time required by the Cost Accountant to verify and certify the information, he requested that he may be granted a period of six (6) weeks to provide the said information. He has further submitted that vide his submissions dated 04.09.20019 he has provided the MRP data of the key products at the Brand Combination level which was considered in the DGAP's Report dated 24.06.2019 alongwith sample invoices. He has also claimed that he was in the process of preparing the said data for all the products

which were under consideration in the above Report dated 24.06.2019. As far as supporting invoices for the said price changes in case of all the products under consideration were concerned, he submitted that the invoices related to numerous Brand Combinations for a period of 7 years and in certain cases, the invoices had been archived and he was in the process of acquiring copies of the invoices from his warehouses at various locations across the country where such invoices have been archived. He requested that he may be granted a period of six (6) weeks to provide the said information. It is clear from the above submissions that the Respondent has not supplied the basic data which was required to establish the claims made by him in his submissions although he was asked to do so by the DGAP vide his e-mail dated 23.09.2019 and by this Authority vide its order dated 24.09.2019. He has supplied partial information vide his submission dated 03.10.2019. The Respondent has not supplied the above data even after a lapse of a period of 6 weeks as was committed by him vide his above submissions. Since, the present proceedings are time bound accordingly the defence of the Respondent was closed vide order dated 15.11.2019 a copy of which was also supplied to the Respondent vide e-mail dated 18.11.2019 as well as by post which was received by him on

21.11.2019. Inspite of due communication of the above order the Respondent has not approached this Authority therefore, it can be construed that the Respondent did not want to submit the required information and all his contentions made in this regard were frivolous.

112. Based on the above facts the profiteered amount is determined as **Rs. 2,30,40,74,132/-**as per the provisions of Rule 133 (1) of the above Rules as has been computed vide Annexure-13 of the Report dated 24.06.2019. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. The Respondent is also directed to deposit an amount of Rs. 2,30,40,74,132/-in the CWF of the Central and the concerned State Government, as the recipients are not identifiable, as per the provisions of Rule 133 (3) (c) of the above Rules alongwith 18% interest payable from the dates from which the above amount was realised by the Respondent from his recipients till the date of its deposit. The above amount shall be deposited within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned Commissioners CGST/SCST. The State/Union Territory wise amount of benefit to be deposited in the concerned CWF is as under:-

Table

S. No.	State Code	State	Profiteered Amount (Rs.)
1	02	Himachal Pradesh	33,02,17,775

2	03	Punjab	8,47,46,490
3	05	Uttarakhand	1,23,42,666
4	06	Haryana	2,08,76,240
5	07	Delhi	9,66,05,932
6	08	Rajasthan	3,27,78,720
7	09	Uttar Pradesh	54,05,98,573
8	10	Bihar	7,38,65,910
9	18	Assam	8,44,00,366
10	19	West Bengal	15,31,51,571
11	20	Jharkhand	2,85,72,596
12	21	Orissa	3,86,09,317
13	22	Chhattisgarh	71,047
14	23	Madhya Pradesh	3,04,91,758
15	24	Gujarat	4,64,65,155
16	27	Maharashtra	41,36,41,031
17	29	Karnataka	11,74,23,349
18	32	Kerala	1,76,04,638
19	33	Tamil Nadu	8,57,12,789
20	36	Telengana	5,72,57,528
21	37	Andrapradesh(New)	3,86,40,679
	Grand Total		**2,30,40,74,132/-**

113. It is evident from the above narration of facts that the Respondent has denied the benefit of tax reduction to the customers in contravention of the provisions of Section 171(1) of the CGST Act, 2017 and has thus profiteered as per the explanation attached to Section 171 of the above Act. Therefore, he is apparently liable for imposition of penalty under Section 171(3A) of the CGST Act, 2017. Therefore, a show cause notice be issued directing him to explain why the penalty prescribed under the above sub-Section should not be imposed on him. Accordingly, the notice dated 02.07.2019 vide which it was proposed to impose penalty on the Respondent under Section 29 and 122-127 of the above Act read with Rule 21 and 133 of the CGST Rules, 2017 is hereby withdrawn to that extent.

114. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by this Authority is deposited in the CWFs of the Central and the State Governments as per the details given above. 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.

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

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

23.12.19

A.K. Goel
(Secretary, NAA)

F. No.22011/NAA/54/jnj(fmcg)/2019/7366-7404 Date: 23.12.2019

Copy To:-

1. M/s Johnson and Johnson Pvt. Ltd., L.B.S Marg, Mulund(W), Mumbai-400080.

2. Director General, Directorate 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,
3. Commissioner of Commercial Taxes, Office of the Chief Commissioner of State Tax, Eedupugallu, Krishna District, Andhra Pradesh.
4. Commissioner of Commercial Taxes, Additional Commissioner (GST), Commercial Tax Department, Ground Floor, Vikas Bhawan, Baily Road, Patna – 800 001
5. Commissioner of Commercial Taxes, Commercial Tax, SGST Department, Behind Raj Bhawan, Civil Lines, Raipur - 492 001
6. Commissioner of Commercial Taxes, C-5, Rajya Kar Bhavan, Near Times of India, Ashram Road, Ahmedabad.
7. Commissioner of Commercial Taxes, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula. PIN - 134 151.
8. Commissioner of Commercial Taxes, Excise & Taxation Commissioner, Government of Himachal Pradesh, B-30, SDA Complex, Kasumpati, Shimla.
9. Commissioner of Commercial Taxes, Vanijya Therige Karyalaya, 1st Main Road, Gandhinagar, Bangalore- 560 009
10. Commissioner of Commercial Taxes, Government Secretariat, Thiruvananthapuram -695001.
11. Commissioner of Commercial Taxes, Moti Bangla Compound, M.G. Road, Indore
12. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010
13. Commissioner of Commercial Taxes, Office of the Commissioner of State Tax, Banijyakar Bhawan, Old Secretariat Compound, Cuttack - 753 001.
14. Commissioner of Commercial Taxes, Office of Excise and Taxation Commissioner, Bhupindra Road, Patiala- 147 001
15. Commissioner of Commercial Taxes, Kar Bhavan, Ambedkar Circle, Jaipur, Rajasthan - 302 005.
16. Commissioner of Commercial Taxes, PAPJM Building, Greams Road, Chennai – 600 006.
17. Commissioner of Commercial Taxes, O/o the Commissioner of State Tax, CT Complex, Nampally Station Road, Hyderabad - 500 001.
18. Commissioner of Commercial Taxes, Office of the Commissioner, Commercial Tax, U.P. Commercial Tax Head Office Vibhuti Khand, Gomti Nagar, Lucknow (U.P)
19. Commissioner of Commercial Taxes, State Tax Department, Head Office Uttarakhand, Ring Road, Near Pulia No. 6, Natthanpur, Dehradun
20. Commissioner of Commercial Taxes, 14, Beliaghata Road, Kolkata - 700 015.
21. Commissioner of Commercial Taxes, Deptt of Trade & Taxes, Vyapar Bhavan, IP Estate, New Delhi-2 Pin: 110 002.
22. Commissioner of Commercial Taxes, Office of the Commissioner of Taxes, Government of Assam, Kar Bhawan, Ganeshpuri, Dispur, Guwahati - 781 006.
23. Commissioner of Commercial Taxes, Commercial Taxes Department, Project Bhawan, Dhurva, Ranchi- 834 004.
24. Chief Commissioner of Central Goods & Services Tax, Bhopal Zone 48, Administrative Area, Arera Hills, Hoshangabad Road, Bhopal M.P. 462 011

25. Chief Commissioner of Central Goods & Services Tax, C.R.Building Rajaswa Vihar, Bhubaneshwar 751007
26. Chief Commissioner of Central Goods & Services Tax, Cochin Zone C.R.Building, I.S.Press Road, ERNAKULAM COCHIN682018
27. Chief Commissioner of Central Goods & Services Tax Delhi Zone C.R. Building, I.P. Estate, NEW DELHI110 109
28. Chief Commissioner of Central Goods & Services Tax, Hyderabad Zone GST BHAVAN, L.B.Stadium Road, Basheer Bagh, HYDERABAD 500 004
29. Chief Commissioner of Central Goods & Services Tax Jaipur Zone, New Central Revenue Building, Statue Circle, CSCHEME JAIPUR 302 005
30. Chief Commissioner of Central Goods & Services Tax, Meerut Zone Opp. CCS University,Mangal Pandey Nagar, Meerut 250 004.
31. Chief Commissioner of Central Goods & Services Tax, Mumbai Zone GST Building, 115 M.K. Road, OPP. Churchgate Station, MUMBAI400020
32. Chief Commissioner of Central Goods & Services Tax, Telangkhedi Road, Civil Lines, Nagpur 440001
33. Chief Commissioner of Central Goods & Services Tax Panchkula SCO 407408, SECTOR8, PANCHKULA
34. Chief Commissioner of Central Goods & Services Tax, Pune Zone GST Bhawan ICE House, 41A, Sasoon Road, OPP. Wadia Collage, PUNE411001
35. Chief Commissioner of Central Goods & Services Tax, (Ranchi Zone) 1st Floor, C.R. Building, (ANNEX) Veerchand Patel Path Patna, 800001
36. Chief Commissioner of Central Goods & Services Tax, Vadodara Zone 2ND FLOOR, Central Excise Building, Race Course Circle, Vadodara 390 007
37. Chief Commissioner of Central Goods & Services Tax Visakhapatnam Zone GST Bhavan, Port Area, Visakhapatnam 530 035.
38. NAA Website.
39. Guard File.