

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

Case No. 21/2020  
Date of Institution 25.09.2019  
Date of Order 13.04.2020

**In the matter of:**

1. Sh. Apoorve Talera, Proprietor, Shree Gautam Traders, Vardhaman Complex, Near ICICI Bank, Vapi, Gujarat.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

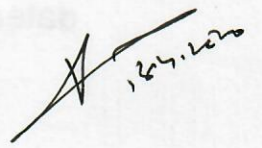
**Versus**

M/s Litecon Industries Pvt. Ltd., Block No. 255, B/h Kamraj Sugar, Joj N Joy Road, N. H. 8, Taluka Kamrej, Distt. Surat-394180.

Respondent

**Quorum:-**

Dr. B. N. Sharma, Chairman  
Sh. J. C. Chauhan, Technical Member  
Sh. Amand Shah, Technical Member



Present:-

1. None for the Applicant No. 1.
2. None for the Applicant No. 2.
3. None for the Respondent.

ORDER

1. The present Report dated 24.09.2019 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case are that the Gujarat State Screening Committee on Anti-profiteering, vide its letter dated 22.02.2019 had forwarded an application dated 04.01.2019 filed by the Applicant No. 1 to the Standing Committee on Anti-profiteering, under Rule 128 (2) of the CGST Rules, 2017, alleging profiteering by the Respondent in respect of "Fly Ash Blocks" supplied by the Respondent. The Applicant had also enclosed two invoices of "Fly Ash Blocks" supplied by the Respondent along with his application viz. Invoice No. 4204 dated 18.12.2018 and Invoice No. 4481 dated 02.01.2019.
2. The Applicant No. 1 had also alleged that the Respondent did not pass on the benefit of reduction in the GST rate from 12% to 5% w.e.f. 01.01.2019 notified vide Notification No. 24/2018- Central Tax (Rate) dated 31.12.2018 and instead increased the unit base price. The

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Applicant No. 1's invoice details have been furnished by the DGAP in the Table-A given below:-

**Table-A**

Sr. No.	Name of the product supplied	Pre GST rate revision on 31.12.2018			Post GST rate revision on 01.01.2019			Difference (in Rs.)
		Invoice No. & Date	GST rate	Price excluding GST (in Rs. Per cu. mt.)	Invoice No. & Date	GST rate	Price excluding GST (in Rs. Per cu. mt.)	
1.	Fly Ash Blocks	4204 dated 18.12.2018	12%	2232.14	4481 dated 02.01.2019	5%	2380.95	148.81

3. The Gujarat State Screening Committee on Anti-profiteering had conducted prima facie verification of the application and after having satisfied itself that the Respondent was involved in profiteering, had forwarded the application to the Standing Committee on Anti-profiteering.

4. The Standing Committee on Anti-profiteering had examined the aforesaid reference, in its meeting and forwarded the same to the DGAP for detailed investigation in terms of Rule 129 (1) of the above Rules.

5. The Applicant No. 1 had also submitted the following documents along with his application:-

(a) Duly filled in Form APAF.

(b) Proof of identity (Aadhar Card).

(c) Copies of Tax Invoices mentioned in Table "A" above.

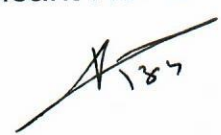
6. The DGAP, on receipt of the application and the supporting documents from the Standing Committee on Anti-profiteering, had issued Notice under Rule 129 (3) of the CGST Rules, 2017 on 10.04.2019 calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in the GST rate w.e.f. 01.01.2019 has 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 supporting documents. Vide the above mentioned notice, the Respondent was also given an opportunity to inspect the non-confidential evidence/information furnished by the Applicant No. 1 during the period from 15.04.2019 to 17.04.2019, which the Respondent did not avail.
7. Vide e-mail dated 18.09.2019, the DGAP had also provided Applicant No. 1 an opportunity to inspect the non-confidential documents/reply furnished by the Respondent on 19.09.2019 which the Applicant No. 1 did not avail.
8. The period of investigation conducted by the DGAP in this case is from 01.01.2019 to 31.03.2019.
9. The DGAP had sought extension of time for completing the investigation which was duly extended by this Authority vide its order dated 19.06.2019 in terms of Rule 129 (6) of the CGST Rules, 2017.
10. The DGAP, in his Report dated 24.09.2019 has stated that the Respondent had filed his submissions vide letters/e-mails dated 12.04.2019, 14.04.2019, 28.04.2019, 02.05.2019, 04.06.2019, 10.06.2019, 17.08.2019, 19.08.2019, 30.08.2019 and 07.09.2019 which are summed up as follows:-

- a. That there was an increase in the cost of each and every raw material required for the manufacture of the said "Fly Ash Blocks", as compared to the month of December, 2019 and the increase in the cost of raw materials ranged from 0.28% to as high as 22%.
- b. That the cumulative effect of increase in the prices of raw materials when factored with their proportion in the total cost of the product came to 1.73%. Thus, out of the total percentage increase in the base price of the product on and from 01.01.2019 when compared with December, 2019, 1.73% was attributable to the increase in the cost of production as demonstrated by the cost sheet furnished by him.
- c. That the product was made taxable @ 5% from 01.01.2019 but the inputs, capital goods and input services for the final product "Fly Ash Blocks" attracted taxable rate higher than 5% leading to accumulation of ITC. The Respondent has also stated that:-
- (i) All the inputs were taxable at the rate of more than 5%, such as Soluble Oil, Cement and the like.
- (ii) All the input services were taxable at the rate of more than 5% such as legal services, security services, telephone/mobile/internet services and the like. Barring transportation, all the input services of the Respondent were taxable at the rate of 18%.



(iii) All the capital goods were taxable at the rate of more than 5%. Generally, all the capital goods of Chapter 84 and 85 of the CTA, 1975 were taxable at the rate of 18%.

- d. That as per the CBIC Circular No. 79/53/2018-GST dated 31.12.2018, the ITC in respect of input services and capital goods was not to qualify for refund of ITC due to inverted duty structure and thus he was left with no option but to treat the excess ITC in respect of input services and capital goods over and above 5% as cost of production since the said unutilized amount would have never materialized to him as refund and would have always remained blocked and unutilized. Thus, partial increase in the base price of the product manufactured by him i.e. "Fly Ash Blocks" was due to blockage of the accumulated ITC pertaining to input services.
- e. That the Applicant No. 1 had not made any payment in the months of November, 2018 and December, 2018 for the goods purchased by him. The Applicant No. 1 had made payment of Rs. 1,57,550/- for the goods purchased by him in the month of September, 2018 belatedly in the month of January, 2019. As business policy, the Respondent was charging interest on the delayed payments at the rate of 18% per annum. Thus, the interest on delayed payment was adjusted by way of increase in the base price of the product supplied to the Applicant No. 1.

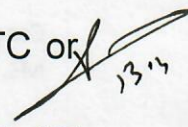


11. The Respondent has also furnished the following documents to the DGAP: -

- (a) GSTR-1 & GSTR-3B Returns for the period from November, 2018 to March, 2019.
- (b) Details of invoice-wise outward taxable supplies for the period from November, 2018 to March, 2019.
- (c) Sample copies of the invoices, pre & post 01.01.2019.
- (d) Purchase Register and sample Purchase Bills.
- (e) Details of invoice-wise outward taxable supplies for the period from January, 2018 to October, 2018.

12. The DGAP has examined the application, the various replies of the Respondent and the documents/evidence brought on record and observed that the main issues for determination were whether the rate of GST on the "Fly Ash Blocks" supplied by the Respondent was reduced from 12% to 5% w.e.f. 01.01.2019 and if so, whether the benefit of such reduction in the rate of GST has been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017. He has also observed that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the "Fly Ash Blocks" supplied by the Respondent from 12% to 5% w.e.f. 01.01.2019, vide Notification No. 24/2018-Central Tax (Rate) dated 31.12.2018 and the same had also not been contested by the Respondent.

13. The DGAP has also examined Section 171 of the CGST Act, 2017 and stated that the legal requirement in the event of benefit of ITC or

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reduction in the rate of tax was that there must be a commensurate reduction in the prices of the goods or services. Such reduction could only be in terms of money, so that the final price payable by a recipient got reduced commensurate with the reduction in the tax rate or benefit of ITC. This was the only legally prescribed mechanism to pass on the benefit of ITC or reduction in the rate of tax to the recipients under the GST regime and there was no other method which a supplier could adopt to pass on such benefits.

14. The DGAP has also submitted regarding the contention of the Respondent that the base prices were increased to offset the increase in prices of the raw materials, increase in cost of production and blockage of accumulated ITC due to inverted duty structure etc. that his contention could not be accepted as such increase in the prices of raw materials could not have happened overnight to exactly coincide with the GST rate reduction w.e.f. 01.01.2019. Thus, the increase in the cost of raw materials/input services, if any, had no relevance in the context of GST rate reduction w.e.f. 01.01.2019. The DGAP has further submitted that Section 171 of the CGST Act, 2017 did not provide any scope for adjustment of increase in the cost against the benefit of reduced tax rate and it could not be argued that the elements of cost were affected by the downward revision of the output GST rate. He has also argued that the direct and indirect costs, demand and supply and other expenses might be considered in determination of prices but these factors were independent of the output GST rate and the commercial factors could not change overnight on the change of GST rate.





15. The DGAP has also clarified regarding blockage of accumulated ITC due to inverted duty structure and stated that it was seen that the ITC had three parts viz. ITC on inputs, ITC on services and ITC on capital goods. In respect of tax on inputs, the refund of ITC was allowed in case of inverted duty structure and hence it would not matter. Regarding ITC on services, the DGAP has observed that the refund of ITC was not allowed but inverted duty structure before 01.01.2019 was there also and hence it would have no effect on profiteering after 01.01.2019. Regarding ITC on capital goods, it was seen that the Respondent had not taken any ITC on capital goods during the period under consideration.

16. The DGAP has also reported that the methodology adopted for determining the amount of profiteering could be explained by illustrating the calculation in respect of a specific item i.e. Fly Ash Blocks 600 x 200 x 75. This item sold during the month of December, 2018 (pre-GST rate reduction) was taken and an average base price (without GST) was obtained by dividing the total taxable value by total quantity of this item (size) sold during December, 2018. The average base price of this item (size) was compared with the actual selling price of this item (size) sold during the post-GST rate reduction period i.e. on or after 01.01.2019 as has been illustrated in the Table-B given below:-

**Table-B**

(Amount in Rupees)

Sl. No.	Description	Factors	Pre Rate Reduction (Before 01.01.2019)	Post Rate Reduction (From 01.01.2019)
1.	Product Description (Item Code)	A	Fly Ash Blocks 600 x 200 x 75	
2.	Period	B	December, 2018	

3.	Total quantity of item sold	C	15845	
4.	Total taxable value	D	295015.35	
5.	Average base price (without GST)	$E=D/C$	18.62	
6.	GST Rate	F	12%	5%
7.	Commensurate Selling price (post Rate reduction)	$G=E*1.05$		19.55
8.	Invoice No.	H		GST/4462/1819
9.	Invoice Date	I		01.01.2019
10.	Total quantity (above invoice)	J		1490
11.	Total Invoice Value	K		30173
12.	Actual Selling price (post rate reduction of item (size))	$L=K/J$		20.25
13.	Difference (Profiteering)	$M=L-G$		<b>0.70</b>
14.	Final Profiteering	$N=M*J$		<b>1043</b>

17. The DGAP has thus stated that the Respondent did not reduce the selling price of the "Fly Ash Blocks 600 x 200 x 75", when the GST rate was reduced from 12% to 5% w.e.f. 01.01.2019, vide Notification No. 24/2018 Central Tax (Rate) dated 31.12.2018 and hence profited an amount of Rs. 1043/- on particular Fly Ash Blocks item (size) and thus the benefit of reduction in the GST rate was not passed on to the recipients by way of commensurate reduction in the price, in terms of Section 171 of the CGST Act, 2017. The profiteering in case of all impacted items (size) of the Respondent had also been arrived in the similar manner as per the illustration given above. However, the average base prices for others items (size) would be different from the item (size) which has been shown in the Table above and accordingly, profiteering had been calculated item-wise.

18. The DGAP has also submitted that as regards the amount of profiteering, perusal of the invoices made available by the Respondent

indicated that the Respondent had increased the base prices of the "Fly Ash Blocks" when the rate of GST was reduced from 12% to 5% w.e.f. 01.01.2019 and on the basis of aforesaid pre and post-reduction GST rates and the details of the outward taxable supplies (other than zero rated, nil rated and exempted supplies) of the "Fly Ash Blocks" during the period from 01.01.2019 to 31.03.2019, as furnished by the Respondent, the amount of net higher sales realization due to increase in the base prices of the impacted goods, despite the reduction in the GST rate from 12% to 5% or the profiteered amount came out to be Rs. 55,60,340/-. The DGAP has also furnished details of the computation of the profiteered amount vide Annexure-16 of his Report. The DGAP has further submitted that the profiteered amount had been arrived at by comparing the average of the base prices of the "Fly Ash Blocks" sold during the period from 01.12.2018 to 31.12.2018, with the actual invoice-wise base prices of "Fly Ash Blocks" sold during the period from 01.01.2019 to 31.03.2019. 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 prices.

19. Thus, the DGAP has reported that the amount of profiteering by the Respondent on account of contravention of the provisions of Section 171 of CGST Act, 2017 was Rs. 55,60,340/- which included the profiteering of Rs 299/- in case of the Applicant No. 1. The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. 55,60,340/- has been furnished by the DGAP in the Table given below:-

**Table**

<b>Sr. No.</b>	<b>State Code</b>	<b>State</b>	<b>Profiteered Amount (Rs.)</b>
1	24	Gujarat	13,39,998
2	25	Daman and Diu	3,051
3	26	Dadar and Nagar Haveli	2,52,843
4	27	Maharashtra	39,64,448
<b>Grand Total</b>			55,60,340/-

20. The DGAP has also clarified that in this case, the allegation of the Applicant No. 1 that the base prices of the "Fly Ash Blocks" were increased when there was a reduction in the GST rate from 12% to 5% w.e.f. 01.01.2019, so that the benefit of such reduction in the GST rate was not passed on to the recipients by way of commensurate reduction in prices, was sustainable and it appeared that the base prices of the "Fly Ash Blocks" were indeed increased by the Respondent post GST rate reduction w.e.f. 01.01.2019. Thus, by increasing the base prices of the goods subsequent to the reduction in the GST rate, the commensurate benefit of reduction in the GST rate from 12% to 5%, was not passed on to the recipients. The total amount of profiteering covering the period from 01.01.2019 to 31.03.2019 was Rs. 55,60,340/-.
21. The above Report was considered by this Authority in its meeting held on 25.09.2019 and it was decided to hear the Applicants and the Respondent on 23.10.2019. Accordingly, a notice dated 26.09.2019 was issued to the Respondent to explain why the Report dated 24.09.2019 should not be accepted and his liability should not be fixed for violation of the provisions of Section 171 of the CGST Act, 2017.
22. Six personal hearings were accorded to the parties on 23.10.2019, 11.11.2019, 27.11.2019, 23.12.2019, 15.01.2020 and 07.02.2020 out

of which no hearing was attended by the Respondent. During the course of the hearings, none appeared for the Applicant No. 1 and 2.

23. The Respondent had sent his first written submission on 09.11.2019 vide which he has submitted that the DGAP's Report dated 24.09.2019 was devoid of facts of the case and did not take cognizance of the cogent evidence on record and was thus erroneous to that extent.

24. He has also submitted that the fundamental and basic errors in the quantification of the alleged profiteered amount of Rs. 55,60,340/- were as follows:-

a. That he was selling his product in the market on the basis of price per cubic metre. He has never sold his product on the basis of types of AAC blocks such as "Fly Ash Blocks 600 \*200\*75\* " or "Fly Ash Blocks 625\*240\*100".

b. That inspite of the above undisputed fact that he was selling his product on the basis of per cubic metre, the DGAP had done his working and arrived at the alleged profiteered amount on the basis of the types of the AAC blocks being sold based on their dimensions.

c. That in Row Number 418 of the Excel file named as "profiteering" supplied by the DGAP, the profiteering amount determined was Rs. 0/- (Invoice No. GST/4915/1819 dated 24.01.2019) whereas on the same day another invoice was raised on the same party i.e. M/s Godrej and Boyce Mfg. Co. Ltd. (Invoice No. GST/4919/1819 dated 24.01.2019), wherein the DGAP had determined profiteering of Rs. 14,804/-.

- d. That thus, in two similar invoices raised on the same day to the same party, in one case the DGAP had determined profiteering of Rs. 0/- whereas in the other case the same was determined as Rs. 14,804/-.
- e. That such instances were found throughout the working of the DGAP.
- f. That by working out the average on the basis of types of the AAC blocks sold by the Respondent instead of on the basis of total cubic metre sold, the DGAP had arrived at totally wrong and inconsistent figures of alleged profiteering.
- g. That the DGAP had further not considered the freight expenditure incurred in the alleged profiteered amount although the fact was that the freight element was factored in the selling price.
25. The Respondent has also submitted that the reasons given by the DGAP for not considering the rise in the prices due to rise in the prices of the raw materials before arriving at the amount of profiteering seemed to be purely whimsical in nature.
26. The Respondent has further submitted that he had furnished his reply dated 29.05.2019 before the DGAP and the same along with all its annexures should be considered as part and parcel of this reply. He has also contended that the fact of increase in the prices of the raw materials has led to an increase in the prices of the final product which was specifically brought to the notice of the DGAP. He has also furnished cost sheet, copies of purchase registers and sample purchase invoices vide Annexures A to F.



27. The Respondent has further contended that it was specifically brought to the notice of the DGAP that on an average 1.73 % of the price rise was due to demonstrated increase in the prices of the raw materials which could not be included in the profiteering. The DGAP should have perused the data and given his findings on the same either accepting the contentions or rebutting the same. However, the DGAP had chosen to remain discreet on the said issue.

28. The Respondent has also claimed that instead of giving objective findings on the issue of price rise of the raw materials, the DGAP had tried to step in to the shoes of the Respondent and attempted to sit in judgment as to when a businessman should factor an increase in the prices of the raw materials in to the prices of the final products. The Respondent has further claimed that the decision as to when a corresponding increase in the prices of the raw materials should be factored in the prices of the final product should best be left to the acumen of the concerned entrepreneur. The DGAP was not authorized to decide as to whether or not or for that matter, as to when, an increase in the prices of raw materials should be factored in the prices of the final products.

29. The Respondent has also claimed that he had also submitted before the DGAP vide his submission dated 29.05.2019 that his final product being "Fly Ash Blocks" suffered from severe inverted duty structure menace wherein the GST rate of final products stood at 5% whereas the input services and capital goods were taxable @ 18%. The excess accumulated credit was non refundable leading to rise in the prices of the final products on and from 01.01.2019. However, the DGAP had summarily rebutted the above defence pertaining to the ITC.

accumulation due to inverted duty structure by merely stating that inverted duty structure was there before 01.01.2019 also and hence it would have no effect on the profiteering after 01.01.2019. However, there was an apparent contradiction between Section 54 of the CGST Act, 2017 and Rule 89 of the CGST Rules, 2017 which dealt with quantification of the refund amount in the inverted duty structure. Whereas Section 54 prohibited the refund of ITC in respect of capital goods and input services in case of inverted duty structure there was no such embargo in Rule 89 wherein the refund of ITC was generally allowed.

30. The Respondent has further claimed that subsequently Rule 89 was amended restricting the refund of ITC on input services and capital goods, vide Central Board of Indirect Tax and Customs (CBIC) Circular No. 79/53/2018-GST dated 31.12.2018. Thus, the Respondent was compulsorily required to increase the base prices of his final products to absorb the ITC on input services since it was now non refundable. This important aspect and legislative amendment had been ignored by the DGAP.
31. The Respondent has also argued that the DGAP had also completely ignored the comparative data of other customers of the Respondent submitted along with cogent evidence, on the perusal of which it was clearly forthcoming that increase in the prices in the case of other customers ranged only from 1.71% to 1.99 %.
32. Clarifications were sought from the DGAP on the Respondent's above mentioned submissions. The DGAP has filed his clarifications on 06.12.2019 vide which he has submitted that the allegations of the Respondent were improper as the findings in his investigation Report



were based on the documents and record furnished by the Respondent himself. The DGAP has also submitted that the contention of the Respondent regarding fundamental and basic errors in the quantification of the profiteered amount was incorrect as the profiteering has been calculated on the basis of sale reports submitted by the Respondent. He has also claimed that in Annexure-16 of his Report dated 24.09.2019, the Respondent, apart from the details like Invoice No. & date, place of supply and tax rate etc., has also submitted the following details which are given in the Table below:-

Date	Goods Description	Size	Quantity(A)	Quantity (B)	Rate per unit	Value
12.01.19	Fly Ash Blocks	625x200x100	1500 Nos	18.75 Cubic Meter	2261	42410.63
03.01.19	Fly Ash Blocks	625x200x100	1440 Nos	18.00 Cubic Meter	2190.48	39428.68
01.01.19	Fly Ash Blocks	625x200x225	640 Nos	18.00 Cubic Meter	2285.71	41142.78

The DGAP has further submitted that the cubic meter in the calculation had been shown as the quantity (Volume) of the goods sold in the above invoices. It was not a product description. Hence each different size had been taken as different item and comparison had been made accordingly for computation of profiteering. However, if each different volume (Quantity-B) was taken into consideration as a distinct item,

which appeared to be incorrect, the profiteering would come to Rs. 1,15,67,524.

33. The DGAP has also averred that the contention of the Respondent that profiteering calculated against one purchaser for two different invoices issued on the same day was different, did not hold any ground as profiteering had been calculated against each invoice after comparing it with the average base price. The DGAP has further averred that the freight expenditure had not been shown in the tax invoices issued by the Respondent and only the rate at which the goods were sold had been shown in the invoices issued to the customers. Hence the contention of the Respondent appeared to be incorrect. The DGAP has also enclosed copies of the invoices. He has also stated that all other issues had already been dealt in his Report dated 24.09.2019.
34. The Respondent was also given opportunity to file his written submissions against the DGAP's clarification mentioned above. However, the Respondent did not submit any submissions. Accordingly, the hearing was closed by this Authority vide order dated 23.12.2019. However, the Respondent vide e-mail dated 31.12.2019, again requested for an opportunity of hearing which this Authority had allowed vide its order dated 02.01.2020.
35. The Respondent has filed his next written submissions on 11.01.2020 via e-mail vide which he has stated that the DGAP's clarifications were non comprehensive and were factually unacceptable. He has also stated that on perusal of the DGAP's clarifications, it transpired that the rate of the product being Fly Ash Blocks 625 x 200 x 100 was Rs. 2261/- and this rate was per cubic metre, thus Rs. 2261/- \* 18.75 cubic metre led to taxable value of Rs. 42,410.63/-. Thus, it was amply clear

that the Respondent was selling the Fly Ash Blocks on the basis of per cubic metre quotation and not on the basis of number of pieces or the various types of Fly Ash Blocks. He has further stated that the DGAP, even in his clarifications has failed to comprehend the method of billing of sales adopted by the Respondent.

36. The Respondent has also contended that the DGAP has arrived at the new profiteered amount of Rs. 1,15,67,524/- and the said figure would hold true if each different volume was taken as a distinct item. However, the DGAP had also clarified that the said method and working was inappropriate. Thus, the DGAP has himself accepted that his method and working was inappropriate. The Respondent has also submitted the following:-

- (i) That the DGAP along with his clarifications dated 06.12.2019 has supplied new profiteering working in Excel sheet soft copy.
- (ii) In the said working of the new profiteering, the commensurate price (excluding tax) of Fly Ash Block 600 x 200 x 75 was adopted as Rs. 18.48 /- per piece (and not as per cubic metre) in respect of Invoice No. GST/4462/1819 appearing in Row No. 4.
- (iii) However, for the same product i.e. Fly Ash Block 600 x 200 x 75, the commensurate price was adopted as Rs. 22.90/- per piece in respect of Invoice No. GST/4493/1819 appearing in Row No. 28.

37. The Respondent has also pleaded that he failed to understand as to how there could be two commensurate prices for a given product of specific dimension. He has also stated that the above demonstrated difference was true for every dimension type of Fly Ash Blocks and was the hallmark

of the DGAPs revised workings. The Respondent has further pleaded that when a specific submission was made that the Respondent was selling the product on per cubic metre basis, the DGAP has continued to do working on per piece basis. Even the said per piece working lacked integrity and rationale.

38. The Respondent has also contended that in the month of December 2019 i.e. before reduction in the GST rate from 12 % to 5 %, the total sales in value terms were Rs. 3,03,57,175.31 whereas the total sales in quantity terms were 13133.78 cubic metres Thus, the average per cubic metre rate was Rs. 2311.38. He has also stated that for the period covered under the DGAP's investigation, the total sales in value terms were Rs. 10,00,62,033 /- and the total sales in quantity terms were 41,831.68 cubic metres. Thus, the average rate per cubic metre was Rs. 2,392.02/-. Thus, the Respondent, post GST rate reduction and for the period covered by the present anti-profiteering proceedings, has charged/collected Rs. 33,73,307/- (41,831.68 cubic metres \* 2,392.02 per cubic metre – Rs. 2,311.38 per cubic metre) in excess. However, the said excess could not be termed as profiteered amount because:-

- a. Increase in prices of raw materials was to the extent of 1.73 % as elaborated in submission dated 11.11.2019.
- b. Availability of refund of ITC on capital goods and input services was restricted by the CBIC on 31.12.2019 i.e. on the date of reduction in the GST rate from 12 % to 5 %, which was also elaborated in his submissions dated 11.11.2019.

39. The Respondent has also claimed that as stated in his submission dated 09.11.2019, the calculation of average price lacked rationale. He has

further claimed that the DGAP has himself mentioned the transport charges / freight charges separately in the sales sheet. However, the freight incurred by the Respondent has not been taken in to account while quantifying the profiteering amount. The Respondent has also submitted that the statement of the DGAP that freight was not mentioned separately in the invoices was absolutely incorrect and misleading. Thus, the DGAP has not considered the freight expenditure and has arrived at highly overstated and totally unrealistic figures of profiteering. The Respondent has also furnished sample invoices wherein freight has been charged separately. The Respondent has also requested to decide the case on the basis of his submissions and waived his right of personal hearing.

40. Clarifications were again sought from the DGAP on the Respondent's above mentioned submissions. The DGAP vide his Report dated 23.01.2020 has submitted that the clarifications given by him dated 06.12.2019 were in response to the submissions of the Respondent after the Report was submitted before this Authority. The DGAP has further submitted that the Respondent has contended that increase in prices of the raw materials and non-availability of refund of ITC has led to increase in prices which could not be termed as profiteered amount. In this regard the DGAP has claimed that his Report dated 24.09.2019 was proper as the price of a product could not increase as soon as the rate of tax was reduced. Further, the contention of the Respondent that he was selling his products on the basis of per cubic meter was not correct. He has also enclosed copies of two invoices and claimed that in the first invoice the Fly Ash Blocks were sold at the rate of Rs. 2,595.24 per cubic meter and in the next invoice of Fly Ash Blocks they were sold @ Rs. 1,952.38 per cubic meter. Thus, the rate per cubic meter was not constant and it

varied. Hence, the rate per unit quantity of number had been correctly taken by him. The DGAP has also claimed that the average base price method adopted for a product (SKU) pre rate reduction and its comparison with each invoice after the rate reduction has been followed in all such cases. The DGAP has also clarified that the contention of the Respondent that the freight expenditure was not taken into the consideration might not be accepted as the Respondent was paying tax on the amount inclusive of freight charges and addition of freight had been done for the pre rate reduction period as well as for the post rate reduction period. He has also claimed that at the time of investigation, in the invoices submitted by the Respondent the freight component was not shown separately.

41. The Respondent has filed his last written submissions on 06.02.2020 vide which he has stated that the contention of the DGAP that the price of a product could not increase as soon as the rate of tax was reduced was not correct given the fact that two undisputed events had coincided with the change in the rate of tax, the first was the CBIC clarification dated 31.12.2018 which stated that the refund of ITC on accumulated ITC of input services and capital goods would not be available. Since, the Respondent's product faced the menace of inverted duty structure, such non refundable ITC was nothing but cost which had to be passed on to the customers otherwise viability and survival of the business would get threatened. The second was the demonstrated and substantiated rise in the prices of the raw materials.
42. He has also stated that the DGAP has only questioned the timing of the price rise whereas no submissions on merits of the two reasons given above for price rise had been given by the DGAP. The Respondent has

further stated that regarding the unit of measurement at which the product was sold by the Respondent, the DGAP has finally accepted that the Respondent was selling his product on per cubic metre basis whereas the DGAP has made calculations on per piece basis. The Respondent has also submitted that the difference in the prices per cubic metre was of no consequence since such a difference would also percolate down to per unit selling price. He has also claimed that such per piece calculation lacked objectivity as for a single product, two different prices were adopted. He has also reiterated his previous submissions on the issue of freight expenditure.

43. We have carefully considered the Reports filed by the DGAP, submissions of the Respondent and other material placed on record and it is revealed that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the "Fly Ash Blocks" supplied by the Respondent from 12% to 5% w.e.f. 01.01.2019, vide Notification No. 24/2018-Central Tax (Rate) dated 31.12.2018 which has also not been contested by the Respondent. Therefore, it is evident that rate of tax has been reduced on the above product which was admittedly being supplied by the Respondent. Therefore, the provisions of Section 171 (1) which state that "*any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" squarely apply in this case and the Respondent is bound to pass on the benefit of the above tax reduction to his recipients w.e.f. 01.01.2019.

44. It is also revealed that the DGAP has computed the profiteered amount per unit of the Fly Ash Blocks keeping in view their dimensions as has been explained by him in Table-A of his Report. He has calculated the

average base price of each unit dimension wise for the period from 01.12.2018 to 31.12.2018 and compared it with the actual price of each such unit of the product dimension wise charged by the Respondent during the period from 01.01.2019 to 31.03.2019. The DGAP has calculated the average base price for the pre rate reduction period as the Respondent had sold a particular unit at different base prices to his customers and therefore, there was no alternative except to calculate the average base price for comparison with the actual base price charged post rate reduction. It was also not possible to compare the actual pre rate reduction base price with the actual post reduction base price as the same customer may not have purchased the product in the pre rate reduction period and may have purchased it in the post rate reduction period or vice versa. It was also necessary to compare the average pre rate reduction base price with the actual post rate reduction actual base price as the benefit of tax reduction was required to be passed on to each customer who had purchased the product during the post rate reduction period. Had the comparison been made by calculating the average base price for the post rate reduction period the buyers of those units which had been sold below such average base price would have been denied the benefit of tax reduction although the base price charged from them might have been more than the commensurate price which was required to be charged from them by the Respondent keeping in view the tax reduction. The average base price computed by the DGAP for the pre-rate reduction period is also based on the GSTR-1 Return filed by the Respondent for the month of December, 2019 and since it is spread over a period of 31 days only it gives more accurate and representative value of the average base price. On the basis of the average base prices so



computed by the DGAP in respect of each unit of the product dimension wise, commensurate price has been computed by the DGAP in respect of each unit, keeping in view the reduction in the rate of tax, which has been compared with the actual selling price of the unit having similar dimension supplied post rate reduction and in case the price charged was more than the commensurate price, profiteered amount has been calculated. Accordingly, the DGAP has computed the base prices in respect of all the 66 dimension wise units of the product being sold by the Respondent as per Annexure-16 of his Report and has compared their commensurate prices with the actual sale prices post rate reduction and reported that the Respondent has profiteered an amount of Rs. **55,60,340/-** from his customers. The above methodology has been adopted by the DGAP in all such previous cases of tax reduction which has been duly approved by this Authority. The above mathematical methodology adopted by the DGAP is reasonable, appropriate, accurate and in consonance with the provisions of Section 171 (1) of the CGST Act, 2017 and hence, the same can be relied upon.

45. The Respondent has filed his first written submission on 09.11.2019 vide which he has submitted that he was selling his product on the basis of price per cubic metre and not dimension wise and hence the profiteering has been wrongly computed by the DGAP. However, perusal of the Report of the DGAP shows that the details of the outward taxable supplies submitted by the Respondent himself during the course of the investigation showed that the Respondent was selling his product dimension wise and not cubic meter wise. The invoices showing cubic meter wise sales of his products were not submitted by him during the course of the investigation done by the DGAP and hence, the above claim

of the Respondent appears to be an afterthought which cannot be accepted.

46. The Respondent has also submitted that in Row No. 418 of Annexure-16 furnished by the DGAP, the profiteering amount has been determined as Rs. 0/- whereas on the same day in another invoice it has been computed as Rs. 14,804/-. In this context perusal of Row No. 418 of Annexure-16 shows that the Respondent has sold product of 625 X 200 X 150 dimension the commensurate price of which was Rs. 49.38 per unit whereas the selling price post rate reduction was Rs. 49.06 per unit and hence there was no profiteering. However, vide Row No. 421 he has sold product having dimension of 625 X 240 X 200, the commensurate price of which was Rs. 67.14 per unit and the sale price post rate reduction was Rs. 81.75 per unit, hence, there was profiteering of Rs. 14.61 per unit. By no stretch of imagination commensurate and sale prices of the products having different dimensions can be same and accordingly, the profiteered amount will also be different. It is also evident that the Respondent has increased the selling price of the product mentioned in Row No. 421 much more and hence the profiteering has been on the higher side per unit. Therefore, the above claim of the Respondent is wrong and frivolous and hence, it cannot be accepted.

47. The Respondent has further submitted that the DGAP has not considered the expenditure incurred on freight although it was factored in the selling price. Perusal of the record shows that the DGAP has not taken in to account the freight as it was not mentioned separately by the Respondent in his invoices which were submitted by him during the course of investigation. Had he done so the same would have been considered by the DGAP while computing the profiteered amount. The invoices

produced by the Respondent mentioning the freight separately during the course of the present proceedings as an afterthought cannot be relied upon as it was incumbent on the Respondent to produce them before the DGAP during the investigation. Since, the transaction value realised by the Respondent mentioned in each invoice which was issued during the pre and the post GST period, on which tax was paid by the Respondent, has been taken in to account by the DGAP, while computing the profiteered amount, no fault can be found in the computation of the profiteered amount. Hence, the above claim of the Respondent is not tenable.

48. The Respondent has also claimed that there has been increase in the prices of the raw materials which has led to an increase in the prices of the final products. He has also furnished cost sheet, copies of Purchase Register and sample purchase invoices vide Annexures A to F. However, it is evident from the record that the Respondent has increased the rates of his products w.e.f. 01.01.2019 the date from which the rate reduction has come in to force. The Respondent has no ground to claim that the prices of the raw materials have increased on the intervening night of 31.12.2018/01.01.2019 when the rate reduction has come in to force. The prices have also been increased exactly equal to the reduction in the rate of reduction. Such increase is unimaginable and unheard of which shows that it has been made with the sole aim of misappropriating the benefit of tax reduction and not to pass it on. Hence, the above claim of the Respondent cannot be accepted.

49. The Respondent has further claimed that the DGAP has tried to sit in judgment as to when and how he should increase his prices. In this connection it would be pertinent to mention that provisions of Section 171

provide for passing on the benefits of tax reduction and ITC and they give no mandate to fix the prices. During the course of the present investigation the DGAP has neither gone in to the aspect of raising of the prices by the Respondent nor he has directed the Respondent to fix his prices in a particular manner. He has only investigated the complaint of not passing on the benefit of tax reduction. The Respondent is free to fix and raise his prices as per his own strategy but under the pretext of doing so he cannot pocket the benefit of tax reduction which has been given by the Central and the State Governments from their valuable tax revenue. The Respondent is not required to pay even a single penny from his account. However, he cannot be allowed to deny the benefit to the vulnerable, voiceless and unorganised customers by claiming that there was increase in the prices of the raw materials on the intervening night of 31.12.2018/01.01.2019. The above argument of the Respondent is farfetched and hence, the same cannot be accepted.

50. The Respondent has also contended that his products suffered from denial of ITC due to inverted tax structure which was not allowed by the CBIC w.e.f. 01.01.2019, the date from which the rate of tax was reduced, which has increased his cost. In this connection it would be relevant to mention that the Respondent was eligible to claim the benefit of ITC on all the inputs which formed major part of his cost and hence he has benefitted more than what was his output tax liability. The Respondent was only not eligible to claim benefit of ITC on the input services and the capital goods. The Notification dated 31.12.2019 issued by the CBIC has only clarified the above aspect and it has nowhere denied him the benefit of ITC on input services and capital goods as it was not available to him under Section 54 of the CGST Act, 2017 w.e.f. 01.07.2017. Moreover, the

Respondent has not claimed ITC on the capital goods during the period of investigation. Since, the benefit of ITC on input services and capital goods was not available to the Respondent since coming in to force of the CGST Act, 2017 w.e.f. 01.07.2017 and the Respondent had fixed his prices keeping in view the above denial during the period from 01.07.2017 to 31.12.2018 for the last one and half year, he cannot claim that such denial has resulted in increase in his cost suddenly on 01.01.2019. Hence, the above contention of the Respondent is untenable.

51. The Respondent has also claimed that he was selling his products per cubic meter and not as per their dimensions. He has also produced copy of an invoice to prove it. However, perusal of the record shows that the Respondent was charging different prices for different dimension of his products and was not selling them at the per cubic meter rate. Nowhere the selling price was mentioned in per cubic meter in the invoices submitted by him to the DGAP during the course of the present investigation. Therefore, the above claim of the Respondent is not justified and hence the same cannot be accepted.

52. The Respondent has further claimed that the DGAP has wrongly arrived at the profiteered amount of Rs. 1,15,67,524/- computed on the basis of per cubic meter. However, perusal of the two invoices enclosed by the DGAP with his Report dated 23.01.2020 shows that the contention of the Respondent that he was selling his products on the basis of per cubic meter was not correct as they show different rates of sale per cubic meter. Thus, the rate per cubic meter was not constant and it was different for different units. In case he was selling his products by charging price per cubic meter the sale prices would have been same per cubic meter irrespective of the dimensions of the units. Hence, the rate per unit

quantity of number had been correctly taken by the DGAP. As has been discussed above the Respondent has not sold his product on the basis of volume per cubic meter but has sold it per unit dimension wise and hence, the above profiteered amount of Rs. 1,15,67,524/- calculated by the DGAP cannot be taken to be correct.

53. The Respondent has also pleaded that the DGAP in his clarifications dated 06.12.2019 has supplied new profiteering working in Excel Sheet in which the commensurate price (excluding tax) of Fly Ash Block 600 x 200 x 75 was adopted as Rs. 18.48 /- per piece (and not as per cubic metre) in respect of Invoice No. GST/4462/1819 appearing in Row No. 4. However, for the same product i.e. Fly Ash Block 600 x 200 x 75, the commensurate price was adopted as Rs. 22.90/- per piece in respect of Invoice No. GST/4493/1819 appearing in Row No. 28. However, perusal of the Excel Sheet shows the dimensions of the product shown in Row No. 28 are 625 X 200 X 225 and not 600 x 200 x 75 as has been claimed by the Respondent. The commensurate price without tax has been shown as Rs. 33.40 and not Rs. 22.90 in Row No. 28 as has been claimed by the Respondent. The number of the invoice has also been wrongly mentioned as GST/4493/1819 whereas it is GST/4483/1819 in the above Row. The above sheet has been prepared after taking in to account the prices per cubic meter wise and not unit wise as has been claimed by the Respondent otherwise the profiteered amount would not have come to Rs. 1,15,67,524/-. Therefore, all the above claims made by the Respondent are misleading and frivolous and hence they cannot be entertained.

54. The Respondent has further pleaded that he failed to understand as to how there could be two commensurate prices for a given product of

specific dimension. However, the above claim of the Respondent is falsified by the copies of the invoices submitted by him which have been mentioned above. In each invoice the dimensions of the product have been found to be different. The DGAP has correctly computed the profiteered amount on the basis of the dimensions of the product and there is no error in the same. Hence, the contention of the Respondent made on this ground is untenable.

55. The Respondent has himself admitted that he has charged an excess amount of Rs. 33,73,307/- during the period from 01.01.2019 to 31.03.2019, however, it could not be included in the profiteered amount as it was charged due to increase in the prices of the raw materials as well due to denial of ITC w.e.f. 01.01.2019. In this connection it would be pertinent to mention that both the above claims have been considered in detail in the paras supra and have not been found to be correct and hence the claim made by the Respondent in this regard is not maintainable.

56. The Respondent has also submitted that the difference in the prices per cubic metre was of no consequence since such a difference would also percolate down to per unit selling price. The above contention of the Respondent is incorrect as there can be no difference in the per cubic meter wise price of the products as the cost of production would be same. However, per unit price would vary keeping in view the dimensions and hence the prices per cubic meter and per unit dimension wise would be different which cannot be equated. Hence, the claim made by the Respondent on this ground cannot be accepted.

57. Based on the above facts, it is established that the Respondent has acted in contravention of the provisions of Section 171 of the CGST Act, 2017 and has not passed on the benefit of reduction in the rate of tax to his

recipients by commensurate reduction in the prices. Accordingly, the profiteered amount is determined as **Rs. 55,60,340/-** as per the provisions of Rule 133 (1) of the CGST Rules, 2017. The Respondent is therefore directed to reduce the prices of his products as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017, keeping in view the reduction in the rate of tax so that the benefit is passed on to the recipients. Since, the Applicant No. 1 has stated vide his letter dated 27.04.2019 attached by the DGAP as Annexure-7 with his Report dated 24.09.2019 that he has received the disputed amount therefore, an amount of Rs. 299/- computed as the profiteered amount in respect of the above Applicant shall not be paid to him and shall be deposited in the Consumer Welfare Funds (CWFs) as this amount cannot be retained by the Respondent. Accordingly, the Respondent is directed to deposit the profiteered amount of Rs. 55,60,340/- along with the interest to be calculated @ 18% from the date when the above amount was collected by him from the recipients till the above amount is deposited in terms of the Rule 133 (3) (b) of the CGST Rules, 2017. Since, rest of the recipients in this case are not identifiable, the Respondent is directed to deposit the amount of profiteering of Rs. 55,60,340/- along with interest in the CWFs of the Central and the concerned State Governments as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017 in the ratio of 50:50 along with interest @ 18% till the same is deposited. Accordingly, an amount of Rs. 27,80,170/- will be deposited in the Central CWF while the balance will be deposited in the State CWFs as has been shown in the Table given below:-



<b>Sr. No.</b>	<b>State Code</b>	<b>State</b>	<b>Profiteered Amount (Rs.)</b>
1	24	Gujarat	6,69,999
2	25	Daman and Diu	1,525.50
3	26	Dadar and Nagar Haveli	1,26,421.50
4	27	Maharashtra	19,82,224
<b>Grand Total</b>			27,80,170/-

58. The above amount shall be deposited within a period of 3 months by the Respondent, from the date of receipt of this order, failing which the same shall be recovered by the concerned Commissioners of the Central and the State GST, as per the provisions of the CGST/SGST Acts, 2017 under the supervision of the DGAP and shall be deposited as has been directed vide this order. A detailed Report shall also be filed by the concerned Commissioners of the Central and the State GST indicating the action taken by them within a period of 4 months from the date of this order.

59. It is also evident from the above narration of the facts that the Respondent has denied the benefit of rate reduction of GST to his recipients in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and has thus resorted to profiteering. Hence, he has committed an offence under Section 171 (3A) of the CGST Act, 2017 and therefore, he is apparently liable for imposition of penalty under the provisions of the above Section. Accordingly, a Show Cause Notice be issued to him directing him to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him.

60. As per the provisions of Rule 133 (1) of the CGST Rules, 2017 this order was required to be passed within a period of 6 months from the date of receipt of the Report furnished by the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority

*[Handwritten signature]*  
15/13

on 25.09.2019 the order was to be passed on or before 24.03.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed before the above date due to *force majeure*. Accordingly, this order is being passed today on 13.04.2020 in terms of the Notification No. 35/2020-Central Tax dated 03.04.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017 .

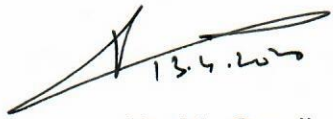
61. A copy of this order be sent to the Applicants and the Respondent free of cost. File of the case be consigned after completion.

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

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

Sd/-  
(Amand Shah)  
Technical Member

Certified copy

  
(A. K. Goel)  
Secretary, NAA



File No. 22011/NAA/84/Litecon/2019

Dated: 13.04.2020

Copy To:-

1. M/s Litecon Industries Pvt. Ltd., Block No. 255, B/h Kamraj Sugar, Joj N Joy Road, N. H. 8, Taluka Kamrej, Distt. Surat-394180.
2. Sh. Apoorve Talera, Proprietor, Shree Gautam Traders, Vardhaman Complex, Near ICICI Bank, Vapi, Gujarat.
3. Commissioner of Commercial Taxes C-5, Rajya Kar Bhavan, Near Times of India, Ashram Road, Ahmedabad.
4. The VAT & UTGST Department, Udyog Bhavan, Third Floor, Bhenslore, Nani Daman-396210.

5. Commissioner of Commercial Taxes GST Bhavan, Mazgaon, Mumbai-400 010.
6. Chief Commissioner of Central Goods & Services Tax Vadodara Zone 2 Floor Central Excise Building, Race Course Circle, Vadodara 390 007.
7. Office of the Commissioner, Central GST & Central Excise, 2nd Floor, Hani's Landmark Building, Above HDFC Bank, Vapi-Daman Road, Vapi, Gujarat – 396191.
8. Chief Commissioner of Central Goods & Services Tax, Mumbai Zone GST Building 115 M.K. Road, Opp Churchgate Station, Mumbai 400020.
9. Chief Commissioner of Central Goods & Services Tax, Telangkhedi Road, Civil Lines, Nagpur 440001.
10. Chief Commissioner of Central Goods & Services Tax Pune Zone GST Bhawan Ice House, 41A, Sasoon Road, Opp. Wadia College, Pune 411001
11. Director General Anti-Profitteering, Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
12. NAA Website/Guard File.

  
13.4.2020

