BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	44/2020
Date of Institution	30.10.2019
Date of Order	17.08.2020

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 Lite Bite Travel Foods Pvt. Ltd., B-505, 5th Floor, Town Centre-II, Andheri Kurla Road, Andheri East, Mumbai-400059.

Respondent

Quorum:-

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

17.8

Present:-

1. None for the Applicant.
2. Sh. Shashi Mathews and Sh. Abhishek Boob, Advocates for the Respondent.

ORDER

1. The present Report dated 25.10.2019, received on 30.10.2019 by this Authority, has been furnished by the Applicant i.e. the Director General of Anti-Profiteering (DGAP), under Rule 129(6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received by the DGAP from the Standing Committee on Anti-Profiteering on 02.05.2019 recommending a detailed investigation in respect of a report dated 24.02.2019 submitted by the Joint Commissioner (AE), CGST & CX, Mumbai East and originally examined by the Maharashtra State Screening Committee on Anti-profiteering. The application had been filed under Rule 128 of the CGST Rules 2017, alleging profiteering in respect of restaurant service supplied by the Respondent (Franchisee of M/s Subway Systems India Pvt. Ltd.). In the application, it was alleged that despite the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017, the Respondent had not passed on the

commensurate benefit since he had increased the base prices of his products.

2. The DGAP in his report has stated that on receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 (3) of the CGST Rules, 2017 was issued on 14.05.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017, had not been passed on to his 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. The Respondent was also allowed to inspect the relied upon non-confidential evidence/information or any data which formed the basis of the said notice between 21.05.2019 and 23.05.2019, which was however not availed of by the Respondent.

3. The DGAP has reported that the period covered by the current investigation was from 15.11.2017 to 30.04.2019.

4. The DGAP has also reported that in response to the notice dated 14.05.2019 and subsequent reminders, the Respondent has submitted his replies vide his letters/e-mails dated 27.05.2019, 26.07.2019, 01.10.2019, 02.10.2019, 07.10.2019, 10.10.2019, 11.10.2019, 16.10.2019, 18.10.2019, 21.10.2019 and 22.10.2019. Vide the aforementioned e-mails/letters, the Respondent submitted the following documents/information:-

(a) Copies of GSTR-1 Returns for the period July 2017 to April 2019.

(b) Copies of GSTR-3B Returns for the period July 2017 to April 2019.

(c) Copies of Electronic Credit Ledger for the period July 2017 to April 2019.

(d) Price lists of the products.

(e) Invoice-wise outward supply details or the period July 2017 to April 2019 for the Subway Outlets (Franchise Code "61382" and "61383").

(f) Details of input tax credit availed by the Respondent for the Subway Outlets (Franchise Code "61382" and "61383") for the period July 2017 to 14.11.2017.

(g) Sample invoices based on which ITC has been claimed.

5. The DGAP in his report has further reported that in addition to the above documents, the Respondent, interalia, made the following submissions:-

a. That he had 35 operational outlets at Terminal 2 of the Mumbai International Airport, out of which 18 outlets were awarded to him in Package 1; that out of his 35 outlets, two outlets were franchisees of Subway; that out of the 18 outlets that were allocated to him in package 1, 9 outlets were at Level 3 and 9 outlets were at Level 4 of the Food court; that the Food court at Level 4 was also divided into 2 parts; that in the first part of that Food court he had 5

outlets and in the second part there were 4 outlets; that one of his Subway outlets was located in the Food Court at Level 4 where he was operating 4 restaurants; that he was receiving joint invoices for the LPG/Electricity/Water expenses in respect of these 4 outlets and for apportionment of the Input Tax Credit (ITC) amongst these 4 outlets including his Subway outlet, he was equally distributing ITC between these 4 outlets; that a joint invoice pertaining to rent of all his 18 outlets (including franchisees of Burger King/Pizza Hut/Punjab Grill operated by him) was being received and ITC of GST paid on rent for the Subway outlet was being apportioned by him on the basis of the ratio of its area to the total area of his 18 outlets.

b. His other Subway outlet was operating on a revenue-sharing basis with M/s Mumbai International Airport Limited (hereinafter referred to as "the MIAL"), where 28% of the revenue earned was being shared by him with M/s MIAL.

6. The DGAP has also reported that in terms of Rule 130 of the CGST Rules 2017, Respondent had also been informed by the DGAP vide notice dated 14.05.2019 that if any information/documents provided by him were confidential, a non-confidential summary of such information/documents could be furnished by him. However, the Respondent did not classify any of the information/documents provided by him as confidential in terms of Rule 130 of the Rules, ibid.

7. DGAP has also reported that based on a careful examination of the case records, including the reference from the Standing Committee on Anti-Profiteering, various replies of the Respondent and documents/evidence placed on record, it emerged that the Respondent had around 35 restaurant outlets on the same GST registration out of which two were Subway outlets and the inquiry conducted by the Joint Commissioner (AE), CGST & CX, Mumbai East was limited to the Subway outlets of the Respondent. The DGAP has further reported that he had not examined outward supplies made from the other outlets by the Respondent.

8. The DGAP has reported that the main issues for determination were whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST had been commensurately passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

9. The DGAP has further reported that the GST rate on the restaurant service had indeed been reduced from 18% to 5% w.e.f. 15.11.2017 along with the condition that no ITC on the goods and services used in supplying the service would be available to the Respondent vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017. Since the present case was a case of reduction in the rate of tax, it was important to examine the provisions of Section 171 of the CGST Act, 2017 to

ascertain whether the present case was a case of profiteering or not. Section 171(1) reads as follows:-

"*Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement of the above provision was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must follow a commensurate reduction in the prices of the goods or services being supplied by a registered person and that the final price charged on each supply had to be reduced commensurately with the extent of benefit and that there was no other legally tenable mode of passing on such benefit of ITC to the recipients/consumers.

10. The DGAP has reported that the Respondent was dealing with a total of 136 items while supplying restaurant services through his Subway outlets before and after 15.11.2017; that the details relating to 32 of the 136 products supplied by him in the pre-rate reduction period, i.e. before 15.11.2017, were not provided by the Respondent; that as per the details submitted by the Respondent, DGAP has compared the average selling prices for the period from 01.10.2017 to 14.11.2017 with the prices post rate reduction i.e. w.e.f. 15.11.2017 and it was observed that the Respondent had maintained pre rate reduction base prices of 9 items, 1 item which was sold pre rate reduction was not sold post rate reduction whereas the base prices of 9 items were either

increased or GST @18% was charged for some time even after rate reduction leading to a net higher cum-tax price incidence on the consumers. As per the data submitted by the Respondent, it was revealed that the Respondent has charged a lower GST rate of 5% on the increased base prices on some of the other items, where earlier the tax amount was computed @18% before 15.11.2017 and @5% w.e.f. 15.11.2017. Hence, because of the increase in base prices, the cum-tax paid by the customers was not reduced commensurately for 94 items despite rate reduction. Therefore, the only remaining point for determination was whether the increase in base price was solely on account of denial of ITC.

11. Further, the DGAP has intimated that the assessment of the impact of denial of ITC, which was an uncontested fact, required determination of the ITC in respect of "restaurant service", as a percentage of the taxable turnover from the outward supply of "products", during the pre-rate reduction period. For instance, if the ITC in respect of restaurant service was 10% of the taxable turnover of a registrant till 14.11.2017 (which became unavailable to him w.e.f. 15.11.2017) and if the increase in the base prices w.e.f. 15.11.2017 was less than 10%, then this would not be a case of profiteering. However, if in the same example, the increase in the base prices w.e.f. 15.11.2017, was by a margin of 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. In the instant case, profiteering was

computed in the same manner as per the above example by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017 due to the following reasons:-

a) There was no reversal of ITC on the closing stock of input and capital goods as on 14.11.2017 by the Respondent, which was required as per the provisions of Section 17 of the CGST Act 2017 read with Rule 42 and 43 of the Rules.

b) The invoices, on which ITC was availed during the month of November 2017 were related to the charges of Rent etc., for the whole month whereas ITC was not available to the Respondent after 14.11.2017.

12. The DGAP in his report has further intimated that the ratio of ITC to the Net Taxable Turnover has been taken as the basis for determining the impact of denial of ITC that was available till 14.11.2017. On verification of the records of the Respondent, it was revealed that ITC amounting to Rs. 15,10,162/- was available during the period from July 2017 to October 2017 which worked out to be 11.16% of his Net Taxable Turnover from the restaurant service supplies amounting to Rs. 1,35,33,198/- during the same period. Further, with effect from 15.11.2017, the rate of tax on restaurant service was reduced from 18% to 5% and no ITC was available to the Respondent. A summary of the computation of the ratio of ITC to the taxable turnover as furnished by the DGAP is at Table-A below:-

Table-A **(Amount in Rs.)**

Particulars	Jul 17	Aug 17	Sept 2017	Oct 2017	Total
ITC Availed as per ITC Register submitted by the Respondent (A)*	3,47,068	4,14,091	3,65,993	3,83,011	15,10,162
Total Outward Taxable Turnover as per Invoice-wise Outward Supply details submitted by the Respondent (B)	33,31,260	34,26,895	31,43,854	36,31,189	1,35,33,198
The ratio of Input Tax Credit to Net Outward Taxable Turnover (C)= (A/B)					11.16%

13. The DGAP has also submitted that the analysis of the details of item-wise outward taxable supplies made during the post-rate reduction period (from 15.11.2017 to 31.04.2019) revealed that the base prices of the different items supplied by the Respondent had been increased by the Respondent, presumably, to offset denial of ITC. The pre and post rate reduction prices of the items sold by the Respondent during the period from 01.07.2017 to 14.11.2017 (Pre-GST rate reduction) and from 15.11.2017 to 31.03.2019 (Post-GST rate reduction) were compared and it was found that the Respondent had increased the base prices of the products supplied by him by more than what was required to offset the impact of denial of ITC in respect of items sold during the same period and hence, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on.

14. The DGAP has further stated that the next step was to compute the amount of profiteering in this case. It was pertinent that as a principle, only those items, where the increase in base prices

was more than what was required to offset the impact of denial of ITC, were considered and the calculation was carried out following the above principle. The extent of profiteering was worked out as per the procedure mentioned in Table-B below:-

Table–B **(Amount in Rs.)**

Name of the product (A)	HARA BHARA PATTY 6" SUB (Z0358)
Total Quantity sold during 01.11.2017 to 14.11.2017 (B)	158
Sum of taxable Value during 01.11.2017 to 14.11.2017 (C)	28119.26
Base price during 01.11.2017 to 14.11.2017 (D=C/B)	177.97
Invoice Value for the item in UI00000210 dated 09.11.2017 (E)	2310.05
Quantity in the invoice (F)	11
Cum tax price (G)	210
Base price with denial of input tax credit @ 11.16% (H=D+D *11.16%)	197.83
GST @ 5% (I=H*5%)	9.89
Total price to be charged(J=H+I)	207.72
Invoice Value as per invoice no. UI00000288 dated 11.01.2018 (K)	3079.97
Quantity in the invoice (L)	14
Cum tax price(M)	220
Profiteering per Unit(N=M-J)	12.27(220-207.72)
Total Profiteering for the invoice(O=N*L)	171.82

15. The DGAP has also claimed that based on the aforesaid pre and post rate reduction prices of the products; the impact of denial of ITC; and the details of outward supplies (other than zero-rated, nil rated and exempted supplies) during the period 15.11.2017 to 31.03.2019 (as per the product-wise sales registers reconciled with the GSTR-1 and GSTR-3B Returns) the amount of net higher sale realization due to increase in the base prices of the service supplied after netting off the impact of denial of ITC or in other words, the profiteered amount worked out Rs.

61,67,097/- (including GST on the base profiteered amount) for the period of investigation, which is detailed in Annexure-15 of the DGAP's report. It was also stated that the service had been supplied by the Respondent in the State of Maharashtra only.

16. The DGAP has concluded that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling prices or by way of not reducing the selling prices of the products commensurately, despite the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent and that the extent of profiteering was Rs. 61,67,097/- (inclusive of GST). Thus the provisions of Section 171 (1) of the CGST Act, 2017 had been contravened by the Respondent in the present case.

17. The DGAP has further reported that the inquiry conducted by the Joint Commissioner (AE), CGST & CX, Mumbai East was limited only to the Subway franchise of the Respondent (Franchisee Code "61382" and "61383") and the outward supplies made by him out of his other outlets had not been examined.

18. The above Report of the DGAP was considered by this Authority and it was decided to hear the Respondent on 20.11.2019. A notice dated 01.11.2019 was also issued to the Respondent asking him to reply why the Report dated 25.10.2019 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. However, the Respondent did not appear for the hearing and sought adjournment vide his submissions dated 18.11.2019. Sh. Shashi Mathews, Advocate, and Sh. Abhishek Boob, Advocate represented the Respondent.

19. The Respondent vide his written submissions dated 24.12.2019 stated:-

a. That the said 2 outlets of the Respondent were operated under a franchise agreement with M/s Subway Systems India Pvt. Ltd. (Subway India) and each aspect of the operation of the said outlets was regulated by M/s Subway India. The revision in prices of the products and Point of Sale was also regulated by M/s Subway India and the Respondent did not have any control over the revision of the prices. Any revisions in the prices of the products sold at the Subway outlets operated by the Respondent were duly reflected in the Point of Sale. A copy of the Agreement between the Respondent and M/s Subway India along with e-mail communications regarding the price revisions were attached as Annexure-4 & 5 respectively.

b. That the 2 outlets of Subway operated by the Respondent had two categories of customers. One, individual customers, who bought products as per the price stated in the Menu. Other, where various airlines operating from the Mumbai International Airport, which had entered into written agreements with the Respondent for serving the

customers of their airlines in cases where there was a flight delay. Similarly, the Respondent had entered into an agreement with M/s Mumbai International Airport Pvt. Ltd. (GVK) to cater to the employees of GVK. The prices for such combo were discounted prices and the prices charged therein were the base prices after reduction by appropriate discounts on the base prices.

c. That the CGST Act or the CGST Rules did not prescribe any methodology to compute profiteering. The only requirement under Section 171 (1) of the CGST Act was that the benefit of any tax rate reduction or benefit of ITC should be passed on to the recipient by way of a *"commensurate reduction in prices"*. However, the statute did not prescribe any method of computation by which amount of profiteering could be computed. Further, 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 defined the word *'prescribed'* to mean as prescribed by the CGST Rules on recommendations of the GST Council. Therefore, the Authority could discharge only such functions and exercise such powers as were specifically mentioned in the CGST Rules.

d. That Rule 126 of the CGST Rules empowered this Authority to determine the methodology and procedure for

determining whether any reduction in the rate of tax on supply of goods or services or benefit of ITC had been passed on by a registered person by way of commensurate reduction in prices. However, to date, neither the CGST Act nor the CGST Rules nor any other form of delegated legislation had prescribed any method of computation by which an amount of *'profiteering'* could be computed. Even this Authority under the Goods and Services Tax Methodology and Procedure, 2018 which had been notified in terms of Rule 126 of the CGST Rules did not prescribe any specific methodology to be adopted in the computation of profiteering.

e. That no guidelines whatsoever had been framed leaving the issue to the complete discretion of the investigating authority (i.e. the DGAP) who for the first time in his Report was devising a particular method by which it was seeking to determine an amount which was allegedly profiteered. Given the absence of knowledge of the basis on which the DGAP had to act, the Respondent was compelled to accept any procedure adopted by DGAP and the opportunity of full defence to the Respondent was also curtailed.

f. That the method adopted by the DGAP had no statutory sanction and could not be regarded as a mandatory prescription at all and in the absence of guidelines as

prescribed under Rule 126, the Respondent could not be held as being non-compliant with the requirements of Section 171 of the CGST Act. The Respondent has relied upon the judgments of the Hon'ble Supreme Court in the cases of CIT v. B.C. Srinivasa Setty, (1981) 2 SCC 460, and CCE v. Larsen & Toubro Ltd., (2016) 1 SCC 170 in his support.

g. That the DGAP has been given absolute unfettered powers to derive any method or computation to arrive at the conclusion that an assessee has profiteered. The absence of a prescription which has statutory approval has led to the entire exercise and the present proceedings being discriminatory.

h. That the requirement of having a mechanism to compute 'profiteering' with proper checks and balances was also raised by the Advisor to the Chief Minister, Punjab as well as the Chief Economic Advisor in the 17th GST Council Meeting held on 18.06.2017.

i. The Respondent has also referred to the similar anti-profiteering provisions which existed in Australia and Malaysia. Australian Competition and Consumer Commission, which was the authority to regulate unreasonably high profits being earned by the assessees pursuant to the implementation of the GST laws in those countries has laid down guidelines to provide for the net

dollar margin method and the price margin method. The said methods provided for the fundamental principles for the determination of price variances and changes. Under the erstwhile Malaysian GST laws, mechanisms with formulas were provided under the Price Control and Anti-profiteering (Mechanism to Determine Unreasonably High Profits) Regulations, 2018. Under the said Regulation, any profit earned over and above the determined 'Net Profit Margin' was considered as an unreasonably high profit and the assessee therein was liable for penal action under the law.

j. That the prescription of methodology/computation provisions by way of the CGST Rules was a necessary imperative as any business which was required to comply with the law ought to be aware of how the law was to be complied with. This was more so when the non-compliance of such a law led to severe adverse civil consequences and even penal proceedings were sought to be initiated based on such alleged non-compliance of the law. In the absence of a prescribed methodology, there was an arbitrary exercise of the power by the DGAP without any jurisdiction.

k. That pricing of the products was a complex exercise and the products were usually not priced individually and in isolation at a unit level. 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 segment, etc. costs and benefits at an entity level, division level, and product category level were all influencers of any pricing decision. Typically, the cost of taxes was only one of the elements which determined the final price.

I. That the Respondent sold his products to various categories of customers viz. Individual Customers and Institutional Customers and while making such sales, the prices of the products depended on the category of each customer. Moreover, prices to an Individual Customer were always different than the prices to an Institutional Customer (who was sold on negotiated prices, by giving appropriate discounts on the sale price). The same product might have different prices when sold to different categories of customers even though the base price was the same for each product at the outlet. While examining the matter for any alleged profiteering, the said factor should have been taken into account by the DGAP and, therefore, the basis of the Report itself was flawed. The Respondent has relied upon the judgment of the Hon'ble Supreme Court 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".*

m. That a unitary approach looking at tax rate alone was not possible and would invariably skew the analysis, if adopted. The fixation of prices being a commercial exercise, a business-minded approach was necessary to interpret the provisions of law, especially when the Legislature had not given any defined guidelines on how to compute profiteering. In this regard, the principle of '*commercial expediency*' was well recognized by the Hon'ble Supreme Court of India under which it had been held that it was the businessman who had to decide how to conduct its business and it was not the domain of the tax authorities to sit in judgment on how 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' had been reiterated.

n. That the approach to fix the *'selling price'* commonly for each category of sales was not proper as it would skew the

analysis. This was more so as the discounts offered to Institutional Customers had not been considered while undertaking the computation of the alleged profiteering amount. The said factor had been completely ignored in the DGAP's Report and hence, the present proceedings ought to be dropped on this ground alone.

o. That the Respondent was never allowed 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 customers. The above manner of adjudication has deprived the Respondent with an opportunity to explain his case or give alternative data before issuance of the Report by the DGAP and the same was therefore violative of the principles of natural justice.

p. That it was a well-settled principle in law that granting an opportunity of hearing was an integral part of the principles of natural justice. He has relied upon 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 has 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. Further, in the case of **Escorts Farms Ltd. v. Commissioner (2004) 4 SCC 281**, the Hon'ble Supreme Court has also

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 relied upon the judgment of the Hon'ble Delhi High Court 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. The DGAP's Report has been prepared without considering the relevant facts and without allowing the Respondent to present his methodology for passing on the benefit of rate reduction to its recipients. Accordingly, the entire proceedings were in contravention of the settled principle of *audi alteram partum* and violation of principles of natural justice. Therefore, the Report of the DGAP was liable to be set aside on this ground itself.

q. That the bare extract of Section 171(1) of the CGST Act did not provide any guidance for initiation of anti-profiteering provisions on that account. Accordingly, it was necessary to refer to the definition of the term 'profiteering' as defined under various dictionaries. As per Black's Law Dictionary, the term profiteering meant 'taking advantage of unusual or exceptional circumstances to make excessive profits'. As per the Oxford Dictionary, the term profiteering

meant 'make or seek to make an excessive profit'. As per Advanced Law Lexicon, the term profiteering meant 'to seek or obtain excessive profits' or 'the one who is given to making excessive profits. The act of profiteering occurred only in cases where an assessee had indulged in acts leading to 'excessive profits'. However, in the facts of the present case, the Respondent had not earned any excessive profits and the Respondent had been suffering losses over the last 2 years. Further, in respect of the 2 outlets under investigation, on account of royalty payments, rent to GVK, payroll costs, raw material costs, and other overhead expenses, etc., there has been no profit earned by the Respondent. Thus, the anti-profiteering provisions did not get triggered, and the DGAP's report should be set aside on this ground alone.

r. The DGAP has taken the period from 01.07.2017 to 31.10.2017 (i.e. 123 days) for computation of ITC ratio which has been denied consequent to the amendments made vide the Rate Amendment Notification. Further, the base prices considered for computation of alleged profiteering were computed for the period from 01.11.2017 to 14.11.2017 (or for the month of October 2017 for products not sold in the above period). Based on the ITC ratio and the base prices, the alleged profiteering amount has been computed for the period from 15.11.2017 to

30.04.2019 (i.e. 532 days). The basis of said computation of alleged profiteering was completely arbitrary as the Respondent could not be expected to retain the same selling prices over a period of over more than 17 months. Several factors affected the selling prices, including the inflation, increase in the cost of raw materials, rent revisions, cost of manpower, response to the pricing strategy adopted by the competitors, etc.

s. That this Authority in the case of ***Kumar Gandharv v. KRBL Ltd.*** (Case No. 03/2018), has itself accepted the fact that an increase in production costs was a valid consideration while determining the quantum of profiteering.

t. That the provisions of Section 171 of the CGST Act coupled with the Report of the DGAP having an investigation period of almost 1 and half year, sought to restrict the right of the Respondent to decide the prices of his products for a prolonged period even in the normal course of his business, thereby acting as a price controlling authority, which was completely in violation of the fundamental rights of the Respondent under Article 19(1)(g) of the Constitution of India. That the Respondent was in the business of providing food items which mostly comprised of vegetables and other products. The raw materials used by the Respondent for preparing the food

items which were sold fresh in the outlets operated by it were mainly agricultural products such as onions, tomatoes, lettuce, etc. These items were heavily linked to seasonal variations in terms of availability and price. Accordingly, the Respondent in his usual course of business was entitled to increase the prices of his products and has also, in fact, increased his prices.

u. That the investigation period adopted by the DGAP in the case of ***M/s NP Foods*** (Case No. 9/2018), ***M/s Hardcastle Restaurants Pvt. Ltd.*** (Case No. 14/2018), ***M/s Jubilant Food Works Ltd.*** (Case No. 04/2019) were based on the same Rate Amendment Notification and pertained to restaurant service. The manner of selection of different investigation periods by the DGAP clearly showed a patently disconnected approach adopted by the DGAP in different investigations under the same Rate Amendment Notification and in respect of restaurant service itself. That the actions of the DGAP were wholly arbitrary in nature and thereby violating Article 14 of the Constitution of India and the concept of equality before the law.

v. That the alleged profiteering amount as computed by the DGAP majorly pertained to the year 2018 and 2019 which has been described in the table below:-

S. NO.	CALENDAR YEAR	PROFITEERING AMOUNT
1.	2017 (from 15.11.2017)	1,37,203.04
2.	2018	45,23,199.85

3.	2019 (upto 30.04.2019)	15,06,694.47

As per the above table, the profiteering calculated for the period beginning from January 2018 to 30th April 2019, was on account of a legitimate increase in prices of the products sold by the Respondent. Profiteering, if any, ought to be restricted only up to 04.01.2018 and any subsequent price revisions could not be attributed to the Rate Amendment Notification.

w. That the total amount of alleged profiteering of Rs. 87,856/- pertained to charging the wrong rate of tax (i.e. charging tax at the rate of 18% or 40%) despite the Rate Amendment Notification, as described below:-

S. NO.	YEAR	PROFITEERING AMOUNT
1.	2017 (from 15.11.2017)	65,356
2.	2018	22,500
TOTAL		87,856

x. That for the period from 15.11.2017 to 04.01.2018, there was an admitted error on account of the wrong charging of tax, leading to profiteering of Rs. 87,856/- (which included the incorrectly charged tax of Rs. 56,168/- that had been duly paid to the Government, and has not been retained illegally by the Respondent. There was alleged profiteering calculated by the DGAP to the extent of Rs. 78,261/- which was in respect of items such as Maxx chips, orange juice and fountain drinks.

y. That the Respondent has not increased his base prices for 51 days (i.e. up to 04.01.2018) after the Rate Amendment Notification, and therefore, the allegation of alleged profiteering was completely baseless and arbitrary and any further revisions in the product prices were on account of various factors not related to the Rate Amendment Notification.

z. That the Respondent also supplied aerated beverages which were prepared on the spot and items were taxable at the rate of 40%. Consequently, post the rate reduction, these items were sold at the tax rate of 5%, without any benefit of ITC. Accordingly, the loss of ITC computed by the DGAP has to be revised taking into account the fact that ITC loss on aerated beverages was much higher than the ITC ratio of 11.16% as has been computed by the DGAP in his report.

aa. That to calculate the total profiteering amount as alleged in the Report, the DGAP has incorrectly considered only those instances where there was an alleged positive profiteering. The DGAP has inexplicably ignored instances where even as per the DGAP's calculation, the Respondent has passed on excess benefit (more than the commensurate benefit) to his recipients after the GST rate reduction. In such cases, the DGAP has considered the profiteering as 'NIL'. Where the Respondent has sold

products to his customers at a price lesser than the alleged ideal selling prices, it was only reasonable that those instances should be considered while computing the total amount of the alleged profiteering.

bb. That the DGAP ought not to ignore the negative profiteering amounts (i.e. where higher benefits have been passed on to the consumers), as the same had resulted in artificially inflating the alleged profiteering amount. The concept of 'zeroing' was also against the position adopted by the Government of India in the anti-dumping investigation before the WTO. Reference in this regard was made to Report No. WT/DS141/AB/R dated 01.03.2001 of the Appellate Body of the WTO.

cc. That if the instances where excess benefit passed on by the Respondent was considered, an amount of Rs. 5,66,862/- would be reduced from the total amount of alleged profiteering determined by the DGAP.

dd. That the DGAP has computed the ITC ratio by taking the total ITC available for the period from 01.07.2017 to 31.10.2017, while the Rate Amendment Notification was issued on 15.11.2017. In this regard, the reasoning provided by the DGAP for not considering the period from 01.11.2017 to 14.11.2017 was that the Respondent has failed to reverse the credit available in respect of stock as on 15.11.2017 when the Rate Amendment Notification was

notified which restricted the right to avail ITC. Further, as the invoices in respect of Rent pertained to the entire month of November 2017, the same could not be computed.

ee. That while computing the ITC ratio for the period from 01.07.2017 to 31.10.2017, the DGAP had himself enquired from the Respondent to provide for the proportionate ITC in respect of the 2 outlets under investigation, which was duly provided by the Respondent.

ff. That the DGAP ought to have considered the ITC in respect of stock as on 15.11.2017 and the proportionate ITC for 14 days in respect of the Rent invoice for the month of November 2017. The action of the DGAP in failing to consider the ITC for the said period itself showed the arbitrary manner of computation of ITC ratio for the said pre-rate reduction period and the alleged profiteering amount accordingly computed was therefore incorrect, and ought to be set aside.

gg. That to arrive at the base price, the DGAP had considered the period from 01.11.2017 to 14.11.2017 (and wherever the price was not available, base price was calculated based on October 2017 prices). However, to arrive at the ITC ratio, the DGAP had ignored the period from 01.11.2017 to 14.11.2017. Such a skewed approach had also led to a skewed calculation of the ITC ratio and

thus, the approach adopted by the DGAP has to be held to be incorrect.

hh. That in the case of 2 product descriptions, the DGAP has compared different brand products with each other as the products considered before GST rate reduction were of a different brand from the products considered after the GST rate reduction with which they have been compared with. The Respondent has provided the details of the said product as under:-

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.	Himalayan Water Bottle	Water Bottle	18.11.2017	44,529/-
2.	Himalayan Water Bottle SRV	Water Bottle	24.12.2017	2,19,855/-
The total amount of alleged profiteering (INR)				2,64,384/-

ii. That as per the above table, the said products were of different brands and being different products, could not be compared with each other. The products considered after the rate reduction were new products that had been launched in the market for the first time after 15.11.2017 and therefore, there could not be any profiteering in the products introduced after rate reduction. The DGAP has himself excluded 32 new products which were not supplied before Rate Amendment Notification. Therefore, the

computation of the alleged profiteering amount in respect of the products described above was against the stand adopted by the DGAP. Accordingly, the profiteering amount of Rs. 2,64,384/- calculated on these 2 products ought to be dropped as these were completely new products introduced by him for the first time after 15.11.2017 and the computation in this regard was based on a comparison between incomparable product descriptions. Therefore, out of total profiteering calculated of Rs. 61,67,097/-, an amount of Rs.2,64,384/- ought to be outrightly dropped.

jj. That while arriving at the profiteered amount, 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 straight jacket formula could be used for either arriving at a base price or for calculating profiteering. At the same time, the DGAP has also failed to appreciate that various factors had contributed to an increase in costs incurred by the Respondent. That the pricing of products was dependent on the expenses incurred by a company. Therefore, the increase in his costs ought to have been considered.

kk. That the DGAP ought to have considered the additional costs that had been incurred by the Respondent during the implementation of GST and the transition from the earlier

tax regime to an altogether new tax regime. As per DGAP's own report, the DGAP had examined 94 products which had been impacted by the rate reduction. Due to the said change, the Respondent was burdened with various additional costs, including change in IT systems, marketing costs, operating costs, etc. The Respondent had absorbed such increased tax costs not only during the implementation of GST but also during the rate reduction. There were also certain additional costs which had to be borne regularly, including the inflation-related increase in cost of raw materials, ingredients, services, etc. which were factored in while determining the pricing of products. The DGAP had not factored in all these additional costs while computing the alleged profiteering liability, including costs which were directly co-related to implementation of the GST which was an arbitrary and unreasonable approach. Therefore, the findings in the Report were liable to be set aside.

II. That the Respondent had a policy of providing periodical increments in the remuneration offered to his various categories of employees. Accordingly, the cost of manpower was also a very relevant factor to be considered while deciding the prices, to continue with the sustainable operation of his outlets. The Respondent had been

providing the following hike in the remuneration (in percentage) over a period of 3 years:-

For 2016-17

Grades	Performance Category				Average
	A	B	C	D	
Team Members	15	12	10	8	11
Shift Manager	13	11	9	7	10
ARM / RM	12	10	8	6	9

For 2017-18

Grades	Increment %				Average
	A	B	C	D	
Team Members	15	12	10	8	11
Shift Manager	14	11	9	7	10
ARM / RM	14	9	8	5	9

For 2018-19

Grades	Increment %				Average
	A	B	C	D	
Team Members	11	9	7	4	8
Shift Manager	9	7	5	3	6
ARM / RM	8	6	4	2	5

mm. That the cost of rental of the outlets had also increased considerably over a period of time (average increase being 15.35% in the past 4 years). The rental cost for the

Subway outlet at the Departure terminal in the past 4 years has been furnished in the below table:-

	2015-16	2016-17	2017-18	2018-19	2019-20
Area	65	65	65	65	65
Rate	9,518	11,439	13,179	15,130	16,825
Monthly rental	6,18,670	7,43,535	8,56,635	9,83,450	10,93,625

nn. That the above-referred increase in the cost of manpower as well as rent had to be necessarily factored in while computing the alleged profiteered amount and the commensurate benefit to the above extent ought to be granted. The Report of the DGAP has failed to consider the same and was completely arbitrary.

oo. That the 2 outlets being investigated under the franchisee model, wherein M/s Subway India was the ultimate authority which controlled the price and the Respondent had no real control over the prices of the products being sold. The POS was also controlled by M/s Subway India and any revision in the prices was done by M/s Subway India at the back-end.

pp. That in the franchisee model, the purpose of controlling the prices by the franchisor was that the prices of products remained the same in a particular region and to avoid a situation that there was any variance in the menu prices at

the whims and fancies of the franchisees in earning excessive profits. In this regard, e-mail communication regarding revised menu prices intimated by M/s Subway India was annexed by the Respondent as **Annexure-12.**

qq. That M/s Subway India also had control over the purchase of inputs and the same was periodically intimated to all franchisees, including the Respondent. In this regard, relevant intimation by the Respondent along with the relevant sheet providing information on the procurement of inputs was annexed as Annexure-13 by the Respondent.

rr. That M/s Subway India was controlling the input procurement as well as the menu prices, if at all there was any profiteering, the same should be demanded from the franchisor (i.e. M/s Subway India), which controlled the prices, and the Respondent should not be saddled with any liability on this account, as he was merely operating as per the terms of the Franchise Agreement.

ss. That this Authority in the case of ***Jijrushu N. Bhattacharya v. M/s NP Foods***, which was also a Subway franchisee (in respect of a market store) had held that there was no profiteering. Accordingly, in light of the submissions made in the above paragraphs and principles of judicial discipline, a similar finding ought to be rendered by this Authority in the facts of the present case.

tt. That the whole approach of the DGAP was not only contrary to the statutory provisions but completely arbitrary and did not take into account the commercial realities. The anti-profiteering provisions were in the nature of anti-abuse provisions and 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). It was well settled that the right to reasonable profit was a part of the right to trade and any methodology prescribed under Section 171 which was part of a taxing statute could not be *de-hors* a reasonable profit that might be earned by an enterprise. The DGAP has erred in adopting a notional base price without considering any of the relevant factors including the tax incidence before the implementation of GST and has acted narrowly and arbitrarily.

uu. That the approach adopted by the DGAP in the Report restricted the right of the Respondent to carry on trade freely and amounted to price fixation by the authorities, which was not the intent of the legislation. Under Section 171, there was no intention of the Government to move away from the free price market principles to an administered price mechanism. Presently, the economy primarily was following the principles of market / liberal economy where prices were determined by market forces. Neither the Constitutional provisions nor the CGST Act

empowered the DGAP to get into the realm of price fixation. It was the Respondent's understanding that the aim of Section 171 of the CGST Act was not to fix prices but to prevent profiteering.

vv. That by computing profiteering at a product level without consideration of a commensurate increase in costs and expenses of the Respondent, the present exercise by the DGAP was effectively resulting in administration of price fixation which was not the intention of the anti-profiteering provisions. A mere change in GST rate could not necessarily lead to a reduction in price (without consideration of a commensurate increase in costs and expenses) and the business of a registered dealer was to be seen as a whole for the purposes of Section 171 of the CGST Act, 2017.

ww. That it was well settled that the right to reasonable profit was a part of the right to trade and any methodology prescribed under Section 171 could not be *de-hors* a reasonable profit that might be earned or cost incurred by an enterprise. MRP only indicated a price above which the goods could not be sold and it could not be assumed as the price realized by a person for all his supplies. It was a general commercial practice to sell goods at price less than the MRP and thus any price arrived on the basis of MRP alone was notional, not real, and could not form the basis

to determine "commensurate" reduction in price. The DGAP has erred in adopting an average base price based on MRP without considering any of the relevant factors including the tax incidence before GST. The DGAP has acted narrowly and arbitrarily by ignoring the relevant considerations and the Report unreasonably interfered with the right to carry on trade and was violative of Article 19(1)(g) and Article 300A of the Constitution of India.

xx. That the DGAP has proceeded as if Section 171 was a consumer protection measure as opposed to a business regulation measure and the DGAP has failed to appreciate that GST law could not be used to protect consumer interest at the cost of businesses being forced to incur losses by virtue of a narrow interpretation of the law. That the Report has failed to recognize the right of a business/ registered person to balance GST benefits and losses across its products/product channels to ensure that commensurate GST benefit was passed on to its recipients across its various sales on an overall basis.

20. A supplementary report was sought from the DGAP on the above submissions made by the Respondent. In response, the DGAP, after considering the above submissions made by the Respondent, has furnished his issue-wise report, which is as below:-

a. Point No. 1 to 13:- No comments have been offered since these paragraphs contained only the facts on record.

b. Point No. 14 to 22:- The DGAP has stated that the extent of profiteering was arrived at, on a case to case basis, by adopting suitable method based on the facts and circumstances of each case as well as the nature of the goods or services supplied. There could not be any fixed methodology for the determination of the quantum of benefit to be passed on.

c. Point No. 23 to 27:- The DGAP has stated that there were several factors other than taxes that went in determining prices but they could not change overnight on the date of change of tax rates to warrant a change in the base prices.

d. Point No. 28 to 29:- The DGAP has stated that the amount of profiteering was computed only from the data submitted by the Respondent. The Respondent was always free to submit his own methodology which he has failed to do. He was always free to meet the officers and present his point of view.

e. Point No. 30 to 33:- The DGAP has stated that the extent of profiteering was arrived at, on case to case basis, by adopting a suitable method based on the facts and circumstances of each case as well as the nature of the goods or services supplied. There could not be any fixed

methodology for the determination of the quantum of benefit to be passed on.

f. Point No. 36 to 45:- The DGAP has stated that the period of investigation was not prescribed in the CGST Act or Rules. The DGAP had followed the practice of taking the period of investigation from the date of rate reduction till the previous month of the day on which notice of investigation was issued. The DGAP did not seek to act as a price controlling authority but was required to take action if Section 171 of the CGST Act, 2017 was violated.

g. Point No. 46:- The DGAP has stated that the benefits on account of denial of ITC had been already accounted for in the profiteering calculations.

h. Point No. 47 to 49:- The DGAP has stated that the benefits passed on by the Respondent in some instances where the prices charged were lower than the prices arrived at after incorporating the impact of denial of ITC was to a different set of consumers. The sum of the total amount of such additional benefit passed could not be offset against the increased prices charged from another set of customers.

i. Point No. 50 to 53:- The DGAP has stated that the contentions of the Respondent in these paras have already been covered in the paras 15, 16, and 17 of the Report dated 25.10.2019.

j. Point No. 54 to 56:- The DGAP has stated that the amount of profiteering was computed only from the data submitted by the Respondent vide various replies as mentioned in the report dated 25.10.2019.

k. Point No. 57 to 66:- The DGAP has stated that the cost of the items/ inputs could not change overnight on the date of the change in the tax rate.

l. Point No. 67:- The DGAP has stated that the methodology adopted by him in his Report was in line with the legal principles and this methodology has been consistent throughout in all similar cases and has been approved by this Authority. Regarding the methodology prescribed by the Authority, the procedure and methodology for determination of profiteering and intent thereof were determined by the Authority on case to case basis by adopting the most appropriate and accurate method based on facts and circumstances of each case as well as the nature of the goods and services supplied. There could not be any fixed mathematical methodology formulations/methodology for determination of quantum of benefit to be passed on which could cover different sectors of the economy and each case has to be decided based on its specific facts.

m. Point No. 68 to 70:- The DGAP has stated that in terms of Section 171 of the CGST Act, 2017, the legal requirement

was abundantly clear that in the event of the benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of goods or services. Such reduction could only be in terms of money so that the final price payable by a consumer got reduced. This was the legally prescribed mechanism to pass on the benefit of ITC or reduction in the rate of tax to the customers under the GST regime and there was no other method that a supplier could adopt to pass on such benefits. There was no violation of the right of the Respondent to carry of trade freely and this did not amount to price fixation by the Government.

21. The Respondent, vide his submissions dated 12.02.2020, filed his contentions against the above supplementary report of the DGAP. Upon perusal of the submissions dated 12.02.2020 made by the Respondent, it is observed that he has reiterated the issues mentioned in his earlier submissions dated 24.12.2019. In addition to the submissions dated 24.12.2019, the Respondent has made the following submissions, which are as below:-

a. That that the DGAP has admitted that the methodology was adopted on a case to case basis, and there was no fixed methodology provided under the law for the determination of quantum of profiteering. Reliance was

placed on the judgement of the Hon'ble Supreme Court given in the case of ***Commissioner of C. Ex. & Cus. Kerala v. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC)***, wherein it was held as under:-

> *"35. The aforesaid finding is in fact contrary to a long line of decisions, which have held that where there is no machinery for assessment, the law being vague, it would not be open to the assessing authority to arbitrarily assess to tax the subject. Various judgments of this Court have been referred to in the following passages from Heinz India (P) Ltd. v. State of U.P., (2012) 5 SCC 443."*

b. That in response to the DGAP clarifications that the prices could not change overnight on the date of change of tax rates, the Respondent had claimed that he did not change the prices overnight, and more so, with effect from 15.11.2017, when the rate of tax had changed on the restaurant service. As per his submissions made at ***Para 42 to 45 of the Submissions dated 24.12.2019*** (***Page 18 to 19***) and ***Annexure 9 of Submissions dated 24.12.2019*** (***Page No. 218 to 220***) it has been clearly pointed out that out of the total amount of alleged profiteering amounting to Rs. 61,67,097/- the amount of alleged profiteering for the period up to 04.01.2018 was admittedly Rs. 78,261/- only. That the Respondent could not be expected to restrain from making a yearly revision of prices as per the settled principles of 'commercial

expediency' as referred by the Respondent in his submissions dated 24.12.2019, which was done w.e.f. 05.01.2018, thereby leading to the computation of alleged profiteering as per the DGAP's report.

c. That the amount of alleged profiteering in the present case was mostly on account of price revision made with effect from 05.01.2018 and for the first 51 days the amount of alleged profiteering was almost negligible. The alleged profiteering computed on account of price revision with effect from 05.01.2018 had led to price fixation by the DGAP, which was completely illegal and arbitrary, and violative of the fundamental rights of the Respondent.

d. That the DGAP has not provided any clarification in respect of submissions made by the Respondent in respect of Para 50 to 53 of Submissions dated 24.12.2019. Failing to consider the period from 01.11.2017 and 14.11.2017 for computation of ratio of ITC was completely irrational and arbitrary and the said amounts ought to have been considered to arrive at the correct ratio of ITC. This was more so required as the base price of the products has been computed based on sales data for the said period, i.e. from 01.11.2017 to 14.11.2017.

e. That choosing a very long period of investigation has largely resulted in the huge alleged profiteering as the said

period of the investigation did not factor in the variation in the prices of various inputs over such a long period.

f. That the DGAP has completely ignored the factor that the Respondent was operating under the franchisee model and was bound to follow the instructions of its franchisor regarding price revisions. In this regard, the Respondent had placed on record email communications between the Respondents and the franchisor, which clearly showed that the franchisor, i.e. M/s Subway India, was regulating the prices.

g. That it was not even a case where the Respondent had increased his prices overnight to take benefit on account of a reduction in the rate of tax on the restaurant services.

h. That the stand adopted by the DGAP in his report was that the only factor considered relevant for computation of alleged profiteering was tax rate, as opposed to several other factors that were relevant in the determination of pricing of a particular product by any company. In this regard, despite specific submissions made by the Respondent that in the business line of the Respondent, the pricing was dependant on several volatile factors and the prices could not remain constant for a long period, the DGAP has merely clarified that on account of reduction in the rate of tax, there must be a commensurate reduction in prices of goods or services. The said clarification by the

DGAP itself led to price fixation, as the said analogy has been applied by the DGAP for a long period of more than 17 months. The price revision that has happened on 17.11.2017 (i.e. after the amendment in the rate of tax on restaurant services), there was a negligible profiteering for the period up to 04.01.2018. The considerable amount of profiteering pertained to price revision undertaken by the Respondent with effect from 05.01.2018 which was on account of several alien factors, and it was completely erroneous and arbitrary for the DGAP to factor profiteering for the price revision that has happened after more than 51 days from the date of amendment in the rate of taxes on restaurant services.

22. We have carefully considered the Report of the DGAP, the submissions made by the Respondent, and the other material placed on record. On examining the various submissions we find that the following issues need to be addressed:-

a. Whether the Respondent has passed on the commensurate benefit of reduction in the rate of tax to his customers?

b. Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 committed by the Respondent?

23. Section 171 of the CGST Act provides as under:-

"(1). Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices."

(2). The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether ITCs availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3). The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

(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 so 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.

Explanation:- For the purpose 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 input tax credit to the recipient by way of commensurate reduction in the price of the goods or services of both."

24. From Section 171 of the CGST Act 2017 it is clear that it itself defines the term "profiteered" which means the amount determined on account of not passing on the benefit of reduction in the rate of tax on supply of goods and services or both or the benefit of Input Tax Credit to the recipient by way of commensurate reduction in the prices of the goods or services or both. We also find it pertinent that Section 171 of the CGST Act 2017 provides that the "profiteered amount" is to be computed in respect of each supply made by a registered person. As per the above-said provisions, there is no connection between the term "profiteered" and "Profit". The scope of profiteering is confined to the question whether the benefit accruing on account of reduction in the tax rate or the benefit of ITC as the case may be, has been passed on to the recipient/consumer or not. In the context of the same, some of the submissions made by the Respondent, i.e. those relating to the increase in his costs on account of royalty, advertising charges and inflation due to the cost of raw materials do not have any ramification on the computation of the amount of profiteering. Further, Section 171

of the Act, ibid, mandates that profiteering has to be calculated on each supply/transaction and therefore it has to be calculated on each actual invoice/actual supply in the relevant period, comparing the prices mentioned therein with the prevailing base prices before the reduction in the tax rate in the availability of ITC. For the computation of profiteering, the actual transaction value of a product in the pre and post-tax rate reduction period is compared. Hence, the pricing and the amount of profit/loss at the end of the supplier becomes irrelevant for the computation of profiteering. We also find it pertinent to mention that this Authority or the DGAP has no legislative mandate to fix the prices or the profit margins in respect of any supply (which are the rights of the supplier) and it is obligated by Section 171 of the CGST Act, 2017 to ensure that the benefit of the reduction in the rate of tax and/ or benefit of ITC (which is a sacrifice of revenue from the kitty of Central and State Governments in a welfare state) is passed on to the recipients, and if tracked down the entire value chain, to the end consumers. The welfare of the consumers who are voiceless, unorganized, and scattered is the soul of this provision. The trade is bound to pass on the benefit of tax reduction and ITC which becomes available to it due to revenue sacrificed by the Government. This Authority or the DGAP does not, in any manner, interfere in the business decisions of the Respondent and hence the functioning of this Authority and the anti-profiteering machinery is within the

confines of the four walls of the provisions of Section 171 of the CGST Act 2017 and in no way violates the tenets of Article 19 (1) (g) of the Constitution. Keeping the above observations in mind, we proceed to address the specific issues raised by the Applicant and the Respondent in the present case.

25. It is clear from the plain reading of Section 171(1) mentioned above that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the DGAP's Report that there has been a reduction in the rate of tax from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 in the post GST period. It has been revealed from the DGAP's Report that the ITC which was available to the Respondent during the period July 2017 to October 2017 was 11.16% of the net taxable turnover of restaurant service supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the ITC was not available to the Respondent. The DGAP in his Report has stated that the Respondent had increased the base prices of different items by more than 11.16% i.e. by more than what was required to offset the impact of denial of ITC, supplied as a part of restaurant service, to make up for the denial of ITC post-GST rate reduction.

26. The DGAP for computation of the profiteered amount has compared the average base prices of the products which were being charged by the Respondent during the pre rate reduction period with the actual post rate reduction base prices of these products. It was not possible to compare the actual base prices prevalent during the pre and the post GST rate reduction periods due to the reasons that the Respondent was (i) selling his products at different rates to different customers based on the various factors such as sales, inventory position, competitor's strategy, market penetration and customer loyalty (ii) the same customer may not have purchased the same product during the pre and the post rate reduction periods and (iii) a customer may have purchased a particular product during the pre rate reduction period and may not have purchased it in the post rate reduction period or vice versa and (iv) the average base prices computed for a period of 14 days w.e.f. 01.11.2017 to 14.11.2017 or for the previous months provide highly representative and justifiable comparable average base prices. On the basis of the average pre rate reduction base price the commensurate base price has been computed by adding denial of ITC of 11.16% and compared with the invoice wise actual base price of the product as has been illustrated in Table-B supra. However, the average pre rate reduction base price was required to be compared with the actual post rate reduction base price as the benefit is required to be passed on each product to each customer. In

case average to average base price is compared for both the periods, the customers who have purchased a particular product on the base price which is more than the commensurate base price would not get the benefit of tax reduction. Such a comparison would be against the provisions of Section 171 as well as Article 14 of the Constitution which require that each customer has to be passed on the benefit of tax reduction on each purchase made by him. The above methodology employed by the DGAP for computing the profiteered amount appears to be correct, reasonable, justifiable and in consonance with the provisions of Section 171 of the CGST Act, 2017 and has been successively approved by this Authority in the cases of tax reduction and hence the same can be relied upon.

27. One of the contentions made by the Respondent is that the CGST Act and the Rules made thereunder did not prescribe any procedure or mechanism for calculation of profiteering due to which the DGAP had arbitrarily adopted a methodology that best suited his motives. In terms of Section 171(3) of the above Act, this Authority could discharge only such function and exercise such powers as were specifically mentioned in the CGST Rules, 2017. However, the Methodology and Procedure, 2018 notified by this Authority in terms of Rule 126 of the CGST Rules did not prescribe any specific methodology to be adopted in the computation of profiteering. Therefore, in the absence of any methodology in the Rules, the entire approach adopted by the

DGAP, and this Authority was without jurisdiction. The above contention of the Respondent is not correct. In this regard, it is submitted that the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC has been mentioned in Section 171 (1) of the CGST Act, 2017 itself which states 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.*" It is clear from the perusal of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that the benefit of tax reduction or ITC has to be passed on by a registered dealer to his customers since it is a concession which has been granted from the public exchequer which cannot be misappropriated by a supplier. It also means that the above benefits are to be passed on each Stock Keeping Unit (SKU) or unit of construction to each buyer and in case they are not passed on, the profiteered amount has to be calculated for which investigation has to be conducted on all such impacted SKUs/units. These benefits can also not be passed on at the entity/organization/branch level as the benefits have to be passed on to each recipient at each SKU/unit level. Further, the above Section mentions "any supply" which connotes each taxable supply made to each recipient thereby clearly indicating that a supplier cannot claim that he has passed on more benefit to one customer, therefore, he would pass less benefit to another

customer than the benefit which is actually due to that customer. Each customer is entitled to receive the benefit of tax reduction or ITC on each SKU or unit purchased by him. The word "commensurate" mentioned in the above Section gives the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each SKU or unit based on the tax reduction as well as the existing base price of the SKU or the additional ITC available. The computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from SKU to SKU or unit to unit and hence no fixed methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a recipient or for computation of the profiteered amount. However, to give further elaborate upon this legislative intent behind the law, this Authority has been empowered to determine the 'Procedure and Methodology' which has been done by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed formula which fits all the cases of profiteering can be set while determining such a "Methodology and Procedure" as the facts of each case are different. In one real estate project, date of start and completion of the project, price of the house/commercial unit, mode of payment of the price, stage of completion of the project, rates of taxes, amount of ITC availed, total saleable area, area sold and the taxable

turnover realised before and after the GST implementation would always be different from the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to another project. Therefore, no set parameters can be fixed for determining methodology to compute the benefit of additional ITC which would be required to be passed on to the buyers of such units. Moreover, this Authority under Rule 126 has the power to 'determine' Methodology & Procedure and not to 'prescribe' it. However, fixation of the commensurate price is purely a mathematical exercise that can be easily done by a supplier keeping in view the reduction in the rate of tax and his price before such reduction or the availability of additional ITC post implementation of GST. Further, the facts of the cases relating to the Fast Moving Consumer Goods (FMCGs), restaurants, construction and cinema houses are completely different and therefore, the mathematical methodology employed in the case of one sector cannot be applied in the other sector otherwise it would result in denial of the benefit to the eligible recipients. Moreover, both the above benefits have been granted by the Central as well as the State Governments by sacrificing their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their pocket and hence they have to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous and mandatory which truly

reflect the intent of the Central and State legislatures. Therefore, the above contention of the Respondent is frivolous and hence the same cannot be accepted. The Respondent cannot deny the benefit of tax reduction to his customers on the above untenable ground as Section 171 provides a clear cut methodology to compute both the above benefits. Further, in the present case, the methodology adopted by the DGAP for calculation of profiteering has been furnished as is given in the below table:-

Table (Amount in Rs.)

Name of the product (A)	HARA BHARA PATTY 6" SUB (Z0358)
Total Quantity sold during 01.11.2017 to 14.11.2017 (B)	158
Sum of taxable Value during 01.11.2017 to 14.11.2017 (C)	28119.26
Base price during 01.11.2017 to 14.11.2017 (D=C/B)	177.97
Invoice Value for the item in UI00000210 dated 09.11.2017 (E)	2310.05
Quantity in the invoice (F)	11
Cum tax price (G)	210
Base price with denial of input tax credit @ 11.16% (H=D+D *11.16%)	197.83
GST @ 5% (I=H*5%)	9.89
Total price to be charged(J=H+I)	207.72
Invoice Value as per invoice no. UI00000288 dated 11.01.2018 (K)	3079.97
Quantity in the invoice (L)	14
Cum tax price(M)	220
Profiteering per Unit(N=M-J)	12.27(220-207.72)
Total Profiteering for the invoice(O=N*L)	171.82

Perusal of the above Table shows that the Respondent had increased the base price of the item i.e. HARA BHARA PATTY 6" supplied by him as a part of restaurant service to make up for the denial of ITC post GST rate reduction. The pre and post GST rate reduction prices of the item sold during the period 15.11.2017 to 30.04.2019 were compared and it is established

that the Respondent had increased the base prices by more than 11.16% i.e., by more than what was required to offset the impact of denial of ITC in respect of the product. Similar methodology has been adopted while computing the profiteered amount in respect of the other impacted proudcts and it is established that in respect of the items sold by the Respondent post-rate reduction, the commensurate benefit of reduction in rate of tax from 18% to 5% has not been passed on. Therefore, the above claim of the Respondent cannot be accepted.

28. The Respondent has relied upon the judgement passed by the Hon'ble Supreme Court in the cases of **CIT v. B. C. Srinivasa Setty (1981) 2 SCC 460, CCE v. Larsen & Toubro Ltd. (2016) 1 SCC 170** and ***Commissioner of C. Ex. & Cus. Kerala v. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC)*** and stated that there was no machinery provision in the anti-profiteering measures and hence they could not be enforced. On this aspect, it is to be noted that no tax has been imposed under the above measures and hence the law settled in the above cases is not applicable. However, it would be relevant to mention here that Section 171 (2) of the CGST Act, 2017 and Rule 122, 123, 129 and 136 of the CGST Rules, 2017 have provided elaborate machinery in the form of this Authority, the Standing and Screening Committees, the DGAP and a large number of field officers of the Central and the State Taxes to implement the anti-profiteering provisions. Therefore, the Respondent cannot allege

that no machinery has been provided to implement the above measures.

29. The Respondent has also cited the extract from the minutes of the 17th GST Council Meeting wherein the Advisor to the Chief Minister, Punjab as well as the Chief Economic Advisor raised the issue of requirement of having a mechanism to compute profiteering with proper checks and balances. However, the issues raised by the above officers are incorrect as the methodology to compute the profiteering is itself contained in Section 171 of the CGST Act, 2017 as has been explained above. The Respondent has also pointed out that the Malaysian Government has introduced the Price Control and Anti-Profiteering (Mechanism To Determine Unreasonably High Profits for Goods) Regulations, 2018 and under the said Regulations, any profit earned over and above the determined 'Net Profit Margin' was considered as an unreasonably high profit rendering the supplier liable for penal action under the law. The anti-profiteering measures in Australia revolved around the 'Net Dollar Margin Rule' serving as the fundamental principle for the determination of price variances and changes as its guideline. In this regard, it would be appropriate to mention that the above Act has been repealed by Malaysia as it was not found to be working properly. Moreover, this Act was promulgated to control prices after the introduction of GST in the above Country whereas no provision for controlling prices has

been made in the CGST Act, 2017. Similarly, the 'Net Dollar Margin Rule' applicable in Australia also provides a mechanism for price control which is not the intent of Section 171. This Authority has also not been mandated to work as a price controller or regulator and it is only empowered to ensure that the benefits of tax reduction and ITC are passed to the consumers as per the specific provisions of Section 171 (1) of the CGST Act, 2017. Strangely, the Respondent is advocating the implementation of the price control measures under the CGST Act, 2017. The above claim of the Respondent also runs contrary to the argument of the Respondent which claims that no fetters can be placed on his power to fix the prices of his products in violation of the provisions of Article 19 (1) (g) of the Constitution. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted.

30. The Respondent has further argued that the pricing of the products is a complex exercise and usually the products are not priced individually and in isolation at a unit level. Several considerations such as demand and supply, fixed and variable costs, price of raw material, logistics, market situation, inflation, consumer segment, etc. were all influencers of any pricing decision. However, the cost of taxes was only one of the elements which determined the final price. The same product might have different prices when sold to different categories of customers even though the base price is the same for each

product as the outlet. In this connection, it would be pertinent to mention that the provisions of Section 171 (1) and (2) of the above Act require the Respondent to pass on the benefit of tax reduction to the consumers only and have no mandate to look into fixing of prices of the products which the Respondent was free to fix. If there was an increase in his costs the Respondent should have increased his prices before 15.11.2017, however, it cannot be accepted that his costs had increased exactly on the intervening night of 14.11.2017/ 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 an uncanny coincidence is unheard off and hence there is no doubt that the Respondent has increased his prices for appropriating the benefit of tax reduction to deny the above benefit to the consumers.

31. The Respondent, in support of his above contention, has also relied upon the decision of the Hon'ble Supreme Court given in the case of **Basant Industries v. Asst. Collector of Customs 1996 (81) ELT 195 (SC).** Perusal of the above-said judgment shows that in that case, the Hon'ble Supreme Court had decided on an issue of valuation in the context of taxation, in a matter which has no similarity with the case before us wherein the issue of profiteering has to be decided per the provisions of Section 171 of the CGST Act 2017. Therefore, the above-mentioned case is also found to be of no help to the Respondent.

32. The Respondent has further pleaded that an unitary approach looking at tax rate was not possible and a business-minded approach was needed while fixing the prices. He has also referred the principle of '*commercial expediency*' recognized by the Hon'ble Supreme Court 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** wherein it was been held that it was the businessman who had to decide how to conduct its business and it was not the domain of the tax authorities to sit in judgment on how the business was to be conducted. The contention of the Respondent is not correct as this Authority has not acted in any way as a price controller or regulator/ as it doesn't have the mandate to regulate the same. The Respondent is free to exercise his right to practice any profession or to carry on any occupation, trade or business, as per the provisions of Article 19 (1) (g) of the Constitution. He can also fix his prices and profit margins in respect of the supplies made by him. Under Section 171 this Authority has only been mandated to ensure that both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments are passed on to the end consumers who bear the burden of the tax. The intent of this provision is the welfare of the consumers who are voiceless, unorganized, and vulnerable. This Authority is charged with the responsibility of ensuring that both the above benefits are passed on to the

consumers/ recipients as per the provisions of Section 171 read with Rule 127 and 133 of the CGST Rules, 2017. This Authority has nowhere interfered with the business decisions of the Respondent. However, under the garb of commercial expediency the Respondent cannot misappropriate the amount of tax reduction granted from the public exchequer. He has to account for how he has passed on the benefit which he has failed to do. Hence, the cases cited by him do not help his cause.

33. The Respondent has also contended that the approach to fix the selling price commonly for each category of sales was not proper. The discounts offered to the Institutional Customers had not been considered while undertaking the computation of the alleged profiteering amount. It would be pertinent to mention here that Section 171 (1) requires that the Respondent should pass on the benefit of tax reduction from 18% to 5% w.e.f. 15.11.2017 which implies that he should have continued to charge the same base prices which he was charging on 14.11.2017 and should have charged 5% GST on them instead of 18% GST w.e.f. 15.11.2017. However, the Respondent had not done so and he had increased the base prices w.e.f. 15.11.2017 and then charged GST @5%. The above act of the Respondent amounts to denying the benefit of tax reduction. Therefore, to compute the profiteered amount the base price which was existing on 14.11.2017 was required to be compared with the base price which he had charged post rate reduction to

ascertain whether the Respondent has passed on the benefit of tax reduction or not. Mere charging of GST @5% post rate reduction does not amount to passing on of the benefit when the base price has been increased to offset the benefit. Therefore, the comparison of the base prices made by the DGAP is correct. Further, the investigation carried out by the DGAP reveals that the profiteering has been computed on the transaction value as per the provisions of Section 15 of the CGST Act, 2017 and all the discounts which do not form part of such value cannot be included in the price of the product.

34. The Respondent has further contended that principles of natural justice had been violated by the DGAP since he was not allowed 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 the customers. In support of his claim, he has relied upon the decisions of the Hon'ble Supreme Court given 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.** He has also relied upon the decision of Hon'ble Delhi High Court in the case of **CCE v. SG Engineers 2015 (322) ELT 204 (Del.).** In this regard, it is revealed from the record that the amount of profiteering has been computed only from the data submitted by the Respondent. The Respondent was always free to submit his own methodology and to meet the officers and present his point

of view, which he has failed to do so. Further, after receipt of the Investigation Report from the DGAP, this Authority has accorded ample opportunity for hearing to the Respondent however, nowhere in the written submissions, the Respondent has submitted his own methodology describing the method of price fixation of his products. Therefore, the above-said case laws referred by the Respondent are of no help to him and the contention raised by him in this behalf is not tenable.

35. The Respondent has also referred to the definition of the term profiteering as per various dictionaries i.e. Black's Law Dictionary, Oxford Dictionary, and Advanced Law Lexicon. He has also stated that the act of profiteering occurs only in the cases where an assessee indulged in acts leading to excessive profit and in the present case, the Respondent has not earned any excessive profit as he has been suffering losses in respect of the 2 outlets under investigation. In this connection, it would be appropriate to refer to the definition of the profiteered amount given in the Explanation attached to Section 171 mentioned above which states that "*For the purpose 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 input tax credit to the recipient by way of commensurate reduction in the price of the goods or services of both*". Therefore, the definition of profiteering cited by the Respondent is not applicable as the

definition of profiteered amount has been clearly given in the above Explanation and hence the above claim of the Respondent is not correct. Further, the provisions of Section 171 of the CGST Act, 2017 do not force the Respondent to fix his prices and profit margins in respect of the supplies made by him.

36. The Respondent has also contended that for the purpose of computation of the quantum of profiteering, the DGAP has taken a long period of more than 17 months i.e. from 15.11.2017 to 30.04.2019. It could not be expected from him to retain the same selling prices over a period of over more than 17 months keeping in view the various factors like inflation resulting into increase in the cost of raw materials, rent revisions, cost of manpower, response to the pricing strategy adopted by the competitors, etc. Profiteering, if any, should be restricted only up to 04.01.2018. He has also relied upon the cases of ***M/s NP Foods*** (Case No. 9/2018), ***M/s Hardcastle Restaurants Pvt. Ltd.*** (Case No. 14/2018), ***M/s Jubilant Food Works Ltd.*** decided by this Authority where the investigation period adopted by the DGAP was much less than the present case. In this context, we observe that in this case, while the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017, the Respondent had increased the base prices of his products immediately thereafter and did not pass on the resultant benefit by a commensurate reduction in the prices of his supplies at any point of time till 31.04.2019. In other words, the violation of the provisions of

Section 171 of the CGST Act 2017 has continued unabated in this case and the offence continues to date. The Respondent has nowhere produced any evidence to prove from which date the benefit was passed on by him. The fact that the Respondent has not complied with the law till 31.04.2019 implies that profiteering has to be computed for the entire period and hence we do not see any reason to accept this contention of the Respondent. We further observe that had the Respondent passed on the benefit before 31.04.2019, he would have been investigated only till that date. Therefore, the period of investigation i.e. from 15.11.2017 to 31.04.2019 has been rightly taken by the DGAP. The Respondent cannot claim protection under Article 14 of the Constitution when he has violated the above Article himself by denying the benefit of tax reduction to millions of customers. Hence, the cases relied upon by the Respondent are of no help to him. Therefore, the contention of the Respondent is not correct and hence, cannot be accepted.

37. The Respondent has also relied upon the decision of this Authority in the case of ***Kumar Gandharv v. KRBL Ltd.*** (Case No. 03/2018), wherein it has been allegedly accepted that the increase in the production costs was a valid consideration while determining the quantum of profiteering. In this context, it is pertinent to mention that in the above case no benefit of the increase in the cost was given. Instead, the rate of tax had been increased and hence the provisions of Section 171 (1) were not

applicable as there was no tax reduction. Therefore, the facts of the above case referred by the Respondent are different from his case and hence, they cannot help him.

38. The Respondent has also pleaded that right to reasonable profit is a part of the right to trade, which is a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India and the right to trade included the right to determine prices and such right which had been granted by the Constitution of India could not be taken away without any explicit authority under the Law. Therefore, this form of price control was a violation of Article 19(1)(g) of the Constitution of India. The contention of the Respondent is not correct as this Authority or the DGAP has not acted in any way as a price controller or regulator as they don't have the mandate to regulate the same. The Respondent is free to exercise his right to practice any profession or to carry on any occupation, trade or business, as per the provisions of Article 19 (1) (g) of the Constitution. He can also fix his prices and profit margins in respect of the supplies made by him. Under Section 171 this Authority has only been mandated to ensure that both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments are passed on to the end consumers who bear the burden of the tax. This Authority is charged with the responsibility of ensuring that both the above benefits are passed on to the general public as per the provisions of Section

171 read with Rule 127 and 133 of the CGST Rules, 2017. This Authority has nowhere interfered with the business decisions of the Respondent and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

39. The Respondent has further contended that the profiteering calculated by the DGAP for the period from January 2018 to April 2019 was on account of a legitimate increase in the prices of the products sold by the Respondent. The provisions of Section 171 (1) and (2) of the above Act require the Respondent to pass on the benefit of tax reduction to his recipients/ consumers only and the argument of increased costs is of no relevance to the issue in hand. It is beyond even an uncanny coincidence that prices of goods supplied by the Respondent were increased on the same night on which the tax rate was reduced by the Government and that too by exactly the same quantum. Hence we are left with no doubt that the Respondent has denied the benefit of rate reduction in the rate of tax to his recipients/ customers. Therefore, the contention of the Respondent is not maintainable.

40. The Respondent has further contended that for the period from 15.11.2017 to 04.01.2018, out of the total amount of profiteering computed by the DGAP, an amount of Rs. 87,856/- was on account of an incorrect tax rate, out of which, an amount of Rs. 56,168/- had been duly paid as tax to the Government and had not been retained illegally by him. This contention of the Respondent is not correct because the provisions of Section 171

(1) and (2) of the CGST Act, 2017 mandate that the benefit of reduction in the tax rate is to be passed on to the recipients/ customers by way of commensurate reduction in price, which includes both, the base price and the tax paid. In the present case, 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 the 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 very objective of both the Central as well as the State Governments which aimed to provide the 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 his customers 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. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted.

41. The Respondent has further contended that the DGAP has not considered the impact of ITC loss on the aerated beverages. On the account of various factors, these items were taxable at the rate of 40%. However, post-rate reduction, these items were sold at the tax rate of 5%, without ITC benefit. Therefore, the loss of ITC on aerated beverages was much higher than the ITC ratio of 11.16% as computed by the DGAP. In this regard, it is pertinent to mention that the value of the transaction between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the selling price. Therefore, to determine the profiteering in respect of aerated beverages items, the pre and post rate reduction transaction values were compared by the DGAP. Further, the DGAP has arrived at the profiteered amount by calculating the total impact of ITC denial which included the loss of ITC in respect of aerated beverages based items also. Therefore, the contention of the Respondent is not maintainable and hence, denied.

42. The Respondent has also alleged that and the DGAP has ignored the negative values and resorted to 'zeroing' to compute higher profiteering which was used by the anti-dumping authorities in certain countries which was opposed by the Government of India before the WTO and vide *Report No.* ***WT/DS141/AB/R dated 1.3.2001 of the Appellate Body of WTO, regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India***, the stand of the Indian Government

was accepted and it was held that the practice of 'netting off' should be applied and hence the above methodology was binding on the DGAP while calculating 'profiteering'. If the instances where excess benefit passed on by the Respondent is considered, an amount of Rs. 5,66,862/- would be reduced from the total amount of alleged profiteering. The above contention of the Respondent is not correct as no netting off can be applied in the cases of profiteering as the benefit has to be passed on to each customer which has to be computed on each SKU. Netting off implies that the amount of benefit not passed on certain SKUs will be subtracted from the amount of benefit passed on other SKUs and the resultant amount shall be determined as the profiteered amount. If this methodology is applied the Respondent shall be entitled to subtract the amount of benefit which he has not passed on from the amount of benefit which he has claimed to have passed, which will result in complete denial of benefit to the customers who were entitled to receive it. Every recipient of goods or services is entitled to the benefit of the tax rate reduction by way of reduced prices and Section 171 does not offer the Respondent any leeway to suo moto decide on any other modality to pass on the benefit of reduction in the rate of tax to his recipients. Therefore, any benefit of tax rate reduction passed on to a particular recipient or customer cannot be appropriated or adjusted against the benefit of tax rate reduction due to another recipient or customer. Hence, this methodology of

'netting off' cannot be applied in the present case as the customers have to be considered as individual beneficiaries and they cannot be compared with dumped goods and netted off. This Authority has also clarified in its various orders that the benefit cannot be computed at the product, service, or entity level as the benefit has to be passed on each supply of goods and services. Hence, the above contentions of the Respondent are not correct as the Respondent cannot apply the above methodology of netting off as has been approved in the above Report of the WTO as it would result in denial of benefit to the customers which would amount to a violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution. Accordingly, the profiteered amount cannot be reduced by Rs. 5,66,862/-.

43. The Respondent has also contended that while computing the ratio of ITC to Net Taxable Turnover, the DGAP has considered the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017, whereas, the Rate Amendment Notification was notified on 15.11.2017. The DGAP should consider the ITC in respect of stock as on 15.11.2017 and the proportionate ITC for 14 days in respect of the Rent invoice for the month of November 2017. In this connection, it is pertinent to mention that as per the provisions of Section 171 of the CGST Act, 2017 read with Rule 42 and 43 of the CGST Rules, 2017, the Respondent has not reversed the ITC on the closing stock of Inputs and

Capital goods as on 14.11.2017. Further, the Respondent has also availed ITC on the invoices related to charges of Rent, etc. for the whole month of November 2017, however, the said ITC was not available to the Respondent w.e.f. 14.11.2017. Therefore, the above contention of the Respondent is not sustainable.

44. The Respondent has further contended that in the case of two of his products, the DGAP has incorrectly made a comparison of his two different brand products since the products supplied in the pre-tax rate reduction period were sold under a different brand. Also, two of his products had been introduced only after 15.11.2017. Therefore, the profiteering amount of Rs. 2,64,384/- calculated on these 2 products should be reduced. In this regard, we find no ground to differ from the observation of the DGAP that the amount of profiteering is computed only from the data submitted by the Respondent vide his various submissions. Also the Respondent has not submitted any documentary evidence to prove his contention. Therefore, the contention of the Respondent is not tenable.

45. The Respondent has also pleaded that the DGAP while arriving at profiteering has failed to appreciate that different factors at different points in time affect the costing and pricing of a product and therefore, no straight jacket formula could be used for either arriving at a base price or for calculating profiteering. The pricing of products was dependent on various factors like increase in

expenses and increase in cost due to GST implementation, change in IT systems, marketing costs, operating cost, increased cost of manpower and rental cost which should be considered while arriving at the profiteering. In this connection, it would be pertinent to mention that the provisions of Section 171 (1) and (2) of the above Act require the Respondent to pass on the benefit of tax reduction to the consumers only and have no mandate to look into fixing of prices of the products which the Respondent was free to fix. If there was an increase in his costs the Respondent should have increased his prices before 15.11.2017, however, it cannot be accepted that his costs had increased exactly on the intervening night of 14.11.2017/ 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. We thus opine that the Respondent has increased the prices of his supplies only for appropriating the benefit of tax reduction to deny the above benefit to the consumers.

46. The Respondent has also claimed that he was operating both of his outlets under investigation under the franchisee model, wherein M/s Subway Systems India Pvt. Ltd. was the ultimate authority which controlled the prices, POS and any revision in the prices and the Respondent has no real control over the prices of the products being sold. Therefore, profiteering, if any, should be demanded from the franchisor i.e. M/s Subway India.

Upon perusal of the agreement between the Respondent and M/s Subway Systems India Pvt. Ltd. i.e. the franchisor, it is revealed that there isn't any clause related to the control of the prices or MRP of the products supplied by the Respondent. The Respondent was free to fix the prices of his products. Further, the provisions of Section 171 of the CGST Act, 2017 required a registered person under GST to pass on the benefit of additional ITC or reduction in the rate of tax by way of commensurate reduction in the prices of the goods or services supplied by him. Hence, it is the responsibility of the Respondent to comply with the provisions of Section 171 of the CGST Act, 2017. Therefore, the contention made by the Respondent is not correct.

47. The Respondent has also relied upon the decision of this Authority in the case of Jijrushu N. Bhattacharya v. M/s NP Foods wherein it was held that there was no profiteering in that case; therefore, the same should be accepted in his case too. However, on perusal of the above-referred order, it is found that in that case the rates fixed after rate reduction were commensurate with the denial of ITC. However, in the present case, the rates fixed by the Respondent after rate reduction are higher than the denial of ITC. The facts of the above-referred case are different from the present case. Therefore, the contention of the Respondent is not acceptable.

48. The Respondent has further contended that the right to reasonable profit was a part of the right of trade and any

methodology prescribed under Section 171 of the Act, ibid, could not be de-hors a reasonable profit. In this regard, it is pertinent to mention that this Authority doesn't have the mandate to regulate the same. The Respondent is free to exercise his right to practice any profession or to carry on any occupation, trade or business, as per the provisions of Article 19 (1) (g) of the Constitution. He can also fix his prices and profit margins in respect of the supplies made by him. Under Section 171 this Authority has only been mandated to ensure that both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments are passed on to the end consumers who bear the burden of the tax. This Authority is charged with the responsibility of ensuring that both the above benefits are passed on to the general public as per the provisions of Section 171 read with Rule 127 and 133 of the CGST Rules, 2017. This Authority has nowhere interfered with the business decisions of the Respondent and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

49. Based on the above facts the profiteered amount is determined as Rs. 61,67,097/- as has been computed in Annexure-15 of the DGAP's Report dated 25.10.2019. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. Further, since the recipients of the benefit, as determined, are not identifiable, the Respondent

is directed to deposit an amount of Rs. 61,67,097/- in two equal parts of Rs. 30,83,548.50/- each in the Central Consumer Welfare Fund and the Maharashtra State Consumer Welfare Fund as per the provisions of Rule 133 (3) (c) of the CGST Rules 2017, along with interest payable @ 18% to be calculated starting from the dates on which the above amount was realized by the Respondent from his recipients till the date of its deposit. The aggregate amount of Rs. 61,67,097/- shall be deposited, as specified above, within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned SGST Commissioner.

50. 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 he has thus resorted to profiteering. Hence, he has committed an offence under section 171 (3A) of the CGST Act, 2017, and therefore, he is liable to penal action under the provisions of the above Section. Accordingly, a 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.

51. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioner of SGST Maharashtra 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 Maharashtra State Governments as per the details given above. A report in compliance of this order shall be submitted to this Authority by the concerned SGST Commissioner within a period of 4 months from the date of receipt of this order.

52. Further, the DGAP vide his report dated 25.10.2019 has reported that the Respondent has 35 operational outlets at Mumbai International Airport, Terminal 2 and out of these 35 outlets, only 02 outlets were franchisees of M/s Subway Systems India Pvt. Ltd. It is also clear to us that the Respondent has profiteered in his two Subway outlets. Therefore, as per the provisions of Section 171(2) of the CGST Act, 2017, this Authority has reasons to believe that there is a need to investigate all the outlets of the Respondent since profiteering on the part of the Respondent has already been established in the case of his two Subway outlets as also the fact that supplies from various outlets of the Respondent are being made through a single GST registration and the same ITC Pool/Electronic Credit Ledger is being used for all the supplies being made from that registration. Therefore, this Authority, in line with the provisions of Section 171(2) of the CGST Act, 2017 and as per the amended Rule 133 (5) (a) of the CGST Rules 2017 directs the DGAP to further investigate all the other outlets of the said

Respondent for violation of the provisions of Section 171 of the CGST Act 2017 and to submit his Report as per the provisions of Rule 133 (5) (b) of the CGST Rules, 2017, since there are adequate reasons to believe that the Respondent may not have passed on the benefit of rate reduction to his customers in terms of Section 171(1) of the Act ibid, in the same manner as in the two outlets.

53. 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 on 30.10.2019, this Order was to be passed on or before 29.04.2020. However, due to the 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 in terms of the Notification No. 55/2020- Central Tax dated 27.06.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes and Customs under Section 168 A of the CGST Act, 2017.

54. A copy each of this order be supplied to the Applicant, the Respondent and the concerned Commissioner CGST/SGST for necessary action. File be consigned after completion.

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

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

17.8.2020

(A.K Goel)
Secretary, NAA

File No. 22011/ NAA/97/Lite Bite/2019/4145-4149 Dated: 17.08.2020

Copy To:-

1. M/s Lite Bite Travel Foods Pvt. Ltd., B-505, 5th Floor, Town Centre-II, Andheri Kurla Road, Andheri East, Mumbai-400059.
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
3. Chief Commissioner of Central Goods & Services Tax, Mumbai Zone GST Building, 115 M.K. Road, Opp. Churchagate Station, Mumbai-400020.
4. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010.
5. Guard File.

17/8

A. K. GOEL
SECRETARY, NAA