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

Case No.	66/2020
Date of Institution	05.02.2020
Date of Order	28.10.2020

In the matter of:

1. Ms. Avanti Patel, anonymous Applicant.
2. Director General of Anti-Profiteering, Indirect Taxes & Customs, Second Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Starbucks Coffee, Tower-2, 10th Floor, Indiabulls Financial, Elphinstone Road, Lower Parel, Mumbai- 400013.

Respondent

Quorum:-

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

Present:-

1. None for the Applicant No. 1.
2. Ms. Gayatri, Joint Commissioner, for the Applicant No. 2.
3. Mr. Nikhil Chandrana, Chief Finance Officer, Mr. Arun Ramachandran, Tax Head, Mr. Jay Paleja, General Manager, Mr. Pratik Jain and Mr. Sumit Lunker Authorised Representatives for the Respondent.

ORDER

1. The brief facts of the present case are that under Rule 128 (1) of the Central Goods and Services Tax (CGST) Rules, 2017, an application was filed by the Applicant No. 1 against the Respondent before the Standing Committee on Anti-profiteering alleging that the Respondent had not passed on the benefit of reduction in the GST rate on restaurant service when it was reduced from 18% to 5% w.e.f. 15.11.2017 without benefit of ITC and he had increased the base prices of the food items sold by him and applied 5% GST thereon, by either maintaining the pre-rate reduction selling prices or even increasing them in the post-rate reduction period and thus he had resorted to profiteering. In support of her allegation, the above Applicant had submitted copies of tax invoices dated 11.11.2017 and 15.11.2017 vide which she had purchased "Short Capuccino" from the Respondent.

2. The application was examined by the Standing Committee on Anti-profiteering in its meeting held on 02.07.2018 and as per the minutes of the meeting it was decided to refer the matter to the Director General of Anti-Profiteering (DGAP) to investigate and collect necessary evidence to determine whether the benefit of reduction in the rate of tax on the restaurant service had been passed on by the Respondent to his recipients as per the provisions of Rule 129 (1) of the above Rules.

3. The DGAP had sought extension to complete the investigation, which was extended upto 31.12.2018 by this Authority vide its orders dated 09.10.2018 and 15.11.2018 in terms of Rule 129 (6) of the CGST Rules, 2017. After completing the investigation the DGAP had submitted his Report under Rule 129 (6) of the CGST Rules, 2017 on 27.12.2018. The period of investigation was from 15.11.2017 to 30.06.2018.

4. The DGAP in his Report had stated that a notice under Rule 129 (3) of the CGST Rules, 2017 was issued on 27.07.2018, calling upon the Respondent to submit his reply as to whether he admitted that the benefit of reduction in the rate of tax had not been passed on to the recipients by way of commensurate reduction in prices. The Respondent was also asked to suo moto determine the quantum of benefit not passed on, if any, and indicate the same in his reply to the notice.

5. The DGAP had also stated that the Respondent in his replies had submitted that he was engaged in the business of operating and maintaining restaurants under the name "Starbucks- A Tata Alliance" or "Starbucks Coffee- A Tata Alliance" where he was selling Coffee,

Tea and Iced Beverages etc. He had also submitted that he had adopted a policy to revise his prices twice in a financial year and accordingly prices were being revised on an annualized basis @7-8% depending upon the price of the product. He had also claimed that though the revised base prices factored in the cost of non-creditable input GST, there was no increase in the ultimate prices (inclusive of GST) charged from the recipients. He had further claimed that though the base price of the complained product Short Cappuccino had increased when the GST rate on restaurant service was reduced from 18% to 5% but its selling price (inclusive of GST) had actually decreased as could be seen from the Table-1 below:-

Table - 1

Type of product	**Price up to 14.11.2017 (Rs.)**			**Price w.e.f.15.11.2017 (Rs.)**		
	Base Price	GST @ 18%	Actual Price to Consumer	Base Price	GST @ 5 %	Actual Price to Consumer
Short Cappuccino	155	28	183	170	9	179

6. The DGAP's Report had further stated that the Respondent was primarily engaged in making Business-to-Customer (B2C) sales at his restaurants so the tax charged on the invoices was not available as credit to his recipients but formed part of his cost. He had also claimed that even after increasing the base prices to compensate for the loss of input tax credit (ITC), he had managed to reduce the selling-cum-tax prices for his recipients and the base prices were increased only to offset the loss of ITC which was to the extent of 10-11% and which was more than the increase in the base prices. The Report had also mentioned that the Respondent had claimed that in the month of

October 2017, he had completed 5 years and had opened his 100th store and to celebrate the occasion he had offered all short/tall size handcrafted beverages at Rs. 100 (inclusive of all taxes) and this offer was only for one day i.e. on 28.11.2017 and was valid at his all stores in India, except 6 office stores which did not operate on weekends.

7. The Report had further mentioned that the Respondent had claimed that total sales made by him on an all India basis on 28.11.2017 were 2.35 lakh drinks which was 7 times more than his usual sales and he had received an amount of Rs. 2.32 Crore, which was 2.3 times more than his usual sales on a Saturday.

8. The DGAP had also submitted that while determining the ITC as a percentage of the total taxable turnover of the Respondent, the ITC for the period from July, 2017 to 14th November, 2017, as furnished in the GSTR-3B Returns, had been adjusted by excluding the amount of ITC on inter-unit branch transfers (as per ITC Register) and while determining the net taxable turnover of the Respondent during the period from July, 2017 to 14th November, 2017, the total taxable turnover (excluding inter-unit branch transfers as per ITC Register), as per GSTR-1 Returns, had been taken into consideration. Based on these calculations the ratio of ITC to the net taxable turnover had been taken for determining the impact of denial of ITC which was not available to the Respondent after 14.11.2017. The DGAP had further stated that the ITC amounting to Rs. 14.33 Crore (approx.) was available to the Respondent during the period from July, 2017 to 14.11.2017 which was estimated to be 10.83% of the net taxable turnover of restaurant service (approx. Rs. 132.45 Crore) supplied during the same period. From 15.11.2017, when the GST rate on

restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent and based on the data provided by the Respondent the ITC ratio to the taxable turnover had been arrived at by the DGAP as has been shown in the Table-2 given below:-

Table - 2 **(Amount in Rs.)**

Particulars	Jul., 2017	Aug., 2017	Sept., 2017	Oct., 2017	1st November to 14th November, 2017	Total
ITC Availed as per GSTR-3B Returns (A)	1,16,85,510	2,37,47,582	2,64,50,928	3,94,79,987	5,48,15,528	15,61,79,535
Less: Tax on Inter unit branch transfer as per ITC Register (B)	38,01,244	33,00,201	25,31,613	23,23,742	8,44,760	1,28,01,560
Net Input Tax Credit available for the period from 01.07.2017 to 14.11.2017 (C)= (A-B)	78,84,266	2,04,47,381	2,39,19,315	3,71,56,245	5,39,70,768	14,33,77,975
Total Outward Taxable Turnover as per GSTR-1 Returns (D)	31,93,37,086	29,71,03,612	30,21,16,195	33,09,16,091	14,98,98,633	1,39,93,71,617
Less: Inter unit branch transfers as per ITC Register (E)	2,29,55,267	1,94,19,499	1,52,05,541	1,29,94,299	42,95,612	7,48,70,218
Net Outward Taxable Turnover for the period from 01.07.2017 to 14.11.2017 (F) = (D-E)	29,63,81,819	27,76,84,113	28,69,10,654	31,79,21,792	14,56,03,021	1,32,45,01,399
Ratio of Input Tax Credit to Net Outward Taxable Turnover (G)= (C/F)						**10.83%**

9. The DGAP in his Report had further submitted that the invoices issued by the Respondent clearly showed that the Respondent had increased the base price of the product Short Cappuccino from Rs. 155/- to Rs. 170/- when the rate of GST was reduced from 18% to 5%. Based on the reduction in the rate of tax and after taking into account the impact of denial of ITC, the outward supplies (other than zero rated, nil rated

and exempted supplies) during the period from 15.11.2017 to 30.06.2018, the DGAP had estimated the amount of net higher sale realization due to increase in the base prices of the products. The DGAP had stated that 571 products were sold during the period from 01.11.2017 to 14.11.2017 and after scrutiny of the outward supplies it was found that 51 more products were also sold by the Respondent.

10. The DGAP had calculated the profiteered amount as Rs. 4,51,29,600/- by comparing the average base prices of the 51 products sold during the period from 01.10.2017 to 31.10.2017 and 571 products sold during the period from 01.11.2017 to 14.11.2017, with the actual basic prices of the said products sold during the period from 15.11.2017 to 30.06.2018. This profiteered amount had been arrived at in respect of those supplies where the base prices, post 15.11.2017, were increased by more than 10.83% (impact of denial of input tax credit).

11. After perusal of DGAP's Report, this Authority in its meeting held on 02.01.2019 had decided to hear the Applicants and the Respondent on 18.01.2019 and accordingly notice was issued to all the interested parties. On the request of the Respondent date of hearing was adjourned to 31.01.2019. On behalf of the Applicant No. 1 none appeared, the DGAP was represented by Sh. R. A. Rajneesh, Assistant Commissioner and the Respondent was represented by Sh. Nikhil Chandrana, Chief Financial Officer, Sh. D. K. Beri, Advisor, Sh. Gurudas B. Puri, Sh. Rahul Chakraborty and Sh. Pratik Jain Authorised Representatives. Further hearings were held on 21.02.2019, 07.05.2019 and 21.05.2019.

12. The Respondent in his written submissions dated 31.01.2019 had stated that he was primarily engaged in the business of operating and

maintaining restaurants under the brand name 'Starbucks- A Tata Alliance' where beverages and food items were being sold and traded. He had also stated that the Respondent had adopted a policy of revising his prices twice in a financial year to the extent of 7-8% depending upon the prices of the products and adopted a strategy of differential pricing based on the area of operation (metro city store, a non-metro city store and airport store). He had further submitted that there were 101 stores as of 14.11.2017 and 31 new stores were added post 15.11.2017 and presently he had around 132 stores in the country. He had further stated that pursuant to the change in the rate of tax and on account of loss of ITC, the base prices were increased on the products to recover the increased cost due to loss of ITC but the selling price of the complained product was reduced as has been shown in the Table-3 below:-

Table - 3 (Amount in Rs.)

Product 'Short Cappuccino'	**On 14.11.2017**	**On 15.11.2017**
Base Price	155	170
GST (@ 18% / @ 5%)	28	9
Price After Tax	183	179
Reduction in price to the customer		**4**

13. The Respondent had also submitted that the ratio of ITC to sales calculated by the DGAP had been computed without considering the appropriate value of sales as the Report had taken the total value of outward taxable turnover from GSTR-1 Returns but the value of inter-unit branch transfers for each State was taken from the ITC Registers, as against the Sales Registers which had resulted in higher net taxable outward turnover than the actual sales made in a particular

State. He had further claimed that if the correct sale values were considered, the ratio of ITC to sales for the period from 01.07.2017 to 14.11.2017, would be 11.79% as against 10.83% as estimated by the DGAP.

14. The Respondent had further submitted that the DGAP while computing the average base prices prior to 14.11.2017 had taken incorrect value of quantities. He had also claimed that the DGAP had reduced the value of credit notes issued during the period from 01.10.2017 to 31.10.2017 for 51 products and for the period from 01.11.2017 to 14.11.2017 in respect of 571 products but had failed to reduce the corresponding quantity relating to the credit notes which had resulted in net sales being divided by the incorrect value of quantity. In other words this had resulted in calculation of alleged profiteering on a product even when there was no profiteering by the Respondent.

15. The Respondent had also claimed that he had adopted a policy of increasing the prices twice in a financial year, the first increase was w.e.f. 18.04.2018 by 3.75% which was ignored by the DGAP while computing the average prices. The Respondent had further claimed that he was following a differential pricing policy for his various formats of stores viz. Airport Stores, Tier-1 City Stores and Tier-2 City Stores. He had also mentioned that in the absence of any prescribed valuation methodology under the GST law with regard to profiteering, he had laid down certain possible methods of calculation, for the purpose of arriving at the profiteered amount in the most logical manner. The Respondent had submitted his own calculations format-wise at pan India level as has been shown in the Table-4 below:-

Table-4

S. No.	Method of Calculation	PAN India/ Formation wise	Price Pre rate change upto 14.11.2017	Price post rate change from 15.11.2017	Profiteered amount ignoring increased price from 18.04.2018	Remarks
1.	Actual to Actual	Formation wise	Price list as on 14.11.2017	Price list as on 15.11.2017	3,81,740/-	Comparing actual price on 14.11.2017 to actual price on 15.11.2017
2.	Average to Average	Formation wise	Average price	Average price	18,26,576/-	Average to Average comparison
3.	Average to Average	PAN India	Average price	Average price	25,44,662/-	Method applied in Jubiliant Food Works
4.	Average to Transaction	Formation wise	Average price	Transaction level price	43,50,565/-	This is a variation to the method followed by the DGAP with format to format comparison
5.	Average to Transaction	PAN India	Average price	Transaction level price	1,51,36,248/-	This is the method followed by the DGAP

16. He had also contended that the old stores and the new stores were considered by the DGAP on the same footing. However the new stores which were launched after 15.11.2017 could not have comparable prices for the products sold in the new stores and so the profiteered amount estimated for the new stores should be eliminated.

17. The Respondent had further contended that for the period from 15.11.2017 to 30.11.2017, the DGAP had considered duplicate value of sales in the State of Maharashtra. He had also argued that the average price per item code prior to 14.11.2017 had been computed using the sale details for the period from 01.11.2017 to 14.11.2017 in respect of 571 products but for 51 products which were not sold during the aforementioned period, the average price was computed using the sale details for the month of October 2017 which was not justified because in October 2017, he had completed 5 years and opened his 100th store in India and on this occasion he had offered all short and

tall sized beverages at uniform price of Rs. 100/- (inclusive of all taxes) in all stores operational on 28.10.2017. Hence, the sales made on 28.10.2017 should be considered as exceptional supplies and must be ignored for the purpose of computation of average price per product since these supplies could not be treated as an indicator of the sales trend.

18. The Respondent had further argued that while computing the alleged amount of profiteering, the DGAP had sought to compare the tax inclusive price of the product sold by the Respondent, however, the Respondent had deposited tax in the account of the Government.

19. The Respondent had also averred that if his above objections were to be considered by the DGAP, the alleged profiteered amount would be reduced from Rs. 4,51,29,600/- to Rs. 1,34,86,898/-. He had further averred that the DGAP's approach to compare the average price with the actual price on a pan India basis was incorrect. If the DGAP had compared the average price for both the periods then the net profiteering would be Rs. 24,23,497/- and not Rs. 4,51,29,600/-.

20. He had also pleaded that the pricing for the products was based on various factors such as cost of raw materials, cost of services, inflation, consumer price index, food price index, exchange rate, market conditions, competition, business strategy and pricing adopted in similar markets etc. Based on these factors the Respondent had adopted a consistent pricing policy of increasing prices twice a year. He had further pleaded that the change in the rate of tax with effect from 15.11.2017, with loss of ITC, required immediate adjustment in prices and these adjustments were done only to recover the increased cost due to denial of ITC. It was his submission that instead of

increasing the prices of the products to recover other incremental costs he had increased the prices only to the extent of denial of ITC with an intention of not causing displacement to the market and had borne such incremental cost in the interest of consumers. To substantiate his claim he has referred to the case of ***Kumar Gandharv v. KRBL Ltd. (2018) (13) GSTL 412 (NAPA)*** decided by this Authority wherein the increase in the price of paddy was considered to declare that there was no profiteering.

21. He had also maintained that Section 171 of the CGST Act, 2017 required only to pass on the reduction in the rate of tax to 'the recipient' but the DGAP had considered all the products sold not only to the Applicant No. 1 but also to all other recipients, which was beyond the scope of his investigation. It was also submitted that in terms of Rule 129 (3) of the CGST Rules, 2017 the DGAP was to issue notice to all the interested parties containing information of the relevant products including description of the goods which implied that the scope of the investigation was to be restricted to the products stated in the application. Moreover, the product 'Short Cappuccino' sold to the above Applicant was sold at Rs. 170/- even though the recalibrated commensurate price was Rs. 172.05/-, thus there was loss to the Respondent. The Respondent had further submitted that if the DGAP's Report was to be considered at an entity level for all the products even then the ratio of ITC to the sales as per his calculations would be 11.79% and by even considering the DGAP's approach the ratio of ITC to sales would be 10.83% or 11.79% (later revised by the DGAP) and therefore any price increase upto 11.79% was justifiable and did not amount to profiteering and since the average price increase made by

him from 15.11.2017 was 9 to 10%, any question of profiteering was to be ruled out.

22. The Respondent had also claimed that Rule 126 of the CGST Rules, 2017 empowered this Authority to determine the methodology and procedure for computing the extent of profiteering. However, no precise computation methodology or principles had been formulated by this Authority. The anti-profiteering provisions enacted in Australia and Malaysia were supported by the detailed set of rules for determining the manner in which the 'unreasonably high profits' or 'price exploitation' would be computed. In light of the legislations enacted in other countries upon introduction of GST, it was essential for this Authority to expressly set out detailed regulations for providing the methodology for commuting the extent of profiteering.

23. He had further claimed that right to trade was a fundamental right guaranteed under Article 19 (1) (g) of the Constitution of India. Right to trade included the right to determine prices and such right could not be taken away without any explicit authority under the law passed by the Parliament or the State legislature under Entry 34 of the Concurrent List (List III) of the Seventh Schedule to the Constitution of India.

24. He had also contended that the benefit of reduced rate of GST was passed on to the customers since the GST rate of 5% had been charged instead of the erstwhile GST rate of 18% and the basic price of the product in question was also reduced after giving effect to the increased tax cost on account of denial of ITC.

25. The Respondent had also stated that the notice issued to him sought to levy penal action under Section 29, 122, 123, 124, 125, 126 and 127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST

Rules, 2017. However, the notice nowhere specified the reasons why any penal action needed to be initiated and simply stated that in case this Authority confirmed the allegation of profiteering against the Respondent, he would be liable to penal action in terms of the aforesaid referred provisions. In this regard, he had submitted that it was settled law that where any penal action was proposed to be taken, then the authorities must be clear in their mind as to why the action was to be initiated especially when there was no allegation of malafide intention on the part of the Respondent. He had placed reliance on the cases of ***B. Lakshmichand v. Government of India 1983 (12) E.L.T. 322 (Mad.) and Commissioner of Central Excise, Bombay-III v. Bhikhlal Dwarkadas 1998 (99) E.L.T. 438 (Tribunal)]*** in this regard. He had further submitted that it was a settled principle that while interpreting any provision contemplating imposition of penalty a penal provision could not be lightly invoked or exercised without giving due adherence to the core facts and circumstances of the case. He had also relied on the decision rendered in the case of ***Suryovonics Limited v. Ministry of Commerce 2010 (254) E.L.T. 0073 (A.P.)*** by the Hon'ble High Court of Andhra Pradesh, wherein it was held that unless an act of violation was directly attributable to a person, penalty liability could not be extended.

26. The Respondent in his further submissions dated 07.05.2019, 20.05.2019 and 29.05.2019 had stated that in line with his policy of taking two price increases in a financial year, he had increased the base prices of his products by 3.75% w.e.f. 18.04.2018 and therefore any subsequent price change should be ignored for computing the profiteered amount. He had also stated that the DGAP had not

considered the exceptional sales made on 28.10.2017 and that in respect of the new stores / markets there could be no element of profiteering as these stores did not operate prior to 15.11.2017. He had further stated that the average price increase made by him from 15.11.2017 was 9-10%, which was less than the loss of ITC of 11.79% as calculated by the DGAP and therefore he had passed on more benefit than the loss of ITC to him. He had also tabulated the trend of price increases made by him since 2014-15 onwards as is given in the Table-5 below:-

Table – 5

Period	Average percentage of price increase for food and beverages
April-14	4.73%
July-14 to December-14	3.90%
April-15	6.54%
October-15	4.67%
April-16	2.33%
October-16	3.38%
April-17	4.12%

27. The Respondent vide his submission dated 16.07.2019 had stated that the investigation period from 15.11.2017 to 30.06.2018 was excessive. He had relied on the decision of this Authority given in the case of ***Mohammad Azid Ramzani and another v. M/s Adarsh Marbles (2019-TIOL-42-NAA-GST)***. He had also submitted that in the above case this Authority had held that the stock holding period and periodicity of price revision could be important criteria in determining the period of investigation. Further, this Authority had also held that since no documentary evidence to this effect was produced by the Respondent his contention could not be considered. The Respondent quoting the above case, in the present case, had stated that he had

provided the relevant evidence and satisfactorily established the trend followed by him with regard to periodic price revisions.

28. In response to the submissions of the Respondent, the DGAP in his reply dated 15.04.2019 had admitted certain factual errors as had been mentioned by the Respondent in his various submissions. The errors admitted by the DGAP were as follows:-

a. that the B2B taxable turnover for the month of September, 2017 was inadvertently taken as Rs. 1,87,06,258/- instead of Rs. 56,11,365/- in Annexure-30 of his original Report dated 27.12.2018.

b. the quantity pertaining to the credit notes had been inadvertently included in the total quantity and accordingly revised ITC ratio to the taxable turnover was computed again as has been shown in Table-6 below:-

Table - 6

Particulars	Jul., 2017	Aug., 2017	Sept., 2017	Oct., 2017	01.11.2017 to 14.11.2017	Total
ITC Availed as per GSTR-3B Returns (A)	1,16,85,510	2,37,47,582	2,64,50,928	3,94,79,987	5,48,15,528	15,61,79,535
Less: Tax on Inter unit branch transfers as per ITC Register (B)	38,01,244	33,00,201	25,31,613	23,23,742	8,44,760	1,28,01,560
Net Input Tax Credit available for the period 01.07.2017 to 14.11.2017 (C)= (A-B)	78,84,266	2,04,47,381	2,39,19,315	3,71,56,245	5,39,70,768	14,33,77,975
Total Outward Taxable Turnover as per GSTR-1 Returns (D)	31,93,37,086	29,71,03,612	30,21,16,195 **289021303**	33,09,16,091	14,98,98,633	1,39,93,71,617 **1386276725**
Less: Inter unit branch transfers as per ITC Register (E)	**45560740**	**31224231**	**28723245**	**44952105**	**20079253**	**170539574**
Net Outward Taxable Turnover for the period 01.07.2017 to 14.11.2017 (F) = (D-E)	**273776346**	**265879381**	**260298058**	**285963986**	**129819380**	**1215737151**
Ratio of Input Tax Credit to Net Outward Taxable Turnover (G)= (C/F)						**11.79**

29. The DGAP had also submitted that during the course of investigation, the Respondent had mentioned the "quantity" in credit notes in positive value, as a result of which the quantity pertaining to the credit notes had been inadvertently included in the total quantity, instead of being excluded. The contention of the Respondent that duplicate sale entries had been considered in the working for November, 2017 in respect of the supplies made in the State of Maharashtra had also been examined by the DGAP and vide his Report dated 26.12.2018 he had modified his calculations and therefore the profiteered amount was reduced from Rs. 4,51,29,600/- to Rs. 2,42,82,996/- as has been given in the Table-7 below:-

Table – 7

S. No.	State & Code (Place of Supply)	Profiteering (Rs.)
1	Delhi (07)	86,34,890
2	Haryana (06)	10,41,014
3	Karnataka (29)	12,17,384
4	Maharashtra (27)	1,16,64,413
5	Tamil Nadu (33)	4,66,846
6	Telangana (36)	7,22,196
7	Uttar Pradesh (09)	3,50,141
8	West Bengal (19)	1,86,112
Total		**2,42,82,996/-**

30. The DGAP had further claimed that the Respondent had submitted outward taxable supplies (other than zero rate, nil rated and exempted supplies) for all the stores and on comparison of the old stores sales data with the new stores sales data, it was observed that the Respondent had sold products at the same prices in both the stores. Therefore, the new stores data was taken into consideration.

31. This Authority had carefully considered all the Reports furnished by the DGAP, the submissions of the Respondent and the documents placed

on record and it was revealed that the prices of the products being sold by the Respondent were reduced from 18% to 5% w.e.f. 15.11.2017. However the benefit of ITC was withdrawn thus the loss of ITC benefit that was available to the Respondent prior to 15.11.2017 had now become part of his cost, hence the base prices of the product could be increased to compensate the loss of ITC. Section 171 of the CGST Act, 2017 required this Authority to examine whether the benefit of rate reduction had been passed on by the Respondent to the recipients by fixing his post-rate reduction prices commensurately after taking in to account the denial of ITC.

32. The Respondent had submitted that the value of inter unit branch transfers was taken from the ITC Registers instead of the GSTR-1 Returns which had resulted in higher net taxable turnover and accordingly the ITC ratio to the taxable turnover was estimated at 10.83% instead of 11.79%. The DGAP vide his Report dated 15.04.2019 had admitted this mistake and accordingly he had revised the ITC ratio to the taxable turnover from 10.83% to 11.79%. The DGAP had also admitted that the quantity pertaining to the credit notes had been inadvertently included in the total quantity and accordingly he had revised the average base prices. Accordingly, all the calculation errors had been removed and the DGAP had revised Annexure-31 attached to his Report.

33. The Respondent had also claimed that he had made sales through 3 different channels namely Tier-1 City Stores, Tier-2 City Stores and the Airport Stores. From the data provided by the Respondent it was seen that the prices charged in the Tier-1 and Tier 2 City Stores were same but the prices for the same products varied at the Airport Stores. For

instance the price for the beverage 'Tall Latte' at the Airport Stores was Rs. 220/- while it was Rs. 205/- in Tier-1 and 2 City Stores. Similarly for the 'Carrot Cake with Cream Cheese' it was Rs. 240/- at the Airport Stores while it was Rs. 235/- in the other Tier-1 and 2 City Stores. The following Table submitted by the Respondent also reflected that the prices were same for the Tier-1 and 2 channels while there was variation in prices for the same product sold in the Airport channel. Considering the fact that the price variation was almost Rs. 15/- or there was almost 7.3% difference in prices, it appeared from the contention of the Respondent that while comparing the City Stores prices of the product with the Airport Stores prices the DGAP should have adopted a different methodology:-

Article Description	**Airport Stores**						
	Apr-15	Oct-15	Apr-16	Oct-16	Apr-17	Nov-17	Apr-18
Tall Latte	170	180	185	190	195	210	220
Tall Java Chip Frappuccino	200	205	210	215	225	245	255
Tall C Macchiato	195	205	210	225	245	265	270

Article Description	**Tier 1 City Stores**						
	Apr-15	Oct-15	Apr-16	Oct-16	Apr-17	Nov-17	Apr-18
Tall Latte	155	165	170	175	180	195	205
Tall Java Chip Frappuccino	185	190	195	200	210	230	240
Tall C Macchiato	190	200	205	210	225	245	250

Article Description	**Tier 2 City Stores**						
	Apr-15	Oct-15	Apr-16	Oct-16	Apr-17	Nov-17	Apr-18
Tall Latte	155	165	170	175	180	195	205
Tall Java Chip Frappuccino	185	190	195	200	210	230	240
Tall C Macchiato	190	200	205	210	225	245	250

34. The DGAP vide his Report dated 15.04.2019 had also stated that based on the pre and post reduction GST rates, considering the impact of denial of input tax credit and the details of invoice-wise outward supplies (other than zero rated, nil rated and exempted supplies) during the period from 15.11.2017 to 30.06.2018, 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 goods, despite the reduction in GST rate from 18% to 5% (with denial of input tax credit), had been worked out. The DGAP had also stated that 571 items were sold during the period from 01.11.2017 to 14.11.2017 and 51 more items were sold during the month of October 2017. Accordingly the profiteered amount had been computed by comparing the revised average base prices with the actual base prices of the said items sold during the period from 15.11.2017 to 30.06.2018. The revised profiteered amount was calculated as Rs. 2,42,82,996/- as per the Revised Annexure-31 and this profiteered amount had been calculated only in respect of those supplies where the base prices post 15.11.2017, were increased by more than 11.79% (impact of denial of ITC). But the profiteered amount had been arrived at by considering the average prices of all the 3 channels together. However, this Authority was of the opinion that the average prices should be calculated separately for the Tier-1 and 2 City Stores and the Airport Stores.

35. Accordingly this Authority vide its Interim Order No. 18/2019 dated 05.12.2019 had directed the DGAP under Rule 133 (4) of the CGST Rules 2017 to reinvestigate the following issues:-

i) to recalculate the average pre-rate reduction base prices separately for Tier-1 and 2 City Stores and compare them with the actual prices of the post-reduction period.

ii) to recalculate the average pre-rate reduction base prices for the Airport Stores and compare them with the actual post-rate reduction prices.

iii) to investigate on the basis of the evidence whether the increase in the prices made by the Respondent w.e.f. 18.04.2018 was justified.

36. The DGAP was directed to submit his Report based on the above observations after reinvestigation within a period of two months. The DGAP has accordingly, re-investigated the case and submitted his Report dated 05.02.2020 to this Authority.

37. The DGAP has stated that after receipt of the aforesaid order from this Authority, notice was issued on 23.12.2019 calling upon the Respondent to submit fresh information/documents. The Respondent has submitted his replies to the said Notice, vide letters dated 30.12.2019, 22.01.2020 and 28.01.2020. The response of the Respondent, vide the said letters, has been summed up by the DGAP as follows:-

(a) The Respondent has stated that it was normal for him to increase prices and both internal and external factors were considered while deciding to raise prices. There were many reasons or factors that were responsible for pricing decisions of goods and services which might be regular or abrupt but were primarily receptive to business, market and customer considerations. Generally, pricing decision for

any goods or services was based on various factors such as cost of raw materials, cost of services, inflation, consumer price index, food price index, exchange rate, market conditions, competition, business strategy and pricing adopted in similar markets etc. The Respondent has also added that the food and beverage industry typically followed a pattern of periodic increases in prices of products. The periodicity of the price increase depended on the company. In the case of the Respondent, he had been adopting a consistent pricing policy of increasing prices twice a year (rounded off to the nearest INR 5/- or INR 10/-, depending upon the price of the product). The factors due to which the Respondent had been increasing prices were as under:-

- Inflationary trends relating to cost of raw material, consumables and capital expenditure;
- Variable expenses such as royalty, rent, marketing expenses, etc.;
- Fuel and Power cost;
- Purchasing power of the customer;
- Competitive pricing;
- Regional pricing.

(b) The Respondent has also submitted before the DGAP the trend of price increase made by him since 2014-15 as is given in the Table below:-

Table

Period	Average percentage of price increase for food and beverages
April-14	4.73%
July-14 to December-14	3.90%
April-15	6.54%
October-15	4.67%
April-16	2.33%
October-16	3.38%
April-17	4.12%
November-17	9-10%
April-18	3.75%
October-18	6%
April-19	4%

(c) The Respondent has further submitted that the decision to increase prices from October, 2017 was postponed as the Respondent was in the process of making changes to the IT system in the wake of GST implementation. On 15.11.2017, the Central Government had issued notification reducing the GST rate applicable on the restaurant supplies from 18% to 5% with denial of ITC. Hence, considering the significant loss of ITC, the Respondent had undertaken a price increase w.e.f. 15.11.2017 which was less than the ITC loss to him.

(d) The Respondent has also claimed that since the trigger for the investigation was whether there was any profiteering on account of change in the base prices due to reduction in the rate of tax (and denial of ITC) with effect from 15.11.2017, any subsequent price change should be ignored. Accordingly, the Respondent has submitted that for making the calculations for the period from 18.04.2018 to 30.06.2018, the prices should be kept constant at the 15.11.2017 price level.

38. The DGAP has also intimated that the Respondent has also submitted the following documents/information for all the 10 registrations held by him:-

i. Copies of GSTR-1 Returns from July, 2017 to June, 2018.

ii. Copies of GSTR-3B Returns from July, 2017 to June, 2018.

iii. Invoice-wise details of outward supplies reconciled with GSTR-3B Returns for the period from July, 2017 to June, 2018.

iv. Submissions with regard to increase in prices w.e.f. 18.04.2018 along with supporting documents.

39. The DGAP has also submitted that as per the directions of this Authority passed vide I.O. No.18/2019 dated 05.12.2019, he had initiated re-investigation in the case. At the time of submission of the earlier investigation Report dated 26.12.2018, the Respondent had submitted all the requisite information and data which was not sufficient for the current re-investigation. Accordingly, during the re-investigation the Respondent was asked to submit the data again. Hence the case had been reinvestigated again on the basis of fresh information/documents submitted by the Respondent.

40. The DGAP has further submitted that the various replies of the Respondent and the documents/evidence on record has been examined by him in detail. The issue for investigation was whether the rate of GST on the restaurant services provided by the Respondent was reduced w.e.f. 15.11.2017 and if so, whether the Respondent had passed on the benefit of such reduction in tax rate to the recipients in terms of Section 171 of the CGST Act, 2017.

41. The DGAP has also stated that it was important to examine Section 171 of CGST Act, 2017 which governed the anti-profiteering provisions under the GST which reads as "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 was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously only be in absolute terms such that the final price payable by a consumer must get reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax under the GST regime to the consumers. Moreover, it was also clear that the above Section simply did not provide a supplier of the goods or services, any other means of passing on the benefit of ITC or reduction in the rate of tax to the consumers.

42. The DGAP has further stated that while determining the ITC as a percentage of the total taxable turnover of the Respondent, the ITC for the period from July, 2017 to 14.11.2017, as furnished in the GSTR-3B Returns, had been adjusted by excluding the amount of ITC on inter-unit branch transfers. While determining the net taxable turnover of the Respondent during the period from July, 2017 to 14.11.2017, the total taxable turnover (excluding inter-unit branch transfers as per ITC Register), as per GSTR-1 Returns for the period from July, 2017 to 14.11.2017, had been taken into consideration. Finally, the ratio of ITC to the net taxable turnover had been taken for determining the impact of denial of ITC (which was available to the Respondent till 14.11.2017). Accordingly, the finding was that ITC amounting to Rs.

14.33 Crore (approx.) was available to the Respondent during the period from July, 2017 to 14.11.2017 which was approximately 11.79% of the net taxable turnover of restaurant service (approx. Rs. 121.57 Crore) 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 said ITC was not available to the Respondent. A summary of the computation of ratio of ITC to the taxable turnover of the Respondent has been given in the following Table:-

Table

(Amount in Rs.)

Particulars	Jul, 2017	Aug, 2017	Sept, 2017	Oct, 2017	1st November to 14th November, 2017	Total
ITC Availed as per GSTR-3B Returns (A)	11685510	23747582	26450928	39479987	54815528	15,61,79,535
Less: Tax on Inter unit branch transfers as per ITC Register (B)	3801244	3300201	2531613	2323742	844760	1,28,01,560
Net ITC available for the period 01.07.2017 to 14.11.2017 (C)= (A-B)	**7884266**	**20447381**	**23919315**	**37156245**	**53970768**	**14,33,77,975**
Total Outward Taxable Turnover as per GSTR-1 Returns (D)	319337086	297103612	289021303	330916091	149898633	1,38,62,76,725
Less: Inter unit branch transfers included in B2B sales as per GSTR-1 Returns (E)	45560740	31224231	28723245	44952105	20079253	17,05,39,574
Net Outward Taxable Turnover for the period 01.07.2017 to 14.11.2017 (F) = (D-E)	**273776346**	**265879381**	**260298058**	**285963986**	**129819380**	**1,21,57,37,151**
Ratio of ITC to Net Outward Taxable Turnover (G)= (C/F)						**11.79**

43. The DGAP has also contended that as regards the issue of recalculating the average pre-GST base prices separately for the Tier-1, Tier-2 City Stores and the Airport stores and compare them with the actual base prices of the post-rate reduction period for the Tier-1 and Tier-2 City Stores and the Airport Stores respectively, the profiteering in the case of restaurant service was computed by taking the data of a particular item i.e. Tier2105246 sold through the same channel i.e. Tier-2, during the month of 01.11.2017 to 14.11.2017 (pre-GST rate reduction) and an average base price (without GST) was obtained on

dividing the total taxable value by total quantity of this item sold during the period from 01.11.2017 to 14.11.2017. The average base price of this item was compared with the actual selling price of this item sold through the same channel during the post-GST rate reduction period i.e. on or after 15.11.2017. The DGAP has illustrated the same as is given in the Table below:-

Table **(Amount in Rupees)**

Sl. No.	Description	Factors	Pre Rate Reduction (Before 15.11.2017)	Post Rate Reduction (From 15.11.2017 to 30.06.2018)
1.	Product Description (Item Code)	A	Tier2105246	
2.	Channel	B	Tier-2	
3.	Period	C	01.11.2017 to 14.11.2017	
4.	Total quantity of item sold	D	342	
5.	Total taxable value	E	77,546	
6.	Average base price (without GST)	F=E/D	226.74	
7.	GST Rate	G	18%	5%
8.	Base price with denial of ITC @11.79%	H=F*1.1179		253.48
8.	Commensurate Selling price (post Rate reduction)	I=H*1.05		266.15
7.	Invoice No.	J		5200940041
8.	Invoice Date	K		21.11.2017
9.	Total quantity (above invoice)	L		1
10.	Total Invoice Value	M		267.76
11.	Actual Selling price (post rate reduction	N=M/L		267.76
12.	Difference (Profiteering)	O=N-I	**1.61**	

44. The DGAP has further contended from the above Table that the Respondent had not reduced the selling price of the "Tier2105246" product, commensurately when the GST rate was reduced from 18% to 5% (with denial of ITC @11.79%) w.e.f. 15.11.2017, vide Notification No. 46/2017 Central Tax (Rate) dated 14.11.2017 and hence he had profiteered an amount of Rs. 1.61 on the above item

and thus the benefit of reduction in the GST rate was not passed on to the recipients by way of commensurate reduction in the price, in terms of Section 171 of the CGST Act, 2017. The DGAP has also stated that on the basis of the above calculation, profiteering in case of all the impacted items of the Respondent i.e. Restaurant Service had also been arrived at in the similar way. However, the average base prices for other channels were different from the channel shown in the Table above and accordingly, profiteering has been calculated channel-wise by the DGAP.

45. The DGAP has also stated that on the basis of the aforesaid pre and post-reduction GST rates, the impact of denial of ITC and the details of outward supplies (other than zero rated, nil rated and exempted supplies) during the period from 15.11.2017 to 30.06.2018, the product wise sale registers were reconciled with the GSTR-1 and GSTR-3B Returns and the amount of net higher sale realization due to increase in the base prices of the service, despite the reduction in the GST rate from 18% to 5% (with denial of input tax credit) has been worked out. The DGAP has found that total 1365 items in each category i.e. Tier-1, Tier-2 City Stores and Airport Stores were sold during the period from 01.11.2017 to 14.11.2017 by the Respondent. After scrutiny of the Respondent's outward supplies during the period from July, 2017 to October, 2017 the DGAP has found that there were additional 141 items in October, 2017, 95 items in September, 2017, 70 items in August, 2017 and 87 items in July, 2017 which were also sold by the Respondent. The profiteered amount computed by the DGAP was Rs. 1,04,70,664/- which included the GST on the base profiteered amount. The said profiteered amount has been arrived at by comparing the

average of the base prices of the items sold in each category i.e. Tier-1 and Tier-2 City Stores and the Airport Stores during the period from 01.07.2017 to 14.11.2017 with the actual invoice-wise base prices of items sold in each category i.e. Tier-1 and Tier-2 City Stores and the Airport Stores respectively during the period from 15.11.2017 to 30.06.2018. The excess GST so collected from the recipients has also been included in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased base prices.

46. The DGAP has also stated that the third issue in the Interim Order was to investigate on the basis of the evidence whether the increase in the prices made by the Respondent w.e.f. 18.04.2018 was justified. The DGAP has observed from the submissions of the Respondent that he has been increasing the prices of his items two times in a year mostly in the month of April and October. The DGAP has stated that this Authority might take a view on this contention as it contained a legal point which pertained to the price revision.

47. The DGAP has also stated that the place of supply (State or Union Territory) wise break-up of the total profiteered amount of Rs 1,04,70,664/- was as under:-

Table

Sr. No.	State & Code (Place of Supply)	Profiteering (Rs.)
1	Delhi (07)	23,55,097
2	Haryana (06)	6,74,336
3	Karnataka (29)	8,63,611
4	Maharashtra (27)	54,22,157
5	Tamil Nadu (33)	3,41,226

6	Telangana (36)	47,999
7	Uttar Pradesh (09)	2,44,497
8	West Bengal (19)	89,741
Total		**1,04,70,664**/-

48. The DGAP has also argued that the allegation of profiteering by way of increasing the base prices of the products, to more than offset the impact of denial of input tax credit, despite a reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017 (with denial of input tax credit), stood confirmed against the Respondent. Hence, Section 171(1) of the CGST Act, 2017 requiring that "a 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", had been contravened in the present case. The place of supply-wise total profiteered amount as computed by the DGAP was Rs. **1,04,70,664/- (One Crore Four Lakh Seventy Thousand Six Hundred and Sixty Four)**.

49. The above Report dated 05.02.2020 was carefully considered by this Authority and it was decided that the Applicants and the Respondent be asked to appear before this Authority on 25.02.2020. The Respondent was issued notice on 10.02.2020 asking him to explain why the above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed. During the course of the hearings no one appeared for the Applicant No. 1, Ms. Gayatri, Joint Commissioner, appeared for the Applicant No. 2 and the Respondent was represented by Mr. Nikhil Chandrana, Chief Finance Officer, Mr. Arun Ramachandran, Tax Head, Mr. Jay Paleja, General Manager, Mr.

Pratik Jain and Mr. Sumit Lunker Authorised Representatives. The Respondent has filed his written submissions dated 25.06.2020 and 13.08.2020. The issues raised by the Respondent in his above submissions have been mentioned in the subsequent paras.

50. It was submitted by the Respondent that his pricing policy ought to be considered for the purpose of computing the alleged amount of profiteering. He has also submitted that this Authority had directed the DGAP to investigate on the basis of evidence whether increase in the prices made by the Respondent w.e.f. 08.04 2018 was justified. It was further submitted that the DGAP in his Report dated 05.02.2020 has considered the details provided by the Respondent which established the price increase made by the Respondent. The DGAP has investigated, verified and observed that the Respondent has increased the prices of his products two times in a year mostly in the months of April and October. While the DGAP has confirmed that the Respondent has a trend of increasing prices of his products two times a year, he has requested this Authority to take a final view on the same. However, he has stated that the DGAP has not considered the price increases made post rate reduction in his Report dated 05.02.2020.

51. The Respondent has also submitted that he has been adopting a consistent pricing policy of increasing prices twice a year rounded off to nearest Rs. 5/- or 10/-, due to the following factors:-

i. Inflationary trends relating to cost of raw material, consumables and capital expenditure;

ii. Expenses such as royalty, rent, marketing expenses, etc.;

iii. Fuel and Power cost;

iv. Purchasing power of the customer;

v. Competitive pricing;

vi. Regional pricing.

52. The Respondent has further submitted the trend of price increases since April, 2014 till April, 2019 as has been given in the Table below:-

Sr. No.	Period	Average percentage of price increase for food and beverages
1.	April 2014	4.73%
2.	July 2014 to December-2014	3.90%
3.	April 2015	6.54%
4.	October 2015	4.67%
5.	April 2016	2.33%
6.	October 2016	3.38%
7.	April 2017	4.12%
8.	November 2017	9-10%
9.	April 2018	3.75%
10.	October 2018	6%
11.	April 2019	4%

Based on the sample invoices, price lists and handheld menus respectively, the aforesaid consistent and continuous price increase trend for the product "Tall Latte" has been depicted by the Respondent mentioning the price movement from April 2015 to April 2018 for each format / category of store as under:-

Month	Base Price in INR		
	Airport Store	Tier 1 City Store	Tier 2 City Store
April 2015	170	155	155
October 2015	180	165	165
April 2016	185	170	170
October 2016	190	175	175
April 2017	195	180	180
November 2017	210	195	195
April 2018	220	205	205

The Respondent has also undertaken a similar analysis for another product viz. "Tall Java Chip Frappuccino" as is given below:-

Month	Base Price in INR		
	Airport store	Tier 1 city store	Tier 2 city store
April 2015	200	185	185
October 2015	205	190	190
April 2016	210	195	195
October 2016	215	200	200
April 2017	225	210	210
November 2017	245	230	230
April 2018	255	240	240

It was further submitted that with the change in rate of tax with effect from 15.11.2017, in addition to the aforesaid factors for revision in prices, loss of ITC has become an additional factor requiring immediate adjustment in prices. Despite the above mentioned factors, the 'price to customer' was adjusted only to recover the increased cost due to denial of ITC. In view of this, price increase made on 18.04.2018 should be ignored for the purposes of calculation of the amount of profiteering.

53. The Respondent has also stated that after review of the evidence submitted by the Respondent, the DGAP has confirmed that the Respondent has been taking price increases. However, the DGAP has requested this Authority to take a final view on the same. By doing so principally the Respondent's submission of ignoring price increases has been accepted by the DGAP but the effect of the same has not been given in the amount calculated vide his Report dated 05.02.2020. If such effect was considered, the alleged amount of profiteering would be reduced to INR 33,82,472/-.

54. Without prejudice to the submissions made above, the Respondent has further stated that the DGAP ought to have adopted a reasonable period for investigation. In this regard, reference was made to the Order dated 26.6.2019 passed by this Authority in the case of ***Mohammad Azid Ramzani & another v. M/s Adarsh Marbles 2019-TIOL-42-NAA-GST***. In the said case since M/s Adarsh Marbles had failed to provide documentary evidence to demonstrate its stock holding period and the periodic price revision, the argument that the period considered was excessive was not accepted by this Authority. However, the Respondent being in the restaurant business has a very limited stock holding period. In the present matter, considering that the Respondent had revised his prices with effect from 18.04.2018, the DGAP ought to have adopted a period for investigation upto 17.04.2018 only. In view of the above, the Respondent has submitted that this Authority should restrict the present investigation for the period from 15.11.2017 to 17.04.2018. If it was considered, the alleged amount of profiteering would be further reduced to INR 22,77,109/- for the above period.

55. It was also submitted that in the case of ***Kumar Gandharv v. KRBL Ltd. 2018 (13) G.S.T.L. 412 (N.A.P.A.)***, this Authority has held that due to increase in the price of paddy (which was one of the raw materials) and increase in rate of GST, no benefit has been derived by the Respondent. Considering this, in the present case also where price was increased due to business considerations, the impact of such change should be ignored in the profiteering calculations.

56. The Respondent has also claimed that even if it was assumed that the Respondent has benefitted to the tune of the alleged quantified amount, considering that there has been a substantial increase in cost, the same should be made available as an offset against the alleged profiteering. If such offset was not granted, it would lead to grave injustice to the Respondent.

57. The Respondent has further claimed that the investigation ought to have been restricted to the product in respect of which the complaint was made. He has also added that the present investigation has been initiated in response to the complaint filed by the Applicant No. 1 in respect of 'Short Capuccino' purchased by her at one of the Respondent's outlets on two dates viz. 11.11.2017 and 15.11.2017. Therefore, the scope of the DGAP's investigation should have been restricted to the product for which the complaint was made and it could not be simply expanded to include all the products sold by the Respondent. It was also submitted that as per Section 171 of the CGST Act, the emphasis was to pass on the benefit of reduction in the price to 'the recipient' and by seeking to compute profiteering on all the products, the DGAP has not restricted himself to the product sold to the complainant/recipient but for all the recipients, which was beyond

the scope of this investigation. Further, Rule 129(3) of the CGST Rules provided for issue of notices to all the interested parties containing information of the relevant products including description of the goods. Thus, the provision clearly implied that the scope of the investigation was to be restricted to the goods against which the complaint was made. It was further submitted that when this Authority in the case of ***Crown Express Dental Lab v. Theco India Private Limited 2018-TIOL-14-NAA-GST*** had observed that the DGAP had restricted his investigation in respect of the machine in respect of which the complaint was made and the Respondent had profiteered, the DGAP was directed to conduct a separate inquiry in respect of the other products of the Respondent also. In view of the aforesaid, it was submitted that when no profiteering was established in respect of the product for which the complaint was filed, the investigation should be dropped.

58. The Respondent has also contended that even if it was assumed that the DGAP was correct by going beyond the product referred to by the above Applicant and such benefit calculation was required to be done at the entity level, then at the entity level the ratio of loss of ITC to sales as agreed by the DGAP was **~11.79%.** By applying the approach followed by the DGAP, given that the ratio of denial of ITC to sales was 11.79%, any price increase upto 11.79% was justifiable and did not amount to profiteering. Since the average price increase made by the Respondent from 15.11.2017 was **~9-10%**, any question of profiteering was ruled out. In fact, the Respondent could even justify a higher average price increase above 11.79%. Hence, any allegation of profiteering was preposterous and in complete disregard of the facts.

59. It was further contended that the average prices computed for the period upto 14.11.2017 should be compared only with the average prices for the products sold from 15.11.2017. It was also submitted that vide his submissions dated 31.01.2020 and 07.05.2020, he has stated that the DGAP's approach to compare the average prices with the actual prices at a later date was incorrect. He has further submitted that if the DGAP intended to compute the average prices to neutralize the impact of differential pricing and spot discount schemes offered by the Respondent on a case to case basis, the DGAP ought to have computed the average prices for the period post 15.11.2017 so as to similarly neutralize the impact of differential pricing and spot discount schemes offered by the Respondent on a case to case basis.

60. The Respondent has also argued that in the absence of any prescribed methodology, arbitrary approach has been followed by the DGAP. He has further argued that Rule 126 of the CGST Rules empowered this Authority to determine the methodology and procedure for computing the extent of profiteering. However, no precise computation methodology or principles have been formulated by this Authority. It was also submitted that the methodology to determine whether the taxpayer has passed on the benefit of reduced rate of GST or enhanced input tax credits was one of the essential ingredients of Section 171 of the CGST Act. Consequently, the absence of the aforesaid methodology would lead to a scenario wherein the entire investigation conducted by the DGAP would become a futile exercise. It was also pleaded that the concept of anti-profiteering has been introduced in various countries such as Australia and Malaysia vide which detailed set of rules for determining the

manner in which the 'unreasonably high profits' or 'price exploitation' would be computed have been framed. In light of the legislations enacted in other countries upon introduction of GST, it was essential for this Authority to expressly set out the detailed regulations for providing the methodology for commuting the extent of profiteering. It was therefore submitted that this Authority should issue suitable guidelines for computation of the extent of profiteering and direct the DGAP to submit the investigation report in accordance with such guidelines.

61. It was also averred that the Respondent has solemnly attempted to immediately pass on the benefit of reduced GST rate to his customers after offsetting the increased cost due to denial of input tax credit. The bonafides of the Respondent to pass on the benefit of reduced GST rate to the customers were evident from the fact that the 'price to customer' for 'Short Capuccino' was reduced from INR 183/- to INR 179/-.

62. It was also argued that right to trade was a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. Moreover, right to trade included the right to determine prices and such right could not be taken away without an explicit authority under the law passed by the Parliament or the State legislature under Entry 34 of the Concurrent List (List III) of the Seventh Schedule to the Constitution of India. The Respondent has further argued that the benefit of reduced rate of GST was passed on to the customers since the GST rate of 5% has been charged instead of the erstwhile GST rate of 18%. Moreover, the basic price of 'Short Capuccino' was also reduced by the Respondent after giving effect to the increased tax cost

on account of denial of input tax credit. It was also submitted that the DGAP, while determining the alleged quantum of profiteering has travelled beyond the scope of Section 171 of the CGST Act and by seeking to exercise control over the prices of the goods and/or services supplied by the Respondent. This form of price control was in violation of Article 19(1)(g) of the Constitution of India.

63. We have carefully considered the Reports of the DGAP, the submissions of the Respondent and the documents placed on record and it is revealed that the Respondent is engaged in the business of operating and maintaining restaurants under the name of "Starbucks-A Tata Alliance" or "Starbucks Coffee-A Tata Alliance" where he sells Coffee, Tea, Iced Beverages and food items. The Respondent is selling his products through the Airport Stores situated in Mumbai and Delhi, Tier-1 City Stores located in Mumbai, Delhi, Gurugram, NOIDA, Chandigarh, Mohali and Kolkata and Tier-2 City Stores located in Bangalore, Chennai, Hyderabad, Pune, Ahmedabad, Surat and Vadodra. Presently he has 132 stores in the country situated in 11 States/UTs. It is also revealed that the rate of tax on the products being sold by the Respondent was reduced from 18% to 5% without the benefit of ITC vide Notification No. 46/2017-Central Tax dated 14.11.2017 w.e.f. 15.11.2017 and therefore, there is no dispute that the Respondent was required to pass on the benefit of rate reduction to his buyers as per the provisions of Section 171 (1) of the CGST Act, 2017. Since the denial of ITC benefit that was available to the Respondent prior to 15.11.2017 has now become part of his cost, hence the base prices of the products being sold by the Respondent could be increased to compensate the loss of ITC.

64. It is further revealed that the Applicant No. 1 vide invoice dated 11.11.2017 had purchased "Short Capuccino" when the rate of GST was 18% by paying Rs. 155/-, from the Respondent's Lower Parel, Mumbai City Store. She vide invoice dated 15.11.2017 had again purchased the above product when the rate of GST was 5% by paying price of Rs. 170/-. She had complained to the Standing Committee on Anti-Profiteering that the Respondent had not passed on the benefit of rate reduction to her. Accordingly, after having prima facie been satisfied the above Committee had forwarded her complaint to the DGAP for detailed investigation under Rule 129(1) of the above Rules. The DGAP, vide his Report dated 26.12.2018, had estimated the profiteered amount as Rs. 4,51,29,600/- by comparing the average base prices of the 51 products sold during the period from 01.10.2017 to 31.10.2017 and 571 products sold during the period from 01.11.2017 to 14.11.2017, with the actual base prices of the said products sold during the period from 15.11.2017 to 30.06.2018. To investigate whether the Respondent had passed on the benefit of rate reduction, the DGAP had computed the ratio of denial of ITC to the Net Taxable Turnover for the period from 01.07.2017 to 14.11.2017 by taking in to account the ITC and the Turnover of the Respondent during the above period and arrived at the ratio of denial of ITC @10.83%. Accordingly, the DGAP had computed the profiteered amount in respect of those supplies where the base prices, post 15.11.2017, were increased by more than 10.83% by the Respondent. However, no profiteering was computed by the DGAP on the products the base prices of which were increased upto 10.83% to make up the loss on account of denial of ITC post rate reduction. The Respondent

had argued that the actual impact of denial of ITC was 11.79% and not 10.83% as had been calculated by the DGAP. The DGAP, vide his clarifications dated 15.04.2019, had accepted the contention of the Respondent and revised the impact of denial of ITC from 10.83% to 11.79%. Accordingly, the DGAP had re-computed the profiteered amount as Rs. 2,42,82,996/-. Further, the Respondent had contended that the average pre rate reduction average base prices should have been computed separately for the Tier-1 and Tier-2 City Stores as he was charging similar prices for both of them but different prices for the Airport Stores. This Authority, after carefully considering the above submission of the Respondent had directed the DGAP to re-compute the base prices and the profiteered amount separately for the above stores under Rule 133 (4) of the CGST Rules, 2017 vide its Interim Order No. 18/2019 dated 05.12.2019. The DGAP was further directed to find out whether the increase in the prices made by the Respondent w.e.f. 18.04.2018 was justified or not. Accordingly, the DGAP has submitted his investigation Report dated 05.02.2020 to this Authority as per the directions passed in the above order. The DGAP has re-computed the ratio of ITC to the Net Outward Taxable Turnover as 11.79% w.e.f. 01.07.2017 to 14.11.2017 vide Table-D of his above Report which has also been duly accepted by the Respondent and hence the same can be fully relied upon.

65. Accordingly, the DGAP based on the pre and post reduction GST rates, the impact of denial of ITC, the details of the outward taxable supplies other than zero rated, nil rated and exempted made during the period from 15.11.2017 to 30.06.2018, as per the product wise sales registers reconciled with the GSTR-1 and GSTR-3B Returns,

has computed the amount of net higher sale realization or the profiteered amount due to increase in the base prices of the products, despite reduction in the GST rate from 18% to 5%. He has found that total 1365 items in each category i.e. Tier-1 and Tier-2 City Stores and Airport Stores were sold during the period from 01.11.2017 to 14.11.2017 by the Respondent and after scrutiny of the outward supplies made during the period from July, 2017 to October, 2017 it was also found that additional 141 items in October, 2017, 95 items in September, 2017, 70 items in August, 2017 and 87 items in July, 2017 were also sold by the Respondent. The profiteered amount has been accordingly calculated as **₹ 1,04,70,664/-** (including GST on the base profiteered amount) as per **Annexure-4** of his Report dated 05.02.2020**.** The profiteered amount has been arrived at by comparing the average of the base prices of the items sold in each category i.e. Tier-1, Tier-2 and Airport Stores during the period from 01.07.2017 to 14.11.2017, with the actual invoice-wise base prices of the items sold in each category of Stores during the period from 15.11.2017 to 30.06.2018. The excess GST so collected from the recipients, has also been included in the aforesaid profiteered amount as the excess prices collected from the recipients also included the GST charged on the increased base prices.

66. The above mathematical methodology employed by the DGAP to compute the profiteered amount is based on the information supplied by the Respondent through his GSTR-1 and GSTR-3B Returns, details of the outward taxable supplies as well as the submissions of the Respondent and hence the same cannot be disputed by the Respondent. The above methodology is logical, reasonable,

appropriate and in consonance with the provisions of Section 171 (1) of the above Act. It has also been approved by this Authority in all such cases of rate reduction where the benefit of ITC has been denied and hence, it can be safely relied upon to determine whether the benefit of tax reduction has been passed on or not.

67. It has been submitted by the Respondent that his pricing policy under which he has been increasing his prices in the months of April and October every year due to increase in his costs, inflation and competition has been verified by the DGAP and therefore, it should be considered for the purpose of computing the amount of profiteering.

68. In this regard para 17 of the Report dated 05.02.2020 submitted by the DGAP has recorded the following findings while verifying the claim of the Respondent regarding regular increases in his prices twice in a year:-

"17. As regards the third issue to investigate on the basis of the evidence whether the increase in the price made by the Noticee w.e.f. 18.04.2018 was justified. It is observed from the submission of the Noticee that they increase the price of his items two times in a year mostly in the month of April and October. Section 171(1) reads as "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." On this submission NAA may take a view as it contains a legal point which pertains to the price revision."

It is quite apparent from the above findings that the DGAP has not explained the evidence which was examined by him while arriving at

the finding of increase in the prices by the Respondent twice in a year. The above finding of the DGAP is unreasoned, not based on supporting evidence, is cryptic, summary and cursory and hence, the same cannot be accepted. The claim of the DGAP that the issue of price increase involved a legal issue can also not be accepted as no grounds have been mentioned on the basis of which it has been claimed that the price increase involved issue of law. Being an agency charged with the responsibility of investigating the anti-profiteering provisions it is the responsibility of the DGAP to specify the reasons on the basis of which the above claim has been made and place the same before this Authority for passing appropriate order.

69. Perusal of the Table prepared by the Respondent which depicts the trend of price increases since April, 2014 till April, 2019 shows that during April, 2014 he had increased his prices by 4.73% however, no increase was made by him in the month of October, 2014. He has claimed to have made increase of 3.90% during the Months of July, 2014 to December, 2014 which falsifies his claim of making increases in the month of October every year. It is also revealed that the Respondent had made increases in his prices in the months of April and October, during the years 2015 and 2016 and in the month of April, 2017. However, no increase was made by him during the month of October, 2017 and it has been claimed that he had made increase in the prices in the month of November, 2017 on the ground that he was in the process of upgrading his IT system due to implementation of the GST. The above claim of the Respondent is fallacious as the GST had come in to force w.e.f. 01.07.2017 and it cannot be accepted that the Respondent had not upgraded his IT system till 15.11.2017,

keeping in view that he could not have issued even a single invoice w.e.f. 01.07.2017 without such upgradation. The Respondent on the basis of the increases made twice during the three years viz. 2015, 2016 and 2018 but not made during the year 2014, 2017 and 2019, cannot claim that he has been normally and consistently increasing his prices during the months of April and October every year. Therefore, the above claim of the Respondent is untenable.

70. It is also revealed that the Respondent has not produced even a single comparative chart of the price increases made by him from April, 2014 to April, 2019 which could establish his claim that he has increased his prices twice every year. He has haphazardly without following any sequence annexed Price Lists of the products sold by him, during the month of April, 2018 (page 143-150 of his submissions dated 13.08.2020), as on 15.11.2017 (page 151-157), April, 2017 (page 158-164), October, 2016 (page 165-169), April, 2016 (page 170-174), October, 2015 (page 175-178) and April, 2015 (Page 179-182) however, from these Price Lists it cannot be concluded that he has increased his prices twice in a year as the details supplied by him are incomplete, unsystematic, incomprehensible and do not included all the Price Lists w.e.f. April, 2014 to April, 2019 as per the claim made by him, hence they cannot be relied upon.

71. It is also established from the below mentioned Table-A furnished by the Respondent that he has claimed to have increased his prices by 9-10% on 15.11.2017 whereas the denial of ITC amounted to 11.79%. Therefore, the claim made by the Respondent that he has increased his prices twice every year as per the percentage shown in the Table is incorrect as he could not have sold his products at loss and he is

trying to justify his claim as an afterthought, whereas actually he has increased his prices by more than 11.79% as is evident from the perusal of Annexure-4. Therefore, both the above claims made by the Respondent are incorrect:-

Table-A

Sr. No.	Period	Average percentage of price increase for food and beverages
1.	April 2014	4.73%
2.	July 2014 to December-2014	3.90%
3.	April 2015	6.54%
4.	October 2015	4.67%
5.	April 2016	2.33%
6.	October 2016	3.38%
7.	April 2017	4.12%
8.	November 2017	9-10%
9.	April 2018	3.75%
10.	October 2018	6%
11.	April 2019	4%

72. The Respondent has also submitted a Table depicting the continuous price increase trend for the product "Tall Latte" from April, 2015 to April, 2018 along with copies of invoices attached with his submissions dated 13.08.2020 at page 72-110 for each category of stores to substantiate his claim that he has increased his price twice every year as per the percentage shown in the Table. The percentage increase in the prices of the above product has been shown in the Table-B furnished below:-

Table-B

Month	Base Price in INR					
	Airport Store	Percentage Increase	Tier 1 City Store	Percentage Increase	Tier 2 City Store	Percentage Increase
Apr-15	170	5.88%	155	6.45%	155	6.45%
Oct-15	180		165		165	
Apr-16	185	2.77%	170	3%	170	3.00%
Oct-16	190	2.70%	175	2.94%	175	2.94%
Apr-17	195	2.63%	180	2.85%	180	2.85%
Nov-17	210	7.69%	195	8.33%	195	8.33%
Apr-18	220	4.76%	205	5.12%	205	5.12%

It is clear from the comparison of Table-A with Table-B that not even a single price increase tallies with each other during the period when it has been claimed to have been made. Whereas the Respondent has claimed to have increased his prices by 9-10% in November, 2017 the actual increase has been shown as 7.69% for the Airport Stores and 8.33% for the Tier 1 and 2 City Stores. The Respondent has not submitted any comprehensible comparison chart based on the invoices which could establish that he had increased his prices as per his pricing policy twice every year. Therefore, the claim of trend of increase in the prices twice is wrong and incorrect.

73. He has also given details of the price rise made by him in respect of the product "Tall Java Chip Frappuccino" as per the Table-C given below which on comparison with the Table-A does not support his contention except for the month of November, 2017 in respect of Tier 1 and Tier 2 City Stores. He has also submitted invoices of the sale of the above product at page 112-118 of his above submission which in the absence of comparative analysis do not establish the claim of the Respondent. Therefore, the claim made by the Respondent that he had increased his pieces twice every year as per the percentage increase mentioned in Table-A cannot be accepted:-

Table-C

Month	Base Price in INR					
	Airport Store	Percentage Increase	Tier 1 City Store	Percentage Increase	Tier 2 City Store	Percentage Increase
Apr-15	200	2.50%	185	2.70%	185	2.70%
Oct-15	205		190		190	
Apr-16	210	2.43%	195	2.63%	195	2.63%
Oct-16	215	2.38%	200	2.50%	200	2.50%
Apr-17	225	4.65%	210	4.76%	210	4.76%
Nov-17	245	8.88%	230	9.52%	230	9.52%
Apr-18	255	4.08%	240	4.34%	240	4.34%

74. The Respondent has similarly submitted the price increase trend in respect of his product "Tall Macchiato" along with the copies of the invoices placed at page 120-142 for his various types of Stores which again do not establish the claim of periodical increase in the prices due to their being no comparison of the price increases overtime twice a year. The details of the claim made by the Respondent in respect of all the three above mentioned products are mentioned hereunder in Table-D which clearly prove that the percentage increase claimed by the Respondent twice every year is wrong and incorrect:-

TABLE-D

	Apr-15	Oct-15	Apr-16	Oct-16	Apr-17	Nov-17	Apr-18
Tall Latte	170	180	185	190	195	210	220
Increase (%)		5.88	2.77	2.7	2.63	7.69	4.76
Tall Java Chip Frappuccino	200	205	210	215	225	245	255
Increase (%)		2.5	2.43	2.38	4.65	8.88	4.08
Tall C Macchiato	195	205	210	225	245	265	270
Increase (%)		4.87	2.43	7.14	8.88	8.16	1.88
Tier 1 City Store	**Apr-15**	**Oct-15**	**Apr-16**	**Oct-16**	**Apr-17**	**Nov-17**	**Apr-18**
Tall Latte	155	165	170	175	180	195	205
Increase (%)		6.45	2.94	2.85	2.77	8.33	5.12
Tall Java Chip Frappuccino	185	190	195	200	210	230	240
Increase (%)		2.7	2.63	2.56	5	9.52	4.34
Tall C Macchiato	190	200	205	210	225	245	250
Increase (%)		5.26	2.5	2.43	7.14	8.16	2.04

Tier 2 City Store	Apr-15	Oct-15	Apr-16	Oct-16	Apr-17	Nov-17	Apr-18
Tall Latte	155	165	170	175	180	195	205
Increase (%)		6.45	2.94	2.85	2.77	8.33	5.12
Tall Java Chip Frappuccino	185	190	195	200	210	230	240
Increase (%)		2.7	2.63	2.56	5	9.52	4.34
Tall C Macchiato	190	200	205	210	225	245	250
Increase (%)		5.26	2.5	2.43	7.14	8.16	2.04

75. The Respondent has also submitted copies of the printed Menu at page 183-210 of his submissions dated 13.08.2020 to claim that he was periodically increasing his prices however, he has not submitted any comparative analysis of the price increase in the absence of which his above claim in not tenable.

76. Based on the above grounds the finding of the DGAP that the Respondent has been increasing his prices twice in a year is not established and hence the same cannot be accepted in view of the any corroborative, cogent and reliable evidence produced by the Respondent.

77. It has further been submitted by the Respondent that he had increased his prices to adjust the loss of ITC and hence, the price increase made by him w.e.f. April, 2018 should be ignored while computing the profiteered amount. In this regard it would be pertinent to mention that the Respondent could have raised his prices to the extent of 11.79% of the base prices which he was charging before the tax reduction however, it is revealed from the investigation carried out by the DGAP that he has increased his prices by more than the above percentage. The Respondent has not increased his prices commensurate to the denial of ITC benefit even once in the post rate reduction period and

he has continued to increase them constantly which establishes that the Respondent has no intention of passing on the benefit of tax reduction as provided under the provisions of Section 171 (1). The Respondent even at this stage continues to be in violation of the above Section and hence, the price increase made by him during the month of April, 2018 or subsequently cannot be ignored while computing the profiteered amount.

78. The Respondent has also stated that the DGAP has confirmed that the Respondent has been making price increases periodically but he has requested this Authority to take a final view on the same. If such effect was considered, the alleged amount of profiteering would be reduced to INR 33,82,472/-. In this regard it would be appropriate to refer to the findings recorded by this Authority in paras supra where it has been held that the observation of the DGAP that the Respondent has been increasing his prices twice in a year is not backed by reliable, cogent and clear evidence and hence the profiteered amount cannot be reduced to Rs. 33,82,472/-.

79. The Respondent has also stated that the DGAP ought to have adopted a reasonable period for investigation. He has also cited the Order dated 26.6.2019 passed by this Authority in the case of ***Mohammad Azid Ramzani & another v. M/s Adarsh Marbles 2019-TIOL-42-NAA-GST*** in his support on the ground that he was having very limited stock holding period and he had increased his prices w.e.f. 18.04.2018 and hence the investigation should be carried out till 17.04.2018 only. As has been discussed above the Respondent has not passed on the benefit of tax reduction any time in the post reduction period and he still continues to be in violation of the provisions of Section 171 (1) and

hence he is required to be investigated even at this stage. Hence, the period of investigation can neither be limited to 17.04.2018 nor the profiteered amount can be reduced to Rs. 22,77,109/-. The facts of the above case cited by the Respondent are not different than that of the Respondent as he has also failed to produce any evidence to show that he has made periodical increases in his prices and hence the above case does not help the Respondent.

80. It was also submitted that in the case of ***Kumar Gandharv v. KRBL Ltd. 2018 (13) G.S.T.L. 412 (N.A.P.A.)***, this Authority has held that due to increase in the price of paddy and increase in the rate of GST, no benefit has been derived by the Respondent and since the price was increased due to business considerations in the present case, the impact of such increase should be ignored. However, perusal of the order passed in the above case shows that the rate of GST was increased from 0% to 5% in respect of the Basmati rice in the above case and not reduced as has been done in the present case and therefore, the provisions of Section 171 (1) were not attracted in the above case. Accordingly, the above case does not support the claim of the Respondent.

81. The Respondent has also claimed that even if it was assumed that the Respondent has benefitted, considering that there has been a substantial increase in cost, the same should be set off against the alleged profiteering. In this connection perusal of the Report of the DGAP dated 05.02.2020 and Annexure-4 of the Report shows that the Respondent has increased his prices by more than 11.79% w.e.f. the intervening night of 14/15.11.2017, the date from which the rate reduction was notified. Such a coincidence is unheard off and appears

to be deliberate to deny the benefit of rate reduction as the costs of the Respondent could not have suddenly risen during the above night. Moreover, this Authority is only concerned about the passing on the benefit of rate reduction as per the provisions of Section 171 (1) and has no mandate to look in the costs of the Respondent. The Respondent has every right to increase his prices depending on increase in his costs but he cannot refuse to pass on the benefit of tax reduction on the ground that his costs have abruptly increased. It is also on record that the Respondent has himself admitted in his submissions that he had increased his prices w.e.f. 15.11.2017 only to absorb the loss of denial of ITC and incremental increase in his costs was not built in the post rate reduction prices, therefore, he cannot resile from his above claim and seek set off against the profiteered amount. Moreover, he could have increased his prices in the month of October, 2017 as per the practice being followed by him but he had not done so and chosen to misappropriate the benefit of tax reduction which he was required to pass on. Therefore, the above contention of the Respondent is untenable.

82. The Respondent has further claimed that the investigation ought to have been restricted to the product in respect of which the complaint was made and it could not have been expanded to include all the products sold by him. In this context it is clear from the perusal of Sub-Section 171 (1) that both the benefits of tax reduction and ITC are required to be passed on by the suppliers to the buyers by commensurate reduction in the prices as they are the concessions which have been granted to them from the public exchequer in the interest of the buyers. Sub-Section 171 (2) provides that the Central

Government may on the recommendations of the GST Council constitute an Authority to **examine** whether the input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the prices of the goods or services or both supplied by him. Therefore, this Authority has jurisdiction to examine all such cases in which the above benefits are required to be passed on suo moto or to get them investigated through the DGAP and its power to do so is not circumscribed by any restriction to the effect that it cannot examine those cases in respect of which no complaint has been made. It is also apparent from the provisions of Rule 129 (1) that the DGAP shall investigate and collect necessary evidence in all such cases in which rate of tax has been reduced or the benefit of ITC has been granted which is required to be passed on to the buyers and submit his Report to this Authority under Rule 129 (6) and hence he is bound to investigate all those cases where benefit of ITC or tax rate is required to be passed on.

83. It would also be pertinent to mention here that the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs vide its Office Order No. 05/Ad.IV/2018 dated 12.06.2018 in pursuance of the Government of India (Allocation of Business) 34th Amendment Rules, 2018 has assigned the following duties to the DGAP:-

a) Conduct of investigation to collect evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate

reduction in prices, in terms of Section 171 of the Central Goods and Services Tax Act, 2017 and the rules made thereunder.

b) Responsibility for coordinating anti-profiteering work with the National Anti-profiteering Authority, the Standing Committee and the State level Screening Committees."

Therefore, it is apparent from the above OM that the DGAP is charged with the responsibility to investigate and collect evidence necessary to determine whether both the above benefits have been passed on or not. No fetters have been placed either in the CGST Act, 2017 or Rule 129 of the CGST Rules, 2017 which provide that the DGAP shall restrict his investigation to the complained goods or services and he would overlook commission of an offence which has been committed in respect of the provisions of Section 171 (1), while supplying other goods or services if it comes to his notice during the course of the investigation. Since, the DGAP is the investigating arm of this Authority any Report furnished by him to this Authority has to cover all the cases of denial of the above benefits once they have come to his notice keeping in view that this Authority has mandate to examine all such cases, determine the amount of benefit and provide relief to the affected buyers. The DGAP is bound to bring before this Authority all such cases in which both the above benefits have not been passed on irrespective of the fact whether any complaint has been received concerning them or not once they have come to his notice. The Respondent cannot be allowed to deny benefit of rate reduction to the other buyers under the above pretext and misappropriate the amount of benefit of ITC which he is not to pay from his pocket. Accordingly,

the DGAP has rightly investigated the benefit of rate reduction to be passed on to the other buyers on the products other than the complained product after giving him due notice under Rule 129 (3) and hence, the investigation conducted by him in this regard is legal and is in consonance with the provisions of Section 171 and the Rules framed under Chapter XV of the CGST Rules, 2017 and therefore, the above claim of the Respondent is not correct and hence, it cannot be accepted.

84. The Respondent has also cited the case of ***Crown Express Dental Lab v. Theco India Private Limited 2018-TIOL-14-NAA-GST*** in which the DGAP had restricted his investigation in respect of the machine in respect of which the complaint was made and profiteering had been established however, the DGAP was directed to conduct a separate inquiry in respect of the other products of the Respondent. In view of the aforesaid, it was submitted that when no profiteering was established in respect of the product for which the complaint was filed, the investigation should be dropped. In this connection it would be relevant to refer to the findings recorded in the para supra which clearly state that there is no restriction on the investigation of the products against which no complaint has been filed or not to extend the investigation if no profiteering has been found on the complained product. The order passed in the above case is not relevant in the facts of the present case as there was profiteering in respect of the machine investigated in the above case and therefore, there was reasonable ground to believe that the Respondent in the above case might have denied benefit of ITC on his other products. Since profiteering has been established in respect of the products other than

the complained product, the same have been correctly investigated as per the provisions of Section 171 read with Rule 129 and hence the proceedings cannot be dropped on the ground that no profiteering was found in respect of the complained product.

85. The Respondent has also contended that even if it was assumed that the DGAP was correct by stating that at the entity level the ratio of ITC to sales was ~11.79% then any price increase upto 11.79% was justifiable and since the average price increase made by the Respondent from 15.11.2017 was ~9-10%, there was no profiteering. In this connection it would be appropriate to mention that as per the provisions of Section 171 (1) every buyer is entitled to the benefit of tax reduction which has to be passed on to him on every product and the same cannot be passed on at the entity level. Any passing of benefit at entity level would amount to denial of commensurate benefit which would fall foul of the provisions of Article 14 of the Constitution as well as Section 171 (1). Therefore, the claim made by the Respondent that he has increased his prices by 9-10% at the entity level which was well below the loss of ITC cannot be accepted. Moreover, the above claim of the Respondent is not borne out from the perusal of Annexure-4 of the investigation Report dated 05.02.2020 which shows that the Respondent has increased his prices by more than 11.79%, the permissible limit upto which he could have increased them to offset the denial of ITC. Accordingly, the above contention of the Respondent is not correct.

86. It was further contended that the average prices computed for the period upto 14.11.2017 should be compared only with the average prices for the products sold from 15.11.2017. In this regard it would be

pertinent to mention that it was essential to compute the pre rate reduction average base price of each product being supplied by the Respondent as he was not selling it on the same price to the various customers and the impact of differential pricing and spot discounts offered by the Respondent on a case to case basis was required to be taken in to account. It was not possible to compare the pre rate reduction average base prices with the post rate reduction average base prices as the benefit is required to be passed on each product to each customer on the basis of the actual price paid by each buyer post rate reduction and therefore, the amount of benefit is required to be computed on each product on the actual price being charged to each customer. If average to average price is compared the commensurate benefit would be denied to the buyers. Therefore, the above claim of the Respondent is incorrect.

87. The Respondent has also argued that Rule 126 of the CGST Rules empowered this Authority to determine the methodology and procedure for computing the extent of profiteering, however, no precise computation methodology or principles have been formulated by this Authority due to which the profiteered amount has not been computed correctly. In this respect it would be pertinent to mention that the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC has been clearly explained 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 a cursory perusal of the above Sub-Section 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 supplier to his buyers since both the above benefits are granted by sacrificing tax revenue by the Central and the State Governments and they cannot be appropriated by a registered person. It also signifies that the above benefits are to be passed on each product or unit of construction or service to every buyer and in case they are not passed on, the denial of benefit or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such products/units/services. What would be the 'profiteered amount' has been clearly mentioned in the explanation attached to Section 171 which is quoted as under:-

"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."

These benefits can also not be passed on at the entity/organisation/branch level as the benefits have to be passed on to each and every buyer on each product/unit/service level by treating them equally. The above provision also mentions "any supply" which means each taxable supply made to each buyer thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer.

Each customer is entitled to receive the benefit of tax reduction or ITC on each product or unit or service purchased by him of course subject to his entitlement. The word "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each product or unit or service based on the tax reduction or the additional ITC which has become available to a registered person after coming in to force of the CGST Act, 2017. Accordingly, the benefit of additional ITC would depend on the comparison of the ITC/CENVAT which was available to a builder in the pre-GST period with the ITC available to him in the post GST period w.e.f. 01.07.2017. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from product to product or unit to unit or service to service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer. Similarly, computation of the profiteered amount is also a mathematical exercise which can be done by any mathematics or accounts knowing person. However, to further explain the legislative intent behind the above provision, this Authority has been empowered to determine the 'Procedure and Methodology' which has been determined by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no set formula, which can cover all the sectors or the products or the services, can be fixed which can be made applicable in all the cases of passing on the above benefits or for computation of the profiteered amount, while determining such a "Methodology and Procedure" as the facts of each case are different.

In the case of one real estate project, date of start and completion of the project, price of the flat/shop, mode of payment of price or instalments, stage of completion of the project, rates of taxes pre and post GST implementation, amount of CENVAT and ITC availed/available, total saleable area, area sold and the taxable turnover received 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 the other project. Therefore, no set procedure/methodology/guidelines can be framed for determining the benefit of additional ITC which has to be passed on to the buyers of the units. Moreover, this Authority under Rule 126 has been empowered to 'determine' Methodology & Procedure and not to 'prescribe' it. Similarly, the facts of the cases relating to the sectors of FMCGs, restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology employed in the case of one sector cannot be applied in the other sector. Moreover, both the above benefits have been given by the Central as well as the State Governments as a special concession out of their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and therefore, they are bound to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous, mandatory and legally enforceable. The above provisions also reflect that the true intent behind the above provision, made by the Central and the State legislatures in their respective GST Acts is to pass on the above benefits to the common buyers who bear

the burden of tax. The Respondent is trying to mislead by wrongly claiming that he was required to carry out complex mathematical computations for passing on the benefit of tax reduction which he could not do in the absence of the procedure and methodology. His claim is absolutely incorrect as he was only required to maintain the pre rate reduction base price of each product being sold by him and then to add 11.79% of the base price in the base price of the product and then charge reduced rate of GST of 5% in the post rate reduction period. However, the Respondent is misappropriating the above benefit by utilising it in his business and is enriching himself at the expense of the vulnerable customers. Hence, no methodology and procedure or guidelines or elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of rate reduction. The Respondent cannot deny the benefit of tax reduction to his customers on the above ground as Section 171 provides clear cut methodology and procedure to compute it. Therefore, the above contention of the Respondent is frivolous and hence the same cannot be accepted.

88. It was also pleaded that the concept of anti-profiteering has been introduced in various countries such as Australia and Malaysia vide which detailed set of rules for determining the manner in which the 'unreasonably high profits' or 'price exploitation' would be computed have been framed whereas no such mechanism has been prescribed by this Authority. It would be relevant to mention here that the provisions made by both the above countries pertain to the regulation of the prices whereas no such provision has been made in the CGST Act, 2017 as it would be hit by Article 19 of the Constitution which

requires that the suppliers should have complete freedom to fix their prices and profit margins. It is strange that the Respondent is seeking to regulate prices when he is not even ready to pass on the benefit of tax reduction which he is not required to pay from his pocket as it has been granted to him by the Central and the State Governments from their precious tax revenue. Therefore, the above contention of the Respondent is not tenable.

89. It was also averred that the Respondent has immediately passed on the benefit of reduced GST rate to his customers after offsetting the increased cost due to denial of input tax credit which was evident from the fact that the 'price to customer' for 'Short Capuccino' was reduced from INR 183/- to INR 179/-. In this regard it would be appropriate to mention that the Respondent has quoted the product on which he has not increased his price by more than 11.79% whereas it is evident from para 16 and Annexure-4 of the Report dated 05.02.2020 filed by the DGAP that the Respondent had profiteered an amount of ₹ 1,04,70,664/- including the GST on the products on which he has increased his prices by more than 11.79%. It would also be relevant to mention here that no profiteering has been computed in respect of those products on which the prices were increased upto 11.79% to make up for the loss of ITC by the Respondent. Therefore, the above plea of the Respondent is untenable.

90. It was also argued by the Respondent that right to trade was a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India which included the right to determine prices which could not be taken away. In this context it would be appropriate to state that there is no provision under Section 171 of the above Act to regulate prices of

the products being sold by the Respondent and the mandate of the above Section is limited to the extent pf passing on the benefits of tax rate reduction and ITC. Neither the DGAP or this Authority has tried to act as a price controller or price regulator nor there is any such power vested in them. The Respondent is free to fix his prices and carry out his business operations as per the right guaranteed to him under the above Article. However, under the pretext of the above right he cannot trample upon the right of the buyers to get the benefit of tax reduction. The contention of increase in the cost cannot be applied to deny the above benefit and therefore, the above claim of the Respondent cannot be accepted.

91. The Respondent has further argued that the benefit of reduced rate of GST was passed on to the customers since the GST rate of 5% has been charged by him instead of the erstwhile GST rate of 18%. In this regard it would be pertinent to mention that mere charging of GST at the reduced rate does not amount to passing on the benefit of such reduction. As is evident from the perusal of the Report dated 05.02.2020 of the DGAP the Respondent has increased his base prices by more than 11.79%, which was the permissible limit upto which he could have increased them and then charged GST at the reduced rate of GST @5%, which clearly establishes that infact no benefit of tax reduction was passed on by him as he had increased the pre rate reduction base prices to nullify the benefit of rate reduction. Therefore, the above claim of the Respondent is unacceptable.

92. The Respondent has also claimed that he has deposited the additional GST which he has collected on the excess prices charged by him in the Government account and hence the same cannot be included in

the profiteered amount. In this connection it would be appropriate to mention that the Respondent has not only collected excess base prices from his 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. The Respondent has thus defeated the objective of both the Central and the State Governments to provide the benefit of rate reduction to the ordinary customers by sacrificing their tax revenue. 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 the ordinary buyers by charging excess GST. Had he not charged additional 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 above Respondent. It would also be appropriate to state here that price includes GST also. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted.

93. It is established from the perusal of the above facts that the Respondent has profiteered to the tune of Rs. 1,04,70,664/- during the period from 15.11.2017 to 30.06.2018 which he is required to pass on to the buyers by commensurately fixing prices of his products after taking in to account the impact of denial of ITC, which he has not done and hence he has violated the provisions of Section 171 (1) of the CGST Act, 2017. Accordingly, as per the provisions of Section 171 (2)

of the above Act read with Rule 133 (1) of the CGST Rules, 2017 the profiteered amount is determined as **Rs. 1,04,70,664/-**. The details of the computation have been given in Annexure-4 of the DGAP's Report dated 05.02.2020. The State wise profiteered amount has been mentioned in the Table given below:-

Table

Sr.No.	State & Code (Place of Supply)	Profiteering (Rs.)
1	Delhi (07)	23,55,097
2	Haryana (06)	6,74,336
3	Karnataka (29)	8,63,611
4	Maharashtra (27)	54,22,157
5	Tamil Nadu (33)	3,41,226
6	Telangana (36)	47,999
7	Uttar Pradesh (09)	2,44,497
8	West Bengal (19)	89,741
Total		**1,04,70,664**/-

94. Accordingly, the Respondent is directed to reduce the prices of his products as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017, keeping in view the reduction in the rate of tax so that the benefit of tax reduction is passed on to the recipients. The Respondent is also directed to deposit the profiteered amount mentioned above along with the interest to be calculated @18% from the date from which the above amount was collected by him from the recipients till the above amount is deposited, in terms of the Rule 133 (3) (b) of the CGST Rules, 2017. Since, the recipients in this case are not identifiable, the Respondent is directed to deposit the above amount of profiteering along with interest in the Consumer Welfare Funds (CWFs) of the

Central and the above State Governments as per the provisions of Rule 133 (3) (c) of the CGST Rules, 2017 in the ratio of 50:50 along with interest @ 18%, till the same is deposited as per the details mentioned in the Table above.

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

96. It is also evident from the above narration of the facts that the Respondent has denied benefit of rate reduction to the buyers of his products 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 for violation of the provisions of Section 171 (1) during the period from 15.11.2017 to 30.06.2018 and therefore, he is apparently liable for imposition of penalty under the provisions of Section 171 (3A) of the above Act. However, perusal of the provisions of Section 171 (3A) under which penalty has been prescribed for the above violation shows that it has been inserted in the CGST Act, 2017 w.e.f. 01.01.2020 vide Section 112 of the Finance Act, 2019 and it was not in operation during the period from 15.11.2017 to 30.06.2018 when the Respondent had committed the above violation and hence, the penalty prescribed under Section 171 (3A) cannot be imposed on the

Respondent retrospectively. Accordingly, notice for imposition of penalty is not required to be issued to the Respondent.

97. 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 from the DGAP under Rule 129 (6) of the above Rules. Since, the present Report has been received by this Authority on 05.02.2020 the order was to be passed on or before 04.08.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date due to *force majeure.* Accordingly, this order is being passed today in terms of the Notification No. 65/2020-Central Tax dated 01.09.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the Central Goods & Services Tax Act, 2017.

98. A copy each of this order be supplied to all the Applicants, the Respondent, Commissioners of Central Goods & Services Tax (CGST) and the State Goods & Services Tax (SGST) of the concerned States 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

28.7.2020

(A. K. Goel)
Secretary, NAA

F. No. 22011/NAA/128/starbucks/2019/5714-5733 Date: 28.10.2020

Copy To:-

1. M/s. Starbucks Coffee, Tower-2, 10th floor, Indiabulls Financial, Elphinstone Road, Lower Parel, Mumbai- 400013
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 and to forward the copy of this Order to the Applicant Ms. Avanti Patel as no contact has been received by this office.
3. Commissioner of commercial Taxes, vanijya bhavan, plot no. 1-3, sector-5, panchkula. Pin - 134 151.
4. Commissioner of commercial Taxes, vanijya therige karyalaya, 1st main road, Gandhinagar, Bangalore- 560 009
5. Commissioner of commercial Taxes, GST bhavan, mazgaon, Mumbai- 400 010
6. Commissioner of commercial Taxes, papjm building, greams road, chennai – 600 006
7. Commissioner of commercial Taxes, o/o the Commissioner of state Tax, ct complex, nampally station road, Hyderabad - 500 001.
8. Commissioner of commercial Taxes, office of the Commissioner, commercial Tax, u.p. Commercial Tax head office vibhuti khand, gomti nagar, lucknow (u.p)
9. Commissioner of commercial Taxes, 14, beliaghata road, kolkata - 700 015.
10. Commissioner of commercial Taxes, deptt of trade & Taxes, vyapar bhavan, ip estate, new delhi-2 pin: 110 002.
11. Chief Commissioner of central Goods & service Tax Chandigarh zone C.R. Building, plot no.19a, sector17c, chandigarh-160017
12. Chief Commissioner of central Goods & Services Tax Delhi zone C.R. Building, I.P. Estate, new delhi110 109
13. Chief Commissioner of central Goods & service Tax, Hyderabad zone GST bhavan, I.B.stadium road, basheer bagh, Hyderabad 500 004
14. Chief Commissioner of central Goods & Services Tax, Meerut zone opp. Ccs university,mangal pandey nagar, meerut-250 004.
15. Chief Commissioner of central Goods & Services Tax, Mumbai zone GST building, 115 m.k. Road, opp. Churchagate station, mumbai-400020
16. Chief Commissioner of central Goods & Services Tax Panchkula sco 407408, sector-8, Panchkula.
17. Chief Commissioner of central Goods & Services Tax, C.R. Building, Queen's Road, Bengaluru.
18. Chief Commissioner of central Goods & Services Tax, 2nd Floor, GST Bhavan, 180 Shanti Pally, R.B. Connector, Kolkata - 700107
19. Chief Commissioner of central Goods & Services Tax, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai - 600034
20. Guard File.