BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	68/2020
Date of Institution	24.12.2019
Date of Order	02.11.2020

In the matter of:

1. Shri M. Srinivas, Principal Commissioner, Medchal Commissionerate, Medchal GST Bhavan, 11-4-649/B, Lakdi-Ka-Pool, Hyderabad-500004.
2. Director-General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Infinity Retail Ltd., Ground Floor, SY No. 128, NH-44, Ratna Arcade, Beside Sree Vensai Tower, Kompally, Hyderabad-500014.

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. None for the Applicant No. 2.
3. Sh. Pramod Dangaich, Chief Finance Officer, Sh. Nitesh Singh, Manager, Sh. Santosh Dalvi, CA and Smt. Meghna Bhavsar, Authorized Representative for the Respondent.

ORDER

1. The present Report dated 23.12.2019, has been furnished by the Applicant No. 2 i.e. the Director-General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that an application dated 29.03.2019 was filed before the Standing Committee on Anti-profiteering, under Rule 128 (1) of the CGST Rules, 2017, by the Applicant No. 1, alleging profiteering by the Respondent in respect of "DSLR Cameras" and "Power Banks" supplied by him. In the application, it was also alleged by the

Applicant No. 1 that the Respondent did not reduce the selling prices of the DSLR Cameras and Power Banks, when the GST rate was reduced from 28% to 18% w.e.f. 01.01.2019, vide Notification No. 24/2018-Central Tax (Rate) dated 31.12.2018 and thus, the benefit of reduction in the GST rate was not passed on to the recipients by way of commensurate reduction in the prices. Along with the application, the Applicant No. 1 had also submitted copies of the invoices, report of the jurisdictional Deputy Commissioner (GST) and signed worksheet of the Respondent.

2. The DGAP has also stated that the Standing Committee on Anti-profiteering had examined the aforesaid application and upon being prima facie satisfied, had decided to refer the same to the DGAP to conduct a detailed investigation in the matter in terms of Rule 129 (1) of the CGST Rules, 2017.

3. The DGAP in his Report has further stated that on receipt of the said reference from the Standing Committee on Anti-profiteering on 26.06.2019, a notice under Rule 129 (3) was issued on 12.07.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 01.01.2019, had not been passed on to the recipients by way of commensurate reduction in prices and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents. The Respondent was also given opportunity to inspect the non-confidential evidence/information which formed the basis of the

investigation from 18.07.2019 to 22.07.2019, which the Respondent had availed of and inspected the documents.

4. The DGAP has also submitted that in response to the above notice, the Respondent did not submit the requisite documents on due date and hence, reminders were issued to him. The Respondent did not submit complete documents even after several reminders, therefore, Summons under Section 70 of CGST Act, 2017 read with Rule 132 of the above Rules were issued to Sh. Pramod Dangaich, Chief Financial Officer to appear in the office of the DGAP on 11.11.2019 and submit the requisite details/documents. In compliance to the Summons, Shri Pramod Dangaich did not appear in the office of the DGAP on 11.11.2019 but submitted certain details vide e-mail dated 12.11.2019. He was again issued 2nd Summons to appear in the office of the DGAP on 18.11.2019 and to submit the pending documents. Sh. Pramod Dangaich had appeared in the office of the DGAP on 22.11.2019 and submitted the details sought vide Summons dated 13.11.2019. Certain other details/clarifications were also sought from the Respondent vide letters dated 28.11.2019 and 03.12.2019 the reply of which had been submitted by the Respondent vide e-mail dated 03.12.2019.

5. The DGAP has also intimated that the period covered by the current investigation was from 01.01.2019 to 30.06.2019.

6. Vide e-mail dated 04.12.2019, the DGAP had also afforded opportunity to the Applicant No. 1 to inspect the non-confidential

documents submitted by the Respondent between 09.12.2019 and 10.12.2019, which the Applicant No. 1 did not avail of.

7. The DGAP has further submitted that in response to the notice dated 12.07.2019 and various letters and summons, the Respondent had replied vide letters/e-mails dated 23.08.2019, 19.09.2019, 26.09.2019, 27.09.2019, 07.10.2019, 17.10.2019, 11.11.2019, 12.11.2019, 15.11.2019, 18.11.2019, 21.11.2019, 22.11.2019, 03.12.2019, 05.12.2019 and 06.12.2019.

8. Vide the aforementioned e-mails/letters, the Respondent had submitted the following documents/information:-

   (a) List of all GSTIN registrations.

   (b) Copies of GSTR-1 and GSTR-3B Returns for the period from December 2018 to June 2019.

   (c) Details of invoice-wise outward taxable supplies for the impacted products during the period from September, 2018 to June, 2019.

   (d) Sample copies of invoices, pre and post 01.01.2019.

   (e) Total outward sales for the period from December, 2018 to June, 2019.

9. The DGAP has also informed that the reference from the Standing Committee on Anti-Profiteering, the various replies of the Respondent and the documents/evidence on record has been carefully examined. The main issues for determination were

whether the rate of GST on the products being supplied by the Respondent was reduced from 28% to 18% w.e.f. 01.01.2019 and if so, whether the commensurate benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

10. The DGAP has further informed that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the Digital Cameras and Power Banks from 28% to 18% w.e.f. 01.01.2019, vide Notification No. 24/2018-Central Tax (Rate) dated 31.12.2018. Since it was a case of reduction in the rate of tax, it was important to examine the provisions of Section 171 of the CGST Act, 2017 to ascertain whether the present case was a case of profiteering or not. Section 171(1) reads as *"Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices."* Thus, the legal requirement of the above provision was abundantly clear that in the event of benefit of ITC or reduction in the rate of tax, there must follow a commensurate reduction in the prices of the goods or services being supplied by a registered person and that the final price being changed for each supply had to be reduced commensurately with the extent of benefit and that there was no other legally tenable mode of passing on such benefits of rate reduction or ITC to the recipients/consumers.

11. The DGAP in his report has also mentioned that on the issue of determination and quantification of profiteering by the Respondent, it appeared that the Respondent had increased the base prices of the DSLR Cameras and Power Banks when the rate of GST was reduced from 28% to 18% w.e.f. 01.01.2019, so that the commensurate benefit of GST rate reduction was not passed on to the recipients by way of commensurate reduction in prices. The methodology adopted for determining the amount of profiteering has been explained by the DGAP by illustrating the calculation of profiteered amount in respect of one specific item i.e. "Canon DSLR 200D Dual Kit (18-55/55-250) Camera" sold during the month of December, 2018 (pre GST rate reduction) vide which an average base price (after discount) was obtained by dividing the total taxable value by total quantity of this item sold during the period from 01.12.2018 to 31.12.2018. The average base price of this item was compared with the actual selling price of same item sold during the post-GST rate reduction period i.e. on or after 01.01.2019 and the same has been illustrated by the DGAP in the Table-A below:-

Table-A

(Amount in Rupees)

Sl. No.	Description	Factors	Pre Rate Reduction (Before 31.10.2018)	Post Rate Reduction (From 01.01.2019)
1.	Product Description	A	Canon DSLR 200D Dual Kit (18-55/55-250)	
2.	Notification No.	B	24/2018-Central Tax (Rate) dated 31.12.2018	
4.	Total quantity of item sold	C	263	
5.	Total taxable value	D	10515535.70	
6.	Average base price (without GST)	E=D/C	39983.03	

7.	GST Rate	F	28%	18%
8.	Commensurate Selling price (post Rate reduction-with GST)	G=E*1.18		47179.97
7.	Invoice No.	H		SLA162030002234
8.	Invoice Date	I		17.01.2019
9.	Total quantity (above invoice)	J		1
10.	Total Invoice Value	K		49460.31
11.	Actual Selling price per unit (post rate reduction-with GST)	L=K/J		49460.31
12.	Excess amount charged or profiteering	M=L-G	**2280.34**	
13	Total Profiteering	N= M*J	**2280.34**	

12. The DGAP has further mentioned that as per the Table-A, it was clear that the Respondent had not reduced the selling price of the "Canon DSLR 200D Dual Kit (18-55/55-250) Camera", when the GST rate was reduced from 28% to 18% w.e.f. 01.01.2019, vide Notification No. 24/2018 Central Tax (Rate) dated 31.12.2018 and thus, he had profiteered an amount of Rs. 2280.34 on a particular invoice by not passing on the benefit of reduction in GST rate to the recipient by way of commensurate reduction in the price, in terms of Section 171 of the CGST Act, 2017. On the basis of above calculation as has been illustrated in Table-A above, the DGAP has calculated the profiteered amount in the similar manner in case of all the impacted goods i.e. Digital Cameras and Power Banks supplied by the Respondent during the period from 01.01.2019 to 30.06.2019.

13. The DGAP has also reported that as per the aforesaid pre and post-reduction GST rates and the details of outward taxable supplies (other than zero rated, nil rated and exempted supplies)

of the above goods during the period from 01.01.2019 to 30.06.2019, as furnished by the Respondent, the amount of net higher sales realization due to increase in the base prices of the impacted goods, despite the reduction in the GST rate from 28% to 18% or in other words, the profiteered amount came to **Rs. 1,91,21,441/**. The details of the computation have been furnished by the DGAP vide **Annexure-21** of his investigation Report. The product-wise break-up of profiteering amount has been furnished by the DGAP in the below given Table:-

S. No.	Product	Profiteering Amount
1.	Digital Camera	1,41,38,734
2.	Power Bank	49,82,707
	Total	1,91,21,441

14. The DGAP has further reported that the profiteered amount has been arrived at by comparing the average of the base prices of the impacted goods sold during the period from 01.12.2018 to 31.12.2018 and 01.09.2018 to 30.11.2018 (those goods which had no sales during December, 2018), with the actual invoice-wise base prices of same products sold during the period from 01.01.2019 to 30.06.2019. 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.

15. The place of supply-wise break-up of the total profiteered amount of Rs. 1,91,21,441/- has been furnished by the DGAP in the Table-B furnished below:-

Table- 'B'

(Amount in Rs.)

S. No.	State Code	State	Profiteered Amount (Rs.)
1	03	Punjab	119009
2	04	Chandigarh	122646
3	06	Haryana	749887
4	07	Delhi	3838960
5	08	Rajasthan	42931
6	09	Uttar Pradesh	702994
7	19	West Bengal	27159
8	23	Madhya Pradesh	352
9	24	Gujarat	2965100
10	27	Maharashtra	5805543
11	29	Karnataka	1896266
12	30	Goa	32010
13	33	Tamil Nadu	1230982
14	36	Telangana	1587602
		Grand Total	**19121441**

16. It has also been intimated by the DGAP that the allegation of the Applicant No. 1 that the base prices of the impacted goods were increased when there was a reduction in the GST rate from 28% to 18% w.e.f. 01.01.2019 and hence, the benefit of such reduction in the GST rate was not passed on to the recipients by way of commensurate reduction in prices stood confirmed against the Respondent as per the details furnished in Annexure-21. Thus, the Respondent by increasing the base prices of the goods subsequent to reduction in the GST rate has not passed on the commensurate benefit of reduction in the GST rate from 28% to

18% to the recipients and thus, he has contravened the provisions of Section 171 of the CGST Act, 2017. Therefore, the total amount of profiteering on account of contravention of the provisions of Section 171 of the CGST Act, 2017 covering the period from 01.01.2019 to 30.06.2019 came out to Rs. 1,91,21,441/-.

17. The above Report was considered by this Authority in its sitting and it was decided to hear the Respondent on 14.01.2020. A notice dated 26.12.2019 was also issued to the Respondent asking him to reply why the Report dated 23.12.2019 furnished by the DGAP should not be accepted and his liability for profiteering under Section 171 of the CGST Act, 2017 should not be fixed. However, the Respondent did not appear for the hearing and sought adjournment vide his submissions dated 09.01.2019. The Respondent had put in an appearance through Sh. Pramod Dangaich, CFO, Sh. Nitesh Singh, Manager, Sh. Santosh Dalvi, CA and Smt. Meghna Bhavsar, Authorized Representative on 29.01.2020.

18. The Respondent vide his written submissions dated 29.01.2020 & 03.02.2020 has made the following submissions stating:-

a. That Section 171 (1) of the CGST Act required the Respondent to pass on the benefit of the reduced tax rate to the customers by way of commensurate reduction in prices. However, the law had not provided any guidelines or

methodology with respect to computation of profiteering amount. The same needed to be computed on case to case basis, considering the facts of the business.

b. That in a retail industry of electronic goods, the pricing of the products was a dynamic and complex exercise. The variation in the sale prices of the products (inclusive of GST) depended upon various business and external factors, such as demand and supply, competition pricing, e-commerce market place, location of the store, brand prices / manufacturer's pricing policy etc. The Respondent had also taken his product pricing decisions on the basis of the above factors. Accordingly, prices of the products varied from store to store and from period to period.

c. That the actual sale prices during the period from January 2019 to June 2019 were purely derived based on the commercial factors and tax played a very little or no role in determining the prices of the products. The DGAP had failed to appreciate that different factors at different points in time affected the costing and pricing of a product and therefore, no straitjacket formula could be used for either arriving at a base price or for calculating profiteering.

d. That the business as a whole alongwith external variable factors needed to be considered, while determining the impact (if any) of profiteering on account of reduction in GST rate. Accordingly, business minded approach needed to be adopted.

while interpreting the provisions of Section 171 (1) of the CGST Act, especially when the Legislature had not given any defined guidelines or methodology for computation of profiteering.

e. That the DGAP has considered product level sale prices of December, 2018 month for comparison. The Respondent was engaged in retail business of electronic goods. December was a festive season for the electronic goods retail industry. The Respondent ran various discount schemes and offers with upfront price reductions to lure the customers and increase his sales during this period. Accordingly, during the month of December the sale prices for all the products were generally lowest considering the festive season. Immediately post festive season i.e. upon completion of promotion/discount schemes, base prices of the products were restored to their regular sale prices. While computing the proposed profiteering amount, the DGAP had considered average of such sale prices for the electronic goods sold during December, 2018 (which were lowest on account of discount schemes), for comparison with actual sale prices during the period from January, 2019 to June, 2019 and it had resulted into showing excess profit earned by the Respondent. As per the Report, such apparent excess profit earned had been considered towards profiteering on account of the GST rate change.

The product pricing was completely dependent on the business scenarios and industry trends and GST had no role to play while deciding the sales prices. Accordingly, the computation undertaken by the DGAP did not hold good in view of the given business circumstances.

f. That as per the DGAP's Report, profiteering in respect to digital cameras was Rs. 1,41,38,205 during the period from January, 2019 to June, 2019 on account of GST rate reduction. It was submitted by the Respondent that on account of introduction of new technology and better cameras in smart phones, the demand for digital cameras had reduced over a period of time. Hence, in order to clear the stock of slow moving digital cameras, the Respondent had been selling the said product below the cost price or at a sale price lower than the regular sale price, resulting in loss or nominal profits. The profit earned (if any) was barely sufficient to meet other indirect costs incurred by him. Hence, the pricing of the digital cameras during the period from January, 2019 to June, 2019 was purely based on the commercial factors. The same was also apparent from the fact that as per books of account for the said period, total profit earned from the sale of digital cameras was equivalent to the aforementioned alleged profiteered amount. These facts clearly showed that the Respondent had not made any excess profit on account of GST rate

reduction. Furthermore, the nominal profit made on account of digital cameras was sufficient enough to meet only the variable expenses relating to the business. Accordingly, the profiteering demand proposed in the Report towards digital cameras was totally baseless and was liable to be dropped.

g. That vide Notification No. 24/2018 dated 31.12.2018, GST rate with respect to Power Banks has been notified as follows:-

HSN	Prior to 1 January 2019		Post 1 January 2019	
	Entry description	Rate	Entry description	Rate
8507	Entry 139: Electric accumulators, including separators thereof, whether or not rectangular (including square) other than lithium-ion battery	28%	Entry 139: Electric accumulators, including separators thereof, whether or not rectangular (including square) other than lithium-ion battery and other lithium-ion accumulators including lithium-ion power banks	
85076000	Entry 376AA: Lithium-ion battery	18%	Entry 376AA: Lithium-ion battery	18%
8507	NA		Entry 376AAA: Lithium-ion accumulators (other than battery) including lithium-ion power banks	18%

h. That the Power Bank consisted of lithium-ion battery and circuit such as charge management system and voltage booster. Vide Notification No. 18/2017 dated 26.07.2018, Entry No. 139 was amended and Entry No. 376AA was inserted to levy GST @18% on lithium-ion battery. Accordingly, electric accumulators other than lithium-ion

battery continued for GST levy @ 28%. Subsequently, vide Notification No. 24/2018 dated 31.12.2018, Entry No. 139 was further amended and Entry No. 376AAA was inserted to levy GST @ 18% on lithium ion based Power Banks. Accordingly, electric accumulators other than lithium ion battery and lithium ion based Power Banks continued for GST levy @ 28%. During the period from 26.07.2018 to 31.12.2018, there was an ambiguity with respect to classification of Power Banks under lithium-ion battery (GST @ 18%) or under other accumulators (GST @ 28%). Thus, vide Notification No. 24/2018 dated 31.12.2018, the Government acknowledged the said ambiguity in classification of the Power Banks. Accordingly, lithium-ion battery based Power Banks were specifically carved out from Entry No. 139 to be subjected to 18% GST under Entry No. 376AAA. This proved that the lithium ion battery based Power Banks were always intended to be classified under 18% GST during the period from 26.07.2018 to 31.12.2018.

i. That during the period from 26.07.2018 to 31.12.2018, the Respondent had imported the 'CROMA' brand Power Banks from his vendors outside India. In view of the ambiguity in classification and applicable GST rate on Power Banks, the Respondent had paid Customs Duty with IGST @ 18%. Thus, the cost of the products included the purchase cost and the basic Customs Duty. During the same period under

consideration, the Customs Authorities had raised the differential Customs Duty demand of 10%, on the ground that the said products were subjected to IGST @ 28% and not 18%. The Respondent was in process of adjudication in this regard.

j. That Section 171(1) of the CGST Act only provided this Authority to collect the profiteered amount on account of reduction in GST rate, where commensurate benefit has not been transferred to the customers. The above Section, did not provide any guidelines, mechanism or methodology for determining the profiteering amount. The anti-profiteering provisions were in the nature of anti-abuse provisions. The said provisions could not be construed in a manner that restricted the right to free trade and determination of sale prices based on the free price market principles. Computation of profiteering, without considering the business scenarios, costs (direct and indirect) and pricing mechanism amounted to price administration. The aim of Section 171 of the CGST Act was not to administer/fix the sale prices, but to prevent profiteering. The business as a whole and overall profit/loss of the Respondent needed to be evaluated while determining whether the Respondent had passed on the commensurate benefit earned due to reduction in GST rate.

k. That while computing profiteering, the DGAP had compared the average invoice value of a product sold during December, 2018 with actual invoice value of product sold during the period from January, 2019 to June, 2019. The DGAP had completely ignored other business factors impacting the sale price of the said electronic goods during the period under consideration, such as discount schemes run during December, 2018, competition pricing, e-commerce platform pricing, cost of the products, tax cost involved and other variable expenses etc. The proposed profiteering to the extent of Rs. 85,92,356/- has been computed erroneously, as important parameters have not been considered. Accordingly, the proposed profiteering amount of Rs. 1,91,21,441/- needed to be reduced by Rs. 85,92,356/-.

l. That while computing profiteering, the DGAP has not considered the following important parameters which are required to be taken in to account:-

Table

Sr. No.	Particulars	Proposed demand amount (Amount in INR)	Annexure
1	Para 14.1 - Excess GST collected has been paid to Government	29,16,750	Annexure I
2	Para 14.2 -Sales return (credit notes) towards	28,75,832	Annexure II

	sales invoices issued during January 2019 to June 2019 not considered		
3	Para 14.3 - Sale of goods with taxable sales price below cost of purchase	13,13,441	Annexure III
4	Para 14.4 - Sale of goods with comparable sales price below the cost of purchase	14,86,332	Annexure IV
Total		**85,92,356**	

m. That the excess GST collected and paid to Government had been erroneously included in the proposed demand towards profiteering amount as has been illustrated in the Table given below:-

Table

Particulars	**Base taxable price**	**GST**	**Invoice value**
December 2018 – sale transaction (A)	100	28	128
January 2019 – sale transaction (as alleged in Report) (B)	108	20	128
January 2019 – ideal sale transaction (without involvement of profiteering) (C)	100	18	118
Profiteering computation as per Report (B)-(C)	8	2	10

n. That as per the above illustration, the DGAP had computed the proposed demand by comparing total invoice value for actual sale transactions for the period from January, 2019 to June, 2019 with total invoice value of ideal sale transactions without involving profiteering (i.e. (B) – (C) in the present illustration). In view of the same, the demand amount consisted of excess taxable sale value as well as excess GST collected from the customers. In the present illustration, the demand amount consisted of excess taxable sale price (i.e. Rs. 8/-) plus excess GST collected (i.e. Rs. 2/-) which amounted to total demand of Rs. 10/-. If the aforementioned illustration was considered, the proposed demand should be computed only towards excess taxable sale price collected from the customers. The proposed demand should not consist of excess GST collected from the customers, as the Respondent had already paid the same to the Government. Since, the GST did not form part of the profit of the Respondent, there was no question of profiteering. The Respondent had computed the demand towards such excess GST collected and paid it to the Government as per Annexure-IV. In view of the same, the proposed demand to the extent of Rs. 29,60,750/- had been erroneously computed in the Report. Since, GST was collected by the Central as well as the State Governments and the Consumer Welfare Funds (CWFs) were also

maintained by them, the profiteered amount to that extent should not be recovered from the Respondent.

o. That the DGAP has not considered the Sale return transactions (i.e. credit notes issued by the Respondent) towards sale transactions for the period from January 2019, to June, 2019. The Respondent had also submitted the details of Sales Register alongwith credit note details on 05.12.2019 to the DGAP. The acknowledgement for submission of the said letter was attached as Annexure-5. However, the said credit note details formed part of the computation prepared by the DGAP and had been ignored while computing the profiteering amount. A summary of the sale returns transactions has been furnished by the Respondent as has been mentioned below:-

Period	Credit note (taxable value)	Credit note (GST)	Credit Note (total value)	Profiteering demand
January 2019 to June 2019	7,15,86,988	1,28,85,656	8,44,72,645	28,75,832

p. That issuance of the credit notes has resulted into cancelation of the sale transactions. Accordingly, there could not be profiteering with respect to parent invoices for which credit notes had been issued and transactions had been

cancelled. The Respondent has mentioned the credit notes issued against the sale invoices issued during January, 2019 to June, 2019 and reduction in the alleged demand to that extent as per Annexure-I and therefore, he has requested that the proposed demand to the extent of INR 28,75,832/- should be dropped.

q. That the Respondent was engaged in the business of retail sale of electronic products. With respect to electronic products, technology got upgraded on a regular basis. In order to clear the inventory of non-moving or obsolete technology products, the Respondent was selling the said products below their cost prices. The DGAP has considered sale transactions made during the period from January, 2019 to June, 2019 for computation of proposed demand amount. During the said period, the Respondent had sold certain products (specified article codes) (i.e. non-moving and / or obsolete technology products) much below their respective cost of purchase. The Respondent had drastically reduced the sale prices (below the cost of purchase) in order to clear the inventory. The variation in sale prices of the said products was completely dependent on the business scenarios and the market factors. The GST did not play any role in determining the sale prices of the said products. The Respondent had sold the said products at loss to the customers. Hence, there wasn't any profiteering in respect of the said goods. Vide

Annexure-II, the Respondent has identified such sale transactions during the period from January, 2019 to June, 2019, where the goods had been sold much below the cost of purchase, on account of business scenarios, industry trends and market factors. The GST rate reduction had no role to play in fixation of the sale prices of the said products. Accordingly, he has claimed that the proposed demand in this regard to the extent of Rs. 13,13,441/- had been erroneously computed and the same needed to be dropped.

r. That the Respondent has identified certain sale transactions with respect to specific article codes, of which inventory was non-moving or slow moving in nature and the details of the same have been furnished in Annexure-III. The said products were sold at a discounted prices (which were much below the regular sales prices of the products). With respect to such products, the Respondent had made nominal profits, as compared to the regular profit. The said nominal profit earned was not even sufficient to recover the variable costs incurred by the Respondent. Hence, there wasn't any question of profiteering in the present case. Accordingly, the profiteering to the extent of Rs. 47,74,651/- had been computed erroneously and the same needed to be dropped. Even if the demand needed to be computed, the same was required to be computed as per the comparison between the actual purchase cost and the sale price and not between the sale

price of December, 2018 and the actual sale price. Accordingly, at least the demand to the extent of Rs. 14,86,332/- and the total proposed demand of Rs. 85,92,356/- had been wrongly computed in the Report which needed to be dropped.

19. Supplementary report was sought from the DGAP on the issues raised by the Respondent vide his above-mentioned submissions dated 03.02.2020 and the DGAP vide his Report dated 27.02.2020 has stated:-

a. That every supplier of goods and services was free to increase the price of his supply depending upon the various components affecting the cost of production/supply. But under the provisions of Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with reduction in the rate of tax, the cum-tax selling price would remain unchanged. Section 171 (1) of the CGST Act, 2017 was very clear which stated that any reduction in the rate of tax or the benefit of input tax credit had to be passed on to the recipients by way of commensurate reduction in prices.

b. That the contention of the Respondent that the prices of his products were lower due to the festival season during December, 2018 was frivolous and unacceptable. Firstly, the contention of the Respondent appeared to be an afterthought

as the Respondent had failed to submit this fact during the investigation. Secondly, the DGAP was following a common procedure for computing profiteering by taking average base price of one month before rate reduction and comparing the same with actual sale price for each transaction during post rate reduction period. Moreover, almost throughout the year, festive seasons were going on in the country and month of December had no specific relevance in this regard. Furthermore, the Respondent had increased the base prices of the products overnight i.e. from 01.01.2019, in such a manner that even with reduction in the rate of tax, the cum-tax selling price remained unchanged which the Respondent had now claimed as increase due to end of festive season. Though the GST had no role to play in deciding the sale price which was completely dependent on several variables, business scenarios and industry trends but the legislative intent behind Section 171 of the CGST Act, 2017, was to pass on the benefit of tax rate reduction by way of commensurate reduction in price. The Respondent had claimed that the base price was restored after festive season, however, no documentary evidence had been produced to establish that the increased base price existed any time before December, 2018.

c. That the objective of Section 171 was to ensure that the benefit of reduction in the rate of tax or benefit of ITC was

required to be passed on to the recipients and not retained by the supplier. Therefore, Section 171 of the CGST Act, 2017 required the supplier of goods or services to pass on the benefit of reduction in tax rate or ITC to the recipients by way of commensurate reduction in prices. If such benefit was not passed on by way of reduction in prices and the benefit was appropriated by the supplier, it amounted to profiteering. The act of profiteering had nothing to do with the profit making or the loss making status of the supplier. Even a supplier having overall loss in his business could have profiteered by denying the benefit which ought to have been passed on to the recipients. Even a loss making entity or supplier could indulge in profiteering and conversely, a profit making entity could pass on the due benefit to the recipients, in terms of Section 171 of the CGST Act, 2017. In the instant case, the issue involved was that the Respondent had not passed on to the recipients the benefit of reduction in tax rate by not reducing the prices of the products commensurately.

d. That with the implementation of GST w.e.f. 01.07.2017, the Government vide Notification No. 01/2017 Central Tax (Rate) dated 28.06.2017 had prescribed a GST rate of 28% on the goods listed in Schedule IV of the said Notification. As per Sl. No. 139 of Schedule IV, the goods described as "Electric accumulators, including separators thereof, whether or not rectangular (including square)" falling under Chapter Heading

85.07 attracted GST rate of 28%. Later on, vide Notification No 18/2018 Central Tax (Rate) dated 26.07.2018, the description of goods mentioned against Entry No. 139 (Chapter Heading 85.07) was substituted as "Electric accumulators, including separators thereof, whether or not rectangular (including square) other than Lithium-ion battery." The said Notification inserted an Entry No. 376AA in Schedule III for "Lithium-ion batteries" classifiable under Chapter Subheading 8507 60 00. By this insertion in Schedule III, Lithium-ion batteries became chargeable to 18% GST. In December 2018, further amendment was made vide Notification No. 24/2018 Central Tax (Rate) dated 31.12.2018 to the Entry No. 139 of Schedule IV whereby, the description of goods against Entry No. 139 (Chapter Heading 85.07) was amended to read as "Electric accumulators, including separators thereof, whether or not rectangular (including square) other than Lithium-ion battery and other Lithium-ion accumulators including Lithium-ion Power Banks." Therefore, Lithium-ion Power Bank (85.07) was not chargeable to 28% GST rate. By the same Notification, the goods "Lithium-ion accumulators. (other than battery) including lithium-ion power bank" falling under Chapter Heading 85.07 was inserted as new Entry No. 376AAA in Schedule III where the GST rate was 18%. From the above changes to the GST rates, it was seen that the goods "Lithium-ion battery" and "Lithium-ion

accumulator including Lithium-ion power bank" were removed from the original category "Electrical accumulators". The Lithium-ion battery was classified under 8507 60 00 while the Lithium-ion Power Bank was classified under 85.07. This corroborated that Power Bank was always considered as an accumulator and attracted 28% GST till 31.12.2018 which was further reduced to 18% vide Notification No. 24/2018 Central Tax (Rate) dated 31.12.2018. Further, Respondent had himself stated that he had been asked by the Customs Authorities to pay the differential Customs Duty of 10% on the ground that the Power Banks were subjected to GST @ 28% till 31.12.2018. Besides, Karnataka Appellate Authority for Advance Rulings vide Order No. KAR/AAAR/02/2019-20 dated 16.08.2019, had held that Power Bank was always considered as an accumulator and never a Static Converter and with the Tariff Notification No. 24/2018 Central Tax (Rate) dated 31.12.2018 the issue of classification of Power Bank under Chapter Heading 85.07 got settled and accordingly it had dismissed the appeal filed by M/s Xiaomi Technology India Pvt Ltd. Even if some litigation was going on with regard to the rate of GST, it did not justify increase in the base prices with intent to set off the benefit.

e. That Section 171 mandated that any benefit of reduction in the rate of tax or the benefit of ITC which has accrued to a supplier must be passed on to the consumers, as both were

concessions given by the Government and the suppliers were not entitled to appropriate such benefits. Further, as per Rule 126 of the CGST Rules, 2017, this Authority had been empowered to determine the methodology and procedure for determination as to whether the reduction in the rate of tax or the benefit of ITC had been passed on by the registered person to the recipients by way of commensurate reduction in prices. The extent of profiteering had to be arrived at on a case to case basis, by adopting suitable method based on the facts and circumstances of each case as well as the nature of goods or services supplied. There could not be any uniform methodology for determination of the quantum of benefit to be passed on. However, this Authority had already notified the 'Methodology and Procedure' under Rule 126 on 28.03.2018. Moreover, the intent of Section 171 of the CGST Act, 2017 was not to administer/fix the sale prices as it nowhere sought to fix the prices at which the goods and services ought to have been supplied. The said Section only required the supplier to pass on the benefit of reduction in the rate of tax or the benefit of ITC to the recipients by reducing the prices commensurately and did not require him to seek any approval to conduct trade or fix prices of the products supplied by him. Further the act of profiteering had got nothing to do with the profit making or the loss making status of the supplier.

f. That the DGAP had not examined the increase in prices due to various reasons. Every supplier of goods and services was free to increase the price of his supply depending upon the various components affecting the cost of production or supply. But under the provisions of the Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with reduction in the rate of tax, the cum-tax selling price would remain unchanged. Section 171(1) of the CGST Act, 2017 was very clear wherein it stated that any reduction in the rate of tax or the benefit of ITC had to be passed on to the recipients by way of commensurate reduction in prices.

g. That the legislative intent behind Section 171 of the CGST Act, 2017, was to pass on the benefit of the tax rate reduction or benefit of ITC by way of reduction in prices. Thus, the legal requirement was that in the event of benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. The price included both basic price and the tax charged on it. Therefore, any excess amount collected from recipients, even in the form of tax, must be returned to the recipients. By not reducing the base prices commensurately, the Respondent had forced his customers/recipients to pay extra tax which they were not liable to pay. Therefore, the amount of extra tax (GST) on the increased base prices was an amount paid by

the customers/recipients which they were not supposed to pay. Moreover, if any supplier had charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively be deposited in the Consumer Welfare Funds, regardless of whether such extra tax collected from the recipients has been deposited in the Government account or not. Besides, any extra tax returned to the recipients by the supplier by issuing credit notes could be declared in the returns filed by such supplier and his tax liability would stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, an option was always available to the Respondent to return the tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent. Therefore, it was clear that the profiteered amount would also include the excess tax (GST) paid by the customers/recipients.

h. That the Respondent had submitted the details of sale returns during the investigation and the same were duly considered by the DGAP in his Report. Accordingly, the sales return data was excluded from the profiteering sheet and the same could be verified from the profiteering excel sheet annexed with the Report dated 23.12.2019 submitted by the DGAP.

i. That the claim of the Respondent that he had sold his products at the price lower than their cost was incorrect. In this regard, first entry of the Annexure –II submitted by the Respondent has been illustrated by the DGAP in the following Table:-

Invoice No.	SLA163030000438
Invoice Date	03.01.2019
Goods Description	Power Bank
Quantity	1
Type of sale	Normal
Discount, if any	-----
Base selling price (commensurate)	385.94
Base selling price (actual)	418.64
Cost price	774.03

Upon perusal of the above Table, it could be seen that the base selling price (commensurate) arrived at by the DGAP was based on the average of entire sales of that Power Bank during December, 2018 whereas the Respondent was claiming cost price almost double to that of base selling price.

which appeared to be unusual as the cost price could not be double of the selling price. Further, the Respondent was claiming high cost price, whereas no document had been submitted by the Respondent in support of his claim. Besides, the above illustrated transaction was a normal sale without any discount, which again was a surprising submission. Therefore, the claim of the Respondent appeared to be incorrect and unacceptable.

j. That as submitted in the above paras, the Respondent had not submitted any documentary evidence in support of his claim of higher cost price. Moreover, these sales were also under normal sales without any discount. Hence, the claim of the Respondent appeared to be frivolous.

20. In response to the above supplementary Report of the DGAP, the Respondent has filed his submissions on 22.06.2020, wherein he has contended:-

a. That he had paid the excess GST collected to the Government and had not retained the same with him and therefore, he had not earned any profit to that extent. Hence, there was no profiteering by him under Section 171 of the CGST Act. Accordingly, the present demand of Rs. 29,60,750/- needed to be dropped. The Consumer Welfare Funds (CWFs) were also maintained by the Government.

Hence, there should not be any additional demand to that extent. The said amount of GST should be transferred by the Government to the Consumer Welfare Funds, if required. The demand proposed in the DGAP's Report pertained to the period from 01.01.2019 to 30.06.2019 whereas the time limit for issuance of credit notes towards excess GST collected in respect of the period from 01.01.2019 to 31.03.2019 had lapsed on 30.09.2019, as per Section 34 (2) of the CGST Act, hence, the Respondent was unable to issue the credit notes refunding the excess GST amount for the above period and to adjust the same against his GST liability for the subsequent period.

b. That the Respondent had submitted credit note wise sales return information (alongwith supporting information for parent sale invoices) vide his letter dated 05.12.2019 and 04.02. 2020 (Annexure 5 to the said letter). The same had been again attached as Annexure-A with this letter. The DGAP had shared the computation worksheet dated 23.12.2019, providing computation of proposed demand which did state credit note transactions details in Column 'T', however, the DGAP had missed to provide adjustment of tax reversal on credit notes towards invoices issued during the period from 01.01.2019 to 30.06. 2020 as has been shown hereunder:-

Gross profiteering demand without giving adjustment of sales return (Column 'U' to 'Y')	Gross profiteering demand if adjustment of sales return is given
INR 1,91,20,911	INR 1,57,27,429

If the said adjustment towards sales return (credit notes) was provided, then proposed demand should be reduced by Rs. 33,93,482/- (gross with tax) / Rs. 28,75,832/- (net without tax) as per Annexure-A. Accordingly, the said demand should be dropped.

c. That at the outset, the Respondent had not challenged the computation of the average sale prices computed for December, 2019. It was also submitted that the technology of the electronic products under consideration i.e. Digital Cameras and Power Banks had been upgraded frequently. The products under consideration were old technology products, whose stock could not be sold due to technology upgrade. In order to sell the stock of the said goods, it was decided to sell them at discounted/reduced prices, which were much below the original purchase cost of the said products. Such scenarios were not unusual in the electronic goods trading industry. As per the Annexure-II attached with the submissions dated 03.02.2020, the Respondent

had identified such sale transactions during the period from 01.01.2019 to 30.06.2019, wherein the goods were sold way below the original cost of the products, resulting in huge losses. Since, no profit had been made by the Respondent, there was no question of profiteering in such cases. Therefore, the proposed demand to the extent of alleged gross profiteering amounting to Rs. 17,40,633/- (Net profiteering amounting to Rs. 14,75,112/-) needed to be dropped.

d. The Respondent had also submitted sale transactions vide Annexure-B alongwith transaction level costs and computation of reduction in the profiteering amount, excel worksheet as well as screenshot from the SAP system confirming the invoice wise sale value which included the invoice value inclusive of taxes and cost (moving average cost which was exclusive of taxes) mentioned in Annexure-2, SAP screenshot of cost movement (moving average cost) for sample transactions covered in Annexure-2 and sample purchase invoices in support of cost amount mentioned in Annexure-2.

e. That in Annexure-III submitted alongwith the submissions dated 04.02.2020, certain sale transactions had been identified with respect to specific article codes, of which inventory was non-moving or slow moving in nature and the said products had been sold at discounted/reduced prices

(which were much below the regular sale prices of the products). With respect to such products, the Respondent had made nominal profits, as compared to regular profit. The said nominal profit earned was not enough to recover the variable costs incurred by the Respondent. Hence, there was no question of profiteering in the present case. Further, product level profiteering amount computed as per the DGAP's Report was higher than the actual nominal profit earned by the Respondent. Accordingly, with respect to said transactions, even if profiteering demand was to be computed, the same should be restricted to the extent of actual profit earned by the Respondent (nominal profit considering the cost price was higher than the base price computed). Accordingly, the proposed demand to the extent of alleged gross profiteering amounting to Rs. 11,09,736/- (Net profiteering amounting to Rs. 9,40,454/-) needed to be dropped. In support of his claim, the Respondent has submitted (Annexure-C) sale transactions alongwith transaction level cost (Annexure-3), excel worksheet as well as screenshot from the SAP system confirming the invoice wise sale value and cost mentioned in Annexure-3, SAP screenshot of cost movement (moving average cost) for sample transactions mentioned in Annexure-3 and sample purchase invoices in support of cost amount mentioned in Annexure-3.

f. That vide submissions dated 03.02.2020 (Paras 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13), it was submitted that the sale prices of the products during the period under consideration were determined after taking into consideration various commercial factors (such as demand vs supply, pricing adopted by competition and e-commerce operator, technology, slow moving / non-moving inventory status, season discount / pricing, promotion/discount offers etc.) as well as the tax rate change and it was requested to consider the commercial factors as well while computing the impact of tax rate change, instead of computing the profiteering amount as per the straitjacket formula. However, the DGAP has straightaway rejected the aforementioned submissions, completely disregarding the various commercial factors playing role in determination of pricing. The Respondent has also reiterated his submissions which he has made vide his submissions dated 03.02. 2020.

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

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

b. Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 in this case?

22. Perusal of Section 171 of the CGST Act shows that it provides as under:-

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

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

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

(3A) Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section

comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:

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

Explanation:- For the purpose of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services of both."

23. It is also observed from the record that the Respondent is engaged in retail trading of electronic goods from his stores under the brand name 'CROMA'. It is also revealed from the plain reading of Section 171 (1) of the CGST Act, 2017 that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the record that there has been a reduction in the rate of tax from 28% to 18% w.e.f. 31.12.2018, on the Digital Cameras and Power Banks being supplied by the

Respondent, vide Notification No. 24/2018-Central Tax (Rate) dated 31.12.2018. Therefore, the Respondent is liable to pass on the benefit of tax reduction to his customers in terms of Section 171 (1) of the above Act. It is also apparent that the DGAP has carried out the present investigation w.e.f. 01.01.2019 to 30.06.2019.

24. It is also evident that the Respondent has been selling different variants of Digital Cameras and Power Banks during the period from 01.01.2019 to 30.06.2019 to his customers. Upon comparing the average selling prices as per the details of transactions submitted by the Respondent for the pre rate reduction period from 01.12.2018 to 31.12.2018 and 01.09.2018 to 30.11.2018 (in respect of those products which had no sales during the month of December, 2018) and the actual selling prices post rate reduction w.e.f. 01.01.2019 to 30.06.2017 it has been found that the GST rate of 18% has been charged by the Respondent w.e.f. 01.01.2019 however the base prices of the products have been increased more than their commensurate prices w.e.f. 01.01.2019 which shows that because of the increase in the base prices the cum-tax price paid by the consumers was not reduced commensurately, inspite of the reduction in the GST rate. On the basis of the aforesaid pre and post reduction GST rates and the details of the outward supplies (other than zero rated, nil rated and exempted supplies) during the period from 01.01.2019 to 30.06.2019, the amount of net

higher sale realization due to increase in the base prices of the products, despite the reduction in the GST rate from 28% to 18% or the profiteered amount has come to Rs. 1,91,21,441/- including the GST on the base profiteered amount. The details of the computation have been given by the DGAP in Annexure-21 of his Report dated 23.12.2019.

25. The DGAP for computation of the profiteered amount has compared the average base prices of 153 products which were being sold by the Respondent during the pre rate reduction period with the actual post rate reduction base prices of these products. It was not possible to compare the actual base prices prevalent during the pre and the post GST rate reduction periods due to the reasons that the Respondent was (i) selling his products at different prices to different customers based on the various business and external factors such as demand and supply, competitor's pricing, e-commerce market place, location of the stores, brand prices and manufacturer's pricing policy etc. (ii) the same customer may not have purchased the same product during the pre and the post rate reduction periods and (iii) a customer may have purchased a particular product during the pre rate reduction period and may not have purchased it in the post rate reduction period or vice versa. The Respondent has himself admitted in his submissions dated 03.02.2020 the prices charged by him differed from store to store and period to period. Therefore, the average pre rate reduction prices of 153 products

were computed by the DGAP, which were being sold by the Respondent, as is evident from the Annexure-21 attached with his Report, on the basis of which commensurate base prices post rate reduction were calculated in respect of the same products and compared with the invoice wise post rate reduction actual base prices of these products, as per the computation illustrated in Table-A supra. The average pre rate reduction base price of each product was required to be compared with the actual post rate reduction base price of the same product as the benefit was required to be passed on each product to each customer. In case average to average base price is compared for both the periods, the customers who have purchased a particular product on the base price which is more than the commensurate base price, would not get the benefit of tax reduction. Such a comparison would be against the provisions of Section 171 as well as Article 14 of the Constitution which require that each customer has to be passed on the benefit of tax reduction on each purchase made by him. On the basis of the aforesaid pre and post-reduction GST rates and the details of outward taxable supplies (other than zero rated, nil rated and exempted supplies) of the above goods sold during the period from 01.01.2019 to 30.06.2019, as have been supplied by the Respondent himself, the amount of net higher sales realization due to increase in the base prices of the impacted goods, despite the reduction in the GST rate from 28% to 18% or the

profiteered amount has been calculated as Rs. 1,91,21,441/ as per Annexure-21 of the investigation Report. The excess GST charged from the recipients has also been included in the profiteered amount. The place of supply-wise break-up of the total profiteered amount of Rs. 1,91,21,441/- has been finished vide Table-B supra in respect of the 14 States/UTs. The above methodology employed by the DGAP for computing the profiteered amount appears to be correct, reasonable, justifiable and in consonance with the provisions of Section 171 of the CGST Act, 2017. The above mathematical methodology has also been approved by this Authority in respect of all such cases of reduction in the rate of tax. The Respondent vide his submissions dated 22.06.2020 has also admitted that he did not have any objection against the average prices computed for the month of December, 2018. Therefore, the above mathematical methodology can be safely relied upon.

26. The Respondent has argued that the law has not provided any guidelines, mechanism or methodology with respect to the computation of the profiteered amount. The above contention of the Respondent is frivolous as the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC or computation of the profiteered amount has been outlined in Section 171 (1) of the CGST Act, 2017 itself which provides that "*any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the*

recipient by way of commensurate reduction in prices." It is clear from the plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is ordered by the Central or the State Governments or a registered supplier avails benefit of additional ITC post GST implementation, the same have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their scarce and precious tax revenue. It also provides that the above benefits are to be passed on any supply i.e. on each Stock Keeping Unit (SKU) of each product or unit of construction or service to every buyer and in case they are not passed on, the quantum of denial of these benefit or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such SKUs/units/services by the DGAP. What would be the 'profiteered amount' has been clearly defined in the explanation attached to Section 171 quoted above. These benefits can also not be passed on at the entity/organisation/branch/invoice/product/business vertical level as they have to be passed on to each and every buyer at each SKU/unit/service level by treating them equally. The above provision also mentions "any supply" which connotes each taxable supply made to each recipient thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer on a particular product therefore he would pass

less benefit or no benefit to another customer than what is actually due to that customer, on another product. Each customer is entitled to receive the benefit of tax reduction or ITC on each SKU or unit or service purchased by him subject to his eligibility. The term "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the price which has to be computed in respect of each SKU or unit or service based on the price and the rate of tax reduction or the additional ITC which has become available to a registered person. The legislature has deliberately not used the word 'equal' or 'equivalent' in this Section and used the word 'Commensurate' as it had no intention that it should be used to denote proportionality and adequacy. The benefit of additional ITC would depend on the comparison of the ITC/CENVAT credit 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. Similarly, the benefit of tax reduction would depend upon the pre rate reduction price of the product and quantum of reduction in the rate of tax from the date of its notification. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from SKU to SKU or unit to unit 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 person who has elementary knowledge of accounts and mathematics. However, to further explain the legislative intent behind the above provision, this Authority has been authorised to determine the 'Procedure and Methodology' which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed mathematical formula, in respect of all the Sectors or the SKUs or the services, can be set for passing on the above benefits or for computation of the profiteered amount, 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 credit and ITC 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 or mathematical methodology 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 Fast Moving Consumer Goods (FMCG), restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology adopted in the case of one sector cannot be applied to the other sector. Moreover, both the above benefits are being 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 provisions, 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 and who are unorganised, voiceless and vulnerable. The Respondent is trying to deliberately mislead by claiming that he was required to carry out highly complex and exhaustive mathematical computations for passing on the benefit of tax reduction which he could not do in the absence of the guidelines, mechanism and methodology framed under the above Act. However, no such elaborate computation was required to be carried out as the Respondent was to maintain the base price of the product which he was charging as on 31.12.2018 and charge GST @18%

w.e.f. 01.01.2019. Instead of doing that he has raised his prices over night as is evident from Table-A supra. The average pre rate reduction base price of the product mentioned in the above Table was Rs. 39,983.03/-. After adding GST @ 18%, the Respondent was required to sell it at the commensurate price of Rs. 47,179.97/- w.e.f. 01.01.2019. However, he had sold the above product at Rs. 49,460.31/- and hence, he has profiteered to the extent of Rs. 2,280.34/-. It is abundantly clear from the above narration of the facts and the law that no procedure and methodology or elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of tax reduction. The Respondent cannot deny the benefit of tax reduction to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of tax reduction and the profiteered amount. Therefore, the above plea of the Respondent is wrong and hence, it cannot be accepted.

27. The Respondent has further contended that the sale prices of the products depended upon various business and external factors such as demand and supply, competition pricing, ecommerce makert place, location of the store, brand prices and competition pricing etc. which the DGAP has failed to appreciate. In this connection, it would be pertinent to mention that the provisions of Section 171 (1) of the above Act require the Respondent to pass

on the benefit of tax reduction to the customers only and have no mandate to look into fixing of prices of the products which the Respondent is free to fix. If there was an increase in his costs the Respondent should have increased his prices before 01.01.2019, however, it cannot be accepted that his costs had increased exactly on the intervening night of 31.12.2018/ 01.01.2019 when the rate reduction had happened which had forced him to increase his prices exactly equal to the reduction in the rate of such tax. Such an uncanny coincidence is unheard off and hence there is no doubt that the Respondent has increased his prices for appropriating the benefit of tax reduction to deny the above benefit to the customers.

28. The Respondent has also contended that during the month of December, the sales prices of the products were generally lowest as December was a festive season month. The DGAP has considered the average sale prices of the products during the month of December, 2018 for comparison with the actual sales prices during the period from 01.01.2019 to 30.06.2019 which has resulted in excess profit which has been considered profiteering. In this context, it would be pertinent to mention that one or the other festive season or festival is always going on in the country throughout the year and the month of December has no specific relevance in this regard. Therefore, it cannot be claimed that in this month the selling prices are the lowest. The Respondent has also not produced any evidence to show that

his prices in the previous month of November, 2018 were more than the prices which he had charged in the month of December, 2018. It is also established from the perusal of Table-A supra and Annexure-21 of the Report that the Respondent had immediately increased his prices from the intervening night of 31.12.2018/01.01.2019 from which the rate reduction had taken effect. Further the rates were increased by the same amount by which the rate of tax was reduced. Therefore, there is no doubt that the selling prices charged by the Respondent during the month of December, 2018 were not the lowest and hence they have been rightly taken in to account while calculating the pre rate reduction average base prices as well as the profiteered amount and hence the above claim of the Respondent is not tenable.

29. The Respondent has further claimed that pricing of the electronic goods and their profit margins was based on several business and external factors and the Respondent was free to fix them. In this regard it would be relevant to state that under the provisions of Section 171 of the Act, this Authority has been only authorized to ensure that the benefit of tax reduction which is nothing but sacrifice of tax revenue made by the Government, is passed on to the customers who actually bear the burden of the tax and it is not pocketed by the Respondent. Therefore, the Respondent is free to fix his prices and profit margins however, under the pretext of such freedom he cannot misappropriate the benefit of

tax reduction which has been granted to him from the public exchequer. The Respondent has also failed to explain how he has increased his prices abruptly w.e.f. 01.01.2019 unless it was with the intention to deny the benefit of tax reduction to the customers. Neither the DGAP nor this Authority has interfered with the business choices made by the Respondent and hence the above contention of the Respondent is not correct.

30. The Respondent has also argued that on account of introduction of new technology and better cameras, the demand for digital cameras had reduced and in order to clear the stock of the same, the Respondent had been selling the said products below the cost prices or at the sale prices lower than the regular sale prices resulting in loss or nominal profits. As per the books of accounts the total profit earned from the sale of the digital cameras was equivalent to the alleged profiteering amount of Rs. 1,41,38,205/- which established that there was no profiteering. In this respect it would be appropriate to mention that the Respondent has not produced invoices or other evidence during the course of the present proceedings to establish that he has sold the cameras on the prices which were lower than their purchase cost. Earning of less profit or no profit also has no correlation with the profiteered amount. The profit earned depends upon the costs of the Respondent which can always be inflated by him whereas the profiteered amount pertains to the amount of tax reduction which has not been passed on by the

Respondent. Further, the loss making concerns are also legally bound to pass on the benefit of tax reduction and they cannot appropriate the same against their losses. Therefore, the above claim of the Respondent is not tenable.

31. The Respondent has also averred that the rate of GST on the Power Bank was always intended to be charged @ 18% and not @ 28% as was evident from the Notification No. 18/2017 dated 26.07.2018 and Notification No. 24/2018 dated 31.12. 2018. During the period from 26.07. 2018 to 31.12. 2018, he had imported Power Banks from outside India by paying IGST and Customs Duty @ 18% however, the Customs Authorities had raised additional demand on the ground that the rate of IGST was 28% which has been challenged by him. In this respect it would be appropriate to mention that the rate of GST on Power Banks was reduced to 18% vide Notification No. 24/2018 dated 31.12. 2018 and prior to it the rate of GST on Power Banks was 28%, otherwise there was no reason for issuing the above Notification. The rate of GST has also been held to be 28% by the Karnataka State Authority on Advance Rulings as well as the Customs Department, before the issue of the above Notification. Therefore, the Respondent cannot claim any relief on the ground that the rate of GST on Power Banks was 18% from 26.07.2018 onwards and he was not required to pass on the benefit of tax reduction on the same w.e.f. 01.01.2019. Accordingly, the above plea of the Respondent is not maintainable.

32. The Respondent has further averred that the computation of the profiteered amount without considering the business scenarios and costs amounted to price administration and was violation of the right to free trade and free price market principles. In this connection it would be pertinent to mention that Section 171 of the CGST Act, 2017 does not provide for price administration or price regulation. The DGAP has only computed the profiteered amount the benefit of which the Respondent has not passed on to his customers. Neither the DGAP nor this Authority have acted as price administrators or price regulators as the process of price fixation adopted by the Respondent has not been examined nor the Respondent has been asked to fix his prices as per their directions and hence, there has been no infringement of fundamental right of the Respondent to free trade and principles of free market prices. The Respondent is completely free to fix his prices and profits but under the garb of free market prices he cannot pocket the benefit of tax reduction to enrich himself at the expense of the unorganised, voiceless and vulnerable customers. Therefore, the above averment of the Respondent cannot be accepted.

33. The Respondent has also argued that while determining the average base prices of the products sold during the month of December, 2018 the DGAP has completely ignored business factors impacting the sale prices of the impacted products and the discount schemes run by the Respondent. Thus, profiteering

to the extent of Rs. 85,92,356/- should be reduced from the proposed profiteered amount of Rs. 1,91,21,441/-. The above contention of the Respondent is not correct because the investigation carried out by the DGAP reveals that the profiteering has been computed on the transaction value of the products as per the provisions of Section 15 of the CGST Act, 2017 and therefore, all the discounts which do not form part of such value have not been included in the computation of the pre rate reduction average base prices of the products. Therefore, there has been no impact of the business factors or the discount schemes on the calculation of the pre rate reduction average base prices of the products sold by the Respondent. The Respondent has also not produced any evidence to show that due to the business factors or discount schemes the prices charged by him in December, 2018 were lower than the prices charged by him during the month of November, 2018. Therefore, the above argument of the Respondent is untenable and hence, an amount of Rs. 85,92,356/- cannot be reduced from the total profiteered amount.

34. The Respondent has further argued that the excess GST collected from the customers on the excess sale prices had been paid to the Government and the same should be excluded from the profiteered amount. In this connection it would be appropriate to mention that the Respondent has not only collected excess base prices from the customers which they were not required to

pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on these excess base prices which they should not have paid. By doing so the Respondent has defeated the very objective of both the Central as well as the State Governments which aimed to provide the benefit of rate reduction to the general public. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of tax reduction to his customers by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing goods from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. The above amount can also not be paid to the eligible buyers or deposited in the Consumer Welfare Funds from the Government accounts as there is no such provision in the above Act. Further, in terms of Section 34 of the CGST Act, 2017, the Respondent could have returned the extra GST charged to the recipients by issuing credit notes and declared it in his Returns and his tax liability would have stood adjusted to that extent. The contention of the Respondent that he could not claim the benefit of credit notes issued during the period of January, 2019 to March, 2019 as the limitation prescribed had

expired in September, 2019 is also not tenable as the Respondent cannot claim ignorance of the above period of limitation. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted. Accordingly, an amount of Rs. 29,16,750/- collected as excess GST cannot be reduced from the profiteered amount.

35. The Respondent has also contended that while calculating the profiteering, the DGAP has not considered the Sale Returns transactions i.e. credit notes issued by the Respondent towards the sales transactions which were retuned by the recipients for the period from January 2019 to June 2019. If the sales return transactions were considered, the profiteered amount would be reduced by Rs. 28,75,832/-. He has also submitted details of the sale returns as per Annexure-A attached to his submissions dated 23.06.2020. In this connection, it would be pertinent to mention that the DGAP vide his supplementary report dated 27.02.2020 has stated that the details of sale returns were submitted by the Respondent during the course of the investigation and the same have duly been considered by him in his Report dated 23.12.2019. Accordingly, the sale returns data was excluded from the profiteering sheet and the same could be verified from the excel sheet of profiteered amount annexed with the DGAP's above Report. Upon perusal of the excel sheet submitted by the DGAP, vide which profiteered amount has been computed as per Annexure-21 of his Report dated 23.12.2019, it

is clear that the DGAP has made a specific entry in the above sheet that only normal sales have been considered by him and the returned sales have not been taken in to consideration by the DGAP while calculating the profiteered amount. Therefore, the above contention of the Respondent is incorrect. Hence, an amount of Rs. 28,75,832/- on account of sale returns cannot be excluded from the profiteered amount.

36. It has further been contended by the Respondent that he had sold some of his goods much below the cost of purchase and therefore there wasn't any profiteering in respect of such goods. He has also submitted Annexure-II vide his submissions dated 04.02.2020 in support of his claim and has stated that an amount of Rs. 13,13,441/- should be reduced from the proposed profiteered amount. In support of Annexure-II the Respondent has also annexed Annexure-B alongwith his submissions dated 22.06.2020 vide which he has furnished the details of the sale transactions alongwith transaction level cost and computation of reduction in the profiteered amount vide Annexure-2, excel worksheet and screen shots from the SAP system confirming the invoice wise sale value and cost, SAP screen shot of cost movement for sample transactions mentioned in Annexure-2 and sample purchase invoices in support of cost amount mentioned in Annexure-2. In this regard, it is mentioned that in the cases where the Respondent has sold his products at less than the pre rate reduction base prices there is no question of computing

profiteering on those products. The profiteered amount has been calculated only on those products where the Respondent has charged more base prices during the post reduction period than the average base prices charged during the pre rate reduction period. As is clear from the Table mentioned in the supplementary Report dated 27.02.2020, filed by the DGAP that the Respondent vide Annexure-II alongwith his claims made vide Annexure-B has tried to show that the cost price of the Power Bank was almost double of its commensurate selling price. While the commensurate base price of the Power Bank was Rs. 385.94, the actual sale price was Rs. 418.84, the cost price has been claimed to be Rs. 774.03. By no stretch of imagination such an unreasonable claim can be accepted. Similar claims have been made by him in respect of other products also. The Respondent has not produced any evidence during the course of the present proceedings which can establish the exorbitant moving cost prices claimed by the Respondent. The screen shots of the SAP system can also not be accepted as the conclusive proof of the cost movement as the Respondent is free to make any entries in the above system as per his convenience. It will also be pertinent to mention here that the pre rate reduction base prices included all the costs which the Respondent had borne while selling these products and hence, the Respondent cannot invent additional costs to be taken in to account while computing the profiteered amount. There is also no evidence on record to show that the

sales made by the Respondent were on discount as all the sales mentioned in Annexure-II were normal sales as has been admitted by the Respondent himself vide Annexure-B. Therefore, the above claim of the Respondent is unreasonable, unsubstantiated and far-fetched which cannot be accepted, hence an amount of Rs. 13,13,441/- cannot be reduced from the profiteered amount on this ground.

37. The Respondent has also claimed that he had sold some of the products mentioned in Annexure-III, on discounted comparable sale prices below the cost of purchase and had made a nominal profit as compared to the regular profit. The said nominal profit earned was not even sufficient to recover the variable costs incurred by the Respondent. Therefore, in view of the above reason, profiteering amounting to Rs. 14,86,332/- should be excluded from the total profiteered amount. To further establish his claim made vide Annexure-III the Respondent has also submitted Annexure-C alongwith his submissions dated 22.06.2020 vide which he has attached the details of the sale transactions alongwith transaction level cost as per Annexure-3, excel worksheet as well as screen shots from the SAP system confirming the invoice wise sale value and cost, SAP screen shot of cost movement for sample transactions mentioned in Annexure-3 and sample purchase invoices in support of cost amount mentioned in Annexure-3. Perusal of the above Annexures shows that the Respondent has claimed that he had

sold the digital cameras on the prices which were slightly more than the average base prices but were less than their regular sale prices. As mentioned in para supra the Respondent has failed to produce any evidence to prove that his cost prices were more than the comparable sale prices. The cost prices shown by the Respondent in the above Annexures have been calculated arbitrarily without any supporting evidence. The screen shots of the SAP system also do not prove his claim of moving costs as the Respondent can make any entries in the system. All the purchase costs incurred by the Respondent on the products sold during the pre rate reduction period have already been taken in to account while computing the average base prices and hence there is no ground to claim that they have increased subsequently. The Respondent cannot claim increase in his costs to deny the benefit of tax reduction. There is also no evidence of giving discount on the sold goods as these sales have been admitted to be normal sales by the Respondent himself vide Annexure-C. Therefore, the above claim of the Respondent is not tenable and hence, an amount of Rs. 14,86,332/- cannot be reduced from the profiteered amount.

38. Given our above findings the profiteered amount is determined as Rs. 1,91,21,441/-, details of the computation of which are given in Annexure-21 of the DGAP's Report dated 23.12.2019. Accordingly, the Respondent is directed to reduce his prices commensurately, as indicated in the above mentioned Annexure,

in terms of Rule 133 (3) (a) of the above Rules. The Respondent is also directed to deposit an amount of Rs. 1,91,21,441/- in two equal parts each in the Central Consumer Welfare Fund and the Consumer Welfare Funds of the States/UTs mentioned supra as per the provisions of Rule 133 (3) (c) of the above Rules, since the recipients are not identifiable. The above amounts shall be deposited along with 18% interest payable from the dates from which the above amount was realized by the Respondent from his recipients till the date of deposit in the Consumer Welfare Funds. The above amount of Rs. 1,91,21,441/-, along with applicable interest thereon, shall be deposited within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned CGST/SGST Commissioners as per the provisions of the CGST/SGST Acts.

39. This Authority as per Rule 136 of the CGST Rules 2017 directs the concerned Commissioners of CGST/SGST to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is deposited in the CWFs of the Central and the State/UT Governments as per the details given above. A report in compliance of this order shall be submitted to this Authority by the concerned Commissioners CGST /SGST within a period of 4 months from the date of receipt of this order.

40. 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 01.01.2019 to 30.06.2019 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 01.01.2019 to 30.06.2019 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.

41. 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 23.12.2019 the order was to be passed on or before 22.06.2020. 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.

42. A copy of this order be sent to the Applicants, the Respondent and the Commissioners CGST/SGST of the concerned States/UTs free of cost for necessary action. File of the case be consigned after completion.

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

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

(A.K Goel)
Secretary, NAA

File No. 22011/ NAA/114/Infinity/2019/ 5773 – 5777 Dated: 02.11.2020

Copy To:-

1. M/s Infinity Retail Ltd., Ground Floor, SY No. 128, NH-44, Ratna Arcade, Beside Sree Vensai Tower, Kompally, Hyderabad-500014. (GSTIN- 36AACCV1726H1ZF).
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
3. Sh. Srinivas, Pr. Commissioner, Principal Commissioner, Medchal Commissionerate, Medchal GST Bhavan, 11-4-649/B, Lakdi Ka Pool, Hyderabad-500004.
4. Commissioner of State Taxes, CT Complex, Nampally Station Road, Hyderabad-500001 (cst@tgct.gov.in).
5. Guard File.

A. K. GOEL
SECRETARY, NAA