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

Case No.	76/2020
Date of Institution	31.01.2020
Date of Order	23.11.2020

In the matter of:

Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicant

Versus

1. M/s Procter & Gamble Home Products (PGHP) Private Limited, P & G Plaza, Cardinal Gracias Road, Chakala, Andheri (E), Mumbai-400099.
2. M/s Procter & Gamble Hygiene and Healthcare (PGHH) Private Limited, P & G Plaza, Cardinal Gracias Road, Chakala, Andheri (E), Mumbai-400099.
3. M/s Gillette India Limited (GIL), P & G Plaza, Cardinal Gracias Road, Chakala, Andheri (E), Mumbai-400099.

Respondents

Quorum:-

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

Present:-

1. Ms. Neeharika, Deputy Commissioner for the Applicant.
2. Sh. Gagan Sawhney, Sh. Ghanashyam Thegde, Sh. Prashant Bhatnagar, Sh. Sachin Wani, Company Employees, P&G Group, Sh. V. Lakshmikumaran, Sh. K. Srikanth Advocates and Sh. Darshan Machchhar, Consultant for the Respondents.

ORDER

1. The first investigation Report dated 05.04.2019 in the present case was received from the Applicant i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129(6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the case were that the Applicant had alleged that the Respondents had not passed on the benefit of reduction in the rate of GST from 28% to 18% w.e.f. 15.11.2017 to the recipients by way of commensurate reduction in the prices of the products being sold by them in terms of Section 171 of the CGST Act, 2017. The DGAP had also stated that the base prices of 1383 goods had been increased by the Respondents after the rate of tax was reduced on

them and hence, the Respondents had contravened the provisions of Section 171(1) of the CGST Act, 2017. The DGAP had further reported that the Respondents had profiteered an amount of Rs. 2,43,93,90,580/- by denying benefit of tax reduction to their customers.

2. The DGAP in his Report had also submitted that the Respondents had claimed in their reply to the notice issued by him that the net price for a product (i.e. post reduction of discount allowed by way of claims) charged to the various trade partners should be considered for the purpose of the investigation into the alleged profiteering by the Respondents. In this regard the DGAP had claimed that perusal of the documents submitted by the Respondents revealed that the invoices raised by the Respondents's trade partners pertained to the "Sales Promotion" services to the Respondents, which the Respondents had reimbursed to them. The said invoices nowhere indicated that they were related to passing on the benefit of reduction in the GST rate from 28% to 18% w.e.f. 15.11.2017. The DGAP had further claimed that no SKU-wise correlation could be established between the claimed texts which had appeared in the calculations and the details of the invoice-wise outward supplies submitted by the Respondents. He had also contended that Section 171 of the CGST Act, 2017 did not provide any other means of passing on the benefit of reduction in the rate of tax or input tax credit other than by way of commensurate reduction in the prices. As such, the deduction claimed on account of "Sales Promotion" services offered by the trade partners of the Respondents to them, could not be considered passing on of the benefit of GST rate reduction w.e.f. 15.11.2017. The DGAP had further contended that he had considered the taxable value of outward supplies made by the Respondents, as reflected

in the GST Returns filed by the Respondents, as the basis for comparing the pre and the post GST rate reduction base prices.

3. The DGAP had also pleaded that the contention of the Respondents that the base prices were so increased as to offset the increase in the cost of production/raw materials, could not be accepted as increase in the prices of the raw materials had not happened overnight to coincide with the GST rate reduction w.e.f. 15.11.2017 and hence, it had no relevance in the context of GST rate reduction. The Respondents had also claimed to have passed on the benefit of GST rate reduction by extending consumer promotion schemes on certain SKUs, beyond 15.11.2017, however, the DGAP had claimed that the provisions contained in Section 171 of the CGST Act, 2017 did not provide for any other means of passing on the benefit of reduction in the rate of tax or benefit of input tax credit except by way of commensurate reduction in the prices. The DGAP had further claimed that it was the Respondents's own business decision to extend the period of consumer promotion schemes, the cost of which could not be set off against the benefit that the Respondents should have passed on to their recipients on account of GST rate reduction w.e.f. 15.11.2017.

4. The DGAP had also stated that the contention of the Respondents that as the amount of refund which the was getting in the industrially backward areas of various States had reduced, which had resulted in increase in the cost, which was directly attributable to the reduced GST rate and accordingly, the same should have been considered for the purpose of investigation into the alleged profiteering by them, was not correct. The DGAP had argued that as could be seen from the Notification No. 10(1)/2017-DBA-II/NER dated 05.10.2017, eligible units were entitled to a

refund of 58% of CGST or 29% of IGST paid through debit in the cash ledger account, in terms of Section 49 (1) the CGST Act, 2017, after utilization of the input tax credit of the CGST or IGST. Accordingly, prior to 15.11.2017, the Respondents were entitled to proportionate refund of CGST or IGST paid through cash ledger and w.e.f. 15.11.2017 the liability of the Respondents to make payment in cash had got reduced due to reduction in the rate of GST which had resulted in reduced refund in absolute terms. However, the DGAP had stated that there was no loss to the Respondents in relative terms as they were still eligible to get the same proportionate refund of actual CGST/IGST paid in cash as was available to them prior to the reduction in the rate of GST. Moreover, such refund of CGST or IGST paid in cash was also dependent on the amount of input tax credit utilized by the Respondents and could not always be attributed to the applicable GST rate. The DGAP had further stated that even after the GST rate reduction, if the input tax credit utilization by the Respondents was reduced, the refund amount might remain the same or it might even increase and Therefore, the claim of the Respondents, for giving deduction from the profiteered amount on account of reduction in the refund amount, was also not acceptable.

5. The DGAP had also submitted that the Respondents had also sought to deduct the cost of written off packing material with the old MRPs, which had become unusable due to the change in the prices on account of reduction in GST rate and advertisement costs etc. The DGAP had countered this claim of the Respondents by stating that the law provided for a legal remedy in such cases by way of affixing new MRP stickers along with the old MRP on the stock in hand as per letter No. WM-10(31)/2017 dated

16.11.2017, issued by the Ministry of Consumer Affairs, Food and Public Distribution, Government of India. The had further stated that there was no provision in the CGST Act, 2017 to allow the cost of packing material to be adjusted against the reduction in the prices on account of the lower GST rate and Therefore, the deduction claimed by the Respondents on this ground, was not admissible. He had also contended that the advertisement costs incurred by the Respondents were the outcome of their business decisions and the Respondents could not claim deduction on this account to increase the base prices of the goods impacted by the GST rate reduction.

6. The DGAP had also claimed that the Respondents had increased the base prices of the impugned goods when the rate of GST had been reduced from 28% to 18% w.e.f. 15.011.2017. He had further claimed that 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 impugned products made during the period from 15.11.2017 to 30.09.2018, as furnished by the Respondents, 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. 2,43,93,90,580/-. The details of the computation were given in Annexure-17 of the DGAP's Report dated 05.04.2019. The profiteered amount had been arrived at by comparing the average of the base prices of the impacted products sold during the period from 01.11.2017 to 14.11.2017 with the actual invoice-wise base prices of the products sold during the period from 15.11.2017 to 30.09.2018. The excess GST so collected from the customers had also

been included in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the additional base price.

7. The DGAP had furnished the place(s) (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. 243,93,90,580/- as has been given in Table below:-

Table

S. No.	Name of State	State Code	Profiteering (Rs.)
1	Andaman & Nicobar Islands	35	2,998,170
2	Andhra Pradesh	37	118,885,664
3	Arunachal Pradesh	12	893,820
4	Assam	18	39,525,176
5	Bihar	10	72,090,126
6	Chandigarh	04	2,659,906
7	Chhattisgarh	22	25,861,763
8	Delhi	07	133,267,551
9	Goa	30	13,993,388
10	Gujarat	24	148,889,094
11	Haryana	06	104,114,698
12	Himachal Pradesh	02	5,850,849
13	Jammu & Kashmir	01	23,092,981
14	Jharkhand	20	34,006,584
15	Karnataka	29	190,536,364
16	Kerala	32	72,487,234
17	Madhya Pradesh	23	63,840,007
18	Maharashtra	27	345,561,225
19	Manipur	14	3,733,964
20	Meghalaya	17	4,225,151
21	Mizoram	15	2,475,171
22	Nagaland	13	3,355,361
23	Orissa	21	44,544,160

24	**Puducherry**	34	4,611,560
25	**Punjab**	03	75,613,811
26	**Rajasthan**	08	79,567,778
27	**Sikkim**	11	46,289
28	**Tamil Nadu**	33	212,721,787
29	**Telengana**	36	138,426,668
30	**Tripura**	16	4,916,011
31	**Uttar Pradesh**	09	289,803,749
32	**Uttarakhand**	05	23,456,261
33	**West Bengal**	19	153,338,259
	Grand Total		**2,43,93,90,580**

8. The above Report was considered by this Authority in its meeting held on 09.04.2019 and it was decided that the Applicant and the Respondents be asked to appear before the Authority on 29.04.2019. Accordingly, a joint notice dated 15.04.2019 was issued to the Respondents in the name of the Proctor & Gamble Group (P&G Group), since the above companies were part of the above Group, were having the same address and were represented by the above Group during the interactive sessions, asking them to explain why the Report dated 05.04.2019 submitted by the DGAP should not be accepted and their liability for profiteering under the provisions of Section 171 of the CGST Act, 2017 should not be fixed. They were also asked to explain why penal provisions under Section 29, 122-127 of the above Act read with Rule 21 & 133 of the CGST Rules, 2017 should not be invoked against them if the allegation of profiteering was established against them. A copy of the Report with its Annexures giving details of the SKUs, methodology and computation of the profiteered amount was also supplied with the above notice. The above notice was duly acknowledged by Sh. Sachin Wani, Authorised Signatory of the P&G Group, vide his e-

mail dated 22.04.2019. Since, the Group had asked for adjournment of the hearing scheduled on 29.04.2019 vide its letter dated 23.04.2019, it was decided to grant next hearing on 15.05.2019. On the request of the Group, hearing was adjourned two more times on 24.05.2019 and 31.05.2019. Finally, the hearing was held on 04.06.2019 which was continued on 06.06.2019. During the course of the hearing the Applicant was represented by Sh. Sachin Kodnani, Superintendent and the Respondents were represented by Sh. Gagan Sawhney, Sh. Ghanashyam Thegde and Sh. Sachin Wani, Company Employees, P&G Group, Sh. V. Lakshmikumaran, Sh. K. Srikanth, Sh. G. Gokul Kishore, Advocates and Sh. K. Santhalia and D. Machchhar, Consultants. The Group had addressed combined oral submissions with power point presentation on behalf of the Respondents during the above hearing and requested for two days time for filing written submissions, which they had filed separately on 19.06.2019, which were forwarded to the DGAP on 20.06.2019 for report. The DGAP was also directed to submit clarifications on the objections raised by the Respondents under Rule 133(2A) of the CGST Act, 2017 by this Authority vide its Order dated 03.07.2019.

9. The DGAP had submitted clarification vide his Report dated 12.07.2019 however, perusal of the same showed that he had not addressed all the objections raised by the Respondents against his Report dated 05.04.2019. Therefore, this Authority had directed the DGAP to furnish fresh clarifications. The DGAP had again submitted his reply dated 16.09.2019 to this Authority but the following issues were not clarified by him:-

    1. The DGAP had not given clarification on the issues of "commensurate reduction", use of word "any", "registered person",

"profiteering" and the "marginal note" mentioned in Section 171 of the Act.

2. The points raised in sub-para B.2 and the discrepancies mentioned in sub-para B.4 of the submissions dated 19.06.2019 made by the Respondents were not explained.

3. The basis of the prices used for comparison for calculation of the profiteered amount was not explained.

4. The benefits passed by the Respondents by way of price reduction to the recipients post supply of goods were not taken in to account by the DGAP.

5. The DGAP had also not submitted how the supplies made to the CSD and the CPC channels were liable to computation of profiteering.

6. The DGAP had also not made submissions on the issue of considering 10 months period for calculation of the profiteered amount.

7. It had also not been clarified why the higher benefit passed in respect of certain products was not considered while computing the profiteered amount by applying methodology of "Zeroing".

8. It had also not been explained how the Respondents were liable to affix stickers showing change in the MRP price.

9. The issue raised with reference to Rule 16 of the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on

Subsidized Articles and for Determination of Injury) Rules, 1995 was required to be explained.

10. Therefore, the DGAP vide I.O. No. 11/2019 dated 04.10.2019 was directed by this Authority to further investigate the above issues under Rule 133 (4) of the CGST Rules, 2017 and submit a comprehensive investigation report thereafter.

11. The DGAP after detailed re-investigation of the case has submitted his Report dated 31.01.2020, as per the directions passed by this Authority vide its Order dated 04.10.2019, under Rule 129(6) of the CGST Rules, 2017.

12. The DGAP has stated that on receipt of the Order dated 04.10.2019, the had issued a letter to the Respondents on 21.10.2019 to provide the copies of agreements entered with the CSD/CPC partners. In response to the letter dated 21.10.2019, the Respondents had replied vide e-mails dated 24.10.2019, 22.11.2019, 05.12.2019 and 09.01.2020 and submitted the following documents:-

For Canteen Stores Department (CSD):

I. Sample letter dated 21.06.2017 showing the revised rate (Nett) which was excluding tax and GST rate of 28%.

II. Sample letter dated 23.11.2017 received post reduction in GST rate from 28% to 18% showing the GST rate of 18%. As stated by CSD in the letter, there was no change in procurement rates, terms and conditions and HSN Code.

III. Sample invoice pre and post reduction in rate of tax from 28% to 18%, showing that the base price excluding tax had remained the same, depicting the fact that the price was negotiated ex-tax.

For Central Police Canteens (CPC):

I. Sample letter dated 25.07.2017 showing the revised rate (Nett) which was excluding tax and GST rate of 28%.

II. Sample invoice pre and post reduction in rate of tax from 28% to 18% showing that the base price excluding tax had remained the same, depicting the fact that the price was negotiated ex-tax.

13. The DGAP has also submitted the point wise clarifications in regard to the objections raised by the Respondents as was mentioned in the I.O. No. 11/2019 dated 04.10.2019 as follows:-

Clarification on the issue of "commensurate" and use of word "any", registered person", "profiteering" and the "marginal note" mentioned in Section 171 of the Act:

The DGAP has stated that Section 171 of the CGST Act, 2017 was very clear, according to which benefit commensurate to the amount of reduction in tax had to be passed on to the recipients by way of reduction in price. As per the website "Lexico", powered by Oxford, the word "equivalent" was also a synonym of the word "commensurate" and the intention of the law was clear that the price of the goods/services had to be reduced by the amount of reduction in the tax

The word "prices" was used in the law to refer to the prices of various goods/services but for each individual product or service, there would be only one selling price and one commensurate price, the difference of which would be the profiteered amount.

The word "*any*" was used before the word "*supply*" to indicate that the benefit of reduction in rate of tax had to be passed on for each and every supply. The word *"registered person"* used in Section 171 of the CGST Act, 2017 could not be applied to suppliers who were not registered under the

CGST Act and it was clear from the word *"recipient"* (in singular) that the benefit had to be passed on to each and every recipient, who might buy a single Stock Keeping Unit (SKU) also. Thus, the profiteering had to be determined at the SKU-level. It was also submitted that the word "*profiteered*" and the definition of profiteered was mentioned in Sub-section 3A of Section 171 of CGST Act, 2017. Since the definition of expression "*profiteered*" was there as explanation, it would apply retrospectively even though Sub-section 3A was inserted by Finance Act, 2019. The DGAP has also stated that his report was in consonance with the marginal note attached to Section 171 and heading of Chapter XV of CGST Rules, 2017.

Point raised in sub-para B.2 and the discrepancies mentioned in sub-para B.4 of the submissions dated 19.06.2019 made by the Respondents:

B.2 : a) Higher price reduction on certain SKUs : The DGAP has stated that as the profiteered amount had to be passed on each and every supply and to each and every recipient individually, higher price reduction on certain SKUs could not be adjusted against the profiteered amount in respect of other SKUs.

b) Extra quantity (grammage): The DGAP has also stated that Section 171(1) of the CGST Act, 2017 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 benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in the prices of the goods or services. Such reduction could only be in terms of money, so that the final price payable by a consumer got reduced

commensurate with the reduction in the tax rate or benefit of input tax credit. This was the only legally prescribed mechanism to pass on the benefit of ITC or reduction in rate of tax to the consumers under the GST regime and there was no other method which a supplier could adopt to pass on such benefits. This issue was also covered in Para-15 of his Report dated 05.04.2019. Thus the benefit of extra quantity (grammage) could not be given to the Respondents.

c) Extension of promotion schemes: The DGAP has further stated that the provisions contained in Section 171 of the CGST Act, 2017 did not provide for any means of passing on the benefit of reduction in the rate of tax or benefit of ITC other than by way of commensurate reduction in price. It was the Respondents's own business decision to extend the period of consumer promotion schemes, the cost of which could not be set off against the benefit that the Respondents ought to have passed on to their recipients on account of GST rate reduction w.e.f. 15.11.2017.

d) Price reduction post supply: The DGAP has also submitted that the taxable value as shown in the GSTR-1/3B Returns filed by the Respondents had been taken into account for determining the base prices both before and after rate reduction w.e.f. 15.11.2017. The evidence submitted by the Respondents in support of their claim of giving post-supply discounts was either invoices issued by their recipients mentioning the description as "Promotion Services" with HSN Code 998361 or 998366 (Advertising Services) or Debit Notes issued by the recipients. However, the profiteering had been quantified at the SKU-level invoice-wise and documentary evidence establishing the correlation between the taxable value reported in

the GST Returns and post-supply discount given on any particular invoice/SKU had not been established by the Respondents.

B.4 : a) Supply to CSD and CPC: The DGAP has further submitted that the Respondents had provided copies of the agreement executed with the CSD/CPC partners vide e-mails dated 24.10.2019 and also provided the copies of sample invoices for the pre and post-GST reduction period vide their reply dated 09.01.2020. After comparing the invoices provided by the Respondents the DGAP has found that the base prices had remained same for the pre and post-reduction periods, Therefore the profiteered amount was recomputed after excluding the profiteering of CPC/CSD partners.

b) Net price of SKU compared with the gross price of SKU post reduction of tax: The DGAP has also intimated that the base prices of the products were calculated on the basis of average prices during the period from 01.11.2017 to 14.11.2017 based on the outward supply details furnished by the Respondents. However, where ever any product was not supplied by the Respondents during the period from 01.11.2017 to 14.11.2017 the base prices submitted by the Respondents themselves were taken as the pre-rate reduction base prices.

c) Profiteering also alleged on certain imported SKUs with increase in Basic Customs Duty (BCD) during period of investigation: The DGAP has further intimated that the contention of the Respondents that the base prices were increased with the increase in the BCD could not be accepted. The increased cost of raw materials/input services had no relevance in the context of GST rate reduction w.e.f. 15.11.2017. Section 171 provided that benefit of any reduction in tax had to be passed on to the recipients and increased cost of materials could not be a ground to offset this benefit.

d) Profiteering also alleged on supply of promotional SKUs: Section 171 of the CGST Act, 2017 did not provide for any other means of passing on the benefit of reduction in rate of tax or ITC other than by way of commensurate reduction in prices. The deduction claimed on account of "Sales Promotion" services offered by the trade partners to the Respondents, could not be considered towards the benefit of GST rate reduction w.e.f. 15.11.2017. The DGAP had considered the taxable value of outward supplies made by the Respondents, as reflected in the GST Returns filed by the Respondents, as the basis for comparing the pre and post GST rate reduction base prices.

e) Reduction in area based fiscal incentives not considered: The DGAP has also claimed that with regard to the contention of the Respondents that as the reduced amount of refund (area based fiscal incentive) has resulted in increase in cost, which was directly attributable to the reduced GST rate, the same should be considered for the purpose of alleged profiteering, it was clear that as per Notification No. 10(1)/2017-DBA-II/NER dated 05.10.2017, the eligible units were entitled to a refund of 58% of CGST or 29% of IGST paid through debit in the cash ledger account, in terms of Section 49 (1) the CGST Act, 2017, after utilization of the ITC of the CGST or the IGST. Accordingly, prior to 15.11.2017, the Respondents were entitled to proportionate refund of CGST or IGST paid through cash ledger. From 15.11.2017 the liability of the Respondents to make payment in cash might have got reduced due to reduction in the rate of GST, resulting in reduced refund in absolute terms, however, there was no loss to the Respondents in relative terms as they were still eligible to get the same proportionate refund of the CGST/IGST paid in cash as was available prior to the reduction in the rate of GST. Moreover, such refund of CGST or IGST paid in cash was also

dependent on the amount of ITC utilized by the Respondents for discharge of output GST liability and could not always be attributed to the output GST rate. In other words, even after the GST rate reduction, if the ITC utilization by the Respondents had reduced the refund amount might remain the same or it might even increase. Besides, if one applied the logic adopted by the Respondents, the prices of goods would be required to be reduced, in case there was an increase in the tax rate, because of availability of more refund. Therefore, the claim of the Respondents to set off the profiteered amount on account of reduction in the absolute amount of refund/incentive/subsidy was also not acceptable.

The basis of the prices used for comparison for calculation of the profiteered amount had not been explained: The DGAP has further claimed that the base prices of the products were calculated on the basis of average prices during the period from 01.11.2017 to 14.11.2017 based on the outward supply details furnished by the Respondents. However, where ever any product was not supplied by the Respondents during the period w.e.f. 01.11.2017 to 14.11.2017 the base prices as submitted by the Respondents were taken as the pre-rate reduction base prices.

The DGAP had also not submitted how the supplies made to the CSD and the CPC channels were liable to computation of profiteering : The DGAP has also contended that the Respondents vide e-mail dated 24.10.2019 had submitted that the base prices excluding tax had remained the same, depicting the fact that the prices were negotiated ex-tax and they had also provided copies of the correspondence made with the CPC/CDS channels. On the basis of the submissions of the Respondents the profiteered amount of CSD/CPC channels had been excluded.

The DGAP had also not made submissions on the issue of considering 10 months period for calculation of the profiteered amount : The DGAP has further contended that the period of investigation had not been prescribed in the CGST Act, 2017 or the corresponding Rules/Notifications or this Authority. As the rate reduction happened w.e.f. 15.11.2017 and the complete reference from the Standing Committee to investigate the matter was received in 08.10.2018, the period from 15.11.2017 till the date of receipt of reference was taken i.e. from 15.11.2017 to 30.09.2018.

It had also not been clarified why the higher benefit passed in respect of certain products had not been considered while computing the profiteer amount by applying methodology of "Zeroing": The DGAP has also averred that the text of Section 171 of the CGST Act, 2017 was very clear according to which the benefit of reduction in tax rate had to passed on each and every supply individually. Thus, if the Respondents had passed on excess benefit in respect of any supply to a recipient, the same could not be adjusted against the profiteered amount in relation to some other supply. Further, the sticker of new MRP had to be fixed along with the old MRP on the stock in hand as provide vide letter No. WM-10(31)/2017 dated 16.11.2017 issued by Ministry of Consumer Affairs, Food and Public Distribution.

It had also not been explained how the Respondents were liable to affix stickers showing change in the MRP Price: The DGAP has further averred that this issue had no bearing on the amount of profiteering determined in respect of the Respondents, as the profiteering had been quantified only on the goods supplied by the Respondents after 15.11.2017 and not on the goods lying in distribution chain on 15.11.2017. Further, the

sticker of new MRP had to be fixed along with the old MRP on the stock in hand as provided vide letter No. WM-10(31)/2017 dated 16.11.2017, issued by Ministry of Consumer Affairs, Food and Public Distribution.

The Issue raised with reference to Rule 16 of the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 was required to be explained: The DGAP has also stated that Section 171 provided that benefit of any reduction in tax had to be passed on to the recipients and increased cost of materials could not be a ground to offset this benefit.

14. The DGAP has also mentioned that after excluding the profiteered amount relating to the CSD/CPC channels, the recomputed profiteered amount of Rs. 2,41,51,14,485/- with place (State or Union Territory) of supply-wise break-up was as has been given in the Table below:-

State Name	Total Profiteering
Andaman Nicobar Islands	26,70,205
Andhra Pradesh	11,84,56,433
Arunachal Pradesh	6,52,319
Assam	3,86,91,768
Bihar	7,13,42,240
Chandigarh	24,72,685
Chattisgarh	2,48,50,574
Delhi	13,17,62,298
Goa	1,39,93,388
Gujarat	14,84,91,508
Haryana	10,32,22,549
Himachal Pradesh	53,70,479
Jammu & Kashmir	2,12,77,761
Jharkhand	3,30,18,668
Karnataka	18,93,66,820
Kerala	7,12,40,333
Madhya Pradesh	6,26,61,366
Maharashtra	34,45,85,159
Manipur	37,07,951
Meghalaya	41,10,394
Mizoram	24,75,171
Nagaland	33,32,336

Orissa	4,38,01,116
Puducherry	46,11,560
Punjab	7,46,00,558
Rajasthan	7,86,14,977
Tamilnadu	21,19,64,315
Telangana	13,69,84,859
Tripura	46,90,362
Uttar Pradesh	28,74,31,916
Uttrakhand	2,26,21,786
West Bengal	15,20,40,632
Total	**2,41,51,14,485**

15. The DGAP has further mentioned that the allegation in this case was that the base prices of the impacted goods were increased when there was a reduction in the GST rate from 28% to 18% i.e. 15.11.2017, so that the benefit of reduction in the GST rate was not passed on to the recipients by way of commensurate reduction in prices. From the details furnished in **Annexure-6** of the DGAP's Report dated 31.01.2020, the DGAP has stated that the base prices of the goods under investigation were indeed increased post-GST rate reduction w.e.f. 15.11.2017. Thus, by increasing the base prices of the goods consequent to reduction in the GST rate, the commensurate benefit of reduction in the GST rate from 28% to 18%, was not passed on to the recipients. The total amount of profiteering covering the period from 15.11.2017 to 30.09.2018 was Rs. 2,41,51,14,485/-.

16. In view of the aforementioned findings, the DGAP has stated that Section 171(1) of the CGST Act, 2017 requiring that any reduction in rate of tax on any supply of goods or services shall be passed on to the recipients by way of commensurate reduction in prices had been contravened in the present case by the Respondents.

17. The above Report was considered by this Authority in its meeting held on 04.02.2020 and it was decided that the Applicant and the Respondents be asked to appear before the Authority on 28.02.2020. A notice dated 05/06.02.2020 was issued to the P&G Group asking it to explain why the

above Report of the DGAP should not be accepted and the liability of the Respondents for profiteering under Section 171 should not be fixed. A copy of the Report along with its Annexures giving details of the SKUs, methodology and computation of the profiteered amount was also supplied with the above notice. The above notice was duly acknowledged by Sh. K. Srikanth, Authorised Representative of the P&G Group vide his letter dated 24.02.2020 who had also requested for adjournment of the hearing scheduled on 28.02.2020. Accordingly, the next hearing was fixed on 18.03.2020. On the request of the Respondents, the hearing was adjourned two more times on 01.04.2020 and 26.05.2020. The Respondents had filed their written submissions dated 10.06.2020 on which DGAP has filed his clarifications under Rule 133(2A) on 30.06.2020, a copy of which was supplied to the Respondents. The Respondents were heard at length through video conference on 13.07.2019 during which they have made combined oral submissions and also given power point presentation. During the course of the hearing the Applicant was represented by Ms. Neeharika, Deputy Commissioner and the Respondents were represented by Sh. Prashant Bhatnagar, Sh. Gagan Sawhney, Sh. Ghanashyam Thegde, Sh. Sachin Wani, Company Employees, P&G Group, Sh. V. Lakshmikumaran, Sh. K. Srikanth, Advocates and Sh. D. Machchhar, Consultant. The Respondents have filed their consolidated written submissions dated 20.07.2020 which were received on 21.07.2020. The contentions raised by the Respondents vide their above submissions have been mentioned as follows:-

I. **<u>Submissions on Price Revision:</u>**

The Respondents have submitted that they have the practice of revising the prices of their products once in about six months and such increase may not cover the entire range of the products supplied by them at the same time. The reason for this frequency was that any revision in prices has a significant impact on the operations of the Respondents in terms of implementing the price changes on packaging and necessary systems changes etc. and on the customers of the Respondents in terms of implementing such price changes and hence, the revision in prices must be well thought out and planned in advance. They have further submitted that every price revision decision undertaken by the Respondents took into consideration multiple factors of cost increase and tax rate changes etc. that would have happened in the past 6 months. At the time of introduction of the GST, cost of raw materials, input services, overheads, effective tax rate and other factors had increased warranting price increase in respect of the products supplied by the Respondents. Stability was considered important as the entire distribution chain comprising of distributors and modern retail customers was taking some time to adjust to the new tax regime. Further, the industry was seeking reduced tax rate of 18% and the Respondents were anticipating such change and Therefore, they did not increase prices of most of their products in July, 2017. When GST rate was reduced with effect from 15.11.2017, The Respondents had put the plan together within a short period of time from the date of issue of the Notification to pass on the net commensurate benefit through mix of price reductions, extension of existing promotions, higher grammage, free and higher post supply price reductions (discounts). The Respondents had

costs (Labour costs, commodities, utilities, change in effective taxation etc.) which have been going up over the past several months.

II. **Submissions on Initiation of Investigation and list of Events:**

The Respondents have also submitted that the present proceedings relating to the alleged profiteering were initiated based on the letter dated 12.7.2018 written by the Secretary of this Authority to the Standing Committee on Anti-profiteering wherein it was alleged that the MRP was not reduced post 15.11.2017 commensurate to the tax reduction as per their own assertion (referring to the Respondents). The above said letter was examined by the Standing Committee on Anti-profiteering in its meetings held on 07.08.2018 and 08.08.2018 wherein it was decided to refer the matter to the DGAP for detailed investigation. Pursuant to the recommendation of the Standing Committee, the DGAP had issued notice under Rule 129 of the CGST Rules, 2017 to the Respondents on 15.10.2018 covering the period from 15.11.2017 to 30.9.2018. The Respondents had submitted replies along with data on various dates viz. 22.10.2018, 26.10.2018, 29.10.2018, 06.11.2018, 26.11.2018, 21.12.2018, 04.01.2019, 18.01.2019, 26.03.2019, 29.03.2019 and 03.04.2019. Pursuant to the investigation of the data submitted by the Respondents and other facts the DGAP had submitted his report to this Authority. The DGAP in his report dated 05.04.2019 had, *inter alia* concluded that the Respondents had contravened Section 171 of CGST Act and profiteered Rs. 2,43,93,90,580/- including GST @ 28% or 18% (as applicable) during the period from 15.11.2017 to 30.9.2018. Pursuant to the report of the DGAP, this Authority had issued notice dated 15.4.2019 to the Respondents's Group of companies as a whole asking

them to show cause as to why the report of the DGAP should not be accepted and liability of the Respondents for alleged profiteering should not be determined. The said notice directed the Respondents to appear for personal hearing on 29.4.2019. On the request of Respondents, the hearing was re-scheduled to 15.5.2019, 24.5.2019 and 31.5.2019. Further, the hearing was rescheduled to 04.06.2019 by this Authority on its own which the Respondents accepted vide e-mail dated 30.05.2019. The Respondents had in response to the DGAP's 1st Report dated 05.04.2019 made their detailed submissions and filed the same on 19.06.2019. Pursuant to the Respondents's submissions, this Authority vide its Interim Order No. 11/2019 dated 04.10.2019 had observed that the replies submitted by the DGAP in response to the Respondents's submissions filed on 19.06.2019 were incomplete and did not consider all the issues and were not comprehensive. Accordingly, this Authority had directed the DGAP to further investigate the issues specified in the order dated 04.10.2019 under Rule 133(4) of the CGST Rules and submit a comprehensive investigation report thereafter. In response to the direction of this Authority the DGAP has furnished a revised investigation report dated 31.01.2020 under Rule 133(4). The 2nd report was received by the Respondents along with a notice dated 05/06.02.2020 vide e-mail on 07.02.2020. Pursuant to the receipt of the Notice whereby the date of hearing was fixed for 28.02.2020, the Respondents vide their letter dated 24.02.2020 *inter alia* pointed out that the DGAP has summarily rejected all but one submission and that the Respondents be granted additional time to prepare and file a detailed rejoinder. Accordingly, this Authority vide its order dated 27.02.2020 had granted the next date of hearing on

18.03.2020. However, the Respondents vide their letter submitted on 13.03.2020 had requested for supply of copy of Annexure-6 attached to the DGAP's report containing the computation of revised profiteering (which was duly provided by this Authority in CD delivered by hand on 13.03.2020 itself) and further submitted that in view of the rapid spread of COVID-19 in different parts of India, the situation was not congenial for the Respondents to travel from Mumbai to Delhi to attend the personal hearing on 18.03.2020 and accordingly they had requested for a new date of hearing. This Authority vide its order dated 18.03.2020 had adjourned the matter to 01.04.2020. Considering that the lockdown was imposed by the Central Government from 25.03.2020 for a period of 21 days up to 14.04.2020, the Respondents were informed that there will be no personal hearing on 01.04.2020 and accordingly, the Respondents had sent an e-mail dated 31.03.2020 requesting for the next date of hearing once the situation improved and the lock down period was over. In response to the Respondents's request, this Authority vide its e-mail dated 01.04.2020 had rescheduled the hearing to 29.04.2020 in the wake of Corona outbreak and subsequent lockdown in Delhi. This Authority vide its e-mail dated 17.04.2020 had further rescheduled the date of hearing to 26.05.2020 due to Corona pandemic outbreak and further extension of the lockdown. Subsequently, the Respondents vide their e-mail dated 22.05.2020 had requested for a further extension of 3 weeks from 26.05.2020, considering the lock down position due to Covid-19 in Mumbai and requested for the personal hearing by Mid-June 2020 by which the situation would improve. Accordingly, the Respondents vide order F. No. 22011/NAA/30/P&G/2019/2091-93 dated 26.05.2020, were directed to file

their consolidated written submissions and the personal hearing was to be given subsequently through video conference based on the specific request of the Respondents. The Respondents had filed their submissions on 09.06.2020 and 25.06.2020 and appeared before this Authority on 25.06.2020. During the hearing, the DGAP had requested for more time to submit reply to the submissions made by the Respondents and accordingly this Authority had granted time and directed the DGAP to submit the response before 30.06. 2020 and fixed the next hearing on 13.07.2020. The Respondents had received DGAP's reply under Rule 133(2A) dated 30.06.2020 on 07.07.2020 and appeared before this Authority on 13.07.2020, wherein the had made oral submissions on preliminary objections as well as merits of the case. This Authority, after hearing the Respondents, had directed the Respondents to file consolidated submissions on or before 20.07.2020. For the sake of ready reference and easy understanding, a list of relevant dates and events has been tabulated by the Respondents as follows:-

LIST OF DATES AND EVENTS

Date	Particulars
14.11.2017	Notification No.41/2017-Central Tax (Rate) dated 14.11.2017 issued amending Notification No. 1/2017-Central Tax (Rate) whereby rate of GST on the goods manufactured by the Respondents were reduced from 28% to 18% with effect from 15.11.2017.
12.7.2018	Letter dated 12.7.2018 received by the Standing Committee on Anti-profiteering from Secretary, National Anti-Profiteering Authority ('NAA') alleging profiteering by the Respondents.
7.8.2018 & 8.8.2018	The said letter was examined by the Standing Committee on Anti-Profiteering wherein it was decided to refer the matter to DG to conduct investigation.

Date	Particulars
15.10.2018 To 05.04.2019	Initiation of investigation under Rule 129 of CGST Rules against the Respondents. Correspondence/emails exchanged, meetings, etc. between the Respondents and the DG wherein all the exhaustive details sought by the DG were promptly provided by the Respondents.
05.04.2019	Report with Reference F. No. 22011/API/95/2018 issued by the DG ('Report').
15.04.2019	Notice vide File No. 22011/NAA/30/P&G/2019 issued by NAA to the Respondents along with a copy of the DG report fixing personal hearing on 29.04.2019. (Shared vide e-mail dated 18.04.2019)
22.04.2019	The Respondents vide e-mail dated 22.04.2019 informed the Hon'ble Secretary, NAA that they have authorized M/s Lakshmikumaran & Sridharan, Attorneys to represent P&G group before NAA and requested to handover the DVD containing all annexures mentioned in the DG Report dated 05.04.2019
23.04.2019	Adjournment sought by the Respondents vide letter dated 23.04.2019 with a request to share all the 17 annexures mentioned in the DG Report and also to grant additional time for making the submissions and to reschedule the date of personal hearing to May 15, 2019.
07.05.2019	Respondent vide e-mail dated 07.05.2019 requested for change in date of personal hearing to May 21, 2019 instead of May 15, 2019.
13.05.2019	Fresh date of personal hearing granted by the Hon'ble Authority vide its Notice for personal hearing fixing the date as May 24, 2019.
17.05.2019	In response to request from Respondent vide e-mail dated 16.05.2019, the office of NAA has shared three excel sheets separately containing the base price data used for calculating the alleged profiteering.
24.05.2019	Fresh date of personal hearing granted by the Hon'ble Authority based on Respondent's request and personal hearing fixed on 31.05.2019

Date	Particulars
30.05.2019	Respondent vide e-mail dated 30.05.2019 confirmed the change in date of personal hearing to June 4, 2019 suggested by office of NAA.
04.06.2019 & 06.06.2019	Respondent through its authorized legal representative appeared for a personal hearing before this Authority and made oral submissions along with a power point presentation covering all arguments in response to the findings given by DG Report.
19.06.2019	Respondent filed written submissions directing the DGAP to carry out further investigation u/r 133(4)
04.10.2019	Interim order passed by NAA directing the DGAP to carry out further investigation u/r 133(4)
31.01.2020	Pursuant to the directions given by the NAA, DGAP furnished a fresh report dated 31.01.2020 (mistakenly mentioned in report as 31.01.2019). This report was furnished under Rule 133(4) of the CGST Rules.
06.02.2020 to 26.05.2020	NAA issued a notice to the Petitioners fixing personal hearing in the matter and directing them to show cause as to why the report dated 31.01.2020 furnished by the Respondents No.3 should not accepted. Pursuant to the receipt of the Notice whereby the date of hearing was fixed for 28.02.2020, the Respondents vide its letter dated 24.02.2020 inter alia pointed out that the DGAP has summarily rejected all but one submission and that the Respondents be granted additional time to prepare and file a detailed rejoinder. Accordingly, this Authority vide its order sheet dated 27.02.2020 was pleased to grant the next date of hearing on 18.03.2020 at 12 Noon. Further, the Respondents vide its letter submitted on 13.03.2020 requested for a copy of Annexure-6 to the DGAP report containing the computation of revised profiteering to be supplied to it (which was duly provided by this Authority in CD delivered by hand on 13.03.2020 itself). In view of the spread of COVID-19 in different parts of India and due to lockdown enforced in the country, the date was extended from time to time. Subsequently, the Respondents vide its email dated 22.05.2020 requested for a further extension of 3 weeks from 26th May,

Date	Particulars
	considering the lock down position due to Covid 19 in Mumbai (as the Respondents are based in Mumbai) and requested for the personal hearing by Mid-June 2020 by which hopefully the situation would improve. Accordingly, the Respondents, vide order sheet No. F.No.22011/NAA/30/P&G/2019/2091-93 dated 26.05.2020, had been directed to file its consolidated written submissions.
09.06.2020 and 25.06.2020	Respondent filed written submissions on 09.06.2020 and 25.06.2020. Respondent also appeared before the NAA through Video Conference on 25.06.2020. Further, the DGAP had requested for more time to submit the reply to the submissions made by the Respondents and accordingly NAA granted time and directed the DGAP to submit the response before 30th June 2020 and fixed the next hearing on 13.07.2020
30.06.2020	DGAP submitted its reply dated 30.06.2020 u/r 133(2A) which was received by the Respondents on 07.07.2020
10.07.2020	In the meantime, Respondent filed writ petition *inter alia* challenging the validity of para 10 of guidelines dated 04.10.2019 issued by this Authority which treats DGAP's report u/r 133(4) as a fresh report, as well as the validity of all consequential notices and proceedings initiated pursuant thereto. After some arguments, the Respondents withdrew the writ petition with liberty to raise all pleas and defenses raised in the writ petition before the National Anti-Profiteering Authority.
13.07.2020	Respondent argued on preliminary objections as well as on the merits of the case before the NAA through Video Conference mode. Respondent also presented the case by means of power point presentation slides covering various issues. The NAA, after hearing the matter, was pleased to direct the Respondents to file its consolidated written submissions before 20.07.2020

III. Submissions on COVID-19 Challenges:

The Respondents have further submitted that in these difficult circumstances, where the entire industry has been facing head winds due to COVID-19 and where the manufacturing activity of the Respondents

has been severely impacted, the sales and profitability of the P&G group was impacted by more than 20% and 30% respectively (based on quarter ended June 2020 details). The Respondents were already facing financial setback and any amount if held as profiteered would be similar to the last straw on the camel's back. The Respondents have submitted that the conclusions drawn in the 2nd DGAP Report were incorrect and devoid of legal merits. The Respondents have not retained any benefit from the reduction in rate of GST and hence they have not profiteered.

IV. **Submissions on Delay in proceedings:**

The Respondents have also stated that in terms of Rule 133(1) of the CGST Rules, this Authority was required to determine whether a registered person has passed on the benefit of reduction in the rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, within six months from the date of the receipt of report from the DGAP. Further, this Authority has powers to seek clarifications from the DGAP under Rule 133(2A) and also refer the matter to the DGAP to cause further investigation or inquiry in accordance with the provisions of the Act and the rules, if this Authority was of the opinion that further investigation or inquiry was required. Additionally, Rule 133(5)(a) of the CGST Rules provided that if this Authority, after receiving report from the DGAP, has reasons to believe that there has been contravention of the provisions of Section 171 in respect of goods or services or both other than those covered in the said report, it might for the reasons to be recorded in writing direct the DGAP to cause investigation or enquiry with regard to such other goods or services or both, in accordance with the provisions of the

Act and the rules. Rule 133(5)(b) provided that this investigation would be deemed to be a new investigation or enquiry and all the provisions of Rule 129 shall mutatis mutandis apply to such investigation or enquiry. The Respondents have further submitted that the effect of Rule 133(5)(b) creating fiction of considering it as a new investigation or enquiry and applying all the provisions of Rule 129 mutatis mutandis to such investigation or enquiry was that a fresh time limit of 6 months (with further extension of 3 months if granted by this Authority) became available to the DGAP to furnish his report under Rule 129(6) of the CGST Rules and accordingly, this Authority has a time of 6 months from the date of receipt of the report from the DGAP to decide the matter in terms of Rule 133(1) of the CGST Rules. The Respondents have further stated that unlike Rule 133(5)(b) of the CGST Rules which deemed the investigation/enquiry as a new investigation/enquiry, no such provision existed in Rule 133(4) of the CGST Rules. The rule making authority has consciously distinguished a further investigation under Rule 133(4) from a new investigation under Rule 133(5). The rule making authority has picked up rule 133(5) and provided that a fresh time limit would be available for the new investigation. The same has not been done for Rule 133(4). This implied that the fresh time limit was not available under Rule 133(4) which was required to be completed and the final order of this Authority was to be passed within the overall time limit of 6 months from the date of receipt of original report of DGAP provided in Rule 133(1). The Respondents have further submitted that every time an order was passed by this Authority under Rule 133(4) of the CGST Rules, if a fresh time limit was made available to the DGAP to furnish report based on further investigation to

be carried out by it and for this Authority to pass an order, it would lead to a situation where the proceedings would not attain finality at any point of time and would lead to a situation of ever greening, which could not be permitted. Further, the sole purpose of setting defined timelines in the rules was to ensure that the investigation did not continue indefinitely so as to cause a prolonged prejudice to the affected party. The timelines required that the investigations be conducted as efficiently as possible in a time bound manner and order be passed within the time limit. Prolonging the time period permitted for investigations was likely to result in adverse impact. The Respondents have also submitted the following dates and events to prove their claim:-

Sl. No.	Events	Date
1	Report furnished by DGAP	05.04.2019 (Received by NAA on 08.04.2019)
2	Personal hearing before NAA – Part heard	04.06.2019
3	Personal hearing before NAA – Concluded	06.06.2019
4	Written submissions filed by Respondent	Filed on 19.06.2019
5	Interim Order No. 11/2019 passed by NAA	04.10.2019
6	Report by DGAP after further investigation u/r	31.01.2020 (mistakenly

	133(4)	mentioned in report as 31.01.2019)
7	NAA notice subsequent to report by DGAP after further investigation u/r 133(4) – fixing date of hearing as 28.02.2020	05/06.02.2020 (mistakenly mentioned in Notice as 05/06.02.2019)

V. **Submissions on time-bar of Proceedings:**

The Respondents have further submitted that since the DGAP had furnished his original report to this Authority on 05.04.2019 and the said report was received on 08.04.2019, this Authority was required to pass a final order within 6 months from 08.04.2019 i.e. by 07.10.2019, after carrying out the entire process, including further investigation by the DGAP under Rule 133(4), if required. In the present case, since the time limit has already expired, the entire proceedings were barred by limitation and needed to be set aside on this ground alone. The Respondents have further added that while this Authority had adjourned the next date of hearing to 13.07.2020 directing the DGAP to file his reply under Rule 133(2A), the Respondents had approached the Hon'ble Delhi High Court by way of Writ Petition *inter alia* challenging the validity of para 10 of the Guidelines dated 04.10.2019 issued by this Authority which treated DGAP's report under Rule 133(4) as a fresh report, as well as the validity of all consequential notices and proceedings initiated pursuant thereto. The matter was heard on 10.07.2020 and the Hon'ble Court had asked the Respondents to raise all their pleas and defenses raised in the writ petition

before this Authority and dismissed the Writ Petition as withdrawn with the liberty to the Respondents to raise the issues before this Authority. The Hon'ble Delhi High Court had also referred to the judgment of the Hon'ble Supreme Court in ***L. Chandra Kumar v. Union of India*** **(1997) Supreme Court Cases 261**, wherein it had been held that the Tribunals shall act as the only courts of first instance in respect of areas of law for which they have been constituted. Accordingly, as per the direction of the Hon'ble Delhi High Court, the Respondents have requested this Authority to consider their aforesaid submissions and hold that no additional time limit was available in respect of further investigation under Rule 133(4) and that the order needed to be passed within the time limit from the report as furnished by the DGAP under Rule 129(6). The Respondents have also contended that this Authority has the power to declare that Rule 133(4) which provided for further investigation did not grant additional time for the same and hence the order should have been passed within the time limit fixed under Rule 133(1) upon furnishing of the report by the DGAP under Rule 129(6) i.e. the 1st Report dated 05.04.2019. Further, the Guidelines issued by this Authority vide File No. Admn.(NAA)/P&M/81/2019/ dated 04.10.2019 specified in para 10 that the Reports submitted by the DGAP under Rule 133(4) would be construed to be fresh Reports for the purpose of Rule 133(1). However, for the reasons discussed supra, para 10 of the Guidelines was not in accordance with the provisions of the CGST Rules. Further, para 10 of the above Guidelines treating the report filed under Rule 133(4), in respect of further investigation as a fresh report, would tantamount to amendment in Rule 133(4) on the lines of Rule 133(5), which this Authority could not do as the power to amend rules was

available only with the Central Government. Accordingly, the Respondents have requested to modify the above Guidelines to this extent and hold that the present proceedings were barred by limitation. The Respondents have further contended that Rule 133(4) provided for a further investigation by the DGAP as opposed to the clarifications in terms of Rule 133(2A). In this regard, the Respondents have highlighted the chain of events before passing of the I.O. dated 04.10.2019 by this Authority and stated that as could be observed from para 8 of the above order, pursuant to the Respondents's submissions filed on 19.06.2019, this Authority had forwarded the submissions to the DGAP on 20.06.2019. Further, this Authority had also directed the DGAP to submit clarifications under Rule 133(2A) on the objections raised by the Respondents, vide its order dated 03.07.2019. Thus, it could be seen that clarifications were sought from the DGAP under Rule 133(2A) but since the DGAP in his reply dated 16.09.2019 did not clarify the objections raised by the Respondents, this Authority had directed the DGAP to carry out further investigation. However, from the points referred for further investigation, it could be seen that these were nothing but the Respondents's objections on which clarifications under Rule 133(2A) were sought earlier. The Respondents have argued that a further investigation under Rule 133(4) stood in distinction from a clarification under Rule 133(2A). If the DGAP had not provided the clarifications sought by this Authority under Rule 133(2A) it did not grant power to this Authority to direct the DGAP to carry out further investigation under Rule 133(4) with respect to the very same objections raised by the Respondents. Therefore, the order dated 04.10.2019 was nothing but a direction seeking clarifications from the DGAP under Rule

133(2A). The time limit for passing of the order by this Authority had already lapsed and any order passed in the present case would be completely barred by time. In the proceedings between the Respondents and the DGAP as adversary, if the DGAP has not provided reasons or clarifications, this Authority should draw adverse inference against the DGAP. Instead, in the present case, the DGAP has been granted additional time to provide clarifications on the subject which was not in accordance with the law. The Respondents have also argued that the anti-profiteering measure was by very essence transitionary in nature as per the stated position of the Government at the time of introduction of GST. In this regard, a statement from the then Finance and Revenue Secretary of Government India at the time of introduction of the GST, issued in response to a question in respect of the implementation of the anti-profiteering measure had clarified as under:-

"*It is only a transitory provision. It will happen only during the first year or second year of implementation, in all likelihood, in only the first year of implementation of GST*"

It has further been argued that prolonging the investigation to such an extent that the order was not passed for more than 2.5 years since the rate reduction took place was harmful to both the businesses and the recipients. The Respondents have also claimed that based on the brief facts of the case as mentioned by the DGAP in his 1st report dated 05.04.2019, it could be seen that the reference to initiate investigation was received by the DGAP from the Standing Committee on 30.08.2018. The DGAP had also stated that since the complete supporting documents/evidences had not been sent by the Standing Committee, the DGAP had requested for the same vide letter dated 12.09.2018 and in

response to the same, the DGAP on 08.10.2018 had received from the Standing Committee the forwarding letter dated 12.07.2018 of the Secretary of this Authority along with Respondents's letters dated 23.05.2018 and 04.07.2018. In this regard, the Respondents have submitted that Rule 129(6) provided that the DGAP would complete the investigation within a period of 3 months from the receipt of reference from the Standing Committee (plus further extended period not exceeding 3 months for reasons to be recorded in writing as may be allowed by this Authority). In the present case, the DGAP had admittedly received the reference on 30.08.2018. Further, the additional documents received on 08.10.2018 dated back to the original reference and could not be construed to be a fresh reference. Therefore, the maximum time limit for the DGAP to complete the investigation and furnish the report was only up to 28.02.2019 i.e. 3 months (+ further extension not exceeding 3 months). The DGAP in para 6 of the report dated 05.04.2019 has stated that the time limit to complete the investigation was extended up to 06.04.2019 by this Authority vide letter dated 31.12.2018. However, Rule 129(6) clearly specified that a further period not beyond 3 months could be made available to the DGAP. Therefore, in the present case, this Authority could have granted extension to the DGAP only up to 28.02.2019, beyond which neither the DGAP could carry out any investigation nor was this Authority empowered to provide any extension. Therefore, the 1st DGAP report itself was beyond the time limit specified in Rule 129(6) and no further proceedings could be carried out in respect of the present case. In this regard, the Respondents have placed reliance on the judgments of the Hon'ble Supreme Court in the cases of ***Oil and Natural Gas Corporation***

***Limited* v. *Gujarat Energy Transmission Corporation Limited and Others* (2017) 5 Supreme Court Cases 42**, ***Singh Enterprises* v. *CCE, Jamshedpur* 2008 (221) ELT 163 (SC)**, ***Commissioner of Customs & Central Excise* v. *Hongo India (P) Ltd.* 2009 (236) ELT 417 (SC)**, ***Commissioner of Income Tax* v. *Gitsons Engineering Co.* [2015] 53 taxmann.com 108 (Madras)**, ***Krishna Kumar Saraf* v. *Commissioner of Income Tax* [2017] 83 taxmann.com 331 (Delhi - Trib.)**, and ***Gujarat Paraffins Pvt. Ltd.* v. *Union of India* 2012 (282) ELT 33.** The Respondents have also submitted that the DGAP has furnished the reports beyond the time limit provided in Rule 129(6) and therefore, the reports dated 05.04.2019 and 31.01.2020 submitted by the DGAP be quashed.

VI. **Submissions on the Methodology adopted by DGAP:**

Respondent's submissions dated 09.06.2020:

The Respondents have also averred that the DGAP in para 20 of his 1st report dated 05.04.2019 has stated that the profiteered amount has been arrived at by comparing the average of the base prices of the impacted products sold during the period from 01.11.2017 to 14.11.2017, with the actual base prices on the invoices of such products sold during the period from 15.11.2017 to 30.09.2018. However, on perusal of the working provided by the DGAP, it could be seen that the said price was a weighted average price of the products sold, derived separately for different types of customers viz. distributors and modern retail stores (MRs) etc. In other words, the pre-GST rate reduction price considered by the DGAP for comparison was not the actual price at which the products have been sold to the customers but was instead an average of the varying prices at

which the impugned products have been sold to the customers. Further, the method of taking average prices pre-rate reduction and comparing it with the actual individual sale prices (from the invoice) post GST rate reduction was on the face of it an inequitable comparison, incorrect, without any logical reasoning and not applicable to the facts of the Respondents. This methodology was bound to produce not actual but distorted picture of the pre and post-GST rate reduction prices. Prices to various customers even within the same channel (e.g. modern retail chain customers) might vary from time to time, based on commercial considerations. The DGAP has averaged the prices based on the sales and quantity of goods sold to a particular customer type during the pre-rate reduction period of 01.11.2017 to 14.11.2017. To illustrate, the Respondents were selling product ARIEL LAUPWD 2KG X 6 MAT FL D+C PC to customer type "MR" at various base prices ranging from INR 347.22 to INR 360.97 during the period from 01.11.2017 to 14.11.2017. Few illustrations of the different prices charged to different customers during the pre-rate reduction period have been furnished by the Respondents as has been tabulated below:-

Customer Code	Invoice date	Product description	Quantity	Base price before discount	Customer type
2002707020	02-11-2017	ARIEL LAUPWD 2KG X 6 MAT FL D+C PC	6	360.97	MR
2002853252	02-11-2017	ARIEL LAUPWD 2KG X 6 MAT FL D+C PC	6	356.49	MR
2002677369	03-11-2017	ARIEL LAUPWD 2KG X 6	30	347.22	MR

		MAT FL D+C PC			

The Respondents have also submitted that the DGAP, based on total sale of this product to customer type MR during the period from 01.11.2017 to 14.11.2017 has determined an average base price of INR 360.58. This average base price was then compared with the actual sale price for the individual sales made from 15.11.2017 onwards and wherever the actual base price charged post rate reduction was higher than the average base price pre-rate reduction, the DGAP has computed the difference as profiteering, whereas in those cases where the actual base price charged post-rate reduction was lower than the average base price pre-rate reduction when compared for the specific customer, the DGAP has ignored the same (i.e. profiteering was marked as "0"). Thus, the DGAP has not only applied an inequitable and incorrect methodology to compare but even applied the same methodology selectively to only choose those instances where the actual price was more than average price to allege profiteering and conveniently ignored those instances where the actual price was lower than the average price by not taking it into account at all in determination of statement of net benefit that remained to be passed on before adjustment of cost escalations, if any. In the above illustration, the DGAP by comparing the average pre-rate reduction prices with the actual prices post rate-reduction expected that the individual base sale price post rate reduction should be INR 360.58 (i.e. the average price). If the price charged post rate reduction was INR 360.58 or below, there would be no profiteering as per the methodology adopted by the DGAP. However, if the price charged was more than INR 360.58, then as per the methodology

adopted by the DGAP profiteering will be calculated even for said line items. Applying the DGAP's methodology, even though the selling price has actually not changed, the profiteering calculation would have been as follows:-

Product description	Customer Type	Base price before discount	DGAP should be base price (i.e. average base price pre-rate reduction)	Profiteering
ARIEL LAUPWD 2KG X 6 MAT FL D+C PC	MR	360.97	360.58	0.41
ARIEL LAUPWD 2KG X 6 MAT FL D+C PC	MR	356.49	360.58	0
ARIEL LAUPWD 2KG X 6 MAT FL D+C PC	MR	347.22	360.58	0

It has been further submitted that even without any reduction in the rate of GST, the DGAP's methodology of adopting average price pre-rate reduction and comparing it with actual price post rate reduction would have resulted in profiteering. The methodology adopted was, Therefore, not an equitable and logical method of computing profiteering. Based on the above illustration, it was claimed that irrespective of how the Respondents priced their products after 15.11.2017, the DGAP's methodology of adopting average price pre-rate reduction and comparing it with actual individual prices post rate reduction was bound to result in profiteering, due to the inherent flaw in the methodology adopted by the

DGAP. Accordingly, the methodology adopted by the DGAP of comparing average price pre-rate reduction with the actual individual price post rate reduction and computing profiteering for each individual sale where the actual price charged was higher than the average price pre-rate reduction (and ignoring sales where excess amount was passed on) was incorrect, inequitable, arbitrary and the same required reconsideration. In support of the above submissions, reliance has been placed on the recent decision of the Hon'ble Delhi High Court in W.P.(C) 1780/2020 in the case of ***M/s. Johnson & Johnson Pvt. Ltd. v. Union of India & Ors.*** wherein the order passed by this Authority was challenged. The Hon'ble High Court in that case vide order dated 18.02.2020 had taken a prima facie view that the methodology adopted by this Authority to consider average of prices pre-rate change and comparing it with specific instances of prices post the change of rates appeared to be incorrect and that the impugned order of this Authority needed reconsideration. Based on this prima facie case, stay of operation of the impugned order of this Authority has been granted in the above case. Therefore, the Respondents have requested to consider the methodology adopted by the DGAP as erroneous and not accept the profiteering amount as alleged by the DGAP in his 2nd report dated 31.01.2020. The Respondents have further submitted that the methodology adopted by them in computing the profiteering (if any), should be accepted and since the Respondents have already passed on excess benefit at entity level, the allegation of profiteering should be withdrawn.

Submissions of the Respondents on DGAP's reply under Rule 133(2A) dated 30.06.2020:

The Respondents have also submitted that the understanding of the DGAP that if an actual to actual price comparison was made then a buyer who has not purchased a product from the Respondent in the pre rate reduction period would not get the benefit of tax reduction if he has purchased the same product in the post reduction period, was incorrect. Without prejudice to the same, the assumption that a new buyer would purchase only at an average price was also incorrect. Therefore, the Respondents have claimed that such a buyer was not entitled to the benefit of tax reduction. The average price was only indicative in nature and the Respondents actually were charging prices which might be higher or lower than the average. The DGAP's explanation did not support the lack of logic in comparing the average prices before the tax rate reduction to actual prices after reduction as such a methodology lacked any logic, was arbitrary and led to comparison of incomparable. Further in respect of methodology for comparison of average prices with average in pre and post rate reduction regime, the DGAP has illustrated the sample calculations and ruled out the Average vs. Average methodology for the determination of the profiteering. The illustration given in the DGAP reply dated 30.06.2020 has been reproduced by the Respondents as follows:-

	Pre- Rate Reduction			Post- Rate Reduction			Profiteering	
Sr. No.	Invoice No. (A)	Base price declared in the invoice (B)	Average base price of the product ('C)	Inv. No. (D)	Base price declared in the invoice ('E)	Average base price of the product (F)	Avg. to Avg. comparison (G)= (F)-('C)	Avg. to Actual comparison (H)= (E)-('C)
1	1	90		8	88		0	0
2	2	92		9	94	95	0	0
3	3	95		10	95		0	0
4	4	98		11	97		0	2
5	5	100	95	12	101		0	6

The Respondents have claimed that based on the above mentioned illustration the DGAP has highlighted the following issues in the adoption of the Average vs. Average methodology:

(a) A consumer who had paid Rs. 97/- or Rs. 101/- post rate reduction (against invoice 11 and 12) would not get any benefit of rate reduction even though he may or may not have purchased goods prior to rate reduction at a rate less than Rs. 95/-.

(b) That the method of computation of profiteering on Actual to Actual or Average to Average price *failed to serve the purpose of extending the benefit to each consumer.*

The Respondents have further claimed that when comparing the prices charged by the Respondents to their recipients before and after the rate reduction, the DGAP was simply required to compare prices before the rate reduction with the prices charged after the rate reduction to the same recipient. Adopting a convoluted methodology of comparing the average prices (which are not the actual prices charged to the recipient) with the actual prices post reduction with an intent to pass the benefit to a recipient who may not have purchased the product in question was not only arbitrary, without any logic but was also beyond the intent of Section 171 of the Act which nowhere called for passing of the benefit to even those who did not purchase the product from the Respondents before rate reduction. In this regard, the comments given by the DGAP favouring the methodology of Average vs. Actual itself showed that the said methodology was not the correct approach to compute profiteering, if any. The Respondents have further submitted the comparison of the invoice

Nos. 4 & 11 and 5 & 12 mentioned at Sr. No. 4 and 5 in the illustration given above.

Sr. No. 4 of illustration table in DGAP's reply dated 30.06.2020:

a. Pre-rate reduction base price: INR 98

b. Post rate reduction base Price: INR 97

c. Whether price increased in post rate reduction regime: No, (there is reduction in price)

d. Whether profiteering established or not as per DGAP method? Yes

e. Profiteering as per DGAP's method: INR 2 (INR 97 – INR 95)

Sr. No. 5 of illustration table in DGAP reply dated 30.06.2020:

a. Pre-rate reduction base price: INR 100

b. Post rate reduction base Price: INR 101

c. Whether price increased in post rate reduction regime: Yes, price increased by INR 1.

d. Whether profiteering established or not as per DGAP method? Yes

e. Profiteering as per DGAP method: INR 6 (INR 101 – INR 95)

The Respondents have submitted from the above mentioned analysis that even in case of price reduction of Rs. 1 for a specific product/customer, the DGAP's methodology has calculated profiteering of Rs. 2 which was fundamentally wrong and against the provisions of the law. This specific case in the illustration given by the DGAP itself was revealing the fundamental flaw in the methodology adopted by the DGAP. Further, in the case at serial no. 5 as mentioned in the table above, the price has been increased by Re. 1 but the profiteering amount as calculated against such product was INR 6. By no means of logic or principle could the profiteering amount in both the cases be justified. The Respondents have

also made sample comparison of the line items where the profiteering has been calculated by the DGAP despite the fact that there was no increase in the prices post rate reduction, and the same is reproduced below:-

Methodology of comparing weighted average prices with actual prices incorrect

Adoption of average prices: (Customer Code 2002641416)

- Actual instances where DGAP has computed profiteering in respect of line items where the price after rate reduction has reduced. This shows flaw of adopting average vs actuals for comparison

Customer code	Invoice date	Product description	Actual vs Actual	DGAP methodology (Average vs Actual)
2002641416	03-11-2017	TIDE LAUPWD 500GX48 JR NS+C NAT PC	36.89	36.87 (Pre-rate reduction average)
2002641416	29-12-2017	TIDE LAUPWD 500GX48 JR NS+C NAT PC	36.88	36.88
		Profiteering computation	-0.01	0.01

The Respondents have further submitted that the methodology adopted by the DGAP was incorrect. The comparison of average with actuals while ignoring negatives was an incorrect approach not in accordance with the provisions of section 171 as has been explained below:-

Methodology of comparing weighted average prices with actual prices incorrect

- Computation by DGAP itself shows the error in methodology

Sl. No.	Pre-rate reduction price of Product 'Z'			Post-rate reduction price of Product 'Z'			Profiteering in case of Average to Average	Profiteering in case of Average to Actual	Noticee submission (profiteering should be 0 in this illustration)
	Inv. No.	Base price declared in invoice	Average base price of the product	Inv. No.	Base price declared in invoice	Average base price of the product			
1	01	90	95	08	88	95	0	0	-2
2	02	92		09	94			0	2
3	03	95		10	95			0	0
4	04	98		11	97			2	-1
5	05	100		12	101			6	1
							Total	8	0

Further, the Respondents have submitted that although no final order has been passed by the Hon'ble Delhi High Court in the case of ***M/s Johnson***

& Johnson v. UOI & ors. mentioned supra, the fact that the operation of the order has been stayed and it has been observed by the Court that the methodology needed consideration itself showed that there was a prima facie defect in the methodology so adopted. It has also been submitted that stay of operation of an order should result in the order (whose operation is stayed) not being available as a binding precedent. Hence, the methodology should be determined keeping in mind the above submissions of the Respondents and the methodology of comparing average with actuals and putting "zero" against negative should be held to be incorrect.

VII. **Submissions on Interpretation of Section 171 of the CGST Act:**

Submissions of the Respondents dated 19.06.2019:

The Respondents have also pleaded that in the absence of any guidelines issued by any authority, it was understood that passing of benefit of GST rate reduction through various methods specified in Para B of his submissions dated 20.07.2020 was in full compliance of Section 171 of CGST Act.

Section 171(1) reads as below:

"(1) 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."

The Respondents have further pleaded that the word "commensurate reduction" in the Section denoted reduction in price after taking into account all the factors which impacted pricing of goods. Had the legislative intention been otherwise, instead of the word 'commensurate', the word

'equal' or 'equivalent' would have been used in this Section. 'Commensurate' connoted proportionality and adequacy. The law did not prescribe how to determine whether a particular amount was commensurate as the legislature was conscious of the fact that pricing of goods was a complex exercise involving numerous factors. The price was based on contract and terms as agreed between the seller and the buyer. The price could be tentative and might get finalized at a later date which could be post supply. The price determinable at the time of supply might not be final and it could vary based on a future event. There could be multiple prices for the same supply at different points of time viz. one before the supply and one after the supply then the price was finalized based on terms of sale like discounts or price reductions based on schemes, turnover, etc. To cover such situations, the word 'prices' has been used in Section 171. The law has also used the word 'any' before supply of goods to denote singular as against the plural for price. Therefore, for the same supply, existence of tentative and final prices has been recognized and consequently, all post-supply price reductions passed on should be factored in while examining whether commensurate reduction in prices has taken place or not. Commensurate reduction was not restricted to passing of benefit of tax rate reduction in monetary terms which was normally the price. Section 171 did not use the words 'pass on the benefit by reduction in price'. The effect of commensurate reduction in prices increased benefit to the recipient due to tax rate reduction. It should be seen whether the objective of Section 171 was being achieved or not. If the recipient has got the benefit in monetary or non-monetary form proportionate to tax rate reduction, Section 171 was complied with. The

price in this regard was the consideration paid or payable for the supply. As per the Indian Contract Act, 1872, consideration included any act or abstinence. While consideration for supply was generally measured in monetary terms, the same could also include non-monetary elements. Thus, price was not only what was reflected in the invoice. The monetary component could already be factored in the invoice price. However, the parties could also choose to settle the consideration partly in non-monetary terms. In the present case, the Respondents have reduced the price by way of reduction in the price itself post-supply and also by way of extension of promotion schemes and additional quantity. By these methods, the Respondents have ensured full and total compliance with Section 171. The Respondents have further pleaded that by use of the word 'commensurate', cost of raw materials, packing materials, over heads and other such elements involving increase in cost was required to be factored in while examining whether Section 171 was applicable or not. Further, increase in quantity or grammage of goods supplied should be considered while considering whether the benefit passed on was commensurate or not. It was for such purpose that the word 'commensurate' has been used in Section 171. The word 'any' has been used twice in Section 171(1). 'Any' would mean tax reduction can be any percentage and it can be ad valorem, specific rate or combination of both i.e. any type of reduction. Any supply does not necessarily mean SKU level supply. At the most it might be interpreted as goods classified under a particular tariff heading/HSN Code. Section 171 has used the words 'registered person'. When the same were read along with 'supply', they denoted that Section 171 was applicable to the persons registered under

the CGST Act. The Respondents have not obtained registration SKU wise. Form GST REG-01 was the form specified under CGST Rules as application form for obtaining registration under the CGST Act. S. No. 18 of this form sought details of goods supplied and the words used were 'Please specify top 5 goods' and the table thereunder sought description of goods along with HSN Code. When registration was obtained based on goods supplied which were classifiable under particular tariff headings, applying Section 171 SKU wise was neither legally sanctioned nor correct. It was also submitted that in place of SKU wise calculation of profiteering, HSN Code could be considered in the light of above submissions for the purpose of calculating alleged profiteering without prejudice to the argument that profiteering (if any) has to be considered at the legal entity level.

Submissions of the Respondents on the Marginal notes to be used an internal aid of interpretation:

The Respondents have also contended that they have not undertaken any activity which tantamounted to 'profiteering'. The interpretation given to Section 171 and rules made thereunder, by the DGAP without considering the 'marginal notes' to Section 171 and heading of Chapter XV of CGST Rules, was untenable and not correct. The text of Section 171 did not use the term 'profiteering'. It was mentioned in the marginal notes to Section 171 and in the heading of Chapter XV of CGST Rules. In order to understand the scope of Section 171, it was pertinent to understand the meaning of the term 'profiteering' which has been used in the marginal notes. It was a settled principle of law that marginal notes were to be used as an internal aid of interpretation to address any ambiguity in the

provision. In this regard, reliance has been placed on the case of ***Indian Aluminum Company v. Kerala State Electricity Board (1975) 2 SCC 414***, wherein the Hon'ble Supreme Court has held that the marginal notes could be relied upon to show what the section was dealing with. In ***UOI v. Harbhajan Singh Dhillon (1971) 2 SCC 779,*** it was observed by the Hon'ble Supreme Court that marginal notes could serve as guidance when there was ambiguity or doubt about the true meaning of the provisions. Similar observations were made by the Hon'ble Supreme Court in the case of ***SP Gupta v. UOI AIR 1982 SC 149***. The Respondents have further contended that the term 'profiteering' was not defined in the CGST Act or rules made thereunder. Therefore, reference to common parlance meaning of the term 'profiteering' must be made. Definition of the term "Profiteer/Profiteering' from various dictionaries has been provided by the Respondents as under:-

a) **The Chambers Dictionary, Allied Chambers (India) Ltd., New Delhi**:

Profiteer is a person who takes advantage of an emergency to make exorbitant profits.

b) **The Collins Cobuild English Dictionary for Advanced Learners - Harper Collins Publication:**

Profiteering involves making large profits by charging high prices for goods that are hard to sell.

c) **Oxford English Reference Dictionary - Oxford University Press:**

Profiteer means to make or seek to make excessive profits, esp. illegally or in black market conditions.

On the basis of the aforementioned meanings, the Respondents have claimed that only where an entity made exorbitant or large profits in an unlawful manner, it could be referred to be a Profiteer. The Respondents in the instant case have not made exorbitant profits in an unlawful manner as was evident from the submissions made in the subsequent paragraphs. Accordingly, it could not be said that the Respondents have profiteered. The Respondents have passed on the benefit of reduction in rate of tax by various methods and have complied with the provisions of Section 171.

Submissions of the Respondents on DGAP's 2nd report dated 31.01.2020:

i. The DGAP has stated that as per the website "Lexico", word "equivalent" was also a synonym of the word "commensurate" and the intention of the law was clear that the price of the goods/services has to be reduced by the amount of reduction in the tax.

The Respondents have averred that if it had been the intention of legislature to provide for an equivalent reduction in price, the same would have been stated in clear terms in the Act itself by using the term 'equivalent' instead of 'commensurate'. The fact that the term equivalent has not been used itself showed that the intention of the legislature was to provide for adjustment of various other factors affecting the pricing of products, like increase in costs, post-supply discounts, etc.

ii. The DGAP has further stated that word "prices" was used in the law to refer to the prices of various goods/services but for each individual product or service, there would be only one selling price and one commensurate price, the difference of which would be the profiteered amount.

In this regard, the Respondents have submitted that the interpretation adopted by the DGAP was incorrect as the same was oblivious of the practical realities of the commercial transactions where price of a product sold could vary from customer to customer depending on various commercial considerations such as the type of customer, quantity of the product bought, discount applied, payment terms applicable to the transaction and the point in time when the sale took place. Considering that the term 'prices' was used in plural form, any interpretation of the same to mean only one selling price for a particular product would defeat the very purpose of usage of the term in plurality. Accordingly, the submission of the Respondents that prices after reducing post-supply discount should be considered was correct.

iii. The DGAP has also stated that the word "any" was used before the word "supply" to indicate the benefit of reduction in rate of tax has to be passed on each and every supply. Further, it was position of the DGAP that the word "registered person" used in Section 171 of the CGST Act, 2017 could not be applied to suppliers who were not registered under the CGST Act and it was clear from the word "recipient" (in singular) that the benefit has to be passed on to each and every recipient, who might buy a single SKU also. Thus, the profiteering has to be determined at the SKU level.

In this regard, the Respondents have submitted that the DGAP's interpretation of term 'any' supply as 'each and every' supply was wholly misplaced. The DGAP's interpretation that benefit has to be passed on to each and every recipient who might buy a single SKU did not help his case that profiteering should be computed at the SKU level. It was also submitted that if a recipient has been supplied only 1 SKU and benefit was

not passed on the said SKU, then the same could be construed as profiteering. However, if the recipient has been supplied 2 SKUs and if any additional price charged on 1st SKU has been offset by passing on higher benefit on the 2nd SKU, then the profiteering should be determined after offsetting the higher benefit passed on to the very same recipient. This was without prejudice to the Respondents's submission that the benefit should be seen from the entity perspective and as long as the benefit has not been retained by the Respondents but has been passed on to the recipient (as a class), there should not be any allegation of profiteering.

iv. The DGAP has also submitted that since the definition of expression "profiteered" has been inserted by way of an explanation, the same will apply retrospectively even though sub-section 3A was inserted by Finance Act, 2019. Further, the DGAP has also contended that his report was in consonance with the "marginal note" attached to Section 171 and heading of Chapter XV of the CGST Rules, 2017.

In this regard the Respondents have claimed that the DGAP's understanding that merely because a definition was given by way of an explanation, it would apply retrospectively was completely incorrect. As per the definition, "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax. This amount would be based on determination by this Authority and the report submitted by DGAP was not conclusive of the allegation of profiteering. Since in the instant case, this Authority has not yet determined any amount to have been profiteered by the Respondents, the definition of "profiteered" provided in explanation has no application.

The Respondents have further claimed that the interpretation of Section 171 adopted by the DGAP was incorrect and should not be accepted, and the interpretation provided by the Respondents alone should be accepted.

Submissions of the Respondents on DGAP's reply under Rule 133(2A) dated 30.06.2020:

The Respondents have claimed that the DGAP in his reply under Rule 133(2A) has stated as follows:

"In this regard it is submitted by the Respondents that the term "Commensurate reduction" in the Section 171 of the CGST act denotes reduction in the price after taking into account all factors which impact the pricing of the goods and that by the use of the word 'commensurate', cost of raw materials, packing materials, overheads and other such elements involving increase in cost are required to be factored in while examining whether Section 171 is applicable or not. Hence, the Respondents made submission that the increases in cost of business operations should be taken into account while determining profiteering, if any.

In this connection it would be pertinent to mention that the provisions of Section 171 of the CGST Act, 2017 requires the Respondents to pass on the benefit of tax reduction to the consumers only and has no mandate to look into the fixing of prices of the products which the Respondents are free to do. If there was any increase in the costs it could have been done prior to the period of rate reduction itself i.e. before 15.11.2017 and accordingly these costs would have been included in the base price of the products sold prior to the rate reduction period. The contention of the Respondents that such additional cost accrued led to increase in prices

concurrently with the rate reduction did not hold any merit and was just eyewash. Cost escalations did not fall within the ambit of Section 171 of the Act and so it could not be considered a valid reason for not passing on the required benefit of tax reduction or of ITC to the recipient. The word 'commensurate' could be interpreted only to mean that the benefit passed on to the recipient has to be in equal measure of benefit accrued on account of tax reduction or benefit of ITC.

Section 171 mentions "reduction in the rate of tax on any supply of goods or services" which did not mean that the reduction in the rate of tax is to be taken at the level of an entity/group/company for the entire supplies made by it. Therefore, the benefit of tax reduction has to be passed on at the level of each supply of Stock Keeping Unit (SKU) to each buyer of such SKU and in case it is not passed on the profiteered amount has to be calculated on each SKU. Therefore, the contention that the profiteered amount should be computed at the tariff heading/HSN Code is untenable. Further, the above Section mentions "any supply" i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by any supplier could not be allowed. A supplier cannot claim that the has passed on more benefits under one tariff heading/HSN Code, than the commensurate benefit which would actually accrue. Each consumer is entitled to receive the benefit of tax reduction on each product purchased by them."

On the above submissions of the DGAP the Respondents have submitted that Section 171 provided for passing of benefit to the recipients. In the instant case, the recipients were Respondent's distributors and modern retail customers etc. The observation of the Respondents that the benefit

of tax reduction should be passed on to consumers was not correct as the Respondents were not making supplies to the consumers, but rather making B2B sales. Even if it was admitted that the benefit of tax reduction has to be passed on to consumers, proceeding against the Respondents on the presumption that such benefit might not have been passed on by the recipients of the Respondents and / or recipients' recipients in forward supply chain to the consumers, was without any legal basis and was out rightly arbitrary. Further, while DGAP has stated that Section 171 has no mandate to look into the fixing of prices of the products which the Respondents were free to do, by alleging profiteering, the DGAP was effectively fixing certain limit on the prices beyond which any sale would be violative of Section 171. Further, the DGAP has stated that if there was any increase in the costs it could have been done prior to the period of rate reduction itself i.e. before 15.11.2017 and accordingly these costs would have been included in the base prices of the products sold prior to the rate reduction period. However, the adjustment was required after considering that the period of investigation spanned across more than 10 months. By ignoring cost increase subsequent to reduction in rate of tax, the DGAP has gone beyond the mandate of section 171 of the CGST Act. The interpretation of DGAP that prices must reduce and stay reduced without considering cost escalations over a substantial period of time could not be the correct interpretation of Section 171. The profiteering needed to be computed at the entity level and not at the SKU level. Therefore, the DGAP's interpretation of Section 171 was incorrect.

VIII. **Submissions on the issue of Benefit computed at entity level or SKU level:**

Submissions of the Respondents filed on 09.06.2020:

The Respondents have submitted that they have already demonstrated why the methodology adopted by the DGAP was erroneous as the same compared average price pre-rate reduction with the actual individual sale invoice-wise price post-rate reduction and computed profiteering on each sale where the actual sale price charged post-rate reduction was higher than the average price while at the same time zeroing (ignoring) cases where the actual sale price charged post-rate reduction was lower. Further, the methodology computed profiteering for SKUs where the amount charged was higher while ignoring the benefit passed on by the Respondents on other SKUs. It did not take into consideration the increased post-supply discounts offered by the Respondents. It also did not take into consideration the increased costs including Customs Duty increase and reduction in refund under the budgetary support scheme. This interpretation of DGAP, presupposed that reduction in the rate of GST should be passed on proportionately at each SKU level even if it meant that the Respondents would suffer loss due to various other factors which might have led to increase in the cost of supply of such products up to, during and after the time of such GST rate reduction. An interpretation and methodology which did not take into consideration all these factors was an erroneous interpretation and was liable to be disregarded. The Respondents have further submitted that the rate of GST on certain products supplied by the Respondents was reduced from 28% to 18% from 15.11.2017 vide Notification No. 41/2017-Central Tax (Rate). The Respondents have also reduced the rate of GST charged from their recipients with effect from 15.11.2017 from 28% to 18% in the invoices

issued to them. In addition to the direct reduction in the MRPs of their products, during the relevant period they have passed on the benefit to their customers by the following means:

1) Benefit passed on by way of higher price reduction on certain SKUs;
2) Extra quantity (higher Grammage at the same or lower price) in packs and new promotions;
3) Extension of promotion schemes running before Nov 15th 2017, which passed on higher value to the customers/consumers;
4) Price reduction post supply.

The Respondents have also claimed that there were discrepancies in the calculation of alleged profiteering by the DGAP which are mentioned below:-

1) Net price of SKU (Gross price net of discounts) prior to reduction of tax was compared with the gross price of SKU post reduction of tax in respect of certain SKUs;
2) Profiteering has been alleged on certain imported SKUs where there was an increase in the Basic Customs Duty (BCD) during the period under investigation;
3) Profiteering has been alleged on supply of promotional SKUs;
4) Reduction in area based fiscal incentives as a result of reduction in rate of GST, which has resulted in reduced margins on the products, not considered

The Respondents have further claimed that the DGAP has calculated total alleged profiteering against the Respondents by including GST @18% on the excess prices alleged to have been charged on supply of these goods, despite the fact that the GST collected has been deposited with the Govt.

and was available as input tax credit to the recipients. Such an inclusion was contrary to Section 171 as the same could not be considered as 'profiteered' by the Respondents under any stretch of imagination. The Respondents have also prepared consolidated working of profiteered amount by giving effect to their submissions as follows:-

- Correcting the error of DGAP of comparing the net price of the SKU (Gross price net of discounts) prior to reduction in rate of tax with the gross price of SKU post reduction of tax;
- Mapping the normal prices which could have been charged by the Respondents for SKUs on which promotion was extended and computing the revised profiteering, including higher benefit passed on:
- Computing the benefit passed on by way of higher price reduction on certain SKUs;
- Computing the benefit passed on by way of higher price reduction on certain transactions where the actual price charged was lesser than the average price computed by DGAP;
- Mapping the normal prices which could have been charged by the Respondents for products with extra quantity (higher Grammage at the same or lower price) in packs and new promotions introduced after reduction in rate of tax, and computing the revised profiteering, including higher benefit passed on;
- Price reduction post supply.

The Respondents have contended that after adjusting all the above factors in the DGAP's working, the revised profiteered amount came to be

negative. In fact, the Respondents have passed on additional benefit of **INR 139.99 Crore (PGHP) + INR 7.12 Crore (GIL)** (incl. GST) which was more than the benefit which the Respondents were required to pass on. The above amount was excluding the submissions of the Respondents on the grounds of reduced area-based incentives and increased Customs Duty etc. Once the said amounts were considered, the benefit passed on would be much higher than the computation presently made by the Respondents. The summary of benefit claimed to have been passed on by the Respondents has been furnished by them as follows:-

PGHP

Particulars	Total (in INR crores)
Profiteering as per DGAP computation	181.51
Less: Reduction in profiteering on account of correction of base price on account of errors as per para C, extension of promotions and new promotions	(61.59)
Less: Zeroing (including on account of extension & new promotions)	(190.36)
Less: Additional benefit passed on by way of increase in post supply discounts	(69.55)
Net profiteering (as per column BE of computation sheet)	**(139.99)**

GIL

Particulars	Total (in INR crores)
Profiteering as per DGAP computation	57.99
Less: Reduction in profiteering on account of correction of base price for extension of promotions and new promotions	(3.17)

Less: Zeroing (including on account of extension & new promotions)	(61.95)
Net profiteering (as per column AX of computation sheet)	**(7.12)**

In view of the above, the Respondents have submitted that they as an entity have passed on much more benefit pursuant to reduction in rate of tax and hence the finding of the DGAP that the Respondents have profiteered was incorrect.

Further, Rule 126 empowered this Authority to determine the methodology and procedure for determination as to whether benefit of reduced rate of tax or input tax credit has been passed on by a registered person to the recipients by way of commensurate reduction in prices. However, the 'Methodology and Procedure, 2018' notified by this Authority under Rule 126 did not provide any methodology or guidelines as to the method for passing on the benefit or for computation. Thus, in the absence of any prescribed methodology, the method adopted by Respondents was as per law and the same was required to be accepted.

Submissions of the Respondents on DGAP's reply under Rule 133(2A) dated 30.06.2020:

The Respondents have also stated that the DGAP in his reply under Rule 133(2A) dated 30.06.2020 has clarified as follows:

"Section 171(1) of the Central Goods and Services Tax Act, 2017 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.

It is mentioned that the word "any" is used before the word "supply" to indicate the benefit of reduction in rate of tax has to be passed on for each

and every supply. Further, it is the position of DGAP that word "registered person" has been used under the CGST Act, and it is clear from the word "recipient" (in singular) that the benefit has to be passed on to each and every recipient, who may buy a single SKU also. Thus, the profiteering has to be determined at the SKU-level."

In this regard, the Respondents have submitted that Section 171 did not state that the benefit needed to be passed on each and every supply and it was only an interpretation of the DGAP. Further, the argument that the benefit needed to be passed on to a recipient who would buy single SKU also did not support the DGAP's contention that the benefit needed to be determined at the SKU level. The Respondents have further submitted that in the absence of methodology provided to the Respondents, they had adopted a reasonable methodology in consonance with the provisions of Section 171 of the CGST Act and thus, the methodology adopted by the Respondents was correct.

IX. **Submissions on prices used by the DGAP for computation of profiteered amount:**

Submissions of the Respondents filed on 19.06.2019 and on DGAP's 2nd report dated 31.01.2020:

The Respondents have submitted that while for most of the SKUs, the DGAP has compared the pre-rate reduction base prices pre-discount with the post-rate reduction base prices pre-discount, in certain category of SKUs, the DGAP has inadvertently compared the pre-rate reduction **post-discount** prices with the post-rate reduction **pre-discount** prices. Accordingly, this Authority vide its interim order dated 04.10.2019 had directed the DGAP to explain the basis of the prices used for comparison

for calculation of the profiteered amount. The DGAP vide his report dated 31.01.2020 has clarified as follows:

- In general, the base prices of the products were calculated on the basis of average prices during the period from 01.11.2017 to 14.11.2017 based on the outward supply details furnished by the Respondents.
- However, wherever any product was not supplied by the Respondents during the period from 01.11.2017 to 14.11.2017, the base prices as submitted by the Respondents were taken as the pre-rate reduction base prices.

However, the DGAP in his report did not offer any comments on the errors highlighted by the Respondents.

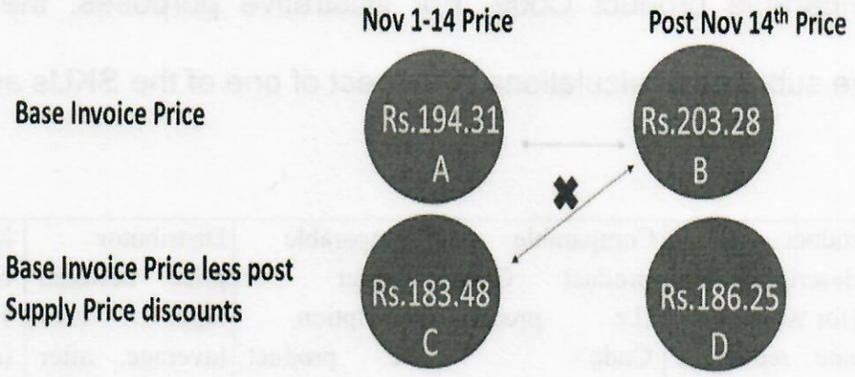
Submissions of the Respondents on DGAP's reply under Rule 133(2A) dated 30.06.2020:

The DGAP in his reply under Rule 133(2A) has clarified the issue and the relevant portion is extracted below:

"The Respondents have alleged that this office has inadvertently made some discrepancy in calculation across some category of SKU's, comparing the pre-rate reduction post-discount price with the post-rate reduction pre-discount prices, however, they have not submitted Invoice/SKU specific data wherein such comparison had been allegedly made. If, there is any such inadvertent error, it may be suitably looked into and rectified, if required, on the basis of facts and uniform methodology followed."

In this regard the Respondents have submitted that while for most of the SKUs, the DGAP had compared the pre-rate reduction base prices pre-discount with the post-rate reduction base prices pre-discount, in certain

category of SKUs, the DGAP had inadvertently compared the pre-rate reduction **post-discount** prices with the post-rate reduction **pre-discount** prices. The illustration for the same is as follows:-



The Respondents have further submitted that to compute profiteering, a comparison could have been made either between A and B (prices pre and post rate reduction, **both before discount**) as had been done by the DGAP for most SKUs, or between C and D (prices pre and post rate reduction, **both after post supply discount**), as submitted by the Respondents. However, in respect of certain SKUs, a comparison was made between **C** and **B** (i.e. pre-rate reduction **post supply discount price** and post rate reduction **base invoice price which was prior to discount**) which was patently incorrect and was an inequitable comparison. It was submitted that if the DGAP's methodology of comparing prices A and B was adopted, it would require correcting the error for these SKUs highlighted by the Respondents, which itself would result in reduction in allegation of profiteering by **INR 28.52 crores (PGHP)**. In this regard, the Respondents have also submitted that for most of the SKUs, the DGAP had pre-rate reduction sales available in order to compute the pre-rate reduction average prices of those SKUs. However, there were few SKUs where the pre-rate reduction sale details were not available with the DGAP, as the Respondents had not sold those

products in the said period. Accordingly, the DGAP had called for information regarding the pre-rate reduction prices from the Respondents. The Respondents vide their submissions dated 29.03.2019 had provided the comparable product Code and prices to the DGAP based on such comparable product Code. For illustrative purposes, the Respondents have submitted calculations in respect of one of the SKUs as follows:-

Product description (for which pre-rate reduction price was not available with DGAP)	Comparable product Code (i.e. product Code comparable to the one for which DGAP asked the pre-rate reduction price)	Comparable product description (i.e. product description comparable to the one for which DGAP asked the pre-rate reduction price)	Distributor price between Nov 1-14 (average, after deducting post sale discount)	MR price between Nov 1-14 (average, after deducting post sale discount)
H&S SHM 360MLX12 SB GST IN	82269429	H&S SHM 360mlx12 SB saver IN	183.48	201.27

In the above illustration, the DGAP did not have any base price for product description H&S SHM 360MLX12 SB GST IN. Therefore, the DGAP had asked the Respondents to submit the price of the product pre-rate reduction. The Respondents submitted that the product comparable to this product sold in the pre-GST regime was product Code 82269429 having product description H&S SHM 360mlx12 SB saver IN. If the details of sales made by the Respondents of this comparable product in the pre-rate

reduction period were examined, it would be found that the sales made and quantity sold of this product was as follows:-

Particulars	Sales	Quantity	Value per unit
Distributor details pre-rate reduction of product H&S SHM 360mlx12 SB saver IN			
Value to distributors (before post supply discount)	28,77,367.54	14808	**194.31**
Value to distributors after reducing post-supply discount	27,16,980.19	14808	**183.48**
MR details pre-rate reduction of product H&S SHM 360mlx12 SB saver IN			
Value to MR (before post supply discount)	9,715.93	48	202.42
Value to MR after reducing post-supply discount	9,660.96	48	201.27

From the above illustration, the Respondents have submitted that there were 2 prices pre-rate reduction for distributors, viz.:

INR 194.31, i.e. the average price pre-rate reduction **before deducting post-supply discount**,

and INR 183.48, i.e. the average price pre-rate reduction **after deducting post-supply discount**

When the DGAP had called for the price of these SKUs, the Respondents had submitted price of INR 183.48 in their submissions dated 29.03.2019, since the Respondents were under the impression that the computation of profiteering for all SKUs would be based on prices after post-supply discount and not prices before post-supply discount. However, on verifying

the computation done by the DGAP in his 1st report dated 05.04.2019, it was observed by the Respondents that the computational methodology followed by the DGAP was to compare prices charged before deducting post-supply discounts. Accordingly, the Respondents had submitted the revised prices (based on prices charged before deducting post supply discount) for these SKUs (INR 194.31 in the above SKU). The Respondents have further submitted that for computation of profiteering for SKU H&S SHM 360mlx12 SB saver IN, the DGAP has taken base price of INR 194.31. Thus, for computing profiteering, if any, for SKU H&S SHM 360MLX12 SB GST IN, for which the comparable product was product Code 82269429 having description as H&S SHM 360mlx12 SB saver IN, the base price adopted by DGAP should be INR 194.31 only (i.e. the price charged before deducting post-supply discount) and not INR 183.48, which was the price charged after deducting post supply discount. The Respondents have further submitted that the above explanation showed the inadvertent error which was made in computation of profiteering and thus, the Respondents have requested this Authority to direct the DGAP to revise the computation on the basis of the above submissions which would result in reduction in allegation of profiteering by **INR 28.52 crores (PGHP)** (excl. GST).

X. **Submissions on consideration of Consumer Promotions:**

Submissions filed by the Respondents on 19.06.2019:

The Respondents had mentioned in their submissions dated 18.01.2019 and 03.04.2019 that certain consumer promotion schemes which were existing before GST rate reduction were continued after 15.11.2017 so as to pass on the benefit of GST rate reduction. The Respondents have

submitted that such schemes were in the nature of higher grammage/extra quantity and price reduction on the pack itself. The Respondents had issued newspaper advertisements in leading dailies such as Times of India and Hindustan Times and also in various regional newspapers to ensure mass awareness about such continuation of promotions to pass on the GST benefit. The above submission of the Respondents were, however, summarily rejected by the DGAP in his Report by terming the same as a business decision of the Respondents. The DGAP has failed to appreciate that these promotions were extended so that they continue after 15.11.2017 as well so as to pass on the benefit of GST rate reduction and the same was also communicated to the consumers by way of newspaper advertisements. The Respondents have contended that the Government did not communicate any method to pass on the benefit of rate reduction to the recipients. In the absence of any prescribed method, the Respondents considered that continuation of the promotion scheme was the only effective way to pass on the benefit on these SKUs at the earliest. The other alternative way of passing the benefit would have required stopping the existing promotion, discard the existing packing material, printing of new packing material to correspond to a change in price of 8% (to give effect to reduction in rate of tax of 10%) and packing in new packing material. This whole process would have taken a minimum of 3-4 months for launch in the market and also would have led to consumers enjoying a lower benefit (7.8%) as against the continuation of existing higher than 7.8% promotion benefit. Since the schemes were already in existence the Respondents had decided to continue such schemes to pass on the benefit in the best interest of the consumers. The

argument that Section 171 contemplated reduction in prices as the only legally permissible method ignored the fact that price reduction by way of extra sales promotion, extra discount, higher grammage, higher combination package etc., was among the various ways of reaching the customers to ultimately pass on the benefit. In fact, higher grammage would result in reduction in prices per Gram. The purpose was to give choice to consumers to calculate the price per Gram of detergent or per ml. of shampoo etc. and allow them to exercise their option of buying. It was incorrect to say that such promotion schemes were for business promotion and the Respondents should have given further discount over and above. The Respondents have also claimed that the benefit passed on by way of extension of promotions should be considered and reduced from the alleged profiteering. These SKUs were promotional in nature and accordingly, were already being supplied at a reduced price in comparison with the price of a similar non-promoted pack. Accordingly, with the reduction in GST rates, further reduction in prices of such SKUs was not feasible. Accordingly, an amount of INR 19,71,93,934/- (PGHP) and INR 3,30,14,424/- (GIL) computed on supplies of these SKUs needed to be excluded from the alleged profiteering.

Submissions of the Respondents on DGAP's 2nd report dated 31.01.2020:

The Respondents have submitted that in reply to their submissions filed on 19.06.2019, the DGAP in his report dated 31.01.2020 has stated that the provisions contained in Section 171 of the CGST Act, 2017 did not provide for any means of passing on the benefit of reduction in rate of tax or input tax credit other than by way of commensurate reduction in prices.

The DGAP has further asserted that it was the Respondents's own business decision to extend the period of consumer promotion schemes, the cost of which could not be set off against the benefit that the Respondents ought to have passed on to their recipients on account of GST rate reduction w.e.f. 15.11.2017. It was further stated that the said issue was covered in detail in para-17 of DGAP's Report dated 05.04.2019. In this regard, the Respondents have submitted that any change in price and alteration in MRP on the product pack required a significant number of steps to be undertaken, which was a time-consuming process. In the context of such high number of impacted SKUs, one needed to understand the magnitude of work involved in changing the MRP on the product packaging. Accordingly, as a measure to immediately pass on the benefit on account of reduction in rate of tax, the Respondents had chosen to continue with the consumer promotion schemes where they were already offering higher grammage/quantity or price reduction on pack. The Respondents have also claimed that the business decision to extend the consumer promotion schemes was a conscious call taken by the Respondents so that they could pass on the benefit of reduction in rate of GST on a war footing. Despite the measures undertaken by the Respondents, they were being accused of having profiteered. The DGAP has completely ignored the practical business considerations that the Respondents had to take into account while implementing such an unprecedented change in rate of GST for a vast majority of products supplied by the Respondents. The Respondents's decision to pass on the benefit of reduction in GST rate by way of extension of promotion schemes should be considered as one of the

methods of passing on the benefit. Even if the higher benefit passed on was not adjusted against other products, no profiteering could be alleged on these products since the promotions were extended to pass on the benefit of GST rate reduction.

XI. **Submissions on post supply price reductions:**

Submissions filed by the Respondents on 19.06.2019:

The Respondents had submitted before the DGAP that they were offering discounts in the form of post-supply price reduction to various customers as a routine business practice. This meant that such discounts were being offered both in the pre-GST rate reduction and post GST rate reduction period. Accordingly, the Respondents had requested the DGAP to make computations for determination of alleged profiteering based on the comparison between the net price of a product (i.e. after considering such price reductions). However, it had been observed by the DGAP in his 1st Report that there was nothing in the documents to show that the discount was for passing on the benefit of GST rate reduction and hence, the computation of alleged profiteering had been made by the DGAP based on the gross prices. The submission of the Respondents was that although the price reductions were provided both prior to and after reduction in the rate of GST, however, the price reductions provided after reduction in rate of GST had been significantly increased to ensure that the benefit of such rate reduction was passed on by the Respondents to their recipients. The Respondents, as a part of their regular trade practice were running various schemes for their recipients, wherein the recipients sold the goods at a reduced price to their customers and such price reduction was reimbursed to the recipients by the Respondents. This

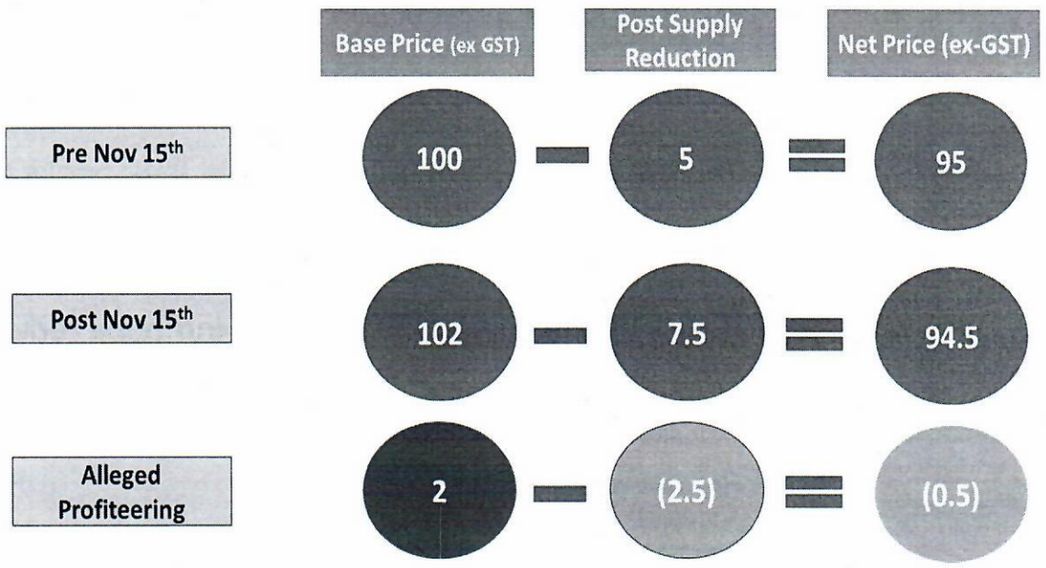
resulted in reduction in net realization by the Respondents from their recipients. Since it was towards reduction in the price of goods supplied earlier, the Respondents were adjusting such price reductions from their sales turnover and reported only the net turnover in their books of account as well as the Financial Statements (viz. Profit and Loss Account). The methodology adopted by the Respondents for giving price reductions has been explained by them as is given below:-

Methodology adopted for implementing Price Reduction scheme

- Scheme for Price Reduction (Discount) to be run in month say July are shared with recipients in the last week of previous month "June".
- Communication to recipients via an email from P&G.
- Price Reduction executed by P&G recipients to retailers on invoice in July.
- Recipient issues invoice to P&G in month August for the price reduction it has executed in month say July to P&G Recipient. The amount is calculated based on sales made by P&G Recipient to his customer.
- The amount paid to P&G Recipient in this regard netted off against Sales Turnover in the Books of P&G.
- P&G increased the discounts given to the recipients in the post Nov 15th period vis-à-vis the pre Nov 15th period.

The Respondents have also contended that it was their policy that while the price reduction scheme was made known in advance to the recipients, the same was allowed only when the Respondents were assured of the fact that the benefit of such price reduction was passed on further to the trade partners below in the supply chain, after carrying out in house and third-party verification. The Respondents had allocated such amount passed on by way of price reduction against individual line-items of sale in the details of outward taxable supplies furnished by them to the DGAP. The DGAP ought to have considered the value after discount, as it was this amount which the Respondents had actually realized for the sale transaction and the base price on which tax was charged in the invoice was merely a tentative price subject to subsequent adjustments on

account of such schemes. This has been illustrated by the Respondents as is given below:-



The Respondents have submitted from the above illustration that the DGAP has alleged profiteering based on a comparison between the base invoice prices ex GST alone (Rs. 100/- and Rs. 102/- in the above illustration). Such price however did not take into consideration the price reductions allowed subsequently (Rs. 5/- and Rs. 7.5 respectively). It was further contended that the allegation of profiteering should have been made based on a comparison between the net prices (after considering price reductions post supply) as that alone reflected the net realization of the Respondents. The Respondents have also submitted that discounts could also be given based on an established practice. In the present case, the Respondents were giving discounts prior to GST rate reduction and the had continued these discounts post GST rate reduction also. Thus, the discounts were given post GST rate reduction as per the established practice. In this regard, the Respondents have relied on the decision of the Hon'ble Supreme Court in the case of **Union of India v. Bombay Tyres International 1984 (17) ELT 329 (SC)** wherein it was held that discounts allowed in the trade by whatever name such discount were described

should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under the agreements or under the terms of sale or by an established practice. The Respondents have also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Moped India Ltd. v. Asst. Collector 1986 (23) ELT 8 (SC).**

The Respondents have further submitted that they have passed on the benefit of tax rate reduction by way of reducing the price subsequent to supply which the DGAP has rejected. In common parlance discount was nothing but reduction in price. It was settled law that the discounts known in advance to the customers were deductible from the value, irrespective of their form or nomenclature. Further, the observation of the DGAP seemed to be on the basis that since the discount had not been claimed by the Respondents for valuing the supply in terms of Section 15 of the CGST Act, the same could not be considered for compliance of Section 171 as it was different from Section 15 of CGST Act. Under Section 15 in determining assessable value / taxable value, additions, subtractions and modifications were made from price however, Section 171 confined itself to the fact whether there was profiteering by the assessee consequent to reduction in tax rate or grant of excess credit. Discounts, incentives, cash backs, pre or post sales may or may not be allowed under Section 15 to arrive at the assessable value / taxable value but such considerations would not, and should not, apply to calculation of profiteering under Section 171. Any benefit passed on by the assessee in whatever form to the recipients must be taken into consideration regardless of the fact whether such deduction was permissible or not under Section 15 of the CGST Act. The Respondents have further submitted that the price

reduction has been given in the monetary form to the recipients on the basis of documents received from the recipients. It was nowhere prescribed that benefit of GST rate reduction should be given on the invoice itself. The benefit could be given subsequent to the supply by way of adjustments in the books of accounts of the recipient and the supplier. In the present case admittedly, the benefit of price reduction had been given subsequent to supply on the basis of invoices/ debit notes issued by the recipients by way of adjustment in the books of account. It also satisfied the condition put by the DGAP that monetary form was the only form in which the benefit could be passed on. Further, the DGAP has rejected the claim of discounts (price reduction) made by the Respondents holding that the same was in the nature of sales promotion services and not discounts. The Respondents have submitted that recipients of the Respondents, treated these price reductions/ discounts as service in view of the fact that there were various cases of litigation under the erstwhile service tax legislation between the Department and the dealers of the automobile companies who were receiving the incentives from the manufacturers post sale. The incentive received by the dealers was considered by the Department as consideration for the service provided by the dealers to the manufacturers and Service Tax was demanded on such incentives. In order to avoid dispute regarding future tax liability and interest thereon, if any, the Respondents had taken position to accept the claim for price reductions from the recipients with tax as it was revenue neutral, being creditable in the hands of the Respondents. Accordingly, even though the price reductions were routed by way of service invoices received from the recipients, it remained a fact that the same were raised

in lieu of schemes announced by the Respondents and were nothing but a reduction in sale prices of the Respondents and not towards any services provided by the Respondents's customers to the Respondents. Accordingly, the Respondents have submitted that the computation of alleged profiteering ought to have been made on the basis of net prices only, which were the prices charged by the Respondents after allowing for price reduction based on the schemes announced from time to time, as the net price alone reflected the actual consideration towards the supply, realized by the Respondents.

Submissions of the Respondents on DGAP's 2nd report dated 31.01.2020:

The Respondents have submitted that this Authority vide its Order dated 04.10.2019 had directed the DGAP to explain as to why the benefits passed on by the Respondents by way of price reduction to the recipients post supply of goods have not been taken in to account. Accordingly, the DGAP in his report dated 31.01.2020 has stated as follows:

- The taxable value as shown in the GSTR1/3B Returns filed by the Respondents has been taken into account for determining the base price both before and after rate reduction w.e.f. 15.11.2017.
- The evidence submitted by the Respondents in support of their claim to have given post-supply discounts was either invoices issued by their recipients, mentioning the description as "Promotion Services" with HSD Code 998361 or 998366 (Advertising Service) or Debit Notes issued by the recipients.
- However, the profiteering has been quantified at the SKU level invoice-wise and documentary evidence establishing the correlation between the

taxable value reported in the GST returns and post supply discount given on any particular invoice / SKU has not been established by the Respondents.

- The issue was addressed in para-16 of the Report dated 05.04.2019.

  In this regard, the Respondents have submitted that the value reported in the GSTR-3B Returns was the value determined at the time of issuance of invoice for supply. It did not take into account the post-supply discount provided to customers as the same was provided subsequently through a separate document. The only requirement in terms of Section 171 was to ensure that the benefit was passed on by reducing prices. Whether such price reduction was at the time of supply or offered as a post supply price discount should not alter the fact that the benefit has been actually passed on. Further, even if the said discount was not deducted from the value of supply under Section 15 for the purpose of payment of tax that did not alter the fact that the discount was actually towards supply of goods and that the commercial price charged by the Respondents towards supply of goods had reduced. The fact that the Respondents have consistently reduced this discount from their sales income and not shown it as a line item of expenditure further showed that the discount was in relation to the supply of goods alone and not for any other purpose. Therefore, the actual treatment of this discount in the books of the Respondents was the right criteria to determine the true nature of such payments which were nothing but sale discounts given to recipients. Accordingly, the Respondents have submitted that the DGAP's assertion that the prices shown in GSTR-1/GSTR-3B Returns alone could be compared was incorrect. Comparison should be made between the prices charged after reducing the post-

supply discount offered to the customers. Further, as regards DGAP's observation that the evidence submitted by the Respondents was either invoices issued by their recipients, mentioning the description as "Promotion Services" with HSD Code 998361 or 998366 (Advertising Services) or Debit Notes issued by the recipients, the Respondents, vide their submissions filed on 19.06.2019 have already submitted that discount allowed in trade by whatever name should be deducted from the sale price. They have also placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Union of India v. Bombay Tyres International 1984 (17) ELT 329 (SC)*** and ***Moped India Ltd. v. Asst. Collector 1986 (23) ELT 8 (SC)***. However, the DGAP has not dealt with the said cases relied upon by the Respondents.

Submissions of the Respondents on DGAP's reply under Rule 133(2A) dated 30.06.2020:

The Respondents have claimed that the DGAP in his reply dated 30.06.2020 has stated as under:-

"The taxable value as shown in the GSTR1/3B Returns filed by the Respondents has been taken into account for determining the base price both before and after rate reduction w.e.f. 15.11.2017. The evidence submitted by the Respondents in support of their claim to have given post-supply discounts were either invoices issued by their recipients, mentioning the description as "Promotion Services" with HSN Code 998361 or 998366 (Advertising Service) or Debit Notes issued by the recipients. However, the profiteering has been quantified at the SKU-level invoice-wise and documentary evidence establishing the correlation between the taxable value reported in the GST Returns and post-supply

discount given on any particular invoice/SKU has not been established by the Respondents. The issue is already covered in detail in Para-16 of the Report dated 05.04.2019."

The Respondents have submitted that the value in Form GSTR1/3B was the value as per Section 15. The post-supply discount may or may not be deductible from the value for the purpose of payment of GST under Section 15, however that did not alter the fact that the benefit has been passed on by the Respondents. Section 171 was independent of Section 15 and non-deductibility of post-supply discount from the value of supply under Section 15 did not mean that the same was not deductible for determining the price charged for the purpose of Section 171. Any amount passed in any manner must be considered for the purpose of Section 171, whether or not the same was deductible under Section 15 of the CGST Act. Further, the Respondents have stated that irrespective of the nomenclature used in the invoice (which was for the purpose of avoiding any dispute relating to GST, which was otherwise revenue neutral), the fact remained that these invoices pertained to the post-supply discount and thus they should be considered for passing on the benefit. The Respondents have already furnished documentary evidence establishing the correlation between the taxable value reported in the GST Returns and post-supply discount given on any particular invoice/SKU, on a sample basis as per their submissions dated 09.06.2020. Despite the same, the DGAP has stated in his reply that the correlation has not been established by the Respondents. The Respondents have submitted the said information vide Annexure-4 attached to their submissions dated 09.06.2020 along with documentary evidence.

XII. **Submissions on profiteering in respect of the supply made to CSD/CPC:**

The Respondents have submitted that the allegation of profiteering in respect of supplies made through CSD/CPC channel was not sustainable, as the price for supplies made to CSD/CPC channel was contractual and the same was negotiated excluding the taxes. Since the DGAP has already excluded the said transactions from the ambit of profiteering, the Respondents did not wish to make any further submissions on the same.

XIII. **Submissions on Impact of Custom Duty Increase:**

Submissions of the Respondents dated 19.06.2020:

The Respondents have stated that they had submitted before the DGAP that certain hair and skin care products (4 products - 6 SKUs) covered under Chapter 33 of the Customs Tariff Act, 1985 namely Pantene 1L (Product Codes 82269523 and 82269524), Head and Shoulders 1L (Product Codes 82269525 and 82269526), Olay Regenerist Cream (Product Code 82259693) and Olay White Radiance Lotion (Product Code 82261222) were imported by the Respondents on which the applicable rate of Basic Customs Duty (BCD) was increased from 10% to 20% w.e.f. 02.02.2018 vide Clause 101 (a) of the Finance Bill, 2018. The said information was also submitted vide para 4 of the Respondents's letter dated 26.03.2019 to the DGAP. These imported finished goods were sold as such by the Respondents. Being non-creditable in nature, such increased BCD has resulted in increase in cost of such imported products for the Respondents and hence, the Respondents were well within their right to revise prices to pass on such increased Customs Duty to their customers. However, the Respondents did not revise prices and the

additional duty burden was absorbed by the Respondents thereby passing on the benefit to the recipients. Therefore, the Respondents had requested the DGAP not to consider these 6 SKUs for determination of alleged profiteering. The Respondents have submitted that additional costs were being incurred by the Respondents due to increased payout of non-creditable BCD on import of such SKUs and hence, the allegation of profiteering on these SKUs was not sustainable.

Submissions of the Respondents on DGAP's 2nd report dated 31.01.2020

The DGAP has in his 2nd report dated 31.01.2020 stated that the contention of the Respondents that the base price was increased with increase in the BCD could not be accepted. The increased cost of raw materials/input services has no relevance in the context of GST rate reduction w.e.f. 15.11.2017. In this regard, the Respondents have submitted that the increase in BCD was a significant change in business environment subsequent to the GST rate reduction for such imported products and hence, such SKUs must be removed from the computation of profiteering. While the BCD was increased from 10% to 20%, the EC and STHEC were replaced with social welfare surcharge, thus taking the effective non-creditable duty component from 10.30% to 22%. The Respondents have also submitted that the DGAP's understanding of the effect of increased Customs Duty on the business of the Respondents was completely incorrect. While the DGAP has alleged that the Respondents have profiteered from a transaction, the increase in Customs Duty has added significant cost on the supply of the very same products on which the GST rate has been reduced. Both the benefit of GST rate

reduction and the increase in Customs Duty were pursuant to changes in the tax structure made by the Government only. Accordingly, the said increase in Customs Duty must be considered as a factor for determining profiteering on these SKUs. In any case, there was no legal backing to the assertion that the Respondents were required to keep passing on the benefit of reduced GST rate for an indefinite period irrespective of the change in the business environment (such as increased Customs Duty) which has resulted in an increase in costs. The Respondents have placed reliance on the **Case No. 3/2018** of ***Kumar Gandharv v. KRBL Limited 2018-VIL-02-NAA***. Accordingly, the Respondents have reiterated that an amount of INR 3,15,09,080/- computed as profiteering in respect of the above 4 products (6 SKUs) should be reduced from the total alleged profiteering.

XIV. **Submissions on the increased quantity and new promotions:**

Respondent submissions filed on 19.06.2019:

The Respondents have further submitted that in the absence of any prescribed methodology for passing on benefit of GST rate reduction, the Respondents have passed on the benefit by various methods. The same also included providing increased quantity of the same product at the same/reduced price per grammage or by way of providing discounts on combo packs (as against the individual prices of the products combined together in such packs). For example - the Respondents were supplying Ariel 14.3 Gr. at MRP of Rs. 2/- as against the same MRP for an Ariel 12 Gm. pack being supplied earlier. The same was done primarily on small sachet packs on which straight price reductions were not possible due to coinage issues. However, there were also some large packs on which

benefit has been passed on using such means. The quantum of benefit passed on by such means aggregated to Rs.105,79,46,321/- (PGHP) and Rs. 36,91,85,863/- excluding the GST. The DGAP has not given any finding on this submission of the Respondents and in effect has not considered this submission of the Respondents. The Respondents have further submitted that the aggregate value of benefit passed on using this method was earlier computed and submitted to DGAP vide letter dated 03.04.2019 based on net price basis under the belief that the DGAP would make comparisons between the net prices of a product (i.e. after considering the effect of post-supply discounts). As the DGAP had rejected the respective discount values, the Respondents had re-submitted their computations for the benefit passed on by way of extension of promotions based on gross price basis which came to Rs. 100,71,57,005/- (PGHP) and Rs. 35,12,63,262/- (GIL) excluding the GST. The benefit passed on by the Respondents using such means should be allowed as reduction from the alleged profiteering as by providing such offers (increased quantity or discount on combo packs), they have in effect passed on the benefit of GST rate reduction to the recipients.

Submissions of the Respondents on DGAP's 2nd report dated 31.01.2020:

The Respondents have also stated that they have passed on the benefit by increasing the grammage in respect of certain SKUs and by introducing new promotions. However, the DGAP in his 2nd report dated 31.01.2020 has stated that the reduction in price was the only prescribed methodology for passing on the benefit of reduction in rate of GST. the Respondents have argued that this Authority in ***Case No. 20/2018 (Order dated***

24.12.2018) in respect of M/s Hindustan Unilever Limited (HUL) has already held that the benefit could be passed on in the form of increase in grammage. However, despite the said order, the DGAP has stated that higher grammage was not an acceptable form of passing on the benefit of reduction in the rate of GST. The Respondents have submitted that the DGAP being an investigating authority was bound to accept the order previously passed by this Authority to the effect that increasing the grammage of products was one of the modes of passing on the benefit. The prices charged for the increased grammage products and new promotions were significantly lower than the prices which the Respondents could have charged based on the prices of normal products sold by them pre-rate reduction. It was done to pass on the benefit of GST rate reduction to the customers, as the Respondents had chosen to increase the grammage and new promotions / combo packs in order to provide additional benefit to the customers at a much lesser price. However, at the time of computing alleged profiteering the DGAP has ignored the said SKUs and did not map any base price pre-rate reduction against the line items of sales for these SKUs. The Respondents have further stated that while they had earlier submitted a standalone computation of the benefit passed on by way of increased grammage/new promotions based on the difference between the actual selling price and the price that could have been charged had the increased grammage/new promotions not been provided, the Respondents have now mapped the said prices that could have been charged in the line item-wise details of supplies as per columns AN and AO of the computation sheet provided as Annexure-3 to their submissions dated 09.06.2020 and have given effect

to the said price in computing the profiteering as well as excess benefit passed on in columns AU and AV respectively. On a perusal of the base price details mapped by the Respondents, it could be seen that the actual selling price of the product was much lower than the base price which the Respondents could have charged. The Respondents have passed on a higher benefit than what was required to be passed on, which should be adjusted against the profiteering.

Submissions of the Respondents on DGAP's reply under Rule 133(2A) dated 30.06.2020:

The Respondents have also contended that the DGAP in his reply dated 30.06.2020 has stated as follows:-

"As mentioned at 'A' above, the profiteered amount has to be passed on each and every supply and to each and every recipient individually, excess benefits passed on certain SKUs by way of increased quantity and new promotions cannot be adjusted against the profiteered amount in respect of other SKUs."

The Respondents have submitted that this was called 'zeroing' which has been held to be incorrect and the Government of India itself had objected to the concept of 'zeroing-in' at the World Trade Organization (WTO). The Respondents have provided detailed submissions in para J in relation to zeroing. Accordingly, the Respondents have requested this Authority to hold the methodology of the Respondents in passing benefit by way of extra grammage and new promotions to be correct. Once the methodology of the Respondents as stated in Para B was accepted, it would be seen that the Respondents have passed on much higher benefit than the profiteering alleged by the DGAP.

XV. **Submissions on the Period of Investigation:**

Submissions of the Respondents dt. 19.06.2019:

The Respondents have submitted that the period covered under the investigation was from 15.11.2017 to 30.9.2018. This covered the business operations of the Respondents for ten months and sixteen days. While the GST rate was reduced from 15.11.2017, there was no reason adduced by the DGAP as to the date of 30.9.2018 being reckoned for conducting the investigation in his 1st report dated 05.04.2019. The Report was silent on the grounds or reasons based on which such period was selected by the DGAP for investigation. The period covered under investigation did not have any statutory basis. Based on the period taken as above, the alleged profiteering was calculated up to the period of September, 2018. However, the report was silent about the period till when the Respondents would be investigated for alleged profiteering. This could lead to an inference that in the absence of any specified time period, increase in the prices, if any, undertaken by the Respondents would be considered as profiteering till the time Respondents were in business. It could even imply that in case if, in future, the Respondents decided to increase price of their goods (due to any commercial reason) it would attract anti-profiteering provisions. The Respondents have submitted that such exercise was contrary to the true intent and spirit of the anti-profiteering provisions contained in the CGST Act which by their very essence were transitionary in nature and Therefore, could not be applied in perpetuity. Thus, it was submitted that the manner in which the provisions pertaining to anti-profiteering were being applied by the DGAP in his report by arbitrarily selecting period of investigation and alleging

profiteering has the effect of restricting the right of the Respondents to do business, a cherished fundamental right guaranteed by the Constitution of India. The Respondents had requested the DGAP to confine the period of investigation to a maximum of three months as during such period the cost of doing business would have changed and the Respondents would have revised the prices based on such cost. It was pertinent to mention that a supplier considered various factors like direct and indirect costs, demand and supply, customer perception, competition, product positioning, legal compliances, profit etc. while determining the price of his goods. It was further submitted that the Respondents were not able to pass on the increased cost to the recipients by way of increase in prices due to adoption of longer period of investigation. It was also submitted that if the period of investigation was beyond 3 months, the effect of increased costs should be taken into account while calculating the alleged profiteering. Pricing of a product was primarily based on expenses incurred and therefore, increase in costs had to be considered. The Respondents have claimed that in their submissions dated 03.04.2019 they had submitted before the DGAP that their business has witnessed increase in costs during the period of investigation spanning over 10 months. The contention of the Respondents on increase in costs had been rejected by the DGAP by observing that such cost increase could not have happened overnight to coincide with GST rate reduction and also that increase in costs was not relevant for determination of profiteering. With reference to the same, the Respondents have submitted that it was never the submission of the Respondents that such costs had increased overnight. They had submitted before the DGAP that the costs of raw material,

packing material, advertisement, transportation costs etc., were increasing during the period under investigation and hence, the Respondents could have increased prices to pass on the cost increases to the customers. However, the Respondents deliberately absorbed such cost increases to *inter alia* pass on the benefit of GST rate reduction to the recipients. Further, such costs were very relevant for determination of prices of various products sold by the Respondents. Such cost increases compelled a business to revise its prices and hence were inextricably linked to pricing decisions. The DGAP had also observed that cost increases were irrelevant for the purpose of determination of profiteering. However, such position adopted by the DGAP was not in consonance with the various orders passed by this Authority. Inflation as a factor has been accepted as a reason for price increase by this authority in the case of ***Kumar Gandharv v. KRBL Ltd. 2018-VIL-02-NAA***. Also, in the cases of ***Hardcastle Restaurants Pvt. Ltd. 2018-VIL-11-NAA*** and ***NP Foods 2018-VIL-08-NAA***, loss of input tax credit has been factored-in for determination of net profiteering. According to the provisions of Section 171 this Authority was mandated to check if the benefit of reduction in GST rates or availability of input tax credit alone have been passed on. Therefore, the provision merely allowed evaluation of passing on benefits during increase in ITC and not reduction of ITC. Loss of input tax credit similarly resulted in an increase in costs. By allowing reduction in ITC to be set-off against the reduction in GST rates, this Authority has in effect allowed adjustment for increase in costs. Therefore, the Respondents have submitted that the investigation undertaken by the DGAP covering the period from November, 2017 to September, 2018, had the effect of

placing unlawful restraint on the fundamental right of the Respondents to carry on their business and was therefore violative of Article 19(1)(g) of the Constitution of India. The Respondents have requested for restricting the period of investigation to 3 months and if the investigation period was to the held beyond 3 months the cost increase should be factored-in for determination of alleged profiteering.

Submissions of the Respondents on DGAP's 2nd report dated 31.01.2020:

The Respondents have also averred that this Authority vide its order dated 04.10.2019 had directed the DGAP to file his submissions on the issue of considering 10 months period for calculation of the profiteered amount. Accordingly, the DGAP in his report dated 31.01.2020 has specified that the period of investigation has not been prescribed in the CGST Act, 2017 or the corresponding Rules / Notifications or by this Authority. As the rate reduction has happened w.e.f. 15.11.2017 and the complete reference from the Standing Committee to investigate the matter was received on 08.10.2018, the period from 15.11.2017 till the date of receipt of reference was taken from 15.11.2017 to 30.09.2018 for investigation. The Respondents have submitted that while making the above observations in his report, the DGAP has not considered the written submissions filed by the Respondents on 19.06.2019 which should be considered. They have submitted that neither this Authority in its letter dated 12.07.2018 nor the Standing Committee in its meetings held on 07.08.2018 and 08.08.2018 had mentioned any specific time period for which investigation was to be conducted. The DGAP has stated that in the absence of any rule or provision contained in this behalf, the period of investigation has been

taken from the date of rate reduction till the previous month of receipt of reference from the Standing Committee i.e. till September 2018. At the outset, this approach of the DGAP was without any basis and was arbitrary, discriminatory and violative of Article 14. If one were to go by this logic of the DGAP and assuming that a person filed complaint and reference from Standing Committee was received in July, 2018, the DGAP would adopt period of investigation up to June, 2018. Similarly, if a complaint was filed and reference was received from the Standing Committee for investigation in December, 2019, the DGAP would adopt period of investigation up to November, 2019. This showed complete lack of application of mind by the DGAP as to what should be the period for which investigation was to be carried out. Applying the anti-profiteering provisions in any manner other than as a transitionary provision would indirectly result in the Respondents being indirectly brought into a price control regime which was not the intent of Section 171. In the absence of any statutory provision on the period for which the Respondents needed to pass on the reduced tax rate, the same would need to be construed in a reasonable manner keeping in mind the factors specific to the Respondents. Even if there was a rule of law which provided that the period of investigation was to be considered from the date of rate reduction till the month previous to receipt of reference from the Standing Committee, the same would be arbitrary in as much as it would treat like entities unequally and hence would be violative of Article 14. This Authority was statutorily empowered to determine this issue and provide for either a specific time period for which investigation was to be conducted on reasonable basis or provide a set of guidelines to be

followed by the DGAP while determining the period of investigation. As provided in Rule 126, this Authority was empowered to determine the methodology and procedure and the DGAP was under the superintendence, direction and control of this Authority, as provided vide the Guidelines dated 04.10.2019 issued by this Authority and hence, sufficient powers should be considered to be available to this Authority to provide for a set of guidelines for determining the period of investigation. This Authority has been interacting with various entities in various sectors and was aware of the way businesses operated, frequent price changes took place and the need for balancing between customer needs and production/development of products, etc. Substantial sectoral information was available from various governmental statistical bodies to analyse a particular sector. The Respondents have also submitted that this Authority has both sufficient information as well as authority to determine the period of investigation that should be adopted by the DGAP. Accordingly, this Authority should determine the period of investigation of 3 months at the most for determining profiteering. Alternatively, guidelines should be issued to act as the guiding principles for the DGAP to determine the period of investigation. The Respondents have further submitted that in a number of instances, this Authority has passed orders covering the period of investigation from 2 to 5 months, as follows:-

Period of investigation adopted is arbitrary

- Period of investigation – 15th November 2017 to 30th September 2018 – extending over 10 months is arbitrary.

Orders passed by National Anti-Profiteering Authority (NAA)			
Party	Order Number and Date	Period covered	Duration
Sharma Trading Company	6/2018 dated 7.9.2018	15.11.2017 to 31.1.2018	3 months
Hardcastle Restaurants (McDonald's)	14/2018 dated 16.11.2018	15.11.2017 to 31.1.2018	3 months
Unicharm India Pvt. Ltd.	43/2019 dated 28.6.2019	27.7.2018 to 30.9.2018	2 months
Excel Rasayan Pvt. Ltd.	2/2019 dated 18.1.2019	15.11.2017 to 31.3.2018	5 months
Harish Bakers & Confectioners	17/2018 dated 7.12.2018	15.11.2017 to 31.3.2018	5 months

In this regard, the Respondents have also cited the decision of the Hon'ble Supreme Court in the case of ***S. G. Jaisinghani v. Union of India & Ors. (1967) 2 SCR 703***, wherein the following was held that:

"14. In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should now where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law. (See Dicey – Law of the Constitution – 10th Edn., Introduction ex). "Law has reached its finest moments," stated Douglas, J. in United States v. Wunderuck, "when it has freed man from the unlimited discretion of some ruler…. Where discretion, is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield slated it in classic terms in the case of John Wilkes, "means sound discretion guided by law. It must be governed by Rule, not by humour: it must not be arbitrary, vague and fanciful"."

(emphasis supplied)

The Respondents have also pleaded that the law was well settled that when a statute vested unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which was to guide it in exercise of the power, it would be affected by the

vice of discrimination since it would leave it open to the authority to discriminate between persons and things similarly situated, as was observed by the Hon'ble Supreme Court in the case of **Maneka Gandhi v. Union Of India 1978 AIR 597.**

It was further submitted that the present investigation was initiated pursuant to the interactive sessions which the Respondents had with this Authority in which various information was provided by the Respondents. Based on the said information, this Authority had presumed that a case was made out against the Respondents and it had forwarded the information to the Standing Committee for examination. This act of this Authority suffered from the vice of discrimination, as while the Respondents were called and asked to submit various information, the same was not the case of similarly placed companies. Further, from the information made available in public domain, it was clear that this Authority has neither initiated similar type of investigation nor called for information from similar type of business competitors of the Respondents till date. This discrimination has led to significant business advantage to the Respondents's business competitors and significant business disadvantages, injury to the Respondents. The complaint itself which is the root cause of this matter suffered from vice of discrimination and hence, should be set aside which will lead to consequential dropping of DGAP's investigation and report.

Submissions of the Respondents on DGAP's reply under Rule 133(2A) dated 30.06.2020:

The DGAP vide his reply has stated as follows:

"The DGAP follows the practice of taking period of investigation from the date of rate reduction till the previous month of the day on which reference is received from the Standing Committee as envisaged in the CGST Rules. The principle behind the practice adopted for taking the period of investigation till the preceding month in which the reference from Standing Committee is received, is to cover the entire period where profiteering has been alleged to have been done."

The Respondents have submitted that the period of investigation was neither envisaged in the CGST Act nor the CGST Rules. The DGAP followed the practice of taking period of investigation from the date of rate reduction till the previous month of the day in which reference was received from the Standing Committee which showed the arbitrariness in determining the period of investigation. Further, the DGAP has stated that the principle behind this practice was to cover the entire period where profiteering has been alleged to have been done. It is submitted that the DGAP has not adduced any evidence to show that profiteering was alleged against the Respondents up to September, 2018. The period of investigation was determined by the DGAP in October, 2018, when the notice for initiation of investigation was first issued vide letter dated 15.10.2018. In the said notice for initiation of investigation, there was no allegation of profiteering up to September, 2018 against the Respondents. Further, the present investigation was initiated pursuant to interactive sessions which the Respondents had with this Authority. The DGAP has not shown that the allegation of profiteering against the Respondents was up to September, 2018, either in the letter written by the Secretary of this Authority to the Standing Committee or the reference given by the

Standing Committee to the DGAP for investigation. The Respondents have requested this Authority to issue guidelines to the DGAP to determine the period of investigation and in the case of the Respondents such period should be restricted to 3 months.

XVI. **Submissions on issue of "zeroing":**

Respondent submissions filed on 19.06.2019:

The Respondents have submitted that the rate of GST on certain products supplied by them was reduced from 28% to 18% from 15.11.2017. Accordingly, the Respondents had also reduced the rate of GST charged from their customers from 28% to 18%. The provisions of Section 171 were silent on whether such benefit was to be passed on at an entity level or at a taxable person ('GSTIN') level or at SKU level. While the report of DGAP alleged profiteering at SKU level, the Respondents had ensured passing of benefit using various means. The Respondents have also passed on the above said benefit by allowing greater price reductions i.e. more than commensurate to the GST rate reduction on various impacted SKUs. However, while determining alleged profiteering on other impacted SKUs, the DGAP has ignored such excess benefit passed on by the Respondents. Where the Respondents have passed on benefit to the customer in excess of the required amount, the DGAP has ignored such measures (treating these as zero (0) for profiteering calculations). On the other hand, the DGAP has insisted that where the benefit to the customers was less than what was the required amount, regardless of other measures, the differential amount was being sought to be alleged as the profiteered amount. This was called 'zeroing' which has been held to be incorrect and the Government of India itself had objected to the concept of

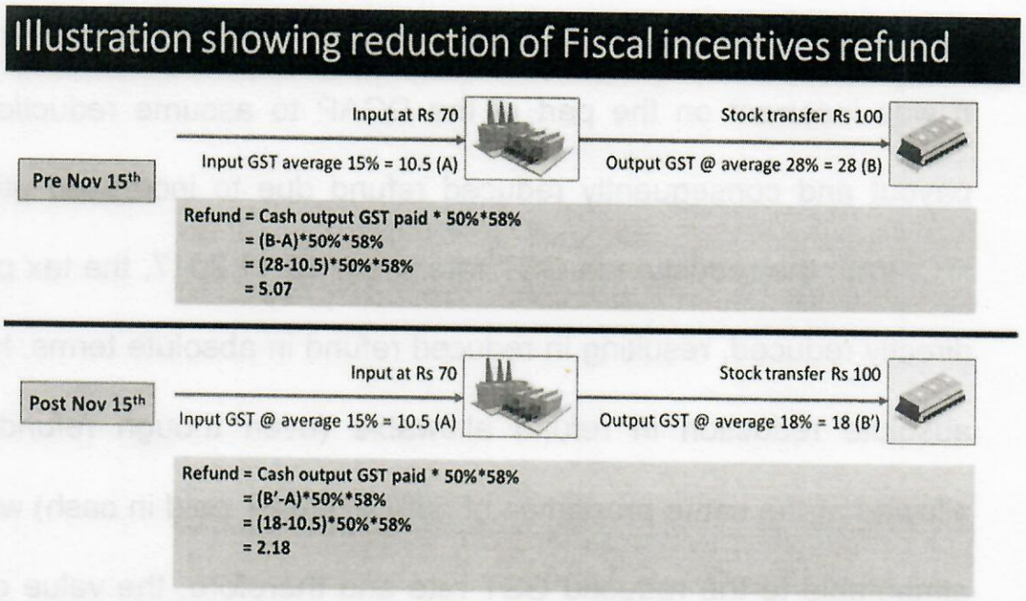
'zeroing-in' at the World Trade Organization (WTO). While calculating the alleged profiteering amount, the DGAP has incorrectly applied a methodology similar to 'zeroing' which was used by anti-dumping authorities in certain countries like European Union (EU). According to the said methodology, while calculating the dumping margins only those SKUs were considered which were being dumped and those SKUs which were not being dumped were not considered. The Government of India disputed this practice and had taken a stand against such methodology at the WTO and argued that while determining the dumping margins, all SKUs should be taken into consideration rather than only those which showed positive dumping. In this regard, attention was invited to the ***Report No. WT/DSI41/AB/R dated 01.03.2001*** of the Appellate Body of WTO regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India. In the subject case, Indian exporters faced an anti-dumping action by the EU as the exporter was exporting different varieties of Bed Linen to EU. In some cases, the exporter was exporting at positive dumping margin, wherein in many cases there was negative dumping margin i.e. the export price was more than the normal value at which goods were sold in India. The European Commission applied their usual practice of not netting off the positive and negative dumping margins. In fact, they applied 'zero' (0) for negative dumping margins and cumulated only positive dumping margins and thereby arrived at higher dumping margins for Indian exporters. Government of India objected to this approach of the European Commission and the matter was taken to the Dispute Settlement Body of the WTO which held in favour of Government of India. In an appeal filed by the EU before the Appellate Body, the Appellate

Body held that the practice of not netting off of positive dumping margins and the negative dumping margins was not correct. Thus, the Government of India succeeded before the WTO Appellate Body which held that the positive and negative dumping margins must be taken together and therefore got lower dumping margins for Indian exporters. European Commission accepted the decision and revised dumping margins not only for Bed Linen cases but also for all other cases against India. Accordingly, the Respondents have submitted that the negative price variations (in case of those SKUs where the reduction in prices has been more than what was considered necessary by the DGAP) should also be considered for determining alleged profiteering.

XVII. **Submissions on the Loss occurred due to reduced fiscal incentive to the Respondents:**

Submissions of the Respondents filed on 19.06.2019:

The Respondents have also submitted that they were having a unit in Baddi, Himachal Pradesh where they were availing the benefit of area-based exemption under the erstwhile Central Excise regime. Under the exemption, the Respondents were not required to pay Central Excise Duty on the goods manufactured in such unit and were also not entitled to avail any CENVAT credit. With the introduction of GST, upfront exemption to this unit was withdrawn as per Notification No. 10(1)/2017-DBA-II/NER dated 05.10.2017 and instead they were required to pay GST on the goods supplied and thereafter claim refund to the extent of 58% of the central tax component paid in cash. For the sake of ready reference an illustration showing the reduced refunds in absolute terms has been submitted by the Respondents as is given below:-



From the above illustration, the Respondents have submitted that the refund available under the new scheme in the GST regime was restricted to specified percentage of tax paid by cash after utilizing input tax credit. Accordingly, if the tax payout in cash was reduced, the amount of refund allowable also got reduced. The Respondents had submitted to the DGAP that the reduction in GST rate w.e.f. 15.11.2017 has resulted in reduced cash payout and consequently, reduced refund under the scheme to the extent of Rs. 3,49,84,177/-. However, the same was rejected by DGAP on the ground that the Respondents were entitled to the same proportion of 58% of CGST component paid in cash as earlier and hence, the amount of refund has not reduced in relative terms. Accordingly, the Respondents have reworked the quantum of reduced refund solely on account of reduction in the rate of tax from 28% to 18% without considering loss on account of refund restricted to 58% of CGST/29% of IGST instead of Respondent's expectation of 100% refund of CGST/50% refund of IGST. The refund reduced solely on account of reduction in rate of tax from 28% to 18% worked out to INR 1,53,08,647/- (PGHP) and INR 2,29,94,202/-

(GIL) respectively which should be adjusted while arriving at profiteering. The DGAP has also stated that reduction in refund could also be possible due to increased utilization of ITC without any factual finding on the same. It was incorrect on the part of the DGAP to assume reduction in cash payout and consequently reduced refund due to increased utilization of ITC. With the reduction in GST rate w.e.f. 15.11.2017, the tax payout has directly reduced, resulting in reduced refund in absolute terms. Hence, the absolute reduction in refund allowable (even though refund was still allowed at the same proportion of 58% of CGST paid in cash) was directly attributable to the reduced GST rate and therefore, the value of reduced refund aggregating to Rs. 1,53,08,647/- (PGHP) and Rs. 2,29,94,202 (GIL) should be reduced from the alleged profiteering to determine the net impact of the GST rate reduction on the Respondents. Relevant computations for such reduced refund have been provided by the Respondents.

Submissions of the Respondents on DGAP's 2nd report dated 31.01.2020:

The Respondents have also submitted that the DGAP has further stated that if one went by the logic adopted by the Respondents, the price of the goods has to be reduced in case there was an increase in the tax rate (because of availability of more refund). In this regard, the Respondents have submitted that the loss in absolute terms alone needed to be considered. Even in relative terms, there was loss to the Respondents which could be explained from the below mentioned illustration which established that reduction in rate of tax has resulted in reduction in the refund in relative terms to the Respondents, as rate of tax on supply of

goods was one of the relevant factors for determining the budgetary support to the Respondents:-

Particulars	Refund pre-rate reduction	Refund post-rate reduction
Loss in relative terms	29% of [28% IGST on outward supply (a) – ITC (b)] =29% * [**28**% * a – b]	29% of [18% IGST on outward supply – ITC] =29% * [**18**% * a – b]
Quantification of loss (Assuming a= 100, b= 10)	29% of [28% IGST on outward supply – ITC] =29% * [28% * 100 – 10] =8.12 –2.9 =5.22	29% of [18% IGST on outward supply – ITC] =29% * [18% * 100 – 10] =5.22 –2.9 =2.32 Reduction in budgetary support = 5.22 – 2.32 = 2.9

Further, the Respondents have also submitted that there was no allegation made by the DGAP that the input tax credit availed by the Respondents has actually increased in the period post rate reduction. Without prejudice to the same, the Respondents have submitted that INR 1,53,08,647/- (PGHP) and INR 2,29,94,202/- (GIL) was the loss in budgetary support computed by the Respondents which was solely on account of reduction in the rate of tax from 28% to 18%, as the Respondents have kept the quantum of input tax credit unchanged. Further, the figures were based on the actual data for the period under investigation. This could be seen from the computation sheet submitted by the Respondents. However, the DGAP has rejected the submissions of the Respondents without verifying the computation made by the Respondents. Had the DGAP verified the computation made by them, it would have been clear that the Respondents's claim was solely on

account of changing the factor of output tax rate getting reduced from 28% to 18% and the Respondents did not make any claim on account of input tax credit change as the input tax credit has been kept constant. The loss in budgetary support has been computed on account of reduction in rate of tax on outward supplies alone. Further, as regards DGAP's assertion that if the Respondents's submission was considered, the price of the goods has to be reduced in case there was an increase in the tax rate (because of availability of more refund), it was submitted that the said understanding of Respondent's submission was plainly incorrect. The Respondents have submitted that hypothetically assuming that there was an increase in the rate of tax by 5% which has resulted in increase in budgetary support by say 0.5%, the Respondents should be entitled to a price increase of 4.5% net (5% - 0.5%). In a case of increase in rate of tax, there was no question of reduction in prices, rather the increase in price would not be required to the full extent of 5% and might be only 4.5% (after adjusting for additional budgetary support). In the facts of the present case, there was no increase in the rate of tax and in such a case the provisions of Section 171 were not applicable and thus, the reliance placed by DGAP on an instance of increase in rate of tax to disallow Respondent's submission for adjustment of reduced budgetary support was wholly incorrect. Accordingly, the Respondents have requested to reduce the value of reduced refund aggregating to INR 1,53,08,647/- (PGHP) and INR 2,29,94,202/- (GIL) from the alleged profiteering.

XVIII. **Submissions on adding GST to the profiteered amount:**

Assuming, without admitting, that the Respondents have profiteered and GST has been collected thereon and the said GST was to be paid in

Consumer Welfare Fund then instead of the Respondents, the Government could transfer the amount equivalent to GST on the profiteered amount to the Consumer Welfare Fund. In this regard, reliance has been placed on the case of ***R. S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited*** **(1977) 4 SCC 98**, wherein the Hon'ble Supreme Court has analysed what the term "collected' meant in the context of the sales tax legislation of Gujarat and it was observed as under:-

"34. Section 37 (1) uses the expressions, in relation to forfeiture any sum collected by the person - shall be forfeited'. What does collected' mean there? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that 'collected" means "collected and kept as his" by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return if eventually it was not taxable, it is not collected. 'Collected., in an Australian Customs Tariff Act, was held by Griffth C.J., not .to include money deposited under an agreement that if it was not legally payable it will be returned' (Words & Phrases p. 274). We Therefore, semanticise Collected' not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer."

It is further submitted by the Respondents that since the amount collected as GST by the Respondents from the recipients on the alleged profiteering amount has already been deposited with Government and there was no factual dispute on this aspect, addition of 18% GST to calculate the alleged profiteering amount was incorrect.

The Respondents have also contended that their recipients were registered suppliers and hence excess GST charged, if any, did not form a part of the cost to the recipients. The amount charged from the recipients as GST which was available as input tax credit to them was only an advance tax paid by the Respondents on behalf of the recipients and did not represent the price for supply of goods. Once the GST so paid on the amount alleged to have been profiteered was deposited with the Government and was also availed as credit by the recipients, it did not form part of recipient's cost. Accordingly, the real cost of goods was only the cost paid exclusive of taxes, since taxes were creditable. In this regard, the Respondents have quoted the judgment of the Hon'ble Supreme Court passed in the case of ***Dai Ichi Karkaria 1999 (112) ELT 0353 SC,*** wherein the Hon'ble Supreme Court had observed that cost must be reckoned from the perspective of a man of commerce, and held that duty which was available as credit under the Modvat scheme did not form part of the cost of raw material:-

"24. We think it is appropriate that the cost of the excisable product for the purposes of assessment of excise duty under Section 4(1)(b) of the Act read with Rule 6 of the Valuation Rules should be reckoned as it would be reckoned by a man of commerce. We think that such realism must inform the meaning that the Courts give to words of a commercial nature, like cost, which are not defined in the statutes which use them. A man of commerce would, in our view, look at the matter thus : "I paid Rs.100/- to the seller of the raw material as the price thereof. The seller of the raw material had paid Rs. 10/- as the excise duty thereon. Consequent upon purchasing the raw material and by virtue of the Modvat scheme, I have

become entitled to the credit of Rs.10/- with the excise authorities and can utilise this credit when I pay excise duty on my finished product. The real cost of the raw material (exclusive of freight, insurance and the like) to me is, therefore, Rs. 90/-. In reckoning the cost of the final product I would include Rs. 90/- on this account." This, in real terms, is the cost of the raw material (exclusive of freight, insurance and the like) and it is this, in our view, which should properly be included in computing the cost of the excisable product."

(emphasis supplied)

Submissions of the Respondents on DGAP reply under Rule 133(2A) dated 30.06.2020:

The Respondents have also claimed that the DGAP in his reply dated 30.06.2020 has clarified as follows:

"Profiteering is the net total of additional amount a consumer has to bear, subject to denial of commensurate benefits of GST rate reduction or benefits of Input Tax Credit by any supplier. GST on this excess amount so charged is also a cost to consumer and has accordingly been correctly incorporated in the amount of profiteering."

In this regard, the Respondents have stated that the present allegation of profiteering was for the supplies made by the Respondents to their recipients being their distributors and modern retail customers etc. These recipients were eligible for input tax credit of GST charged by the Respondents. The Respondents did not make supply to consumers. In respect of supplies to their recipients, even in the unlikely event that this Authority decided that the Respondents have profiteered, the extra GST charged from the recipients was available as input tax credit to these

recipients and did not form part of their cost. Excess GST so charged could not be said to have been borne by the recipients, as they were entitled to input tax credit. Accordingly, an amount of INR 27.69 Crore (INR 153.82 Crore * 18% / 118%) (PGHP), INR 8.85 Crore (INR 57.99 Crore * 18% / 118%) (GIL) and INR 0.31 Crore (INR 2.02 Crore * 18% / 118%) (PGHH) representing the GST collected and deposited with the Government should be reduced from the alleged profiteering amount.

XIX. **Submissions on to whom Profiteered amount should be refunded:**

The Respondents have argued that in the unlikely event of this Authority holding that some amount has been profiteered by the Respondents, then the same would be refunded by the Respondents to their recipients. This would be without prejudice to the right of the Respondents to challenge the proceedings before the higher forums. Rule 133 of the CGST Rules provided that where this Authority determined that a registered person has not passed on the benefit of the reduction in the rate of tax, it might order return to the recipient an amount equivalent to the amount not passed on. It further provided for deposit of such amount in the Consumer Welfare Fund constituted under Section 57 of CGST Act where the eligible person did not claim return of the amount or where such person was not identifiable. According to the Hon'ble Supreme Court, it was the cardinal rule of interpretation that where a statute provided that a particular thing should be done, it should be done in the manner prescribed and not in any other way as per the law settled in the case of ***State of Jharkhand v. Ambay Cements 2004 (178) ELT 55 (SC)***. Similarly, in the case of ***Tata Chemicals Ltd. v. Commissioner of Customs 2015 (320) ELT 45 (SC)***, the Hon'ble Supreme Court has held that if the law required that

something be done in a particular manner, it must be done in that manner and if not done in that manner has no existence in the eyes of law at all. Rule 133 mandated that any amount held as profiteered should be returned to the recipient wherever such person was identifiable. This Authority could not direct that the profiteered amount should be deposited in the Consumer Welfare Fund if the recipient was identifiable. The recipients of the Respondents were identifiable as they were their distributors and modern retail customers and therefore, in the unlikelihood of this Authority holding any amount as profiteered, appropriate orders should be passed to enable the Respondents to return such amount to their recipients.

Submissions on affixing of Stickers of changed MRP:

The Respondents have submitted that the DGAP in his Report dated 05.04.2019 vide para 19 has stated that the law provided for legal remedy in cases where packing materials with old MRP became unusable by way of affixing new MRP along with the old MRP as provided in letter dated 16.11.2017 issued by the Ministry of Consumer Affairs, Food and Public Distribution. The Respondents have submitted that at the time of import or manufacture, the importer or manufacturer was under obligation to comply with various laws. The Legal Metrology Act, 2009 placed ban that the MRP could not be altered. While revision of MRP by affixing sticker was restricted in case of increase in such MRP, in the case of reduction in MRP, the law provided a window. The CGST Act and Rules made thereunder did not deal with affixation of MRP. Affixation of stickers with revised MRP and allied compliances was provided under the Legal

Metrology Act, 2009 and Legal Metrology (Packaged Commodities) Rules, 2011 (LM Rules). Rule 6(3) of the above Rules reads as:

"Rule 6 (3) It shall not be permissible to affix individual stickers on the package for altering or making declaration required under these rules:

Provided that for reducing the Maximum Retail Price (MRP), a sticker with the revised lower MRP (inclusive of all taxes) may be affixed and the same shall not cover the MRP declaration made by the manufacturer or the packer, as the case may be, on the label of the package."

As per the above provision, in respect of reduction in MRP, it was permissible to affix sticker with revised lower MRP and ensure that the revised MRP did not cover the MRP declared earlier. The said rule provided discretion to the supplier regarding affixation of sticker as the words used were 'may be affixed'. Therefore, in case of reduction in MRP, there was no compulsion to affix sticker with revised price. In terms of Rule 33(1) of the aforesaid rules, the Central Government could relax any of the conditions in the rules. In exercise of the said powers, the Legal Metrology Division of Department of Consumer Affairs has issued a circular dated 04.07.2017 permitting the manufacturers or packers or importers to change the MRP on unsold stock manufactured / packed / imported prior to 1st July, 2017 after inclusion of the increased amount of tax due to GST if any, in addition to the existing MRP for a period of three months w.e.f. from 1st July, 2017 to 30th September, 2017. The Respondents have submitted that Rule 6(3) dealt with affixation of sticker with revised lower MRP without reference to a person who was empowered in this regard. The only condition was that such sticker should not cover the MRP declaration already made by the manufacturer or

packer. Therefore, it could be said that such sticker could be affixed also by the distributors, dealers or retailers. The law recognized that the product could be anywhere in the distribution channel and all such persons like dealers and retailers could affix sticker to show the reduced MRP. As submitted above, in case of increase in MRP, relaxation was granted to manufacturers, importers and packers by the above said circular dated 04.07.2017 to affix stickers to declare the changed MRP on the unsold stock as existing on 1st July, 2017. In case of reduction of MRP, all persons including the dealers and retailers have been provided discretion to affix stickers as per Rule 6(3). In respect of reduction of MRP on the goods lying with the dealers and others, law has taken into account practical considerations. It was not possible for the manufacturers to affix stickers with reduced MRP on the products which have already been sold and lying with the dealers and retailers. Therefore, the manufacturers were not liable to affix stickers with reduced MRP when GST rate was reduced in respect of goods lying with others.

It was further submitted that on a few SKUs like small sachets, the Respondents could not reduce the proportionate MRP as that would imply price reduction of only a few paise (for instance, reduction of around 15 paise on INR 2 sachet). Rule 6(1)(e) of the LM Rules mandated that the retail sale price shall indicate that it was the maximum retail price inclusive of all taxes and the price in rupees and paise be rounded off to the nearest rupee or 50 paise. Accordingly, where the price reduction to be made consequent to GST rate reduction was only in the range of 15 to 20 paise, it was legally and commercially not possible for the Respondents to reduce the MRP on such SKUs by only the proportionate amount. In such

a scenario, the only options available was to not undertake price reduction on such SKUs and compensate by a higher price reduction on other SKUs, or to pass higher price reduction / free grammage on selected SKUs and correspondingly lower price reduction on other SKUs. Therefore, the Respondents have complied with Legal Metrology Act and rules made thereunder even while ensuring that benefit of GST rate reduction was passed on to the recipients.

Submissions of the Respondents on DGAP's report dated 31.01.2020:

The DGAP in his report dated 31.01.2020 has stated that the profiteering has been quantified only on the goods supplied by the Respondents after 15.11.2017 and not on the goods lying in the distribution chain on 15.11.2017. However, the DGAP has gone on to state that the sticker of new MRP has to be fixed along with the old MRP on the stock in hand as provided vide letter No. WM-10(31)/2017 dated 16.11.2017, issued by the Ministry of Consumer Affairs, Food and Public Distribution. In this regard, the Respondents have submitted that since the DGAP has stated that this issue did not have any bearing on the profiteering determined, the Respondents did not wish to make any further submissions. It has also been submitted that neither the DGAP nor this Authority have been empowered under the Legal Metrology Act or the rules made thereunder to verify Respondent's compliance with the provisions of legal metrology and hence they should refrain from commenting on compliance with respect to re-stickering of reduced MRP on pack.

XX. **Submissions on procedure and methodology:**

Submissions of the Respondents filed on 19.06.2019:

The Respondents have submitted that the CGST Act or the Rules or the 'National Anti-Profiteering Authority Methodology and Procedure, 2018' did not prescribe any procedure and mechanism for determination and calculation of profiteering which amounted to violation of principles of natural justice. The 'Procedure and Methodology' issued on 19.7.2018 by this Authority only provided the procedure pertaining to the investigation and hearing. The most vital element under Section 171 was to determine whether benefit of reduction in tax rate or availability of input tax credit has been passed on by the registered person or not. This could be ascertained only by computing the impact of difference in the rate of tax or credit availability. The said impact could be ascertained product wise, service wise, entity wise, etc. However, the said Section or Rules made there under or procedure laid down by this Authority were completely silent on this aspect of calculation/computation. In the absence of any framework or guidelines laid down by Section 171 or Rules made thereunder, different approaches might be followed by this Authority / DGAP. Such unfettered discretion would lead to uncertainty, arbitrariness and whimsical approach on case to case basis. Due to lack of any methodology or guidelines for computing profiteering, the registered persons were following different methods for passing on the benefit of reduction in tax rate or benefit of input tax credit to the recipients as per their own understanding. The Respondents have also considered that profiteering should be computed on legal entity basis and accordingly they have passed on the benefit to their customers. The Respondents have further submitted that if the methodology or guidelines would have been prescribed, then the Respondents would have passed on the benefit to their customers

according to such methodology or guidelines and the present proceedings would have been avoided.

Submissions of the Respondents on DGAP's 2nd report dated 31.01.2020:

The Respondents have also pleaded that a reference could be made to anti-profiteering mechanism that was adopted in Malaysia and Australia. While the law in these countries had provisions for anti-profiteering, there were detailed rules, guidelines and computational mechanism given to arrive at what constituted profiteering. Given that there were no such guidelines and computational mechanism provided in the Indian law, the proceedings were liable to be dropped. In the case of ***Commissioner of Income Tax Bangalore v. B. C. Srinivasa Shetty (1981) 2 SCC 460***, the Honourable Supreme Court has held that charging section of capital gains was not attracted where corresponding computation provisions was inapplicable. Thus, in the absence of prescribed method / guidelines / mechanism for computing profiteering, the report of DGAP was liable to be rejected.

Submissions of the Respondents on DGAP's reply under Rule 133(2A) dated 30.06.2020:

As regards the clarification of the DGAP that his Report was in line with the legal principles and this methodology of the DGAP has been consistent throughout in all his reports the Respondents have submitted that the methodology of the DGAP of comparing average price pre-rate reduction with the actual prices post rate reduction and computing profiteering for only those line items where the actual price charged was higher (and putting "0" against negative) itself has been a matter of

challenge before the High Courts in various matters. The Hon'ble Delhi High Court in W.P.(C) 1780/2020 in the case of ***M/s. Johnson & Johnson Pvt. Ltd v. Union of India & Ors*** has passed an interim order dated 18.02.2020 wherein it has taken a prima facie view that the methodology adopted to consider average of prices pre-rate change and comparing it with specific instances of prices post the change of rates appeared to be incorrect. It has also been submitted that the DGAP has not adduced any evidence to show that the methodology adopted by him in the Respondents's case was recommended by this Authority. In fact, it was only after the 1st DGAP's report (wherein the DGAP had already adopted a methodology) that the querist was allowed to make submissions on facts before this Authority. In the absence of availability of these facts, this Authority could not have determined the methodology in the case of the Respondents beforehand and thus the DGAP's assertion that the methodology in the Respondents's case has been determined by this Authority appeared to be incorrect. In any case, in the absence of availability of methodology as on 15.11.2017 when the reduction in rate of tax took place, the Respondents have adopted a reasonable methodology consistent with Section 171 of the CGST Act which should be accepted.

XXI. **Submissions on Principle of "de minimis non curat lex":**

The Respondents have also stated that in terms of submissions made above, the Respondents have in fact passed on more benefit than the profiteering alleged to have been made by them. In light of the same, the Respondents have requested to accept the submissions of the Respondents and pass an order holding that the Respondents have not profiteered as the profiteered amount was less than 0.89% of the sales

turnover hence the principle of "de minimis non curat lex" was applicable on it.

XXII. **Submissions on issuance of Show Cause Notice:**

Submissions of the Respondents filed on 19.06.2019:

The Respondents have also submitted that present proceedings have been conducted in violation of the principles of natural justice as show cause notice had not been issued to the Respondents proposing the action to be taken by this Authority. Moreover, the investigation was initiated on the basis of the reference of the Secretary of this Authority to the Standing Committee who, unilaterally misinterpreted submissions made by the Respondents in their communications, to erroneously conclude admission of profiteering by the Respondents. The Respondents were not given any chance to clarify or explain their communication. Moreover, none of the recipients of the Respondents have complained of non-receipt of benefit of reduced rate. Rule 133 of the CGST Rules, *inter alia,* provided that this Authority shall pass an order within a period of six (6) months [amended from three (3) months by Notification No. 31/2019-Central Tax dated 28.06.2019] from the date of the receipt of the report from the DGAP. The said rule further provided that if this Authority determined that a registered person has not passed on the benefit of reduction in rate of tax on the supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices, it may order the following:-

(a) reduction in prices;

(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest;

(c) deposit such amount in Consumer Welfare Fund where the eligible person does not claim return of the amount or is not identifiable;

(d) imposition of penalty as specified under the CGST Act; and

(e) cancellation of registration under the CGST Act.

Thus, this Authority could give any/all the above directions to the person who has been held as having violated Section 171. It is also submitted that the order required to be passed by this Authority under Section 171 would determine rights and liabilities of the said registered person with civil and/ penal consequences. However, Rule 133 did not provide for issuance of a show cause notice to the person alleged to have contravened Section 171, before passing an order under Rule 133. Therefore, Rule 133 of the CGST Rules, to that extent was violative of principles of natural justice. It has further been submitted that the first principle of natural justice viz. *audi alteram partem* required that the person concerned should be heard. One of the essential elements of hearing was communication of the grounds based on which action was proposed to be taken and a notice to show cause served such an essential purpose so that opportunity to preliminarily rebut was provided. The Respondents have cited the judgment of the Hon'ble Supreme Court passed in the case of ***Canara Bank and Others v. Debasis Das and Others* (2003) 4 SCC 557**, where the Hon'ble Court has held that a notice apprised the party of the case it has to meet. The Court has held as under:-

"15. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate enough so as to enable them to make their representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against them. This is one of the most important principles of natural justice.

16. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

[Emphasis supplied]

Similar observation was made by the Hon'ble Supreme Court in the case of ***Uma Nath Pandey and Others v. State of UP*** **(2009) 12 SCC 40**. Further reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of ***Collector of Central Excise v. ITC Ltd.*** **1994 (71) ELT 324 (SC),** wherein the Hon'ble Court has observed that where an assessee was made responsible for higher duty, he must be given an opportunity of meeting the grounds. Relevant portion of the judgment has been extracted below:-

"4. Before the first respondent is made liable for higher or enhanced duty, it must be told on what grounds it is sought to be made liable for additional duty and it must be given an opportunity of meeting those grounds. This is

the minimum requirement of the principle of natural justice which must be read into sub-rule (5) of Rule 9B, wherever called for."

In another case of ***Vasta Bio-Tech Pvt. Ltd. v. Assistant Commr.*** **2018 (360) ELT 234,** the Hon'ble Madras High has Court has held that if a statute was silent about opportunity being granted to the assessee to put forth his case, then principles of natural justice have to be read in the statute. The Court has held as under:-

"5. .....and if the statute is silent, then, principles of natural justice has to be read into the statute, so that the assessee has reasonable opportunity to put forth their case."

The Respondents have further relied on the case of ***Dharampal Satyapal Ltd. v. Dy. Commissioner of C. Ex.*** **2015 (320) ELT 3 (SC),** where the Hon'ble Supreme Court observed that applicability of principles of natural justice was not dependent on any statutory provision and that the principle has to be mandatorily applied irrespective of the fact whether there was any such statutory provision or not. In the case ***of Union of India v. Hanil Era Textiles Ltd.*** **2017 (349) ELT 384 (SC)**, Hon'ble Supreme Court has held that no order could be passed against a person without issuing a show cause notice to him. In the words of the Court:-

"....no order could be passed against a person without issuing a show cause notice to them/it. This would be in violation of the principles of natural justice and also infringe Article 14 of the Constitution of India. Audi Alteram Partem, as the basic principle of natural justice ensures an opportunity of fair hearing to the parties. Issuance of a show cause notice is a part and parcel of the aforesaid principle which provides that the

parties are in a position to defend themselves adequately; after being aware of the exactness of the allegation against them."

[Emphasis supplied]

The Respondents have further contended that the report consequent to the investigation by DGAP was neither a show cause notice nor could it be treated as substitute to a show cause notice. However, from the hearing notice received by the Respondents, it appeared that this Authority has considered the report of DGAP as a show cause notice, which was not correct. It was submitted that this Authority should have issued a show cause notice before examining the alleged profiteering. Such a show cause notice should have contained the following:

i. Description of the goods and services in respect of which the proceedings have been initiated;

ii. Grounds / reasons on the basis which profiteering has been alleged;

iii. Issues proposed to be examined by the NAA; and

iv. Action proposed to be taken by NAA against the Respondents invoking applicable statutory provisions.

Further, the Respondents have submitted that the DGAP has made his computations for alleged profiteering by using the base price data which has not been provided by the Respondents. Consequently, no opportunity has been given to the Respondents to review, challenge or rebut the accuracy of the base price data used, methodology adopted by the DGAP and hence the Respondents could not identify the discrepancy, if any, in arriving at the alleged profiteering amount. The Respondents have further submitted that unless the aforementioned information was made available

to the Respondents, they could not defend their case and make requisite submissions before this Authority. In the present case except for providing a copy of the report of the DGAP, the Respondents have not been served any notice/communication regarding the issues to be examined and action proposed to be taken against the Respondents. The Respondents could not presume the report of the DGAP to be a show cause notice and defend themselves when the same has been prepared based on the directions of this Authority. In view of the above, the Respondents have submitted that even if the CGST Act and the CGST Rules did not provide for issuance of a show cause notice before initiating proceedings under Section 171, this Authority should have issued a show cause notice to the Respondents in terms of the principles of natural justice as held by the courts in the decisions/judgments referred *supra*. In view of the foregoing, the present proceedings without issuance of a show cause notice were not sustainable.

Submissions of the Respondents on DGAP's reply under Rule 133(2A):

The Respondents have also claimed that the aforesaid submissions were not dealt with by the DGAP in his 2nd report dated 31.01.2020. Accordingly, the Respondents have reiterated the submissions filed on 19.06.2019. The DGAP in their reply dated 30.06.2020 has also stated as follows:

"In this regard it is mentioned that DGAP is not required to give opportunity of hearing to the Respondents as there is no such provision in the CGST Rules, 2017 and the office of DGAP is merely an investigative

authority. The opportunity to present the facts and merits of the case is accorded to the Respondents by the National Anti-profiteering authority."

In this regard, the Respondents have submitted that while this Authority has accorded an opportunity of hearing, the Respondents have not been provided with the show cause notice containing the details mentioned in paras supra. In the absence of the said information, the Respondents were being required to make their own interpretation of the DGAP's report and replies furnished from time to time and verify the computation of profiteering alleged by the DGAP. The Respondents have requested to issue show cause notice and provide opportunity to contest the matter.

Submissions on Penalty:

The Respondents have stated that they been served with 2nd DGAP report dated 31.01.2020 along with hearing notice dated 05/06.02.2020. The said hearing notice did not seek to impose any penalty. Accordingly, the Respondents would not make any further submissions on penal provisions and sought liberty to file submissions in case this Authority held that the Respondents have profiteered.

XXIII. **Additional Submissions of the Respondents dated 09.06.2020:**

a. The Respondents have stated that there were instances where the DGAP has computed profiteering which was in excess of the reduction in the GST rates.

b. The Respondents have also stated that the allegation of profiteering could only be to the extent of reduction in price required as a result of reduction in GST rates.

c. In the instant case, there has been a reduction in tax rates by 10% which as per the DGAP's computation methodology could be given effect by

keeping the base prices constant and then charging 18%. The same could be illustrated as follows:-

Period	Base price (excl. GST)	GST	Base price (incl. GST)
Pre-reduction	148.51	28% (41.58)	190.09
Post-reduction	148.51	18% (26.73)	175.24
Commensurate reduction as per DGAP			INR 14.85 (10% of INR 148.51)

In the above example, if the Respondents had reduced the cum-tax price to INR 185/- post-rate reduction, allegation of profiteering on such product could have been to the extent of INR 9.76 (difference between INR 185 and ideal price of INR 175.24). Further, in case the price of the product was not at all reduced by the Respondents and the Respondents continued to charge a cum-tax price of INR 190.09, it was the Respondents's understanding that they could be charged for profiteering to the extent of INR 14.85 (the difference between actual price of INR 190.09 and ideal price of INR 175.24). However, in no case the allegation of profiteering could exceed INR 14.85, as the same was beyond the scope of Section 171 of the CGST Act. In this regard, the Respondents have submitted that in cases where the cum-tax prices have been increased beyond INR 190.09, the DGAP has considered the amount charged in excess of INR 190.09 also as profiteering under Section 171 which was wholly incorrect and without jurisdiction. An illustration of the same has been provided below:-

Period	Base price (excl. GST)	GST	Base price (incl. GST)
Pre-reduction price	148.51	28% (41.58)	190.09
Post-reduction ideal price computed by DGAP	148.51	18% (26.73)	175.24
Post-reduction actual sale price on 02.07.2018	161.95	18% (29.15)	191.10
Actual profiteering per unit computed by DGAP			INR 15.86 (191.10 – 175.24)

d. The Respondents have submitted from the above that the reduction in price required to pass on the benefit of GST rate reduction was INR 14.85 only (10% of INR 148.51) but the DGAP has gone beyond his jurisdiction and computed profiteering of INR 15.86, which assumed an increase in the sale price of INR 1.01 made by the Respondents also as profiteering. It is further submitted that the said increase in price was attributable to the business profits of the Respondents which was not within the scope of Section 171. In other words, this differential amount of INR 1.01 (15.86 – 14.85) could not be alleged to have been profiteered as the scope of Section 171 was limited to commensurate reduction in prices to the extent of reduction in the rate of tax. The Respondents have further submitted that if the business profits were also treated as profiteered amount, the same would amount to 'price control' which was neither intended nor mandated by Section 171. The Respondents have placed reliance on the case of ***Lifestyle Retail Pvt. Ltd.- Case No. 8/2018 dated 25.09.2018***, wherein this Authority has observed that it was not functioning as a 'price

regulator'. The Respondents have also computed "Profiteering in excess of rate reduction (based on DGAP calculation)" in the computation sheets as per column BF of Annexure-3 attached to their submissions filed on 09.06.2020, as INR 24.51 Crore (PGHP) which was required to be reduced from the profiteered amount. In case their submissions relating to the incorrect prices used for comparison by the DGAP for certain SKUs and benefits passed on by way of post supply price reductions / discounts (as per Para E of submissions) were also considered, then the quantum of profiteering in excess of rate reduction would also undergo revision as per column BG (Profiteering in excess of rate reduction (based on DGAP calculation, after revising Cat 0 and Cat 4 base prices) and column BH (Profiteering in excess of rate reduction (based on post discount prices) respectively.

XXIV. **Submissions on violation of Article 19(1)(g) of the Constitution of India:**

The Respondents have also submitted that the anti-profiteering provisions as provided in the CGST Act, 2017 and the Rules, were invokable only when a registered person did not reduce the prices commensurately pursuant to the rate reduction or benefit of ITC mentioned in Section 171. The Respondents have duly performed their obligation under both the conditions. In the present case, Respondents have increased the prices of the SKUs supplied by them, due to loss of the input tax credit and other commercial reasons. It has also been contended that this Authority could not examine the increase in prices due to loss of input tax credit and other commercial reasons as the same was not covered under the ambit of Section 171. Wherever this Authority or the DGAP examined the increase

in prices undertaken by a supplier, due to reasons other than mentioned in Section 171 and disputed the said increase, they assumed the role of de facto price regulating body which was not the intent of the CGST Act. Further, it was the contention of the DGAP that on perusal of the invoices issued by the distributors/retailers to the ultimate consumers, it was observed that the base prices have been increased and the final selling prices of the products have remained same. On this basis alone, the DGAP has concluded that the reduction in MRP did not indicate that there was commensurate reduction in the prices charged from the ultimate consumers. The Respondents were not provided with any such invoices issued by the distributors/retailers on which reliance was placed by the DGAP. In any case, the Respondents were supplying the products to the distributors/ retailers on principal to principal basis and therefore, so long as the Respondents have reduced their prices to their recipients, they could not be held responsible for the actions of the independent parties in the distribution chain. Therefore, the very basis for this investigation was not sustainable under the law. Moreover, when the supplier charged reduced rate of tax from the recipients and increased the prices due to loss of input tax credit and other commercial reasons, it could not be said to be 'profiteering'. Placing restriction on increase of price due to commercial reasons or due to loss of credit would tantamount to 'price control' or 'price regulation' which was not the intent of Section 171 and would also run contrary to the freedom of trade and business guaranteed under Article 19(1)(g) of the Constitution of India.

18. This Authority vide its Order dated 12.06.2020 had directed the DGAP to file clarifications under Rule 133 (2A) of the CGST Rules, 2017 on the written

submissions filed by the Respondents. The DGAP has filed his clarifications dated 30.06.2020 which have been discussed as follows:-

Clarifications on Methodology:

The DGAP has stated that the Respondents have questioned the methodology adopted by him for calculation of profiteering. In reply he has submitted that the "Methodology and Procedure" has been notified by this Authority on 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, one formula which fits all could not be set while determining such a "Methodology and Procedure" as the facts of every sector were different. By reducing the GST rate, which was the case in hand, the Central as well as the State Governments have sacrificed their tax revenue in the public interest and hence the suppliers were required to pass on the commensurate benefits as per the provisions of Section 171 (1) of the Act. The DGAP has further clarified that the extent of profiteering was arrived at, on a case to case basis, by adopting suitable method based on the facts and circumstances of each case as well as the nature of the goods or services supplied. There could not be any fixed methodology for determination of the quantum of benefit to be passed on under Section 171(1) of the CGST Act, 2017. In the present case profiteered amount has been arrived at by comparing the average of the base prices of the impugned products sold during the period from 01.11.2017 to 14.11.2017, with the actual base prices on the invoices of such products sold during the period from 15.11.2017 to 30.09 2018. The DGAP has taken the average base prices of the products on the basis of details submitted by the Respondents themselves. The period of only 14 days was taken to compute the average base prices so that it was almost equal to the actual prices. The average base prices have

been computed as the Respondents were not selling their products on a single base price and were charging different prices from different buyers. It was also necessary to compare the pre rate reduction prices with the actual post rate reduction prices as the benefit was required to be passed on to each buyer and it could not have been calculated by computing the average base prices post rate reduction. The DGAP has further stated that comparison of Actual to Actual price for the same product for same consumer as sought by Respondent would lead to a situation wherein if in the pre rate reduction period a consumer hasn't purchased a particular item, s/he would be deprived of the benefit of rate reduction post GST rate reduction as there would be no reference price prior to GST reduction to compare with. Profiteering, in terms of Section 171 of the Act, if any, needed to be calculated independently for each and every transaction as each consumer was entitled to get the benefit of rate reduction, irrespective of the fact whether he had purchased the product prior to rate reduction. Further, reduction in tax rate should result in decreased cost to the end consumer, irrespective of the different channels of distribution, pricing strategy within each channel, across different channels and other commercial considerations which might vary from time to time. The DGAP has further clarified that the method of comparison of Average price prior to rate reduction with Average price Post rate reduction for computation of profiteering won't serve the purpose either. For example, in the pre-rate reduction period a product "Z" may have been sold at a price of Rs. 90/92/95/98/- and 100/- in a day or during the period prior to rate reduction to different or same buyer falling under same category. The average price of all these sales would be Rs. 95/-. Now, in the post rate reduction era if the

same product was sold at Rs. 88/94/95/97/- and Rs. 101 /- to different or same buyer, then the following picture (TABLE) shall emerge:-

TABLE

	Pre- Rate Reduction			Post- Rate Reduction			Profiteering	
Sr. No.	Invoice No.	Base price declared in the invoice	Average base of the product	Inv. No.	Base price declared in the invoice	Average base of the product	Avg. to Avg. comparison	Avg. to Actual comparison
	(A)	(B)	('C)	(D)	('E)	(F)	(G)= (F)-('C)	(H)= (E)-('C)
1	1	90		8	88		0	0
2	2	92		9	94	95	0	0
3	3	95		10	95		0	0
4	4	98		11	97		0	2
5	5	100	95	12	101		0	6

Thus, comparison of pre-rate reduction average price with post rate reduction average price for computation of profiteering would lead to a situation where a person/consumer who had paid Rs. 97/- or Rs. 101/- post rate reduction will not get any benefit of rate reduction even though these recipients might or might not have purchased goods in the period prior to rate reduction at a rate less than Rs. 95. Even a new purchaser who would purchase goods at Rs. 97/-, post rate reduction would not get any benefit of profiteering. From the above, it could be observed that the method of computation of profiteering on Actual to Actual or Average to Average price would fail to serve the purpose of extending the benefit to each customer on each transaction as enshrined under Section 171 of the CGST Act, 2017. Thus, by taking Average to Actual method, it could be ensured that:

i. All transactions were covered for the purpose of calculation/computation of profiteering.

ii. Anyone who actually has to incur higher cost got the benefit of rate reduction

iii. The Intent and purpose of the Legislature for including Section 171 in the CGST Act, 2017 and subsequently decision to reduce GST rates by sacrificing precious revenue was achieved in terms of reduced cost to the end consumer.

On the reliance of the Respondents on the recent decision of the Hon'ble Delhi High Court, in W.P.(C) 1780/2020 in the matter of **M/s Johnson & Johnson v. UOI & Others**, it was submitted that the order was interim in nature, and obiter dicta of the Hon'ble Court while granting the interim stay to the petitioner in the above case in the preliminary hearing could not be construed as the *Ratio Decidendi* to plead for relief. The referred matter being *lis pendens* no legal position has arisen out of it.

Clarifications of the DGAP on interpretation of Section 171 of CGST Act, 2017:

On this issue the DGAP has stated that the Respondents have contended that the term "Commensurate reduction" used in Section 171 denoted reduction in the price after taking into account all the factors which impacted the pricing of the goods and that by the use of the word "commensurate", cost of raw materials, packing materials, overheads and other such elements involving increase in cost were required to be factored in while examining whether Section 171 was applicable or not.

In this connection, the DGAP has stated that the provisions of Section 171 required the Respondents to pass on the benefit of tax reduction to the consumers only and have no mandate to look into the fixing of prices of the products which the Respondents are free to do. If there was any increase in the costs it could have been factored in prior to the period of rate reduction itself before i.e. 15.11.2017 and accordingly, these costs would have been

included in the base prices of the products sold prior to the rate reduction period. The contention of the Respondents that such additional cost accrued led to increase in prices concurrently with the rate reduction did not hold any merit and was just an eyewash. Cost escalations did not fall within the ambit of Section 171 and so they could not be considered as a valid reason for not passing on the benefit of tax reduction. The word “commensurate” could be interpreted only to mean that the benefit passed on to the recipient has to be in equal measure of benefit accrued on account of tax reduction or benefit of ITC. The DGAP has further added that Section 171 mentioned “reduction in the rate of tax on any supply of goods or services" which did not mean that the reduction in the rate of tax was to be taken at the level of an entity/group/company for the entire supplies made by a registered person. Therefore, the benefit of tax reduction has to be passed on at the level of each supply of SKU to each buyer of such SKU and in case it is not passed on, the profiteered amount has to be calculated on each SKU. Therefore, the contention that the profiteered amount should be computed at the tariff heading/HSN Code was untenable. Further, the above Section mentioned "any supply" i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by any supplier could not be allowed. A supplier could not claim that he has passed on more benefit under one tariff heading/HSN Code and therefore the would pass on less or no benefit across other tariff heading/HSN Code than the commensurate benefit which would actually accrue. Each customer is entitled to receive the benefit of tax reduction on each product purchased by him. It has also been mentioned that the word “any” has been used before the word "Supply" to indicate that the benefit of reduction in rate of tax has to

be passed on for each and every supply. Further, it is the position of the DGAP that the word "registered person" used in Section 171 could not be applied to the suppliers who were not registered under the Act and it was also clear from the word "recipient" (in singular) that the benefit has to be passed on to each and every recipient, who might buy a single SKU also. Thus, the profiteering has to be determined at the SKU level.

Clarifications on the allegations of using incorrect prices while computing profiteering:

The DGAP has stated that in the present case, the base prices of the products were calculated on the basis of average prices prevailing during the period from 01.11.2017 to 14.11.2017, based on the outward supply details furnished by the Respondents. However, wherever any product was not supplied by the Respondents during the period from 01.11.2017 to 14.11.2017, the base price as submitted by the Respondents was taken as the pre rate reduction base price. The Respondents have alleged that the DGAP has inadvertently made some mistakes in calculations across some categories of SKUs while comparing the pre-rate reduction post-discount prices with the post-rate reduction pre-discount prices, however the Respondents have not submitted Invoices/SKU specific data wherein such comparison had been allegedly made. The profiteering data sheet submitted by the Respondents involved computation of profiteering considering the consumer promotion schemes and price reductions post supply which were not considered by the DGAP as the base price was derived on the basis of actual taxable base price in accordance with Section 15 of the CGST Act, 2017 which specified provision for valuation of supply.

Clarifications on Consumer Promotions non-consideration:

The DGAP has stated that the provisions contained in Section 171 did not provide for any means of passing on the benefit of reduction in the rate of tax or benefit of input tax credit other than by way of commensurate reduction in price. It was the Respondents's own business decision to extend the period of consumer promotion schemes, the cost of which could not be set off against the benefit that the Respondents ought to have passed on to their recipients on account of GST rate reduction w.e.f. 15.11.2017.

Clarifications on post-supply price reduction non-consideration:

The DGAP has stated that the taxable value as shown in the GSTR1/3B Returns filed by the Respondents have been taken into account for determining the base price both before and after rate reduction w.e.f. 15.11.2017. The evidence submitted by the Respondents in support of their claim to have given post-supply discounts were either invoices issued by their recipients, mentioning the description as "Promotion Services" with HSN Code 998361 or 998366 (Advertising Services) or Debit Notes issued by the recipients. However, the profiteering has been quantified at the SKU level invoice-wise and documentary evidence establishing the correlation between the taxable value reported in the GST Returns and post-supply discount given on any particular invoice/SKU has not been established by the Respondents.

Clarifications on profiteering related to CSD/CPC supply:

The DGAP has clarified that the Respondents have provided the copies of the agreements executed with the CSD/CPC partners vide e-mails dated 24.10.2019 and also provided the copies of sample invoices for the pre and post reduction period vide their reply dated 09.01.2020. After comparing the invoices provided by the Respondents, it was found that the base prices had

remained same for the pre and the post reduction period, therefore the profiteered amount was recomputed after exempting the profiteering in respect of CPC/CSD partners. The recomputed amount has been incorporated in the report sent under rule 133(4) on 31.01.2020.

Clarifications on Custom Duty Increment non-consideration:

The DGAP has also stated that the contention of the Respondents that the base price was increased with increase in the BCD could not be accepted. The increased cost of raw materials/input services has no relevance in the context of GST rate reduction w.e.f. 15.11.2017. Section 171 provided that benefit of any reduction in tax has to be passed on to the recipients and increased cost of materials could not be a ground to offset this benefit.

Clarification on increased quantity and new promotions non-consideration:

The DGAP has stated that the profiteered amount has to be passed on each and every supply and to each and every recipient individually, excess benefit passed on certain SKUs by way of increased quantity and new promotions could not be adjusted against the profiteered amount in respect of other SKUs.

Clarifications on Period of Investigation:

The DGAP has stated that he has followed the practice of taking the period of investigation from the date of rate reduction till the previous month of the day on which reference was received from the Standing Committee as envisaged in the CGST Rules. The principle behind the practice adopted for taking the period of investigation till the preceding month in which the reference from Standing Committee is received, was to cover the entire period where profiteering has been alleged to have been done.

Clarifications on issue of "zeroing":

The DGAP has stated that as the profiteered amount has to be passed on each and every supply and to each and every recipient individually, higher price reduction on certain SKUs could not be adjusted against the profiteered amount in respect of other SKUs. As per the provisions of Section 171(1) the benefit accrued due to reduction in the rate of tax was required to be passed on each purchase made by a customer by commensurate reduction in the price.

Clarifications on Loss due to reduced fiscal incentives under budgetary support scheme to be considered:

The DGAP has also stated that with regard to the contention of the Respondents that as the reduced amount of refund (area based fiscal incentive) has resulted in increase in cost, which was directly attributable to the reduced GST rate, the same should be considered for the purpose of the on-going investigation into the alleged profiteering by the Respondents. The DGAP has claimed that as per the Notification No. 10(0/2017-DBA-11/NER dated 05.10.2017, the eligible units were entitled to a refund of 58% of CGST or 29% of IGST paid through debit in the cash ledger account, in terms of Section 49(1) the CGST Act, 2017, after utilization of the input tax credit of the CGST or the IGST. Accordingly, prior to 15.11.2017, the Respondents were entitled to proportionate refund of CGST or IGST paid through cash ledger. W.e.f. 15.11.2017, the liability of the Respondents to make payment in cash might have got reduced due to reduction in the rate of GST, resulting in reduced refund in absolute terms. However, there was no loss to the Respondents in relative terms as they were still eligible to get the same proportionate refund of the CGST/IGST paid in cash as was

available prior to the reduction in the rate of GST. Moreover, such refund of CGST or IGST paid in cash was also a function of and dependent on the amount of input tax credit utilized by the Respondents for discharge of their output GST liability and could not always be attributed to the output GST rate. In other words, even after the GST rate reduction, if the input tax credit utilization by the Respondents have reduced, the refund amount might remain the same or It might even increase. Besides, if one went by the logic adopted by the Respondents, the price of goods would have to be reduced in case there was an increase in the tax rate (because of availability of more refund). Therefore, the claim of the Respondents to set off the profiteered amount on account of reduction in the absolute amount of refund/Incentive/subsidy, was not acceptable.

Clarifications on GST on Profiteered Amount:

The DGAP has stated that the profiteering was the net total of additional amount a consumer has to bear, subject to denial of commensurate benefit of GST rate reduction or benefit of Input Tax Credit by any supplier. GST on this excess amount so charged was also a cost to the consumer and has accordingly been correctly incorporated in the amount of profiteering.

Clarifications on affixing new MRP stickers:

The DGAP has stated that this issue has no bearing on the amount of profiteering determined in respect of the Respondents, as the profiteering has been quantified only on the goods supplied by the Respondents after 15.11.2017 and not on the goods lying in distribution chain on 15.11.2017. Further, the sticker of new MRP has to be fixed along with the old MRP on the stock in hand as provided vide letter No. WM-10(31/2017 dated

16.11.2017, issued by Ministry of Consumer Affairs, Food and Public Distribution.

Clarifications on absence of prescribed Methodology:

The DGAP has stated that the methodology adopted by him in his Report was in line with the legal principles and this methodology has been consistent throughout in all his reports involving allegation of profiteering in similar cases and has been settled before this Authority. As regards methodology prescribed by this Authority, the Procedure and Methodology for determination of profiteering and intent thereof has been determined by it on case to case basis by adopting the most appropriate and accurate method based on facts and circumstances of each case as well as the nature of the goods and services supplied. There could not be any fixed mathematical formulations/methodology for determination of quantum of benefit to be passed on which would cover different sectors of the economy and each case has to be decided based on its specific facts.

Clarifications on issuance of Show Cause Notice:

In this regard the DGAP has mentioned that he was not required to give opportunity of hearing to the Respondents as there was no such provision in the CSGT Act or the Rules and the DGAP was merely an investigative authority. The opportunity to present the facts and merits of the case has been accorded to the Respondents by this Authority.

Clarifications on Profiteered Amount cannot exceed GST Rate Reduction:

The DGAP has mentioned that the amount of profiteering has been computed by them as per the provisions of Section 171(1) of CGST Act, 2017.

19. We have carefully considered all the Reports and clarifications filed by the DGAP, the detailed oral and written submissions and the power point presentations of the Respondents and all the other material placed on record and it is revealed that the present investigation has been conducted by the DGAP for violation of the provisions of Section 171 (1) of the CGST Act, 2017 against the Proctor & Gamble (P&G) Group, in respect of its three subsidiaries, the present Respondent No. 1 viz. (i) M/s Proctor & Gamble Home Products (PGHP) Pvt. Ltd., which is engaged in the manufacture and supply of detergents, shampoos, conditioners, air-fresheners and skin creams, the Respondent No. 2 viz. (ii) M/s Proctor & Gamble Hygiene & Health Care (PGHH) Ltd., which is engaged in the manufacture and supply of shaving creams, after shave lotions and deodorants and the Respondent No. 3 viz. (iii) M/s Gillette India Ltd. (GIL) which is engaged in the manufacture and supply of shaving creams, lotions, gels, shaving blades and razors. The Respondents are selling their above products under different brands and in different sizes and forms. Each type of such product is identified as a Stock Keeping Unit (SKU). These SKUs are supplied through the channels of direct retailers and distributors who are further selling them directly to the consumers or through the whole salers to the grocery stores, pharmacies and hyper/super/mini stores to the ultimate consumers. It is also revealed that the above goods were attracting GST @28% w.e.f. 01.07.2017 when the above tax had come in to force and the same was reduced to 18% w.e.f. 15.11.2017 vide Notification No. 41/2017-Central tax (Rate) dated 14.11.2017 by the Central as well as the State Governments. Therefore, there is no doubt that the rate of

tax was reduced on the above products w.e.f. 15.11.2017 and therefore, the Respondents are liable to pass on the benefit of tax reduction to their customers as per the provisions of Section 171 which states as under:-

"(1). 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.

(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 input tax credits 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 them.

(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."

20. Based on the above provisions of Section 171 the following issues are required to be determined in the present proceedings:-

(i) Whether the Respondents have passed on the benefit of tax reduction in terms of Section 171 (1) or not?

(ii) If not then what is the profiteered amount as per the provisions of Section 171 (2)?

(iii) What penalty in terms of Section 171 (3A) should be imposed on the Respondents if they have violated the provisions of Section 171 (1)?

21. It is also evident from the record that the Respondents have been selling the SKUs mentioned in para supra during the period of investigation from 15.11.2017 to 30.09.2018 to their customers. Upon comparing the average base prices of these SKUs as per the details of sale transactions and GST Returns submitted by the Respondents to the DGAP for the pre rate reduction period from 01.11.2017 to 14.11.2017 and the actual base prices post rate reduction w.e.f. 15.11.2017 to 30.09.2018, it has been found that the GST rate of 18% has been charged by the Respondents w.e.f. 15.11.2017 however the base prices of the SKUs have been increased w.e.f. 15.11.2017 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. In respect of those SKUs which were not sold during the period w.e.f. 01.11.2017 to 14.11.2017 the average base

prices have been taken from the Respondents. 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) made during the period from 15.11.2019 to 30.09.2018, 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. 2,41,51,14,485/- including the GST on the base profiteered amount. The details of the computations have been given by the DGAP in Annexure-6 of his Report dated 31.01.2020.

22. The DGAP for computation of the profiteered amount has compared the channel of distribution wise average base prices of the SKUs which were being sold by the Respondents during the pre rate reduction period w.e.f. 01.11.2017 to 14.11.2017 with the actual post rate reduction channel wise base prices of these products supplied during the period from 15.11.2017 to 30.09.2017. 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 (i) exact comparison of millions of pre and post reduction invoices cannot be done (ii) a customer may not have purchased the same SKU during the pre rate reduction period which he has purchased in the post rate reduction period and (iii) the Respondents were selling their SKUs at different prices to different customers of their distribution channels and even within the same channel based on the various business considerations and hence a particular actual price cannot be taken in to consideration. The Respondents have themselves admitted in their submissions dated

21.07.2020 that they were selling the SKUs at different prices to different customers of their distribution channels and even within the same channel based on the various business considerations such as type of customer, quantity of the SKU bought, discount applied, payment terms applicable to the transaction and the point in time when the sale took place. Therefore, the average pre rate reduction prices of the SKUs were computed by the DGAP, which were being sold by the Respondents, as is evident from Annexure-17 attached with his Report dated 05.04.2019 and Annexure-6 of his Report dated 31.01.2020, on the basis of which commensurate prices post rate reduction were calculated in respect of the same SKUs and compared with the invoice wise post rate reduction actual prices of these SKUs. The average base prices have been computed on the basis of the sale transactions made by the Respondents over a very short period of 14 days w.e.f. 01.11.2017 to 14.11.2017 which give almost equal, correct, exact, dependable and reliable average base prices which can be safely considered for comparison with the post rate reduction actual prices. The average pre rate reduction base price of each SKU was required to be compared with the actual post rate reduction base price of the same SKU as the benefit was required to be passed on each SKU to each customer. In case average to average base price is compared for both the periods, the customers who have purchased a particular SKU on the base price which is more than the commensurate base price, would not get the benefit of tax reduction and a customer who has not purchased a particular SKU in the pre rate reduction period would also be deprived of the benefit if he had purchased that SKU in the post rate reduction

period. 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. Further the word 'any supply' mentioned in Section 171 also requires that the Supplier has to pass on the benefit of tax reduction in respect of each supply made by him. On the basis of the aforesaid pre and post-reduction GST rates and the details of the outward taxable supplies (other than zero rated, nil rated and exempted supplies) of the above SKUs sold during the period from 15.11.2017 to 30.09.2018, as have been supplied by the Respondents themselves, the amount of net higher sales realization due to increase in the base prices of the impacted SKUs, despite the reduction in the GST rate from 28% to 18% or the profiteered amount has been calculated as Rs. 2,41,51,14,485/-/ as per Annexure-6 of the investigation Report dated 31.01.2020. 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 has been furnished vide Table mentioned in the Report dated 31.01.2020 in respect of the 33 States/UTs. The above methodology employed by the DGAP for computing the profiteered amount appears to be appropriate, correct, logical, 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. Therefore, the above mathematical methodology can be safely relied upon.

23. The Respondents through their elaborate oral and written submissions have submitted that thy have the practice of revising prices of their products once in about six months based on multiple factors of cost increase and tax rate changes. However, the Respondents have not produced data even for a period of 2 previous years mentioning the names of the products and the percentage of increase in prices, which could establish that they have been increasing their prices once in six months. They have also submitted that at the time of introduction of the GST, cost of raw materials, input services, overheads, effective tax rate and other factors had increased warranting price increase but keeping in view the market stability they did not increase their prices in July, 2017 but they had increased them when rate reduction was implemented w.e.f. 15.11.2017. In this connection it would be relevant to mention that increase in prices is to be decided by the Respondents themselves and if they have not increased them at the time of implementation of GST it was their business call. However, they cannot increase their prices w.e.f. the intervening night of 14/15.11.2017 from which the rate reduction was notified and that also mostly by the same amount by which the rate of tax was reduced. Such a coincidence is unheard of and it is apparent that this increase has been made by them solely with an intention to deny the benefit of tax reduction to the customers. In case there was any increase in their costs they should have increased their prices any time between the period from 01.07.2017 to 14.11.2017 over a period of more than 4 months. Therefore, the above contentions of the Respondents are untenable.

24. The Respondents have further submitted that due to COVID-19 pandemic where the manufacturing activity of the Respondents have been severely impacted, their sales and profitability has been impacted by more than 20% and 30% respectively and if any amount was held as the profiteered it would be last straw on the camel's back. In this regard it would be appropriate to mention that the Respondents have denied the benefit of tax reduction to the ordinary customers and forced them to pay additional price and GST during the period between 15.11.2017 to 30.09.2018 when there was no impact of COVID-19. The Respondents cannot enrich themselves at the expense of the unorganised, voiceless and vulnerable customers and set off their losses against the profiteered amount illegally obtained by them. Therefore, the above claim of the Respondents is not maintainable.

25. The Respondents have also stated that in terms of Rule 133(1) of the CGST Rules, 2017 this Authority was required to pass order within six months by 07.10.2019 as the report from the DGAP was received on 08.04.2019, as the fresh time limit of six months was not available under Rule 133(4) otherwise the proceedings would never come to an end. In this regard it would be pertinent to note that the I.O. No. 11/2019 dated 04.10.2019 under Rule 133(4) directing the DGAP to conduct further investigation in the present case was passed by this Authority due to the reason that the DGAP had not submitted findings on the issues raised by the Respondents vide their submissions dated 19.06.2019 including wrong computation of the profiteered amount. Therefore, further investigation was required to be done as a consequence of which the profiteered amount has been reduced to Rs. 2,41,51,14,485/- from Rs.

2,43,93,90,580/-. The Respondents cannot contend that the entire investigation including the further investigation ordered under Rule 133(4) should be completed within a period of 6 months when it involved fresh appreciation of the evidence and recalculation of the profiteered amount. Moreover, there is no stipulation under rule 133(1) that the entire investigation including the investigation ordered under Rule133 (4) shall be completed within a period of 6 months. It can also not be disputed that any further investigation ordered under Rule 133(4) has to be conducted by the DGAP as per the provisions of Rule 129 as it is the only Rule which prescribes the procedure for conducting investigation by the DGAP and hence the DGAP can submit his Report only as per the provisions of Rule 129(6). Therefore, there is no doubt that the Report submitted by the DGAP falls within the ambit of Rule 133(1) including the Report submitted under Rule 133(4) on which this Authority can pass order within a period of six months. Further, this Authority under Section 171 (3) of the above Act has been empowered by Rule 126 to determine its own "Methodology & Procedure". Accordingly, under the above Rule read with the OM No. F. No. 13/1/2017-Ad-I dated 09.09.2019, issued by the Government of India, Ministry of Finance, Department of Revenue, as per Para 10 of the Guidelines issued vide File No. Admn.(NAA)/P&M)/81/2019 dated 04.10.2019 this Authority has stated that "It is clarified that the Reports submitted by the DGAP under Rule 133(4) shall be construed to be fresh Reports for the purpose of Rule 133(1)". Therefore, it is quite apparent that para 10 of the Guidelines only clarifies the import of Rule 133(1) which already included in it the provision that the Report

submitted by the DGAP on further investigation shall be a Report submitted under Rule 129(6) and accordingly order can be passed on it within a period of six months. Since, the above Guidelines have been framed under the powers vested in this Authority as per the provisions of Section 171(3), Rule 126 as well as the OM dated 09.09.2019 which have approval of the Parliament, the State Legislatures, GST Council, the Central Government and the State Governments, therefore, the above Guidelines have legal sanctity and any clarification of the time frame fixed for passing order on the Reports filed under Rule 133(4) by considering them fresh Reports within a period of 6 months is legally correct and binding on the Respondents. It is also mentioned that further investigation is not ordered in each and every case and hence there is no question of passing repeated orders under Rule 133(4) and therefore, no allegation of perpetual pending of proceedings or ever greening can survive.

26. The Respondents have also cited the dates and events of the present proceedings to prove their above contention however, perusal of the record shows that the Report from the DGAP was received on 08.04.2019 and the Respondents were directed to appear on 29.04.2019 however, they had sought repeated adjournments and had finally appeared on 04.06.2019 after a lapse of a period of 36 days and then filed their written submissions on 19.06.2019 after a period of 14 days. The Respondents have not explained why the above period of 50 days should be counted in the period of 6 months prescribed under Rule 133(1) while passing order after receipt of the Report under Rule 133(4). Therefore, the above contention of the Respondents is illogical,

unreasonable and contrary to the provisions of Rule 133(1) and hence the same cannot be accepted.

27. The Respondents have also claimed that they had challenged the validity of Para 10 of the above Guidelines before the Hon'ble High Court of Delhi which had asked them to raise all their pleas before this Authority and dismissed the Writ Petition. The Hon'ble Delhi High Court had also referred to the judgment of the Hon'ble Supreme Court in ***L. Chandra Kumar v. Union of India*** **(1997) SCC 261**, wherein it had been held that the Tribunals shall act as the only courts of first instance in respect of areas of law for which they have been constituted. Accordingly, the Respondents have requested this Authority to consider their aforesaid submissions and hold that no additional time limit was available in respect of further investigation under Rule 133(4) and that the order needed to be passed within the time limit of 6 months from the date of report furnished by the DGAP under Rule 129(6). In this connection it would be relevant to refer to the findings recorded in para supra which amply prove that Para 10 of the Guidelines only clarifies the import of the provisions of Rule 133(1) under which the Report submitted by the DGAP after further investigation under Rule 133(4) has to be considered a fresh Report on which order can be passed within a period of six months. Further, perusal of Para 93 of the above judgement shows that the Hon'ble Supreme Court has specifically held that "The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional." Since, the Guidelines dated 04.10.2019 have been

issued under Rule 126 which has been promulgated under Section 171 (3) read with Section 164 of the CGST Act, 2017 therefore, the legal validity of Para 10 cannot be decided by this Authority unless it examines the vires of Section 171 and 164 of CGST Act, 2017 under which this Authority has been created and power to issue the above Guidelines has been conferred on it. Since, the Hon'ble Supreme Court has specifically barred entertaining question of vires of the parent statute this Authority cannot examine the above provisions and consequently Para 10 of the above Guidelines and declare it ultra vires of the above provisions of the Act. Moreover, as per the judgement of the Hon'ble Supreme Court this Authority is only Court of first instance and its decisions are subject to review by the Hon'ble High Court and hence, the vires of Para 10 would be examined by the Hon'ble Court as the Respondents have already submitted in their submissions that they would challenge the present order before the higher forums.

28. The Respondents have further claimed that Para 10 supra treating the Report filed under Rule 133(4) as a fresh report under Rule 133(1) would tantamount to amendment in Rule 133(4) on the lines of Rule 133(5), which this Authority could not do as the power to amend rules was available only with the Central Government. In this regard it would be pertinent to mention that as discussed in para supra this Authority has only clarified the position which already exists in Rule 133(1) and hence such a clarification cannot amount to amendment of Rule 133 (4). Moreover, as per the power conferred on this Authority under Rule 126, which has been framed under Section 171 (3) and 164 of the above Act, this Authority is competent to clarify vide Para 10 of the above

Guidelines that the Report furnished by the DGAP after further investigation ordered under Rule 133(4) shall be treated as a fresh Report under Rule 133 (1) and accordingly order on such Report can be passed within a period of 6 months. Therefore, there is no requirement of modifying the above Para and hold that the present proceedings are time barred as it does not amount to amendment in Rule 133(4) in line with Rule 133(5).

29. The Respondents have also contended that this Authority vide its order dated 03.07.2019 had asked the DGAP to file clarifications under Rule 133(2A) but since the DGAP vide his reply dated 16.09.2019 did not clarify the objections raised by the Respondents, this Authority had directed the DGAP to carry out further investigation vide its order dated 04.10.2019. However, the points referred for further investigation were nothing but the Respondents's objections. Since, further investigation under Rule 133(4) stood in distinction from a clarification under Rule 133(2A) and if the DGAP had not provided the clarifications it did not grant power to this Authority to direct further investigation with respect to the same objections. Therefore, the order dated 04.10.2019 was nothing but a direction seeking clarifications from the DGAP under Rule 133(2A). If the DGAP had not provided clarifications, this Authority should have drawn adverse inference and should not have granted additional time to the DGAP to provide clarifications. As mentioned in para supra it is reiterated that further investigation under Rule 133(4) was only ordered to examine the issues raised by the Respondents in their submissions dated 19.06.2019 and for re-computation of the profiteered amount which has resulted in reducing the liability of the

Respondents. It appears that the Respondents are not satisfied by further investigation and are willing to admit more profiteering. This Authority is fully competent to direct the DGAP to furnish clarifications under Rule 133(2A) or order further investigation as per Rule 133(4) on the basis of the reasonable grounds which have been duly mentioned in the I.O. dated 04.10.2019 and the Respondents cannot dictate what order is to be passed in the proceedings pending before it to arrive at just, equitable and reasonable decision. Therefore, the above claim of the Respondents is unacceptable.

30. The Respondents have also argued that the anti-profiteering measure was transitory in nature. However, the above claim of the Respondents is not borne out from even a cursory perusal of Section 171 as there is no mention in the above Section that the anti-profiteering provisions are transitory. Since the introduction of these measures the Central and the State Governments have reduced rates of tax several times and have also extended the benefit of ITC. The total sacrifice of precious revenue by both the Governments is estimated to be around 1,00,000/- Crore during the last 3 years. However, it has been observed that many of the registered dealers like the Respondents are not interested in passing on both the benefits of tax reduction and ITC and are advancing lame excuses to misappropriate the amount sacrificed from the public exchequer even when they are not required to pay even a single penny from their own pocket. Therefore, the anti-profiteering provisions are bound to remain on the statute book till the registered persons cultivate the habit of voluntarily passing on the above benefits as a matter of routine. Hence, the above contention of the Respondents is incorrect.

31. The Respondents have further argued that as per Rule 129(6) the DGAP was required to complete the investigation within a period of 3 months which could be extended by another 3 months by this Authority, from the date of receipt of the recommendation from the Standing Committee on Anti-Profiteering. Since, the recommendation of the above Committee was received on 30.08.2018 the Report was required to be submitted on or before 28.02.2019, however, it was submitted on 05.04.2019 and therefore, the present proceedings were not maintainable. In this context perusal of the record shows that the DGAP had received recommendation for investigation from the Standing Committee on 30.08.2018 without the supporting documents/evidence on the basis of which investigation was to be carried out. The DGAP vide his letter dated 12.09.2019 had requested the Standing Committee to supply the supporting documents which were received by him on 08.10.2018 and therefore, it is quite apparent that the DGAP could have entered in to investigation only after 08.10.2018, from which the period of 3 months would have expired on 07.01.2019 under Rule 129(6). However, the DGAP had sought extension of three months from this Authority for completing the investigation under Rule 129(6) which was granted to him vide its order dated 31.12.2018 till 06.04.2019. Since, the Report has been furnished on 05.04.2019 it is well within the period prescribed under Rule 129(6). The claim made by the Respondents that the limitation starts w.e.f. 30.08.2018 and not from 08.10.2018 as the letter written by the DGAP to the Standing Committee asking for supporting evidence formed part of the earlier communication is not correct as no investigation could have been carried out in the absence

of supporting evidence. Therefore, the period of limitation for competing the investigation starts w.e.f. 08.10.2018 and hence, the Report submitted by the DGAP dated 05.04.2019 is well within the prescribed time limit fixed under Rule 129(6) and therefore, it is perfectly maintainable.

32. In this connection it would also be relevant to mention that the time limits prescribed under Rule 129(6) and 133(1) are only directory and are not mandatory as no consequences have been provided in the above Rules or the CGST Act, 2017 in case these limits are not observed. The Hon'ble High Court of Delhi while considering the time limit prescribed under Rule 133(1) vide its order dated 27.01.2020 passed in W. P. (C) 969/2020 in the case of ***M/s Nestle India Ltd. & another. v. Union of India & others*** has ruled as under:-

"We also observe that prima facie, it appears to us that the limitation of period of six months provided in Rule 133 of the CGST Rules, 2017 within which the Authority should make its order from the date of receipt of the report of the Directorate General of Anti Profiteering, appears to be directory in as much as no consequence of non adherence of the said period of six months is prescribed either in the CGST Act or the rules framed thereunder."

33. Reliance is also placed on the judgment of the Hon'ble Supreme Court in the case of ***Mahadev Govind Gharge v. Special Land Acquisition Officer (2011) 6 SCC 321*** wherein it was held that:-

"37. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of

procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The Court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve its end object of just, fair and expeditious justice to parties without seriously prejudicing the rights of any of them."

34. Reliance in this regard is further placed on the following judgement of the Hon'ble Supreme Court in the case of ***P. T. Rajan v. T. P. M. Sahir and Ors. (2003) 8 SCC 498***:-

"48. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefore, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha v. The District Magistrate of Mongher & Anr. AIR (1966) Patna 144, Nomita Chowdhury v. The State of West Bengal & Ors. (1999) CLJ 21 and Garbari Union Co-operative Agricultural Credit Society Limited & Anr. V. Swapan Kumar Jana & Ors. (1997) 1 CHN 189).

49. Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused."

Therefore the time limits prescribed under Rule 133(1) and Rule 129(6) are not mandatory and hence all the claims made by the Respondents

on the ground of not observing the time limits prescribed by the above Rules are frivolous.

35. In this regard, the Respondents have placed reliance on the judgments of the Hon'ble Supreme Court passed in the cases of ***Oil and Natural Gas Corporation Limited*** **v.** ***Gujarat Energy Transmission Corporation Limited and Others*** **(2017) 5 SCC 42**, ***Singh Enterprises*** **v.** ***Commissioner Central Excise Jamshedpur*** **2008 (221) ELT 163 (SC),** ***Commissioner of Customs & Central Excise*** **v.** ***Hongo India (P) Ltd.*** **2009 (236) ELT 417 (SC),** ***Commissioner of Income Tax*** **v.** ***Gitsons Engineering Co.*** **[2015] 53 taxmann.com 108 (Madras),** ***Krishna Kumar Saraf*** **v.** ***Commissioner of Income Tax*** **[2017] 83 taxmann.com 331 (Delhi - Trib.),** and ***Gujarat Paraffins Pvt. Ltd.*** **v.** ***Union of India*** **2012 (282) ELT 33** and claimed that the time limits prescribed under Rule 129(6) and 133(1) were mandatory and hence they were required to be followed. However, it is respectfully submitted that the law settled in the above judgements is not being followed in view of the above observation of the Hon'ble High Court of Delhi which specifically pertains to Rule 133(1) and the judgements of the Hon'ble Supreme Court in the cases of ***Mahadev Govind Gharge*** and ***P. T. Rajan supra.*** Accordingly, the Reports dated 05.04.2019 and 31.01.2020 submitted by the DGAP are maintainable and hence they are not required to be quashed.

36. The Respondents have also averred that the DGAP has computed the profiteered amount by comparing the pre-rate reduction average base prices with the post rate reduction actual base prices which was wrong. In this connection it would be appropriate to refer to the findings

recorded in para supra vide which it has been explained in detail why the computation of the profiteered amount has been done by comparing the above prices. Therefore, the above claim of the Respondents cannot be accepted.

37. The Respondents have also furnished Tables and claimed that they were selling product ARIEL LAUPWD 2KG X 6 MAT FL D+C PC to a customer 'MR' at various base prices ranging from INR 347.22 to INR 360.97 during the period from 01.11.2017 to 14.11.2017, the average base price of which has been determined as INR 360.58 by the DGAP, which was compared with the actual sale prices from 15.11.2017 onwards and where ever the actual base price charged post rate reduction was higher than the average base price pre-rate reduction, the DGAP has computed the difference as profiteering, whereas in those cases where the actual base price charged post-rate reduction was lower than the average base price pre-rate reduction the DGAP has ignored the same which was inequitable and incorrect methodology. The above claim of the Respondents is completely wrong as profiteering has to be computed only on those products which have been sold above the pre rate reduction average base prices by the Respondents. Accordingly, the SKUs which have been sold below the pre rate reduction average base price cannot be considered as no profiteering has been done in respect of these SKUs. Since the average pre rate-reduction base price is almost equal to the actual pre rate reduction base price as has been explained above the profiteered amount has been correctly computed by the DGAP and the methodology employed to compute it is appropriate, logical, reasonable, correct and in

consonance with Section 171(1). Therefore, the above plea of the Respondents is not sustainable.

38. The Respondents have furnished another Table and claimed that even without any reduction in the rate of GST, the DGAP's methodology of adopting average base price pre-rate reduction and comparing it with the actual base price post rate reduction would have resulted in profiteering. The above contention of the Respondents is incorrect and wrong as no profiteering has been computed on the products which have been sold by the Respondents on the pre rate reduction average base prices and it has been calculated only on those goods which have been sold on more than the average base prices. Since there is evidence on record that the Respondents have increased the pre rate reduction base prices and have sold their products on the same base prices which they were charging before the tax reduction and even on more prices and have not passed on the benefit of tax reduction by way of commensurate reduction in the prices, there is bound to be profiteering by the Respondents. Therefore, there is no question of profiteering in case the rate of tax was not reduced. Even if the Respondents have passed more benefit than what they were required to pass on certain SKUs, the benefit passed on thus cannot be set off against the benefit which is required to be passed on to another customer on the purchase of another SKU on which no or less benefit has been passed on. The Respondents cannot deny benefit of tax reduction to an eligible customer on the ground that since they have passed more benefit on one product they would pass less or no benefit on the other product. Such denial of benefit of tax reduction would be hit

by Section 171(1) as well as Article 14 of the Constitution and hence the above claim of the Respondents in not tenable. Accordingly, the methodology adopted by the DGAP to compute the profiteered amount is correct in terms of Section 171(1).

39. In support of their above submissions, the Respondents have placed reliance on the observation of the Hon'ble High Court of Delhi given in W. P. (C) 1780/2020 in the case of ***M/s Johnson & Johnson Pvt. Ltd. v. Union of India & Ors.,*** vide its order dated 18.02.2020, whereby the order passed by this Authority has been stayed on the ground that the methodology adopted by the DGAP to compute profiteering was erroneous. In this regard it is respectfully submitted that the above order nowhere states that the methodology adopted by the DGAP was wrong. The Hon'ble Court has specifically stated that "Our attention has been drawn to the tabulation filed by the petitioner before the DGAP, which shows that in respect of several items sold by the petitioner, after the reduction of GST to nil, the price actually fell, however, while computing the profiteered amount such cases have been excluded from consideration." Therefore, it is clear that the above claim of the Respondents is not correct. Moreover, the above case is still pending for final adjudication before the Hon'ble High Court and hence the observations made in the above case cannot be applied in the present case of the petitioner as no such order has been passed in his case.

40. The Respondents have also contended that a buyer would not be entitled to the benefit of tax reduction in the post rate reduction period if he had not bought that product in the pre rate reduction period as no reference price would be available for the pre rate reduction period in

his case. They have further contended that it would also be incorrect to presume that a new buyer would purchase only at an average price. The above claim of the Respondents is completely wrong and ultra vires of the provisions of Section 171(1) as every customer is entitled to the benefit of tax reduction irrespective of the fact whether he has purchased that product in the pre rate reduction period or not. It would also be arbitrary and impracticable for the Respondents to compel their buyers to produce evidence to prove that they have bought a particular product during the pre rate reduction period before they are passed on the benefit. The Respondent can also not legally charge tax at the pre reduction rate of 28% on the above ground in the post rate reduction period from such a buyer as every buyer is entitled to get the benefit on every purchase made by him once the rate of tax has been reduced to 18%. There is no illegality in presuming that such a buyer would have purchased the product at the average price as the average price has been computed on a range of prices on which the Respondents have sold their products and the same average price has been used for comparison in respect of those buyers who have made purchases in the pre rate reduction period. The DGAP has further obtained average base prices of those products which were not sold by the Respondents during the pre rate reduction period from the Respondents themselves and then computed the profiteered amount. Therefore, the above contention of the Respondents cannot be accepted being illegal and discriminatory.

41. The Respondents have also raised objections against the Table furnished by the DGAP in his above reply to establish that it would not be correct to compare the average base prices for the pre and post

reduction periods and the DGAP should have simply compared the prices before the rate reduction with the prices charged after the rate reduction to the same recipient. However, it is quite apparent from the Table submitted by the DGAP that where a person has paid price of Rs. 97/- or 101/- he would not be able to get the benefit if average to average price is compared as the price would be Rs. 95/- during the post rate reduction period. Even a new purchaser who has paid Rs. 97/- would also not get the benefit if the above comparison is made. Moreover, it would simply not be possible to compare the pre and post reduction base prices in respect of each customer as there is a large number of customers and transactions, the same customer may not have purchased the same product during both the periods and some buyers may have bought a product during the pre rate reduction period which they may not have bought in the post reduction period or vice versa. By comparing average to actual prices it is ensured that (i) all transactions are covered while computing the profiteered amount (ii) the benefit is ensured to that buyer who has paid higher price (iii) the objective of passing on the benefit of tax reduction is fully achieved and (iv) benefit of rate reduction is not denied to the consumer who did not make purchase of the same product in the pre-rate reduction era. Therefore, the above contentions of the Respondents are untenable and the average to actual comparison of base prices is correct and logical.

42. The Respondents have also claimed that comparison of the invoice Nos. 04 & 11 and 05 & 12 mentioned at Sr. No. 4 and 5 of the illustration given by the DGAP in his reply dated 30.06.2020 showed that inspite of there being reduction of Rs. 1/- in the price in the post

rate reduction period there was profiteering of Rs. 2/- and when the price was increased by Rs. 1/- the profiteering was Rs. 6/- in respect of the above invoices. In this context it would be appropriate to mention that the Respondents have arbitrarily tried to compare the invoice No. 04 & 11 and 05 & 12 as such comparison is hypothetical. The Respondents have not compared the invoice No. 01 & 08 or 02 & 09 or 03 & 10 where there would be no profiteering. In case actual to actual prices are compared there would be profiteering in respect of 3 invoice Nos. 01 & 08, 02 & 09 and 05 & 12 whereas in case average to actual prices are compared there would be profiteering in respect of 2 invoice Nos. 04 & 11 and 05 and 12 only. Therefore, the inferences drawn by the Respondents from the illustration given by the DGAP are distorted and wrong and hence, the same are untenable.

43. The Respondents have also made comparison of one line item by an illustration on which profiteering has been calculated by the DGAP despite the fact that there was no increase in the price post rate reduction. Perusal of the illustration given by the Respondents shows that as per pre rate reduction invoice dated 03.11.2017 the actual price of TIDE LAUPWD 500 GX48 JR NS+C NAT PC product was Rs. 36.89 and in the post rate reduction period it was Rs. 36.88 as per invoice dated 29.12.2017 and hence the profiteering has been computed as Rs. (-) 0.01 by the Respondents. However, the above claim of the Respondents is completely flawed as the Respondents were required to maintain the same base price post rate reduction which was being charged by them in the pre rate reduction period and then charge GST @18% instead of 28%. The Respondents have deliberately not shown

the pre and post rate reduction cum-tax prices of the above product which would have shown that the Respondents have profiteered on this product. The pre rate reduction cum-tax price of this product would have been Rs. 36.89 + GST @28%=10.32 Total=Rs. 47.21 and post reduction cum-tax price would be Rs. 36.88 + GST @18%=6.63 Total Rs. 43.51 and hence there would be profiteering of Rs. 3.70 (Rs. 47.21-43.51) and not (-) 0.01 as has been claimed by the Respondents.

44. The Respondents have also pleaded that the word "commensurate reduction" used in Section 171 (1) denoted reduction in price after taking into account all the factors such as cost of raw materials, packing materials, overheads and other such elements which impacted pricing of goods and also connoted proportionality and adequacy. In this connection it would be pertinent to mention that Section 171 (1) only requires passing on the benefit of tax reduction and ITC and it has no connection with the other factors which influence the prices of the products. Had it been the intention of the legislature to consider the other factors it would have been specifically mentioned in the above provision. The legislature appears to have intentionally not mentioned the other factors so that the registered persons cannot deny the above benefits on the ground that the other factors have increased their costs and hence they cannot pass on the above benefits. In spite of there being no mention of the other factors in the above provision the registered persons including the present Respondents are leaving no stone unturned to obstruct passing on the benefit of tax reduction on the basis of other factors which find no mention in Section 171 (1). There is no herculean task involved in computing the commensurate price. It

only requires that the Respondents should maintain the pre rate reduction base price (price excluding GST) of a SKU and then charge GST @18% on it instead of 28% in the post rate reduction period. Only one item of tax was required to be changed in the billing software of the Respondents which could have been done very easily. However, the Respondents have chosen to increase their pre rate reduction base price by making several changes in their software and then charged 18% GST so that the post rate reduction price was either same as it was before tax reduction or it was even more. Sudden increase in the costs on the intervening night of 14/15.11.2017 when the rate of tax was reduced appears to be a strange coincidence which cannot be believed. Moreover, this Authority is not a price regulator and hence it has no mandate to look in to the other factors affecting the prices of the Respondents while passing on the benefit under Section 171(1). It is apparent from the above that the Respondents are trying to mislead by giving wrong interpretation to the word "commensurate price" as it does not connote proportionality and adequacy as it is required to be exactly calculated on each SKU and hence the above interpretation of the Respondents is not tenable.

45. The Respondents have further pleaded that the price of a product was based on contract executed between the seller and the buyer which could be tentative and might get finalized at a later date and which could vary based on a future event and there could be multiple prices for the same supply at different points of time viz. one before the supply and one after the supply when the price was finalized based on terms of sale like discounts or price reductions based on schemes, turnover, etc. To

cover such situations, the word 'prices' has been used in Section 171. The law has also used the word 'any' before supply of goods to denote singular as against the plural for price. Therefore, for the same supply, existence of tentative and final prices has been recognized and consequently, all post-supply price reductions passed on should be factored in while examining whether commensurate reduction in prices has taken place or not. In this regard it is mentioned that the passing of the benefit under Section 171(1) is not subject to the agreement executed by the Respondents with their distributors as it is an independent statement of public policy made in favour of ordinary customers by sacrificing precious tax revenue of the Government which is legally enforceable. It is also on record that the Respondents are selling their products at the prices which are fixed by them in advance as is evident from the agreements executed by them with the CSD and CPC and the same are neither tentative nor they are being finalized at a future date based on future events. The Respondents are also not charging different prices before and after supply as they are always charging them pre supply at fixed rates. Any discounts or price reductions unless they form part of the transaction value in terms of Section 15 of the Act are not required to be taken into consideration while computing the profiteered amount. The word "prices" has been used in Section 171(1) to denote that the benefit is to be passed on all prices charged down the entire supply chain and it does not connote tentative or final prices as there is only one definite price which is being charged by the Respondents. The word "any" used in the above section means that the benefit has to be passed on each supply and it does not

mean plural supplies. Therefore, all the above interpretations of the Respondents are far-fetched and wrong and hence they cannot be accepted.

46. The Respondents have also claimed that Section 171 did not use the words 'pass on the benefit by reduction in price' and it could be passed in monetary or non-monetary forms. As per the Indian Contract Act, 1872, consideration included any act or abstinence and the parties could also choose to settle the consideration partly in non-monetary terms. In the present case, the Respondents have reduced the price by way of reduction in the price itself post-supply and also by way of extension of promotion schemes and additional quantity. In this regard it would be pertinent to mention that as is evident from the bare perusal of Section 171 (1) that "*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* Therefore, the claim of the Respondents that Section 171 did not use the words 'pass on the benefit by reduction in price' is frivolous. It is also evident that the benefit of tax has to be passed on by way of commensurate reduction in price in monetary terms and it cannot be passed in non-monetary terms by supplying additional quantities of the products. The Respondents have also not shown any agreement to prove that they have settled the price in non-monetary terms. The Respondents have also failed to produce any evidence to show that they have reduced their prices post rate reduction or through discounts and by supplying additional quantities. Hence, all the claims made by the Respondents in this regard are incorrect and are unacceptable.

47. The Respondents have further claimed that the word 'any' has been used twice in Section 171(1). 'Any' would mean that tax reduction could be any percentage and it could be ad valorem, specific rate or combination of both. Any supply did not necessarily mean SKU level supply and at the most it might be interpreted as goods classified under a particular tariff heading / HSN Code. Section 171 has used the words 'registered person' however, the Respondents have not obtained registration SKU wise and it has been obtained based on the goods supplied which were classifiable under a particular tariff headings and hence Section 171 could not be applied SKU wise and calculation of profiteering should be considered at the level of HSN Code without prejudice that profiteering has to be considered at the legal entity level. In this regard it would be appropriate to note that as per the provisions of the CGST/SGST Acts the rate of CGST and SGST has to be fixed as percentage of the transaction value and it cannot be ad valorem or combination of specific value and ad valorem. "Any supply" mentioned in Section 171 (1) would mean each supply made to each customer. Since the Respondents are making supplies at the SKU level they have to pass on the benefit on each such supply at the SKU level. The Respondents are not making supplies and charging base prices and tax at the HSN Code or entity level hence they cannot pass the benefit at such Code or entity level. As per the provisions of Section 171(1) each recipient is entitled to the benefit of tax reduction at each SKU level and in case he is denied the benefit on the ground that it is to be passed at the HSN Code or entity level then it would amount to infringement of Section 171(1) as well as Article 14 of the Constitution.

48. The Respondents have also contended that the interpretation given to Section 171 by the DGAP without considering the 'marginal notes' attached to it and the heading of Chapter XV of CGST Rules was untenable as it had not used the term 'profiteering'. In this context it is mentioned that what would constitute "profiteered" has been clearly defined in Section 171(1) which has further been clarified by Sub-section (3A) as under:-

"(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:

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."

Therefore, when there is ample clarification on the profiteered amount in Section 171 itself there is no reason to consider the marginal notes.

In this regard, reliance has been placed by the Respondents on the cases of ***Indian Aluminium Company v. Kerala State Electricity Board (1975) 2 SCC 414***, ***Union of India v. Harbhajan Singh Dhillon (1971) 2 SCC 779 and SP Gupta v. Union of India AIR 1982 SC 149***.

However, in view of the facts mentioned in para supra there is no

reason to consider the marginal notes and hence the law settled vide the above judgements is of no help to the Respondents.

49. The Respondents have further contended that the term 'profiteering' was not defined in the CGST Act or the rules made thereunder. Therefore, reference to common parlance meaning of the term 'profiteering' must be made as per its definition mentioned in ***The Chambers Dictionary, The Collins Cobuild English Dictionary*** and ***The Oxford English Reference Dictionary.*** However, as has been discussed in para supra the definition of the profiteered amount has been provided in Section 171(1) and 171(3A) and the explanation attached to it hence, there is no need for using the definition given in the above dictionaries. Accordingly, the above contention of the Respondents is not tenable.

50. The Respondents have also submitted that the DGAP's interpretation of the term 'any' supply as 'each and every' supply was wholly misplaced and therefore, if a recipient has been supplied 2 SKUs and if any additional price charged on 1st SKU has been offset by passing on higher benefit on the 2nd SKU, then the profiteering should be determined after offsetting the higher benefit passed on to the very same recipient. The above claim of the Respondents is highly misplaced as the benefit has to be passed on each SKU to each recipient and it cannot be offset against the other SKU as every recipient may not buy the SKU on which more benefit has been passed on. Such an approach is illogical, inequitable and illegal as a recipient who has been denied benefit of tax reduction on a SKU in respect of which price has not been reduced commensurately cannot be

compelled to get his benefit from the other recipient who has got the benefit on the SKU purchased by him. The Respondents have no discretion to pass on higher benefit on one SKU and not pass on the benefit on another SKU and claim offset on this ground. The above claim of the Respondents is not only against the provisions of Section 171(1) but it is also against Article 14 of the Constitution.

51. The Respondents have further submitted that the DGAP's understanding that merely because a definition of profiteering was given by way of an explanation attached to Section 171, it would apply retrospectively, was completely incorrect. As per the definition, the "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax which could only be determined by this Authority. In this connection it is mentioned that Section 171(1) itself provides the extent of benefit of tax reduction or ITC which has to be passed on to each recipient and in case it is not passed on the amount of denied benefit has to be investigated by the DGAP in terms of Rule 129 and finally examined and determined by this Authority as per Section 171(2) read with Rule 133(1). The Explanation attached to Section 171 merely explains the provisions of Section 171(1) and hence there is no question of its retrospective implementation.

52. The Respondents have also stated that Section 171 provided for passing of benefit to the recipients which in this case were their distributors and modern retail customers and not the ordinary customers and hence they could not be held liable for not passing on the benefit to the ultimate consumers. In this regard perusal of the record shows that

the Respondents have themselves increased the base prices of their products w.e.f. 15.11.2017 which they are supplying to their recipients and have not passed on the benefit of tax reduction to them. In such a scenario they cannot expect their distributors and retailers to pass on the benefit down the supply chain to the ultimate customer when they themselves have not received the benefit of tax reduction. It has repeatedly been made clear by the Union Finance Ministers, the Central Government and the GST Council that the benefit of rate reduction and ITC has to be passed on to the ultimate customer/buyer who bears the burden of tax. The Respondents are not only required to ensure that they themselves pass on the benefit of tax reduction but also to see that the same is passed on by their distributors and retailers down the line. Through the present proceeding it is the Respondents whose liability is proposed to be fixed in terms of Section171 (1) which they cannot avoid on the ground that they are not supplying the goods to the ultimate customers directly. Further, the DGAP has also correctly stated that Section 171 has no mandate to look into the fixing of prices of the products which the Respondents were free to fix. If there was any increase in the costs of the Respondents it could not be considered to have arisen exactly at the time of reduction in the rate of tax, which had forced them to raise their base prices exactly equal to the rate reduction or more. By no stretch of imagination such a coincidence is justifiable and the only conclusion which can be safely arrived at is that the Respondents have deliberately increased their prices to misappropriate the benefit given out of the public exchequer and deny the same to the ordinary customer to enrich themselves at his expense. The DGAP has

not fixed any limit on the prices beyond which any sale would be violative of Section 171. He has only computed the commensurate price of each SKU which the Respondents should have themselves fixed and charged after the rate of tax was reduced from 28% to 18%. Such a commensurate price is based on mathematical computations and hence the same cannot be disputed. Further, if there was any increase in the costs the Respondents should have increased their prices before 15.11.2017. The present investigation has been conducted by the DGAP from 15.11.2017 to 30.09.2018 during which the Respondents have failed to establish that they have reduced their prices commensurately even once and hence they continue to remain in violation of the provisions of Section 171(1) till date. Therefore, the Respondents hardly have any claim to increase their prices on the ground of period of investigation. The DGAP has also not claimed in his Report that the Respondents cannot increase their prices indefinitely. As discussed supra profiteering is required to be computed at the SKU level and not at the entity level. Therefore, the DGAP's interpretation of Section 171 is correct.

53. The Respondents have further submitted that they had reduced the rate of GST charged from their recipients with effect from 15.11.2017 from 28% to 18%. In addition they have passed on the benefit by way of higher price reduction on certain SKUs; extra quantity at the same or lower price in packs and new promotions; extension of promotion schemes running before 15.11.2017 and by price reduction post supply. In this regard it would be appropriate to mention that mere charging of GST @18% does not amount to passing on the benefit when the

Respondents have increased their base prices simultaneously by the same amount by which the rate of tax was reduced or even more and hence the ultimate price paid by a customer has remained same which he was paying before the rate reduction. As discussed supra the Respondents have no discretion to pass on more benefit on certain SKUs as per their own convenience by way of higher price reduction on certain SKUs while passing on no or less benefit on the other SKUs as it would be arbitrary and against the provisions of Section 171(1).

54. In this regard it would also be worthwhile to mention that if the Respondents wanted to establish their claim of passing on the benefit of tax reduction by offering more quantity/grammage of a SKU they should have submitted the following details:-

(i) Name of the SKU.

(ii) Pre rate reduction copy of the invoice showing the base price, rate and amount of tax and cum-tax price of SKU.

(iii) Pre rate reduction Grammage/quantity supplied on the SKU.

(iv) Amount of benefit of tax reduction.

(v) Commensurate Grammage/quantity to be supplied in lieu of amount of rate reduction.

(vi) Grammage/quantity actually supplied post rate reduction.

(vii) Date from which additional Grammage/quantity was supplied.

(viii) Copy of Production Log of manufacture vide which Grammage/quantity was increased.

(ix) Post rate reduction copy of invoice showing base price, amount and rate of tax and cum-tax price of SKU.

(x) Copy of public notice/advertisement informing the customers that the benefit of tax reduction is being passed by increasing the Grammage/quantity.

(xi) Certificate to the effect that increase in Grammage/quantity was not continuation of their ongoing business promotion scheme.

However, the Respondents have not submitted any of the above documents which could establish their above contention. Therefore, the above claim of the Respondents cannot be accepted.

55. As far as the issue of passing on the benefit by way extension of promotion schemes running before 15.11.2017 is concerned, in this regard it would be relevant to mention that as per the provisions of Section 171(1) the benefit can be passed on only by commensurate reduction in the price and it cannot be passed through promotion schemes. The Respondents usually float such promotion schemes in the ordinary course of their business the main aim of which is to increase their sales as the name itself suggests and not to pass on the benefit of tax reduction. Moreover, these schemes benefit their distributors and retailers more than the ordinary consumers. The Respondents have also not been able to establish any correlation between such promotion schemes and the passing on of the benefit of tax reduction. Such an assertion is mere an afterthought to justify passing on of the benefit on the basis of the promotion schemes which were launched in pre rate reduction period to promote sales and hence they do not amount to passing on the benefit of tax reduction.

56. The Respondents have also alleged that there were discrepancies in the calculation of profiteering as (i) Net price of SKU (Gross price net of

discounts) prior to reduction of tax was compared with the gross price of SKU post reduction of tax in respect of certain SKUs (ii) Profiteering has been alleged on certain imported SKUs where there was an increase in the Basic Customs Duty (BCD) (iii) Profiteering has been alleged on supply of promotional SKUs and (iv) Reduction in area based fiscal incentives as a result of reduction in rate of GST, which has resulted in reduced margins on the products, has not been considered. In this connection it would be relevant to mention that it is quite evident from Annexure-6 of the Report dated 31.01.2019 that the computation of the profiteered amount has been made by comparing the transaction value of the SKU charged by the Respondents during the pre and post reduction periods as has been provided under Section 15(1) excluding the amount of discounts as per Section 15(3)(a), both of which state as under:-

"15(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."

15(3) The value of the supply shall not include any discount which is given –

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply;"

Therefore, as per Section 15 (3) (a) of the above Act the value of the supply does not include any discount which was given before or at the time of the supply if such discount had been duly recorded in the invoice

issued in respect of such supply and thus, the GST was chargeable on the actual transaction value after excluding any discount (conditional as well as unconditional) and therefore, actual transaction value has been considered for computation of profiteering. Since, the DGAP has compared the transaction values of a SKU mentioned by the Respondents in their pre and post rate reduction invoices excluding the discounts there is no question of comparing the net price of SKU (Gross price net of discounts) prior to reduction of tax with the gross price of SKU post reduction of tax in respect of certain SKUs and hence the above allegation of the Respondents are not sustainable.

57. The Respondents have further alleged that profiteering has been computed on certain imported SKUs where there was an increase in the Basic Customs Duty (BCD) during the period under investigation. However, the Respondents have themselves admitted in their submissions that they had absorbed the impact of increase in the BCD and had not increased their prices on this ground. Since the Respondents have not increased their prices on the increase in BCD, profiteering has to be computed in case they have not maintained the pre rate reduction prices and charged the reduced rate of tax on them. They have also claimed that profiteering has been alleged on supply of promotional SKUs, however, no details of the SKUs which have been supplied without charging price as a part of promotion scheme have been submitted by the Respondents on which profiteering has been computed. Hence, the above claims of the Respondents are not established.

58. The Respondents have further claimed that there has been reduction in the area based fiscal incentives as a result of reduction in the rate of GST, which has resulted in reduced margins on the products which should be deducted from the profiteered amount. In this regard perusal of the record shows that as per the Notification No. 10(0/2017-DBA-11/NER dated 05.10.2017, the units of the Respondents based in the industrially backward area of Himachal Pradesh were entitled to refund of 58% of the CGST or 29% of the IGST paid through debit through the cash ledger account, as per the provisions of Section 49(1) the CGST Act, 2017, after utilization of the input tax credit of the CGST or the IGST. Therefore, prior to 15.11.2017, the Respondents were entitled to the refund of CGST or IGST paid in cash as per the above percentages. Post 15.11.2017, the liability of the Respondents to make payment in cash has reduced due to reduction in the rate of GST and accordingly, the amount of refund has also reduced. However, there has been no loss to the Respondents as they were still entitled to get refund of the CGST @58% or IGST @29% if paid in cash, as per the Notification dated 05.10.2017, as was available to them prior to the reduction in the rate of GST from 28% to 18%. Therefore, they are still getting the same proportionate refund of tax which they were getting before 05.10.2017 hence, practically they have not suffered any adverse impact on account of reduction in the rate of tax. The refund of CGST or IGST as per the above Notification paid in cash was also dependent on the amount of input tax credit utilized by the Respondents for discharge of their output GST liability which was further based on the output GST rate. In case the input tax credit utilization by the Respondents has

reduced, their refund amount might increase in case the Respondents were paying GST in cash. By their above logic the Respondents certainly do not intend to claim that if there was increase in the rate of tax the Respondents would have to reduce prices of their goods as there would be increase in the refund due to increase in the rate of tax. The Respondents have also furnished two illustrations to establish their claim which show that there has been loss in the refund from 5.22 in the pre rate reduction period to 2.9 in the post reduction period. The above reduction is normal as there has been reduction in the rate of tax from 28% to 18% and hence the refund would be proportionately less. The illustration given by the Respondents that if there was an increase in the rate of tax then they would not be required to reduce their prices is also irrelevant as it does not support their claim that reduction in the rate of tax has reduced their refund. Reduction in the rate of tax would also not have any impact on the margins of the Respondents. Accordingly, an amount of Rs. 1,53,08,647/- (PGHP) and Rs. 2,29,94,202/- Total= Rs. 3,83,02,849/- claimed to have been reduced as per Annexure-15 of the submissions dated 19.06.2019 on the above ground cannot be deducted from the profiteered amount. Hence, the above claim of the Respondents is incorrect and therefore, it is untenable.

59. The Respondents have further claimed that the DGAP has calculated the profiteered amount by including GST @18% which has been deposited with the Government and was available as input tax credit to them. Such an inclusion was contrary to Section 171 as the same could not be considered as 'profiteered' by the Respondents. In this connection it would be appropriate to mention that the Respondents

have not only collected excess base prices from their customers which they were not required to pay due to the reduction in the rate of tax but they have also compelled them to pay additional GST on these excess base prices which they should not have paid. The Respondents have 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 Respondents were legally not required to collect the excess GST and therefore, they have not only violated the provisions of the CGST Act, 2017 but have also acted in contravention of the provisions of Section 171 (1) of the above Act as they have denied the benefit of tax reduction to the ordinary buyers by charging excess GST. Had they not charged the excess GST the customers would have paid less price while purchasing goods from the Respondents and hence the above amount of GST has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the above Respondents. It would also be appropriate to state here that price includes GST also. The profiteered amount can also not be paid from the GST deposited in the account of the Central and the State Governments by the Respondents as the above amount is required to be deposited in the Consumer Welfare Funds (CWFs) as per the provisions of Rule 133 (3) (a) of the CGST Rules, 2017 along with the interest. Therefore, the above contention of the Respondents is untenable and hence it cannot be accepted. Accordingly, an amount of Rs. 27.69 Crore (PGHP), Rs. 8.85 Crore (GIL) and Rs. 0.31 Crore (PGHH) Total= Rs. 36.85 Crore representing the additional GST illegally charged from the buyers cannot be reduced from the profiteered

amount. The above Respondents have also referred to the cases of ***R. S. Joshi Sales Tax Officer*** and ***Dai Ichi Karkaria*** supra in their support, however, in view of the fact that the GST collected by the above Respondent amounts to denial of benefit of tax reduction to the customers both the above cases cannot be relied upon.

60. The Respondents have also prepared consolidated working of the profiteered amount vide their submissions dated 19.06.2019 by (i) comparing the net price of a SKU (Gross price net of discounts) prior to reduction in rate of tax with the gross price of SKU post reduction of tax (ii) Mapping the normal prices which could have been charged by the Respondents for the SKUs on which promotion was extended and computing the revised profiteering, including higher benefit passed on (iii) Computing the benefit passed on by way of higher price reduction on certain SKUs (iv) Computing the benefit passed on by way of higher price reduction on certain transactions where the actual price charged was lesser than the average price computed by the DGAP (v) Mapping the normal prices which could have been charged by the Respondents for products with extra quantity (higher grammage at the same or lower price) and new promotions introduced after reduction in rate of tax and computing the revised profiteering, including higher benefit passed on and (vi) Price reduction post supply. The Respondents have also contended that after adjusting all the above factors in the DGAP's working, the revised profiteered amount came to be negative and they have in fact, passed on INR 139.99 Crore (PGHP) + INR 7.12 Crore (GIL) Total= Rs. 147.11 Crore more than the benefit which the

Respondents were required to pass on, as per the Tables furnished by them.

61. After careful perusal of the submissions and the annexures furnished by the Respondents through the CD and their submissions dated 19.06.2019 it would be appropriate to state that as has been discussed in paras supra (i) the pre and post reduction base prices have been correctly computed excluding the discounts as per the provisions of Section 15(1) and 15(3)(a) and hence there is no mistake in calculating the same. Therefore, the comparison of prices made by the Respondents as per the Annexure attached with their submissions dated 19.06.2019 is not correct (ii) It is also apparent from the plain reading of Section 171(1) that the benefit of tax reduction has to be passed on by commensurate reduction in price and hence the same cannot be passed by way of discounts. Moreover, the Respondents cannot treat the already existing promotion schemes as passing on of the benefit as such schemes were floated by them to increase their sales in normal course of their business. Hence, the mapping of prices which could have been charged by the Respondents for the SKUs on which promotion schemes were extended and revised profiteering was computed which included the higher benefit passed on, as per the annexure attached with their above submissions is wrong and incorrect and accordingly, an amount of Rs. 61.50 Crore cannot be reduced from the profiteered amount on the above two grounds as has been claimed by the Respondents. (iii) As explained in para supra the Respondents cannot pass more benefit on certain SKUs as per their own convenience and refuse to pass on the same on other SKUs. As per the

provisions of Section 171(1) and Article 14 they are required to pass on the benefit on each SKU to each buyer and therefore, computation of the benefit passed on by way of higher price reduction on certain SKUs as per the annexure attached with the submissions dated 19.06.2019 is incorrect and hence an amount of Rs. 190.36 Crore cannot be reduced from the profiteered amount. (iv) No profiteering has been computed on the SKUs where the Respondents have charged less prices as compared to the average prices. In addition any benefit passed on by claiming higher price reduction on certain SKUs where the actual price charged was less than the average price cannot be set off against the profiteered amount as has been computed by the Respondents vide their above submissions as the benefit has to be passed on each SKU (v) As discussed in para supra the Respondents have not supplied the details to prove that they have passed on the benefit by way of supplying extra quantity, hence, mapping of the normal prices which could have been charged by the Respondents for the products with extra quantity or the higher grammage at the same or lower prices as per the annexure attached with their above submissions is wrong and incorrect and hence the amount so computed cannot be allowed to be deducted from the profiteered amount. As mentioned above no benefit can be passed by introducing new promotion schemes, therefore, the mapping of the benefit as per the annexure attached with the submissions dated 19.06.2019 is wrong and hence, no reduction can be permitted in the profiteered amount. (vi) The Respondents could not have reduced their prices post supply by extending discounts as the benefit was required to be passed on by way of commensurate

reduction in the prices upfront. Therefore, computation of benefit on account of post supply rate reductions as per the annexure attached with their submissions dated 19.06.2019 is wrong and incorrect and hence an amount of Rs. 69.55 Crore cannot be reduced from the profiteered amount. Based on the above reasons an amount of Rs. 139.99 Crore in respect of M/s PGHP Ltd. cannot be reduced. The Respondents have also claimed that they have passed on an amount of Rs. 7.12 Crore in respect of M/s GIL on account of correction in the base prices, extension of pre rate reduction promotion schemes and introduction of new promotion schemes as has been computed vide their submissions dated 19.06.2019. However, as discussed above the claim of the Respondents is wrong. Therefore, the above amount of Rs. 7.12. Crore cannot be deducted from the profiteered amount. Moreover, the Respondents are required to pass on the benefit at the level of each SKU and therefore, any claim of passing on the benefit at the entity level is wrong and against the provisions of Section 171(1) and Article 14. Therefore, all the mappings and computations made by the Respondents through their submissions dated 19.06.2019 are frivolous, incorrect, illogical and against the provisions of Section 171(1) and Article 14 and hence they are liable to be rejected.

62. The Respondents have further contended that the 'Methodology and Procedure, 2018' notified by this Authority under Rule 126 did not provide any methodology or guidelines as to the method for passing on the benefit or for computation of the profiteered amount. Thus, in the absence of any prescribed methodology, the method adopted by the Respondents to compute profiteering was as per the law and the same

was required to be accepted. The above contention of the Respondents is untenable as the 'Methodology & Procedure' for passing on the benefits of reduction in the rate of tax and ITC or for 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.*" and therefore, no methodology or guidelines are required to be provided separately for passing on the above benefits or for computation of the profiteered amount. 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 them to their recipients since both the 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) or unit of construction or service to every buyer and in case they are not passed on, the quantum of denial of these benefits 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 as per Rule 129. 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 the 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 SKU 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 therefore, 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 'Methodology & Procedure' which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017 and not on 19.07.2018 as has been claimed by the Respondents. 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 Respondents are trying to deliberately mislead by claiming that they were required to carry out highly complex and exhaustive mathematical computations for passing on the benefit of tax reduction which they could not do in the absence of the guidelines and methodology framed by this Authority. However, no such elaborate computation was required to be carried out as the Respondents were required to maintain the base price of a SKU which they were charging as on 14.11.2017 and then charge GST @18% w.e.f. 15.11.2017 in place of 28%. Instead of doing that the they have raised their pre rate reduction base prices over night as is evident from the discussion made in paras supra. It is abundantly clear from the above narration of the facts and the law that no guidelines and methodology or elaborate mathematical calculations are required to be prescribed separately under Rule 126 for passing on

the benefit of tax reduction or for computation of the profiteered amount. The Respondents cannot deny the benefit of tax reduction to their customers on the above ground and enrich themselves at the expense of their buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of tax reduction and the profiteered amount. Therefore, the computation of profiteering made by the Respondents is incorrect, illogical, arbitrary and against the provisions of Section 171 and Article 14 and hence, it cannot be accepted.

63. The Respondents have also contended that in respect of certain category of SKUs, the DGAP has inadvertently compared the pre-rate reduction post-discount prices with the post-rate reduction pre-discount prices which have not been corrected by him. In this context perusal of Annexure-6 furnished by the DGAP with his Report dated 31.01.2019 shows that the DGAP has compared the pre discount prices in respect of both the pre and post reduction periods as per the provisions of Section 15. The DGAP has not compared the pre-rate reduction post-discount prices with the post-rate reduction pre-discount prices. The Respondents have themselves admitted that the DGAP has compared the pre discount prices in both the periods. Therefore, the above claim of the Respondents is not tenable.

64. The Respondents have also submitted a pictorial diagram to claim that to compute profiteering a comparison could have been made either between A and B where prices pre and post rate reduction both before discount were given as Rs. 194.31 and 203.28 or between C and D where prices pre and post rate reduction both after post supply discount were supplied as Rs. 183.48 and Rs. 186.25 respectively by the

Respondents. However, in respect of certain SKUs, a comparison was made between C and B i.e. pre-rate reduction post supply discount price and post rate reduction base invoice price which was prior to discount, which was patently incorrect and which would result in reduction in allegation of profiteering by INR 28.52 Crore (PGHP). As explained in para supra the DGAP has correctly compared the pre discount base prices during both the periods and hence the above allegation of Respondent is incorrect and therefore, an amount of Rs. 28.52 Crore cannot be reduced from the profiteered amount.

65. The Respondents have further contended that in respect of a few SKUs where the pre-rate reduction sale details were not available with the DGAP as the Respondents had not sold those SKUs in the said period, the Respondents vide their submissions dated 29.03.2019 had provided the comparable product Code and prices to the DGAP. For illustration the Respondents have submitted calculations in respect of one of the SKUs i.e. H&S SHM 360MLX12 SB GST IN which had not been sold in the pre rate reduction period and the comparable SKU of which was H&S SHM 360mlx12 SB saver IN. From the Table submitted by the Respondents it has been claimed that INR 194.31 was the average price pre-rate reduction before deducting post-supply discount of H&S SHM 360mlx12 SB saver IN and INR 183.48 was the average price pre-rate reduction after deducting post-supply discount. When the DGAP had called for the price of these SKUs, the Respondents had submitted price of INR 183.48 under the impression that the computation of profiteering would be based on prices after post-supply discount. However, on verifying the computation done by the DGAP it was

observed that the computational methodology followed by the DGAP was to compare prices charged before deducting post-supply discounts. Accordingly, the Respondents had submitted the revised price based on the price charged before deducting post supply discount for this SKU as INR 194.31. The Respondents have further submitted that for computation of profiteering for SKU H&S SHM 360mlx12 SB saver IN, the DGAP has taken base price of INR 194.31. Thus, for computing profiteering in respect of SKU H&S SHM 360MLX12 SB GST IN the base price adopted by the DGAP should be INR 194.31 and not INR 183.48, which was the price charged after deducting post supply discount. In case this error was corrected it would result in reduction in profiteering by INR 28.52 Crore (PGHP) excluding GST. In this connection perusal of Annexure-6 attached with the Report of the DGAP dated 31.01.2019 shows that the DGAP has taken the pre rate reduction average base price of INR 194.31 only in respect of the SKU SHM 360mlx12 SB saver IN and not INR 183.48 as has been wrongly claimed by the Respondents. Therefore, an amount of Rs. 28.52 Crore in respect of Respondent No. 1 (PGHP) excluding GST cannot be reduced from the profiteered amount. Hence, the above claim of the Respondents is frivolous which cannot be accepted.

66. The Respondents have also mentioned that vide their submissions dated 18.01.2019 and 30.04.2019 they had submitted that certain promotion schemes like higher grammage/extra quantity and price reductions, which were existing before GST rate reduction, were continued after 15.11.2017 so as to pass on the benefit of GST rate reduction. The Respondents had issued newspaper advertisements to

ensure mass awareness about such schemes to pass on the GST benefit. As discussed in detail in paras supra the above claim of the Respondents is not tenable as no tax reduction benefit can be passed on by offering discounts or increase in the quantity as the benefit can be passed only by way of commensurate reduction in the prices as per the provisions of Section 171(1). The Respondents have also not supplied the details of the SKUs and the required documentary proof while claiming passing on of the benefit by way of increase in the quantity. Further, benefit of higher grammage/extra quantity could have been considered by this Authority had the Respondents provided the (i) details of each SKU on which additional quantity was supplied as has been mentioned in para supra (ii) it did not amount to extension of the existing promotion/discount scheme (iv) it was not part of a promotion/discount scheme floated post rate reduction and (iv) there was direct correlation between the increase in quantity and the amount of benefit of tax reduction to be passed. The Respondents have not provided the above evidence and therefore, the above claim of the Respondents cannot be accepted. The contention of the Respondents that they had reduced their prices post rate reduction is also incorrect as they had infact increased their prices equal to the amount of rate reduction or even more. The advertisements issued by the Respondents were misleading and incorrect. Both the above submissions of the Respondents have been carefully perused and it has been revealed that all the claims made by the Respondents in them are wrong and incorrect. Accordingly, the profiteered amount has been computed correctly due to non-passing on the benefit by the Respondents.

67. The Respondents have further maintained that the Government had not communicated any method to pass on the benefit of rate reduction in the absence of which they had continued the promotion schemes. The other alternative would have required stopping of the existing promotions, discarding of the existing packing material, printing of new packing material and packing in new packing material which would have taken a minimum of 3-4 months. The above contention of the Respondents is incorrect as there was no requirement to continue the existing promotion schemes or discarding the existing packing material and packing in the new material. As has been explained in para supra the Respondents were simply required to maintain the base prices of the SKUs which they were charging before the rate reduction and charge GST @18% instead of 28% and no method was required to be prescribed by the Government to pass on the benefit of tax reduction. They were to replace only one entry of GST in their billing software from 28% to 18% w.e.f. 15.11.2017. If the Respondents could change several entries in their software to increase the base prices w.e.f. 15.11.2017 they could have very easily replaced one entry of rate reduction. The Respondents could also have affixed stickers of revised prices on the existing packing material because as a manufacture they were legally responsible for fixing the revised MRPs as per the provisions of Rule 6 of the Legal Metrology (Packaged Commodities) Rules, 2011. However, they have not re-fixed the MRPs after rate reduction. They were also required to stamp or re-sticker or reprint the MRPs on all the impacted SKUs as per the letter issued by the Ministry

of Consumer Affairs, Food and Public Distribution, Govt. of India, dated 16.11.201 which states as under:-

"WM-10(31)/2017

Government of India

Ministry of Consumer Affairs, Food and Public Distribution

Department of Consumer Affairs

Legal Metrology Division

Krishi Bhawan, New Delhi

Dated: 16.11.2017

To,

The Controller of Legal Metrology,

All States/ UTS

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

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

commodity. In this case also, the earlier Labelling/ Sticker of MRP will continue to be visible.

Further, this relaxation will also be applicable in the case of unsold stocks manufactured/packed/ imported after 1st July, 2017 there the MRP would reduce due to reduction in the rate of GST post 1st July, 2017.

This order would be applicable up to 31st December, 2017.

Yours faithfully

(B. N. Dixit)

Director of Legal Metrology

Tel: 01123389489 / Fax.-011-23385322

Email: dirwm-ca@nic.in

Copy to: All Industries/ Industry Associations/ Stake Holders

Accordingly, there was no necessity of new packaging material and no wait of 3-4 months for passing on the benefit. If the Respondents were not capable of doing the above they could have computed the profiteered amount and deposited it in the CWF of the Central and the State Governments as per the provisions of Rule 133(3)(b), which has been done by several big manufactures. However, the Respondents had no such bonafide intention as they had not reduced and re-fixed the MRPs and had continued to sell their products at the pre rate reduction MRPs and therefore, their such unconvincing arguments cannot be

relied upon. It is reiterated that as per Section 171(1) reduction in prices is the only legally permissible method for passing on the benefit of tax reduction and it cannot be done by way of extra sale promotion schemes, extra discount, higher grammage and higher combination packages etc. Accordingly, an amount of INR 19,71,93,934 (PGHP) and INR 3,30,14,424 (GIL) Total= INR 23,02,08,358/- computed on the supplies of the SKUs on the basis of promotion schemes cannot be excluded from the profiteering.

68. The Respondents have also stated that profiteering should be based on the comparison between the net price of a product i.e. after considering the price reductions and not on the gross prices. The price reductions were provided both prior to and after reduction in the rate of GST, however, the price reductions provided after reduction had been significantly increased to ensure that the benefit of such rate reduction was passed on. The Respondents were adjusting such price reductions from their sales turnover and had reported only the net turnover in their books of account as well as Financial Statements. The methodology adopted by the Respondents for giving price reductions has been explained by them through an illustration which shows that the Respondents have claimed that the discount scheme was intimated in advance to the distributors who were further passing the discount to the retailers and were raising the amount of discount through invoices to the Respondents based on the sales made by them to the retailers. The Respondents were adjusting such price reductions from their sales turnover and were reporting only the net turnover in their books of account as well as Financial Statements. Post rate reduction they had

increased such discounts which should be considered for computing the profiteered amount. It is quite apparent from the illustration given by the Respondents that the amount of discount depended on the sales made by the distributors and hence such schemes were entirely focussed on increasing sales and were not meant for passing on the benefit of rate reduction. Such schemes were run by the Respondents in the normal course of their business the major benefit of which has gone to the distributors and retailers. There is enough evidence on record that the Respondents have increased the base prices of the SKUs post rate reduction and hence there is no question of passing on the benefit through discounts which were nothing but sale promotion campaigns. All the entries made in the books of account or Financial Statements by the Respondents were on account of sale promotion schemes and not on account of passing on the benefit of tax reduction and hence they cannot be taken in to consideration while computing the benefit of tax reduction. It is reiterated that the benefit of tax reduction has to be passed on by way of commensurate reduction in the prices as it cannot be passed by offering discounts, hence any reduction in the prices in the post rate reduction period due to the discounts is immaterial. The argument of increasing the post rate reduction discounts is an afterthought on the basis of which the Respondents are trying to justify passing on of the benefit of rate reduction which cannot be accepted.

69. The Respondents have further stated the they had allocated the amount passed on by way of price reduction against individual line-items of sale which ought to have been considered by the DGAP. This has been illustrated by the Respondents by showing the pre rate reduction price

as Rs. 100/-, post supply reduction as Rs. 5/- and net price ex-GST as Rs. 95/-. Post rate reduction base price has been shown as Rs. 102/-, post supply reduction as Rs. 7.5 and net price ex-GST as Rs. 94.5 and the profiteering has been calculated as Rs. 2/- for the pre rate reduction period, Rs. (-) 2.5 for the post supply and Rs. (-) 0.5 for the post rate reduction period. The illustration given by the Respondents is completely hypothetical and is based on the prices and reductions invented by the Respondents which are illogical, arbitrary and illegal as no benefit of tax reduction has been passed by the Respondents by post rate reduction in prices by way of discounts rather they have increased these prices as is evident from the perusal of Annexure-6 attached with the Report of the DGAP. Moreover, the Respondent were required to maintain the pre rate reduction base price of Rs. 100/- which they have admitted to have increased to Rs. 102/-. The Respondents cannot increase the base price and then claim to have increased the discount to pass on the benefit of tax reduction in the post rate reduction period. Accordingly, the above claim of the Respondents cannot be accepted.

70. In this regard, the Respondents have relied on the decisions of the Hon'ble Supreme Court in the cases of **Union of India v. Bombay Tyres International 1984 (17) ELT 329 (SC)** and **M/s Moped India Ltd. v. Asst. Collector 1986 (23) ELT 8 (SC)** in which it was held that the discounts amounted to reduction in the price. The law settled in the above cases is not applicable in the facts of the present case as the issue in the above cases was consideration of the discount while determining value of the product whereas in the present case the issue

is of passing on the benefit of tax reduction which can be done only by way of commensurate reduction in the price and not by offering discounts and hence both the above cases do not help the cause of the Respondents.

71. The Respondents have also contended that the discounts, incentives, cash backs, pre or post sales may or may not be allowed under Section 15 to arrive at the assessable value / taxable value but such considerations should not apply for calculation of profiteering under Section 171. Any benefit passed on in whatever form must be taken into consideration regardless of the fact whether such deduction was permissible or not under Section 15 of the CGST Act. It was nowhere prescribed that benefit of GST rate reduction should be given on the invoice itself and hence it could be given subsequent to the supply by way of adjustments in the books of account. It also satisfied the condition put by the DGAP that monetary form was the only form in which the benefit could be passed on. The above argument of the Respondents is illogical and illegal as the benefit of tax reduction has to be passed on by commensurate reduction in the price in terms of Section 171(1) which is required to be mentioned in the invoice as per Section 33 of the CGST Act, 2017. Issuing of wrong and false invoices showing incorrect price and GST is an offence under Section 122(1)(i). The Respondents cannot invent ways and means as per their own convenience to pass on the benefit and they have to comply with the provisions of Section 171(1). The transaction value for computing the profiteered amount is required to be considered as per the provisions of Section 15 and hence it cannot be claimed that the benefit should be

presumed to have been passed even if it was not calculated as per the legally prescribed provision under the above Section. Any such contention is illegal and hence it cannot be accepted.

72. The Respondents have further contended that their recipients viz. distributors and modern retailers had treated the discounts as service in view of the fact that the incentive received by the dealers was considered by the Department as consideration for the service and Service Tax was demanded on such incentives. In order to avoid litigation the Respondents had accepted the claim for price reductions from the recipients with tax as it was revenue neutral, being creditable in the hands of the Respondents. Accordingly, even though the price reductions were routed by way of service invoices received from the recipients, it remained a fact that the same were raised in lieu of schemes announced by the Respondents and were nothing but a reduction in sale prices of the Respondents, and not towards any services provided by Respondent's customers to the Respondents. Accordingly, the computation of profiteering ought to have been made on the basis of net prices only, which were the prices charged by the Respondents after allowing for price reduction based on the schemes announced from time to time, as the net price alone reflected the actual consideration towards the supply, realized by the Respondents. In this regard it would be worthwhile to state that the evidence submitted by the Respondents in their support was either the invoices issued by their distributors which mentioned the description as "Promotion Services" with HSN Code 998361 or "Advertising Services" with HSN Code 998366 or the Debit Notes issued by the Respondents. Therefore, it is

absolutely clear that the amount paid by the Respondents to their distributors was on account of the services rendered by them for promotion or advertisement of their sales and has nothing to do with passing on of the benefit. The Respondents cannot advance arguments against the factual record and entries made in the invoices. The Respondents have also resorted to misclassification of accounts by making such a claim and have also furnished wrong information in their Returns. The benefit could have been passed on by simply maintaining the pre rate reduction prices and then charging GST on them @18%. Such a claim is being made by the Respondents deliberately to palm off the incentive given by them for sale promotion as passing on of the benefit. The benefit was required to be passed on by commensurate reduction in the price and not by post supply discounts or incentives. Moreover, no correlation has been established by the Respondents between the taxable value reported in the GST Returns and the post supply discounts given on any SKU. Therefore, it cannot be claimed that the post supply discounts were given on account of tax reduction. Since the discounts have been shown as promotion or advertisement services in the books of account they cannot be treated as passing on of the benefit. The Respondents have also furnished details of their above claim vide Annexure-4 attached to their submissions dated 09.06.2020, perusal of which shoes that it gives the details of the promotional amount paid to M/s AM Agencies Jammu, details of sales made to it and the details of the invoice dated 27.01.2018 raised by the above Agencies on account of promotion services on the Respondents. It is established from the entries made in the invoice that the same has been

issued on account of rendering promotional services and not on account of passing on the benefit of tax reduction. There is also no correlation between the promotional amount and the sales made to the above agencies which could establish that this amount was paid on account of passing on the benefit of tax reduction. Hence, the claim made by the Respondents on the above grounds is wrong and misleading and therefore, the same cannot be accepted. The Respondents have also placed reliance on the cases of ***Union of India v. Bombay Tyres International*** and ***M/s Moped India Ltd. v. Asst. Collector supra*** both of which do not apply in the facts of the present case.

73. The Respondents had repeatedly claimed that the allegation of profiteering in respect of supplies made through CSD/CPC channels was not sustainable, as the price of supplies made to CSD/CPC channels was contractual and the same was negotiated excluding the taxes. Since the DGAP has already excluded the transactions made by the Respondents with the CSD and CPC from the ambit of profiteering, the Respondents have not made any further submissions on the same.

74. The Respondents have also claimed that they had submitted before the DGAP that certain hair and skin care products i.e. 4 products comprising of 6 SKUs covered under Chapter 33 of the Customs Tariff Act, 1985 were imported by the Respondents on which the applicable rate of BCD was increased from 10% to 20% w.e.f. 02.02.2018 vide Clause 101 (a) of the Finance Bill, 2018. Being non-creditable such increased BCD has resulted in increase in the cost of these products and the Respondents were entitled to revise their prices. However, they had not revised the prices and the additional duty burden was absorbed

by them and therefore, these 6 SKUs should not be considered for determination of profiteering. In this connection it would be pertinent to mention that Section 171(1) only requires passing on the benefit of tax reduction and has no mandate to look in to the costs of the Respondents. The Respondents have themselves admitted that they had not increased the prices after the rate of BCD was increased which shows that there was no increase in their costs. Further it was the business call of the Respondents to absorb the increase in the BCD and not increase their prices which they cannot offset against the benefit of price reduction. There is also no correlation in the GST rate reduction and the increase in the BCD as both of them have been notified under the different Acts, on different dates and on different grounds. The Respondents have not passed on the benefit of tax reduction after 15.11.2017 as they have not reduced their prices. Therefore, profiteering has been rightly computed on the above products. The Respondents have also placed reliance on the **Case No. 3/2018** of ***Kumar Gandharv v. KRBL Limited 2018-VIL-02-NAA,*** however, the same is not applicable in the facts of the present case as there was no reduction in the rate of tax in the above case and hence Section 171(1) was not attracted, whereas there is established reduction in the rate of tax from 28% to 18% in the present case, the benefit of which is required to be passed on. Accordingly, an amount of INR 3,15,09,080/- computed as profiteering in respect of the above 4 products comprising of 6 SKUs cannot be reduced from the total profiteering.

75. The Respondents have further claimed that they had provided increased quantity of the same product at the same/reduced price per

grammage or by way of providing discounts on combo packs as against the individual prices of the product combined together in such packs on account of passing on the benefit of tax reduction e.g. they were supplying Ariel 14.3 Gr. at MRP of Rs. 2/- against the Ariel 12 Gm. pack which had MRP of Rs. 2/-. In this regard it would be appropriate to note that the Respondents were required to pass on the benefit by way of commensurate reduction in the price of the Ariel 12 Gm. pack only and they had no option of substituting it with another SKU. They have also not explained how Ariel 14.3 Gm pack could be considered as passing on the benefit on Ariel 12 Gm pack when no details have been submitted. The Respondents have also mentioned the issue of coinage on the payment of prices of small sachet packs and reduction in quantity which only shows that the Respondents were not bothered to pass on the benefit to vulnerable sections who generally buy such sachet packs. Moreover, it was for the buyers to render the coinage and not for the Respondents to surmise on their behalf that they would not be able to pay it. The buyers could have easily done it through electronic platforms. The Respondents could also have reduced the quantity by appropriate adjustments in the manufacturing process however, they had not done it with an intention to deny the benefit. They could also have easily deposited the extra amount charged on such sachets in the CWFs. Therefore, an amount of Rs. 105,79,46,321/- (PGHP) and Rs. 36,91,85,863/- (GIL) Total= Rs. 142,71,32,184/- excluding the GST claimed to have been passed on due to additional supply of quantity cannot be reduced from the profiteered amount.

76. The Respondents have also pleaded that this Authority in ***Case No. 20/2018 (Order dated 24.12.2018) in respect of M/s Hindustan Unilever Limited (HUL)*** has already held that the benefit could be passed on in the form of increase in grammage. In this respect it would be correct to mention that the benefit of additional grammage was allowed in the case of HUL as one time relaxation on the grounds that (i) the HUL had supplied the details of each SKU on which additional quantity was supplied, as per the parameters which have been mentioned in para supra (ii) the benefit was not passed on in the form of discount but in lieu of benefit of tax reduction (iii) it did not amount to extension of the existing promotion/discount scheme (iv) it was not part of a promotion/discount scheme floated post rate reduction and (iv) there was direct correlation between the increase in quantity and the amount of benefit of tax reduction to be passed. Since, the Respondents have not submitted any of the above details they cannot claim benefit of the above decision given by this Authority.

77. The Respondents have further pleaded that they have mapped the prices that could have been charged in the line item-wise details of supplies as per columns AN and AO of the computation sheet provided as Annexure-3 to their submissions dated 09.06.2020 and have given effect to the said prices in computing the profiteering as well as excess benefit passed on in columns AU and AV respectively. On perusal of the base price details mapped by the Respondents vide Annexure-3, it could be seen that vide column AN the Respondents have given the details of the new promotion schemes, vide column AO the comparable base prices, vide column AU the revised profiteering including 18% GST

and vide column AV the revised negative amount including GST @18%. Since, the benefit of tax reduction cannot be passed on by way of floating new promotional schemes the above computations of the base prices and the profiteered amount and excess profiteered amount are wrong, incorrect and not in consonance with the provisions of Section 171(1) and hence the same cannot be accepted.

78. The Respondents have also contended that the DGAP has applied the methodology of "Zeroing" while computing the profiteered amount which was held to be incorrect by the Appellate Body of the WTO. In this regard, the Respondents have referred to the ***Report No. WT/DSI41/AB/R dated 01.03.2001*** of the Appellate Body of the WTO regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India, vide which it was held that the methodology of 'Zeroing' could not be applied and both the negative and positive margins have to be considered while applying the anti-dumping provisions. The above contention of the Respondents is not correct as no 'netting off' can be applied in the cases of profiteering as the benefit has to be passed on to each customer which has to be computed on each SKU. Netting off implies that the amount of benefit not passed on certain SKUs will be subtracted from the amount of benefit passed on other SKUs and the resultant amount would be determined as the profiteered amount. If this methodology is applied the Respondents would be entitled to subtract the amount of benefit which they have not passed on one product from the amount of benefit which they have claimed to have passed on the other product, which will result in complete denial of benefit to the customer who has purchased a particular project on which no benefit or

less benefit has been passed on. Hence, the methodology of 'netting off' cannot be applied in the case of tax reduction and the methodology of 'Zeroing' has to be applied as the customers have to be considered as individual beneficiaries and they cannot be dumped as goods and netted off against each other. This Authority has also clarified in its various orders that the benefit cannot be computed at the product, service or the entity level as the benefit has to be passed on each SKU, unit and service as per the provisions of Section 171 (1). Hence, the above contention of the Respondents is not correct as the Respondents cannot insist on not applying the methodology of 'Zeroing' as 'netting off' would amount to violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution.

79. The Respondents have also argued that the period of investigation was from 15.11.2017 to 30.9.2018 spread over 10 months and 16 days. While the GST rate was reduced w.e.f. 15.11.2017 there was no reason to conduct investigation till 30.9.2018. The report was also silent about the period till when the Respondents would be investigated which could lead to an inference that in the absence of any specified time period, increase in the prices undertaken by the Respondents would be considered as profiteering till the time Respondent was in business. Therefore, the period of investigation should be restricted to 3 months after which the Respondents could increase their prices keeping in view their costs. In this respect it would be pertinent to mention that the Respondents are liable to be investigated till the date they could prove that they have passed on the benefit of tax reduction. Since, the details of complaint made against the Respondents were received on

08.10.2018 they have been investigated till 30.09.2018 so that a reference point is available to conduct the investigation as no investigation can be conducted without a fixed time frame. Since, the Respondents have failed to produce any evidence during the course of the investigation or the present proceedings that they have passed on the benefit, hence they are apparently still profiteering in violation of the provisions of Section 171(1) and any subsequent price increase made by them also amounts to profiteering. The contention of the Respondents that one could be investigated in perpetuity is not correct as such a person would be ordered to reduce his prices immediately per as the provisions of Rule 133(3)(a) from the date of passing of the order by this Authority and if the does so no further investigation can be conducted against them. In case the Respondents cannot be investigated till the time they prove passing on the benefit and compliance with the provisions of Section 171(1) they can also not be investigated over a period of 3 months as it has no nexus or rationale with the provisions of Section 171(1). The Respondents are repeatedly harping on increase in their costs but they have not explained how they have suddenly increased their prices on the intervening night of 14/15.11.2017 to exactly coincide with the reduction in the rate of tax by the amount of tax reduction or more. The Respondents have not reduced their prices even once after the rate reduction and have increased them to deny the benefit of tax reduction to the customers and hence the above claim of the Respondents cannot be accepted.

80. The Respondents have further argued that Inflation as a factor has been accepted as a reason for price increase by this Authority in the case of

Kumar Gandharv v. KRBL Ltd. 2018-VIL-02-NAA. Also, in the cases of ***M/s Hardcastle Restaurants Pvt. Ltd. 2018-VIL-11-NAA*** and ***M/s NP Foods 2018-VIL-08-NAA***, loss of input tax credit has been factored-in for determination of net profiteering. By allowing reduction in the ITC to be set-off against the reduction in GST rates, this Authority has in effect allowed adjustment for increase in costs. Therefore, the investigation undertaken by the DGAP had the effect of placing unlawful restraint on the fundamental right of the Respondents to carry on their business and was therefore violative of Article 19(1)(g). The claim made by the Respondents on the basis of the above cases is seriously flawed as all the above 3 cases are based on the benefit of tax reduction and no benefit of inflation or cost has been given in them. In addition reduction in the ITC has also not been adjusted against the GST rate. Any reduction in the ITC due the denial of benefit of ITC has only been allowed to be considered while fixing the commensurate prices in respect of restaurant services. The investigation conducted by the DGAP also does not put any restraint on the right of the Respondents under Article 19(1)(g). Hence, the above claim of the Respondents is wrong and therefore, it is not tenable.

81. The Respondents have also averred that the DGAP has arbitrarily chosen the period of investigation for applying the anti-profiteering provisions which would result in the Respondents being indirectly brought into a price control regime. In the absence of any statutory provision on the period during which the Respondents needed to pass on the reduced tax rate, the same would need to be construed in a reasonable manner keeping in mind the factors specific to the

Respondents. This Authority was statutorily empowered to determine this issue and provide for either a specific time period for which investigation was to be conducted on reasonable basis or provide a set of guidelines to be followed by the DGAP while determining the period of investigation as per the Rule 126 or the Guidelines dated 04.10.2019. In this connection it would be appropriate to note that this Authority has repeatedly held that the investigation has to be carried out till the benefit of rate reduction is passed on as the offence continues to be committed by a registered person till he passes on the benefit in terms of Section 171(1). Such a person cannot be allowed to misappropriate the amount of benefit granted to him from the public exchequer and enrich himself as the expense of unorganised, voiceless and vulnerable customers. The Respondents are not required to pay even a single penny from their own pocket while passing on the benefit of tax reduction and hence the should have no objection on the period of investigation. They cannot be investigated beyond the date from which they have passed on the benefit. Their plea to restrict the period of investigation only means that they want to appropriate the amount of benefit. Therefore, no provision is required to be made either under Rule 126 or the above Guidelines to fix the period of investigation as different registered persons may or may not have passed on the benefit from the same date and hence they would be required to be investigated till the time they have passed on the benefit which may be different in different cases. There is no question of the Respondents being brought under the price control regime as there is no such provision under Section 171(1). Therefore, the above contention of the Respondents is not tenable.

82. The Respondents have also submitted a list of cases in which this Authority has passed orders in which period of investigation was from 2 to 5 months. In this regard it may be observed that these cases were reported immediately after the rate reduction was notified on 15.11.2017 and therefore, they were investigated for not passing on the benefit till the previous month in which the complaint was received by the DGAP for investigation. The Respondents do not mean to contend that the DGAP should have waited for another 10 months so that the period of investigation would be equal to the period of investigation in their case or till the period of investigation was similar in all such cases. Further in all these cases it has also been ordered that further investigation shall be carried out by the DGAP till the date benefit is passed on. Therefore, there is no question of arbitrary selection of the investigation period which as a matter of law is required to be done till the benefit is passed on as per the provisions of Section 171(1). Therefore, the above claim of the Respondents is not correct. In this regard, the Respondents have also cited the decisions of the Hon'ble Supreme Court in the cases of ***S. G. Jaisinghani v. Union of India & Ors.*** and **Maneka Gandhi v. Union Of India supra**. The law settled in the above cases is not applicable as all the registered persons against whom complaints of profiteering are received are being investigated till the date they have not passed on the benefit of tax reduction or ITC. Therefore, there is no question of arbitrary exercise of power and discrimination as all the parties are being treated equally.

83. It has also been submitted by the Respondents that the present investigation was initiated pursuant to the interactive sessions which the

Respondents had with this Authority in which information was provided by the Respondents. Based on the said information, this Authority had presumed that a case was made out against the Respondents and it had forwarded the information to the Standing Committee for examination. This act of this Authority suffered from the vice of discrimination, as this Authority has neither initiated similar type of investigation nor called for information from similar type of business competitors. The above allegation of the Respondents is absolutely frivolous as similar interactive sessions were held with a number of other major FMCG companies like M/s Hindustan Lever Ltd., M/s Nestle India Ltd., M/s Patanjali Ayurveda Ltd. and M/s Johnson & Johnson Pvt. Ltd. etc. and they were duly investigated and held liable for profiteering and hence the above contention is absolutely wrong which cannot be accepted.

84. The Respondents have also submitted that the period of investigation was neither envisaged in the CGST Act nor the CGST Rules. The DGAP was following the practice of taking period of investigation from the date of rate reduction till the previous month of the day on which reference was received from the Standing Committee which showed arbitrariness in determining the period of investigation. The DGAP has not adduced any evidence to show that profiteering was alleged against the Respondents up to September 2018. In this connection it would be relevant to mention that from the interactive sessions held by this Authority with the P&G Group, which represented the Respondents, on 16.05.2018 and 11.06.2018 and their subsequent letters dated 23.05.2018 and 04.07.2018 along with which details of the SKUs and

the dates from which the benefit was passed on by the Respondents were supplied, it was evident that the Respondents had admitted that the benefit of tax reduction had not been passed w.e.f. 15.11.2017 and therefore, the Standing Committee on Anti-Profiteering vide letter dated 12.07.2018 was asked to take necessary action under Rule 128(1). The above Committee after having been satisfied that the Respondents had not passed on the benefit had requested the DGAP to conduct detailed investigation under Rule 129(1). Since the complete documents on the basis of which recommendation for investigation was made by the above Committee were received by the DGAP on 08.10.2018 the investigation was conducted from 15.11.2017 to 30.09.2018, notice of which was duly served on the Respondents on 15.10.2018 under Rule 129(3) in which it was specifically mentioned that the Respondents have not passed on the above benefit. Therefore, there was specific allegation of profiteering made against the Respondents vide the above notice as the Respondents were asked to explain whether the admitted that the benefit of tax reduction had not been passed on by them and if so they should suo moto determine the same. The investigation could only have been done till September, 2018 as it could not been done in respect of future months, as a specific reference period was required for it. The offence could also not be presumed to have continued to be committed in future. The Respondents had not raised any objection against the investigation being conducted till 30.09.2018 before the DGAP and hence their present objection is merely an afterthought. Conducting of investigation till 30.09.2018 causes no discrimination to the Respondents as it has been established after investigation that they

have not passed on the benefit till 30.09.2018. It is absolutely clear from the provisions of Section 171(1) 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.*" and therefore, every such person who has not passed on the above benefits is liable to be investigated till the passes on the benefits. Rule 129(2) also specifies that the DGAP shall conduct investigation and collect necessary evidence to determine whether the above benefits have been passed on. Accordingly, investigation has to be carried out till the date the benefit of tax reduction is not passed on by the Respondents which in this case is limited till 30.09.2018 but can be extended till the passes on the benefit. Therefore, there are clear cut provisions under the above Act and the Rules till what period the investigation is to be conducted and it cannot be restricted to a period of 3 months as contended by the Respondents as there is no such provision in the Act or the Rules or any justifiable ground and hence the above claim of the Respondents is not maintainable.

85. The Respondents have also contended that their recipients viz. distributors and direct retailers were registered suppliers and hence the excess GST charged did not form part of their cost as both were entitled to ITC. In this connection it would be pertinent to mention that since the recipients of the Respondents were entitled to ITC there was no reason for the Respondents to pass on the benefit of tax reduction to them by way of offering discounts. They should have simply maintained their pre rate reduction base prices and charged the reduced rate of tax and their recipients would have claimed ITC and sold the products at the reduced

rate of tax and pre rate reduction base prices which would have resulted in passing on of the benefit. This would have been more conveniently done in respect of the stock available with the distributors as on 15.11.2017 who would have claimed the excess GST of 28% paid by them as ITC and passed on the benefit down the supply chain if the Respondents has allowed them to do so. But instead of following the legal recourse the Respondents had deliberately increased their pre rate reduction base prices and then wrongly claimed to have passed on the benefit through discounts. By doing so they have not only acted against the provisions of Section 171(1) themselves but they have also forced their recipients to commit an offence under the above Section. Since, the distributors had themselves not received the benefit from the Respondents there is no question of their passing it down to the ordinary customers. It also clearly shows that the Respondents have not passed on the benefit on the stock which was in the supply line to the ultimate customer in contravention of the above provision. Therefore, the above contention of the Respondents is not tenable. In this regard, the Respondents have also quoted the judgment of the Hon'ble Supreme Court passed in the case of ***Dai Ichi Karkaria supra,*** wherein the Hon'ble Supreme Court had observed that cost must be reckoned from the perspective of a man of commerce and the duty which was available as credit under the Modvat scheme did not form part of the cost of raw material. The above case does not help the Respondents as they have not acted as men of commerce but have deliberately tried to deny the benefit of tax reduction inspite of the fact that they did not have to bear the cost.

86. The Respondents have also argued that the profiteered amount has to be returned to the recipients as per Rule 133(3)(b) or deposited in the CWFs as per Rule 133(3)(c), constituted under Section 57 of CGST Act, if the eligible persons were not identifiable. The recipients of the Respondents were identifiable as they were their distributors and modern retail customers and therefore, appropriate orders should be passed to enable the Respondents to return such amount to their recipients. In this connection it would be relevant to state that it has been clarified several times by the Union Finance Ministers, the Central Government and the GST Council that the benefit of tax reduction is required to be passed on to the ordinary customer who bears the burden of tax and hence it cannot be returned to the recipients of the Respondents. The Respondents have also relied upon the cases of ***State of Jharkhand v. Ambay Cements*** and ***Tata Chemicals Ltd. v. Commissioner of Customs supra*** to support their above contention. However, the above cases do not support the case of the Respondents as the benefit has to be passed to the ordinary customer and not to the recipients of the Respondents.

87. The Respondents have also submitted that Rule 6(3) of the Legal Metrology (Packaged Commodities) Rules 2011 provided discretion to the supplier regarding affixation of sticker as the words used were 'may be affixed'. Therefore, such sticker could be affixed also by the distributors, dealers or retailers. It was not possible for the manufacturers to affix stickers with reduced MRPs on the products which had already been sold and were lying with the dealers and retailers. In this regard it would be correct to mention that as per the

provisions of Rule 2(d) of the above Rules and the admission of the Respondents themselves that they were manufacturer of all the SKUs which were being supplied by them and hence they are liable for fixing the Maximum Retail Price (MRP) as per the provisions of Rule 2(m). Therefore, unless they had revised their MRPs after the reduction in the rate of tax their distributors would not have been able to fix stickers of revised MRPs. Instead of reducing their MRPs the Respondents had increased their base prices and continued to charge the same MRPs which they were charging from the ordinary customers and hence, they have made no effort to comply with the letter dated 16.11.2017. Therefore, the Respondents cannot shift their liability on to their recipients to affix stickers. Accordingly, the above submission of the Respondents is untenable.

88. It was further submitted by the Respondents that on a few SKUs like small sachets they could not reduce the MRPs as that would imply price reduction of only a few paise and rounding off to the nearest rupee or 50 paise. The only option available was to not undertake price reduction on such SKUs and compensate by a higher price reduction on other SKUs or to pass higher price reduction / free grammage on selected SKUs and correspondingly lower price reduction on other SKUs. It is apparent from the above submissions of the Respondents that they have not passed on the benefit of tax reduction to the most vulnerable section of customers who buy small sachets. They have also arbitrarily passed on more benefit than required on some SKUs and less or no benefit on others. There was no ground for the Respondents to act arbitrarily and in contravention of the provisions of Section 171(1) or the Legal

Metrology (Packaged Commodities) Rules 2011 and hence they have committed violation of the above provisions. In case the Respondents were not able to reduce prices on small sachets they should have computed the profiteered amount and deposited the same in the CWFs as the other manufacturers have done. However, it is apparent that the Respondents had no intention of passing on the benefit hence the above contention of the Respondents is not maintainable.

89. The Respondents have also claimed that the DGAP in his report dated 31.01.2020 has stated that the profiteering has been quantified only on the goods supplied by the Respondents after 15.11.2017 and not on the goods lying in the distribution chain on 15.11.2017, however, the sticker of new MRP has to be fixed along with the old MRP on the stock in hand as provided vide letter No. WM-10(31)/2017 dated 16.11.2017, issued by the Ministry of Consumer Affairs, Food and Public Distribution. It has also been submitted that neither the DGAP nor this Authority have been empowered under the Legal Metrology Act or the rules made there under to verify Respondent's compliance with the provisions of legal metrology and hence they should refrain from commenting on compliance with respect to re-stickering of reduced MRP on pack. In this connection it would be pertinent to mention that as per the self admission of the Respondents as well as the Report of the DGAP it is established that they have not been investigated for profiteering in respect of the stock which was lying in their godowns or with their distributors and retailers. The Respondents cannot get away by denying the benefit of tax reduction on the SKUs lying in the supply chain and hence they are required to be investigated on this account. It

is also apparent from the bare perusal of the letter dated 16.11.2017, issued by the Ministry of Consumer Affairs, Food and Public Distribution that the direction to affix stickers has been issued only (i) to give effect to the GST rates fixed after implementation of the CGST Act, 2017 w.e.f. 01.07.2017 and (ii) for passing on the benefit of tax reduction notified w.e.f. 15.11.2017 to implement the anti-profiteering measures prescribed under Section 171(1) and hence this Authority as well as the DGAP have full jurisdiction to take its cognizance to ensure that the benefit of tax reduction is passed on by affixing additional stickers as has been provided in the above letter and the consumers are not fleeced. Although this Authority does not have the mandate to enforce the provisions of the Legal Metrology Act, 2009 it can certainly direct the DGAP to bring the violation of the provisions of the above Act to the notice of the appropriate authorities for taking action against the Respondents.

90. The Respondents have also pleaded that a reference could be made to anti-profiteering mechanism that was adopted in Malaysia and Australia in which detailed rules, guidelines and computational mechanism was provided to arrive at what constituted anti-profiteering whereas no such guidelines and computational mechanism has been provided in the Indian law. In this context it would be appropriate to state that the anti-profiteering provisions made in both the above Countries provide for 'control on prices' whereas there is no intention to control prices under Section 171(1). The only aim is to pass on the benefit of tax reductions and ITC. It is strange that the Respondents are advocating for control on prices when they are claiming violation of the provisions of Article

19(i)(g) and to have freedom to fix prices as per their own volition. The Malaysian Government has since withdrawn the above measures as they were not working satisfactorily in that Country. Therefore, the above claim of the Respondents cannot be accepted. The Respondents have also relied upon the case of ***Commissioner of Income Tax Bangalore v. B. C. Srinivasa Shetty supra***, where it was held that charging section of capital gains was not attracted where corresponding computation provision was inapplicable. In this regard it would be relevant to mention that no tax has been imposed under Section 171(1) and therefore, there is no question of providing charging Section in the above Act. The methodology to determine whether the benefits of tax reduction and ITC have been passed or for computing the profiteered amount has been outlined in detail in Section 171 itself and hence the law settled in the above case is not being followed.

91. The Respondents have also submitted that the present proceedings had been conducted in violation of the principles of natural justice as show cause notice had not been issued to the Respondents. Moreover, the investigation was initiated on the basis of the reference of the Secretary of this Authority to the Standing Committee who, unilaterally, misinterpreted submissions made by the Respondents in their communications to erroneously conclude admission of profiteering by the Respondents. The Respondents were also not given any chance to clarify their communication. Moreover, none of the recipients of the Respondents have complained of non-receipt of benefit of reduced rates. In this regard perusal of the record shows that the Respondents were duly given show cause notice on 15.04.2019 by this Authority on

the Report dated 05.04.2019 of the DGAP informing them that they have been alleged to have profiteered under Section 171 of the Act and they should explain why they should not be held liable for profiteering. A copy of the Report was also supplied to them in which detailed allegations and computations of profiteered amount had been made. Similar show cause notice was again given to the Respondents on 06.02.2019 on the receipt of the second Report from the DGAP after further investigation under Rule 133(4). Both the notices were duly received by the Respondents. Therefore, the allegation of not issuing show cause notice is incorrect. As mentioned in para supra two interactive sessions were held by this Authority under the powers conferred on it under Section 171(2) read with para 9 of the "Methodology & Procedure" framed by this Authority under Rule 126, with the Respondents to examine whether they have passed on the benefit of tax reduction or not. It was apparent from the letters dated 23.05.2018 and 04.07.2018 of the Respondents and the details of SKUs supplied by them that they had admitted that they had not passed on the benefit in terms of Section 171 and therefore, the Standing Committee was asked by this Authority to take further action under Rule 128(1). The letter dated 12.07.2018 was written by the Secretary of this Authority on the prima facie satisfaction of this Authority that the Respondents have apparently not passed on the benefit and it was not written by him on his own accord. There was no necessity of seeking clarification from the Respondents as they were insistent upon claiming that they have passed on the benefit and therefore, the only course left was to get their assertions investigated. The Respondents cannot

pocket the profiteered amount on the ground that no complaint had been received from their recipients. Such a complaint would not have been made by the distributors against their principals i.e. the Respondents as per the mutual appropriation of the profiteered amount. As per the provisions of Section 171 (2) and Para 9 of the "Methodology & Procedure" framed by this Authority under Rule 126 which empowers this Authority to take suo moto cognizance of all such cases where the benefits of rate reduction or ITC are required to be passed on, it is the onerous duty of this Authority to ensure that the benefit of tax reduction is passed on by the Respondents and accordingly the Respondent have been investigated. The action of taking suo moto cognizance has been approved vide order dated 10.02.2020 passed by the Hon'ble High Court of Delhi in W.P.(C) 969/2020, in the case of ***M/s Nestle India Ltd. & another v. Union of India & others*** in which the Hon'ble Court has observed that:-

"We, however, make it clear that this interim order shall not come in the way of the National Anti Profiteering Authority in cases where it has suo moto taken action." (Emphasis supplied)

92. The Respondents have further submitted that Rule 133 of the CGST Rules provided that this Authority could order the following action against the Respondents if they were held to have profiteered:-

a. reduction in prices;

b. return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest;

c. deposit such amount in Consumer Welfare Fund where the eligible person does not claim return of the amount or is not identifiable;

d. imposition of penalty as specified under the CGST Act; and

e. cancellation of registration under the CGST Act.

However, Rule 133 did not provide for issuance of a show cause notice to the person alleged to have contravened Section 171, before passing an order under Rule 133. Therefore, Rule 133 of the CGST Rules, to that extent was violative of principles of natural justice. In this context it is to be noted that as explained in para supra the Respondents were duly served show cause notices after receipt of the investigation Reports. The Notice dated 15.04.2019 clearly stated that it was proposed to take action against the Respondents under Section 29,122 to 127 of the CGST Act, 2017 read with Rule 21 and 133 of the CGST Rules, 2017. Therefore, it is abundantly clear that due notices were served on the Respondents to impose the consequences mentioned in Rule 133 which were duly received by them and hence there was no ground for issuing notice to the Respondents afresh. Moreover, there is neither any provisions nor repeated notices are required to be served on the Respondents including under Rule 133. Accordingly, the above claim of the Respondents is wrong. The Respondents have also cited the judgments of the Hon'ble Supreme Court and Hon'ble Madras High Court passed in the cases of ***Canara Bank and Others v. Debasis Das and Others***, ***Uma Nath Pandey and Others v. State of UP***, ***Collector***

of Central Excise v. ITC Ltd., Vasta Bio-Tech Pvt. Ltd. v. Assistant Commr., Dharampal Satyapal Ltd. v. Dy. Commissioner of C. Ex. and ***Union of India v. Hanil Era Textiles Ltd***. in their support. But since due show cause notices were given to the Respondents for imposition of consequences prescribed under Rule 133 the law settled in the above cases is not being relied.

93. The Respondents have also contended that the report of the DGAP was neither a show cause notice nor could it be treated as substitute to a show cause notice, however, it appeared that this Authority has considered the report of the DGAP as a show cause notice, which was not correct. In this connection it is stated that this Authority has served show cause notices twice on the Respondents as has been explained above asking them to explain why they should be not be held to have profiteered and why penalty should not be imposed on them for violation of the provisions of Section 171. The Respondents cannot dictate the contents of the notice nor notice can be given by mentioning 1383 SKUs supplied by them as well as millions of sale transactions conducted by them on which profiteering has been computed. Nowhere the Report submitted by the DGAP has been treated as the show cause notice. There is no provision under Rule 133 to serve notice to the Respondents and such a notice cannot be served at every stage of the proceedings as per the wishes of the Respondents. The Respondents have also not objected to the present proceedings at the very beginning on the ground of not having been served with a detailed notice and hence the present objection is nothing but an afterthought which cannot be accepted.

94. The Respondents have also submitted that the DGAP has made his computations for profiteering by using the base price data which has not been provided by the Respondents and no opportunity has been given to them to rebut the same. The Respondents have further submitted that unless the aforementioned information was made available to the Respondents, they could not defend their case. In this respect it would be appropriate to take note that the computation of the pre rate reduction base prices, commensurate prices, post rate reduction prices and the profiteered amount has been made by the DGAP on the basis of the data of sale transactions supplied by the Respondents themselves and the GSTR-1 and GSTR-3B Returns filed by them and hence the claim of the Respondents that they have not supplied the base data is frivolous. This Authority has supplied all the details of computation of the profiteered amount against which the Respondents have mounted a huge defence in their favour through a large number of oral and written submissions. The Respondents have also been heard at length by this Authority. Hence, the above contention of the Respondents is incorrect.

95. The Respondents have also stated that on the 2nd DGAP Report dated 31.01.2020 a notice dated 06.02.2020 has been issued to them in which no penalty has been proposed to be imposed. Accordingly, the Respondents were not making any further submissions on penal provisions.

96. The Respondents have also stated that in a few cases the DGAP has computed profiteering which was in excess of the reduction in the GST rate. They have further stated that the allegation of profiteering could

only be to the extent of reduction in the price as a result of reduction in the GST rate. They have also given illustration of their claim by submitting a Table by stating that if the pre rate reduction price of a SKU was Rs. 148.51 and rate of tax was 28% then an amount of Rs. 41.58 was chargeable as GST and the cum-tax price would be Rs. 190.09. In case the rate of tax was reduced to 18% the cum-tax price in the post reduction period would be Rs. 175.24 and hence the commensurate reduction would be Rs. 14.85. If the Respondents had reduced the cum-tax price to Rs. 185/- post-rate reduction, allegation of profiteering on such product could have been to the extent of Rs. 9.76 (difference between INR 185 and ideal price of INR 175.24). Further, in case the price of the product was not at all reduced by the Respondents and the Respondents continued to charge a cum-tax price of INR 190.09, it was the Respondents's understanding that they could be charged for profiteering to the extent of INR 14.85 (the difference between actual price of INR 190.09 and ideal price of INR 175.24). However, in no case the allegation of profiteering could exceed INR 14.85, as the same was beyond the scope of Section 171 of the CGST Act. They have also submitted a Table to substantiate their contention. It is further submitted by them that the additional increase in price was attributable to the business profits of the Respondents which was not within the scope of Section 171. The above claim of the Respondents is not only illogical but it is also illegal as while passing on the benefit of tax reduction they on the one hand are claiming to reduced the prices commensurately and on the other hand they are withdrawing the benefit by stating that the increase in price was on account of business profits. This ingenious

argument advance by the Respondents amounts to not passing on the benefit of tax reduction and hence the amount so claimed to be business profit is required to be added in the profiteered amount. Any price increase made by the Respondents on the eve of rate reduction cannot be distinguished as increase due to denial of benefit of tax reduction and due to addition of profit as such a distinction if allowed would amount to non-passing of the benefit as it nullifies and negates the passing of tax reduction benefit. The Respondents have also placed reliance on the case of ***Lifestyle Retail Pvt. Ltd.- Case No. 8/2018 dated 25.09.2018***, wherein this Authority has observed that it was not functioning as a 'price regulator'. The above clarification of this Authority is correct and hence, the Respondents cannot claim that this Authority was working as a price regulator as the Respondents cannot withdraw the benefit of tax reduction simultaneously while passing it.

97. The Respondents have also computed profiteering in excess of rate reduction, based on DGAP's calculations, in the computation sheets as per column BF of Annexure-3 attached to their submission filed on 09.06.2020, as **INR 24.51 Crore,** which cannot be reduced from the profiteered amount as any increase claimed to have been made on the basis of business profits amounts to negation of the benefit of tax reduction. They have also claimed that in case their submissions relating to the incorrect prices used for comparison by the DGAP for certain SKUs and benefits passed on by way of post supply price reductions / discounts (as per Para E of submissions) were also considered, then the quantum of profiteering in excess of rate reduction would also undergo revision as per column BG (Profiteering in excess of

rate reduction (based on DGAP's calculation, after revising Cat 0 and Cat 4 base prices) and column BH (Profiteering in excess of rate reduction based on post discount prices) respectively. In this connection it would be pertinent to mention that since the base prices used for comparison have been correctly computed and the benefit of tax reduction cannot be passed by way of post supply price reductions / discounts, accordingly, the profiteered amount computed as per columns BG and BH as per their submissions dated 09.06.2020 is absolutely misconceived, wrong and incorrect and hence the computations of the profiteered amount so made by the Respondents cannot be accepted.

98. The Respondents have further stated that the anti-profiteering provisions were invokable only when a registered person did not reduce the prices commensurately however, the Respondents have duly performed their obligation. They have increased their prices due to loss of the input tax credit and other commercial reasons which could not be examined as the same was not covered under Section 171. The above claim of the Respondents is wholly incorrect as they are required to pass on the benefit of tax reduction and not of ITC. The Respondents are still entitled to the full benefit of ITC which they were availing before the rate reduction. Therefore, the cannot increase their prices on the above grounds. Further, the DGAP has nowhere stated that on perusal of the invoices issued by the distributors/retailers to the ultimate consumers, it was observed that the base prices have been increased and the final selling prices of the products had remained same. Therefore there was no ground to provide such invoices to the

Respondents. The DGAP has recorded in his Reports that the Respondents have not reduced their prices on the basis of the invoices issued by them to their recipients. Therefore, the above contention is also incorrect. It is established from the investigation that the Respondents have not reduced their prices to their recipients and hence they are squarely responsible for not passing on the benefit of tax reduction.

99. It is also apparent from the record that the profiteered amount of Rs. 2,41,51,14,485/- is more than 0.89% of the total sales and hence the principle of **"de minimis non curat lex"** is not applicable in this case. Accordingly, the law settled in the cases of ***Morarjee Goculdas Spinning & Weaving. Co. Ltd. v. Commissioner Central Excise (1998) 102 ELT 420 (Tribunal), Maruti Udyog Ltd. v. Commissioner Central Excise (2004) 173 ELT 382 and Essar Steel India Ltd. v. Commissioner Central Excise (2015) 317 ELT 713 (Tri-Ahmd.)*** is not applicable in the facts of the present case.

100. Based on the above findings it is abundantly clear that the Respondents are liable to pass on the benefit of GST rate reduction from 28% to 18% as was notified by the Central and the State Governments vide Notification No. 41/2017-Central tax (Rate) dated 14.11.2017 w.e.f. 15.11.2017. It is also established that the Respondents have not passed on the benefit of above tax reduction to the ultimate customers in terms of Section 171(1) w.e.f. 15.11.2017 to 39.09.2018. On the basis of the pre rate reduction GST rate of 28% and the post rate reduction GST rate of 18% and the details of outward taxable supplies other than zero rated, nil rated and exempted supplies of the SKUs sold during the

period from 15.11.2017 to 30.09.2018, as have been supplied by the Respondents themselves, the amount of net higher sales realization due to increase in the base prices of the impacted SKUs, despite the reduction in the GST rate from 28% to 18% or the profiteered amount is determined as Rs. 2,41,51,14,485/- as per the provisions of Section 171(1) & (2) of the CGST Act, 2017 read with Rule 133(1) of the CGST Rules, 2017. The profiteered amount in respect of all the 3 Respondents is further determined as (i) Rs. 181,51,46,262/- in respect of the Respondent No. 1 i.e. M/s Proctor & Gamble Home Products (PGHP) Pvt. Ltd. (ii) Rs. 2,00,30,807/- in respect of the Respondent No. 2 i.e. M/s Proctor & Gamble Hygiene & Health Care (PGHH) Ltd. and (iii) Rs. 57,99,37,416/- in respect of the Respondent No. 3 i.e. M/s Gillette India Ltd. (GIL), on the sale transactions made by the above Respondents w.e.f. 14.11.2017 to 30.09.2018, which has been individually and collectively computed in respect of all the 33 States and Union Territories as per Annexure-6 attached to the Report of the DGAP dated 31.01.2020. The consolidated place of supply wise i.e. State/UT wise breakup of the total profiteered amount of Rs. 2,41,51,14,485/- is given in the Table below as per the above Annexure:-

State Name	Total Profiteering (Rs.)
Andaman Nicobar Islands	26,70,205
Andhra Pradesh	11,84,56,433
Arunachal Pradesh	6,52,319
Assam	3,86,91,768
Bihar	7,13,42,240
Chandigarh	24,72,685
Chattisgarh	2,48,50,574
Delhi	13,17,62,298
Goa	1,39,93,388
Gujarat	14,84,91,508
Haryana	10,32,22,549

Himachal Pradesh	53,70,479
Jammu & Kashmir	2,12,77,761
Jharkhand	3,30,18,668
Karnataka	18,93,66,820
Kerala	7,12,40,333
Madhya Pradesh	6,26,61,366
Maharashtra	34,45,85,159
Manipur	37,07,951
Meghalaya	41,10,394
Mizoram	24,75,171
Nagaland	33,32,336
Orissa	4,38,01,116
Puducherry	46,11,560
Punjab	7,46,00,558
Rajasthan	7,86,14,977
Tamilnadu	21,19,64,315
Telangana	13,69,84,859
Tripura	46,90,362
Uttar Pradesh	28,74,31,916
Uttrakhand	2,26,21,786
West Bengal	15,20,40,632
Total	**2,41,51,14,485**

101. Accordingly, the Respondents are directed to reduce prices of all the SKUs commensurately in respect of which profiteering has been computed as per Annexure-6 forthwith in terms of Rule 133 (3) (a) of the above Rules read with Section 171(1) of the above Act.

102. The Respondents are also directed to deposit 50% of the profited amount of Rs. 2,41,51,14,485/- (Rs. 181,51,46,262/- in respect of Respondent No. 1 + Rs. 2,00,30,807/- in respect of Respondent No. 2 + Rs. 57,99,37,416/- in respect of Respondent No. 3) in the Central Consumer Welfare Fund and the balance 50% in the Consumer Welfare Funds of the 33 States/UTs mentioned supra as per the provisions of Rule 133 (3) (c) of the above Rules read with Section 171(1) as per Annexure-6, since the recipients who are millions of ordinary customers 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 Respondents from their recipients till the date of deposit

in the respective Consumer Welfare Funds. The above amount of Rs. 2,41,51,14,485/- along with the 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 Commissioners of the Central and the State Tax of the State/UT Governments as per the provisions of their CGST/SGST Acts.

103. It is also revealed from the record that there are reasonable grounds to believe that the Respondents have apparently not passed on the benefit of tax rate reduction w.e.f. 01.10.2018 onwards although they have consistently maintained during the course of the present proceedings that they have passed on the benefit w.e.f. 15.11.2017. However, they have not produced any reliable and cogent evidence to prove that they have passed on the benefit till the pendency of these proceedings before this Authority. All the claims of the Respondents by passing on the benefit by way of post rate reduction discounts, reduction in the post rate reduction prices, increase in the Grammage/quantity, passing on of the more benefit in respect of certain SKUs and charging of lower prices than the average prices etc. have been found to be wrong and against the provisions of Section 171(1)as well as Article 14 of the Constitution. therefore, the DGAP is directed to carry out further investigation to compute the profiteered amount till the date it has been passed on by the Respondents and furnish Report as per the provisions of Rule 129(6).

104. It is also evident from the record and the admission of the Respondents that the DGAP has not computed the profiteered amount on the stock which was lying with the Respondents and their distributors and retailers

including the modern retailers as on 15.11.2017 when the rate of tax was reduced. Accordingly, the DGAP is directed to further investigate and compute the profiteered amount on the above stock and submit his Report as per the provisions of Rule 129(6).

105. It is further evident from the record that the Respondents have not affixed stickers on the SKUs which were manufactured by them after 15.11.2017 and also on the stock which was lying with them and their retailers including the modern retailers as on 15.11.2017, as per the direction conveyed vide letter No. I WM-10(31)/2017 dated 16.11.2017, issued by the Ministry of Consumer Affairs, Food and Public Distribution, Government of India. Therefore, the DGAP is directed to supply a copy of this order to the concerned authorities responsible for taking cognizance of the violations of the Legal Metrology (Packaged Commodities) Rules, 2011 framed under the Legal Metrology Act, 2009, for taking appropriate action against the Respondents and furnish his report accordingly.

106. 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 Respondents as ordered by this Authority is deposited in the CWFs of the Central and the concerned 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 through the DGAP.

107. It is also evident from the above narration of the facts that the Respondents have denied benefit of rate reduction to the buyers of their SKUs in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and they have thus resorted to profiteering. Hence, they have committed an offence for violation of the provisions of Section 171 (1) during the period from 15.11.2017 to 30.09.2018 and therefore, they are 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 30.09.2018 when the Respondents had committed the above violation and hence, the penalty prescribed under Section 171 (3A) cannot be imposed on the Respondents retrospectively. Accordingly, notice for imposition of penalty is not required to be issued to the Respondents.

108. 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 31.01.2020, the order was to be passed on or before 30.07.2020. 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.

109. A copy of this order be sent to the Applicant, the Respondents 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

F. No. 22011/NAA/30/P&G/2019/6101-6158 Date: 24.11.2020

Copy To:-

1. M/s Procter & Gamble Group, P & G Plaza, Cardinal Gracias Road, Chakala, Mumbai- 400099.
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.
3. Commissioner of commercial Taxes, office of the chief Commissioner of state Tax, eedupugallu, krishna district, Andhra Pradesh.
4. Commissioner of commercial Taxes, Department of Tax & Excise, kar bhawan, itanagar, Arunachal Pradesh - 791 111.
5. Commissioner of commercial Taxes, cct@odishatax.gov.in.
6. Commissioner of commercial Taxes, office of the Commissioner of Taxes, Government of Assam, kar bhawan, ganeshpuri, dispur, Guwahati - 781 006.
7. Commissioner of commercial Taxes, additional Commissioner (GST), commercial Tax Department, ground floor, vikas bhawan, baily road, Patna – 800 001

8. Commissioner of commercial Taxes, commercial Tax, SGST Department, behind raj bhawan, civil lines, Raipur - 492 001
9. Commissioner of commercial Taxes, office of Commissioner of commercial Tax, vikrikar bhavan, old high court building, panji, Goa- 403 001
10. Commissioner of commercial Taxes, c-5, Rajya kar bhavan, near times of India, ashram road, Ahmedabad.
11. Commissioner of commercial Taxes, vanijya bhavan, plot no. 1-3, sector-5, panchkula. Pin - 134 151.
12. Commissioner of commercial Taxes, Excise & Taxation Commissioner, Government of Himachal Pradesh, b-30, sda complex, kasumpati, Shimla.
13. Commissioner of commercial Taxes, Excise & Taxation complex, rail head Jammu.
14. Commissioner of commercial Taxes, commercial Taxes Department, project bhawan, dhurva, Ranchi- 834 004.
15. Commissioner of commercial Taxes, vanijya therige karyalaya, 1st main road, Gandhinagar, Bangalore- 560 009
16. Commissioner of commercial Taxes, Government secretariat, Thiruvananthapuram -695001.
17. Commissioner of commercial Taxes, Moti Bangla compound, m.g. Road, Indore
18. Commissioner of commercial Taxes, GST bhavan, mazgaon, Mumbai- 400 010
19. Commissioner of commercial Taxes, office of the Commissioner of state Tax, banijyakar bhawan, old secretariat compound, cuttack - 753 001.
20. Commissioner of commercial Taxes, office of Excise and Taxation Commissioner, bhupindra road, patiala- 147 001
21. Commissioner of commercial Taxes, kar bhavan, ambedkar circle, jaipur, rajasthan - 302 005.
22. Commissioner of commercial Taxes, sitco building, block-d, above a.g. Office, gangtok, east, sikkim - 737 101.
23. Commissioner of commercial Taxes, papjm building, greams road, chennai – 600 006.
24. Commissioner of commercial Taxes, o/o the Commissioner of state Tax, ct complex, nampally station road, hyderabad - 500 001.
25. Commissioner of commercial Taxes, office of the Commissioner of Taxes & Excise, head of the Department, revisional authority, p.n. Complex, gurkhabasti, agartala - 799 006.

26. Commissioner of commercial Taxes, office of the Commissioner, commercial Tax, u.p. Commercial Tax head office vibhuti khand, gomti nagar, lucknow (u.p)
27. Commissioner of commercial Taxes, state Tax Department, head office uttarakhand, ring road, near pulia no. 6, natthanpur, dehradun.
28. Commissioner of commercial Taxes, 14, beliaghata road, kolkata - 700 015.
29. Commissioner of commercial Taxes, deptt of trade & Taxes, vyapar bhavan, ip estate, new delhi-2 pin: 110 002
30. Commissioner of commercial Taxes, first floor, 100 feet road, ellapillaichavady, pondicherry - 605 005.
31. Chief Commissioner of central Goods & Services Tax, Bhopal zone 48, administrative area, arera hills, hoshangabad road, Bhopal M.P. -462 011
32. Chief Commissioner of central Goods & service Tax c.r.building rajaswa vihar, bhubaneswar-751007
33. Chief Commissioner of central Goods & service Tax Chandigarh zone C.R. Building, plot no.19a, sector17c, chandigarh-160017
34. Chief Commissioner central Goods & service Tax , cochin zone C.R.building, i.s.press road, Ernakulum cochin-682018
35. Chief Commissioner of central Goods & Services Tax Delhi zone C.R. Building, I.P. Estate, new delhi- 110 109
36. Chief Commissioner of central Goods & service Tax, Hyderabad zone GST bhavan, I.B.stadium road, basheer bagh, Hyderabad -500 004
37. Chief Commissioner of central Goods & Services Tax Jaipur zone, new central revenue building, statue circle, Jaipur -302 005
38. Chief Commissioner of central Goods & Services Tax, Meerut zone opp. Ccs university,mangal pandey nagar, meerut-250 004.
39. Chief Commissioner of central Goods & Services Tax, Mumbai zone GST building, 115 m.k. Road, opp. Churchagate station, mumbai-400020
40. Chief Commissioner of central Goods & Services Tax, Telangkhedi road, civil lines, Nagpur -440001
41. Chief Commissioner of central Goods & Services Tax Panchkula sco 407408, sector-8, Panchkula
42. Chief Commissioner of central Goods & Services Tax, Pune zone GST bhawan ice house, 41a, sasoon road, opp. Wadia college, pune-411001
43. Chief Commissioner of central Goods & Services Tax, (Ranchi zone) 1st floor, C.R. Building, (annex) veer chand patel path Patna -800001
44. Chief Commissioner of central Goods & Services Tax, Shillong zone north eastern, 3rtd floor, crescens building, MG Road, shilling -793 001

45. Chief Commissioner of central Goods & Services Tax, Vadodara zone 2nd floor, central Excise building, race course circle, Vadodara -390 007
46. Chief Commissioner of central Goods & Services Tax Visakhapatnam zone GST Bhavan, port area, Visakhapatnam -530 035.
47. Chief Commissioner of central Goods & Services Tax Bengaluru zone C.R. Building Queen's Road, Bengaluru.
48. Chief Commissioner of central Goods & Services Tax, Ahmedabad Zone, GST Bhavan, Revenue Marg, Ambawadi, Ahmedbad -380015.
49. Chief Commissioner of central Goods & Services Tax, Chennai Zone, 26/11, Mahatma Gandhi Road, Nungambakkam, Chennai – 600034.
50. Chief Commissioner of central Goods & Services Tax, Kolkata Zone, 2nd Floor, GST Bhavan, 180, Shantipally, R.B. Connector, Kolkata – 700107.
51. Chief Commissioner of central Goods & Services Tax, Lucknow Zone, 7-A, Ashok Marg, Lucknow – 226001.
52. Chief Commissioner of central Goods & Services Tax, Manipur Zone, O/o the Commissioner, CGST, CGST Bhavan, Al-Noor Tower, Kabo Leikai, Nongpok 25/A, North AOC, Imphal East.
53. Chief Commissioner of central Goods & Services Tax, Mizoram Zone, O/o the Commissioner, GST & CX Commissionerate, Central Tax, Building, House No. D-31A, M. G. Road, Upper Khatla, Aizawl – 796001.
54. Chief Commissioner of central Goods & Services Tax, Nagaland Zone, O/o the Commissioner, GST & CX Commissionerate, Naga Cemetery Road, Khermahal, Dimapur – 797112.
55. Commissioner of Taxes, Manipur, Department of Taxes, Old Guwahati, High Court Complex, North AOC, Imphal West, Manipur – 795001.
56. Commissioner of Taxes, Meghalaya, O/o the Commissioner, GST & CX Commissionerate, Morellow Compound, M. G. Road, Shillong-793001.
57. Additional Commissioner of State Tax, Mizoram, O/o the Commissioner of State Tax, New Secretariat Complex, Aizawl – 796005.
58. NAA website/Guard File.

A. K. GOEL
SECRETARY, NAA