BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	82/2020
Date of Institution	30.01.2020
Date of Order	10.12.2020

In the matter of:

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

Applicant

Versus

M/s Hungry Eyes, 1st floor, A-103, Aster Tower Film City Road, Malad East, Maharashtra -400097.

Respondent

Quorum:-

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

Present:-

1. None for the Applicant.
2. Sh. Amit Kumar, Authorized Representative for the Respondent.

ORDER

1. The present Report dated 29.01.2020 has been furnished by the Director-General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case are that a reference was received by the DGAP from the Standing Committee on Anti-Profiteering on 02.05.2019 recommending a detailed investigation in respect of an application alleging profiteering in respect of restaurant service supplied by the Respondent (Franchisee of M/s Subway Systems India Pvt. Ltd.) after a prima-facie examination by the Maharashtra State Screening Committee on Anti-profiteering under Rule 128 (2) of the CGST Rules 2017. Vide the application, it has been alleged that the Respondent had increased the base prices of his products and had not passed on the benefit of reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017 vide Notification No.46/2017-Central Tax (Rate) dated 14.11.2017 by way of commensurate reduction in prices, in terms of Section 171 of the Central Goods and Services Tax Act, 2017.

2. On receipt of the aforesaid reference from the Standing Committee on Anti-profiteering, a Notice under Rule 129 of the Rules was issued by the Director-General of Anti-profiteering on 10.05.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017 had not been passed on to his recipients by way of commensurate reduction in prices and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the Notice as well as to furnish all documents in support

of his reply. Further, the Respondent was allowed to inspect the non-confidential evidence/information which formed the basis of the said Notice, during the period 20.05.2019 to 22.05.2019. However, the Respondent did not avail of the said opportunity.

3. The DGAP has reported that the period covered by the current investigation was from 15.11.2017 to 31.03.2019.

4. The time limit to complete the investigation was extended upto 01.02.2020 by this Authority, in terms of Rule 129(6) of the Rules, vide Order dated 31.10.2019.

5. The DGAP has also reported that in response to the Notice dated 10.05.2019 and subsequent reminders, the Respondenthad submitted his reply vide e-mails/letters dated 19.06.2019, 22.07.2019, 27.07.2019, 07.10.2019, 10.10.2019, 19.10.2019, 22.11.2019,and 25.11.2019.

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

   (a) Sales Details for the period from July 2017 to March 2019.

   (b) Price Lists of products (pre and post 15.11.2017).

   (c) GSTR-1 and GSTR-3B Returns for the period from July 2017 to March 2019.

   (d) Electronic Credit Ledger for the period from July 2017 to March 2019.

(e) Summary details of Input Credit Register for the period from July 2017 to November 2019.

7. The DGAP has also reported that the reference received from the Standing Committee on Anti-profiteering, the various replies of the Respondent, and the documents/evidence on record had been carefully scrutinized. The main issues to be examined were whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the Central Goods and Services Tax Act, 2017.

8. The DGAP has further reported that at the outset, it was noted that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the restaurant service from 18% to 5% w.e.f. 15.11.2017 with the condition that the input tax credit on the goods and services used in supplying the service was not to be taken, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017. Before inquiring into the allegation of profiteering, it was important to examine Section 171 of the Central Goods and Services Tax Act, 2017 which governed the anti-profiteering provisions under GST. Section 171(1) reads as "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement was abundantly clear that in the event of a benefit of input tax credit or reduction in the rate of tax,

there must be a commensurate reduction in the prices of the goods or services. Such reduction could obviously be in money terms only so that the final price payable by a consumer got reduced. That was the legally prescribed mechanism for passing on the benefit of input tax credit or reduction in the rate of tax to the consumers under the GST regime. Moreover, it was also clear that the said Section 171 simply did not provide a supplier of goods or services, any other means of passing on the benefit of input tax credit or reduction in the rate of tax to the consumers.

9. The DGAP has reported that it was alleged that the Respondent did not pass on the benefit of the reduction in the GST rate to the recipients. It was seen that the Respondent was dealing with a total of 233 items while supplying restaurant services before 15.11.2017. It was also seen that the Respondent had been dealing with a total of 280 items during the period 15.11.2017 to 31.03.2019. The DGAP has compared the average selling prices as per details submitted by the Respondent for the period 01.07.2017 to 14.11.2017, and the actual selling prices post rate reduction, i.e., w.e.f. 15.11.2017 and it was found that the GST rate of 5% had been charged on the increased base prices of 170 items, which established that though the tax amount was computed @ 18% before 15.11.2017 and @ 5% w.e.f. 15.11.2017, the fact was that because of the increase in base prices, the cum-tax price paid by the consumers was not reduced commensurately, despite the reduction in the GST rate. Therefore, the only remaining point for determination was whether the increase in base prices was solely on account of the denial of the input tax

credit. Despite several reminders, the Respondent had failed to submit the sample copies of Invoices pre and post rate reduction.

10. The DGAP has submitted that the assessment of the impact of denial of the input tax credit, which was an uncontested fact, required the determination of the input tax credit in respect of "Restaurant Service" as a percentage of the taxable turnover from the outward supply of "products" during the pre-GST rate reduction period. To illustrate, if the input tax credit in respect of restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017, was upto 10%, one could conclude that there was no profiteering. However, if the increase in the pre-GST rate reduction base price w.e.f. 15.11.2017, was by 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Therefore, this exercise to work out the input tax credit in respect of restaurant service as a percentage of the taxable turnover from products during the pre-GST rate reduction period had to be carried out, though by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. The DGAP has done this because there was no reversal of input tax credit on the closing stock of inputs/input services and capital goods on 14.11.2017 by the Respondent, which was required under the provisions of Section 17 of the Central Goods and Services Tax Act, 2017 read with Rule 42 and 43 of the Rules.

11. The DGAP has also submitted that the ratio of input tax credit to the net taxable turnover had been taken for determining the impact of denial of input tax credit (which was available to the Respondent till 31.10.2017). On this basis, the DGAP has found that input tax credit amounting to ₹3,35,471/- was available to the Respondent during the period July 2017 to October 2017 which was 8.85% of the net taxable turnover of restaurant service amounting to ₹37,90,741/- supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said input tax credit was not available to the Respondent. A summary of the computation of the ratio of input tax credit to the taxable turnover of the Respondent in the pre-GST period was furnished by the DGAP as is given in Table-A below:

TABLE-A

(Amount in ₹)

Particulars	Jul-17	Aug-17	Sept.-2017	Oct.-2017	Total
ITC Availed as per GSTR-3B (A)	83,555	92,187	83,383	76,346	3,35,471
Total Outward Taxable Turnover as per GSTR-3B (B)	10,65,175	8,91,019	9,36,894	8,97,653	37,90,741
The ratio of Input Tax Credit to Net Outward Taxable Turnover (C)= (A/B*100)					**8.85%**

12. The DGAP has further intimated that the analysis of the details of item-wise outward taxable supplies during the period from 15.11.2017 to 31.03.2019, revealed that the Respondent had increased the base prices of 168 items supplied as a part of restaurant service to make up for the denial of input tax credit post

GST rate reduction. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period 01.07.2017 to 14.11.2017 (pre-GST rate reduction) and 15.11.2017 to 31.03.2019 (Post-GST rate reduction) were compared and it was established that the Respondent had increased the base prices by more than 8.85% i.e., by more than what was required to offset the impact of denial of the input tax credit in respect of 168 items sold during the same period. Thus, the DGAP has concluded that in respect of these items, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on. It was also clear that there was no profiteering in respect of the remaining items on which there was either no increase in the base prices or where the increase in the base prices was less than or equal to the denial of the input tax credit, or in the case of those products which were launched for the first time after the post-GST rate reduction.

13. The DGAP reported that having established the fact of profiteering to the extent aforementioned, the next step was to quantify the same. For that purpose, only those items where the increase in base prices was more than what was required to offset the impact of denial of the input tax credit, had been considered. The calculation has been explained in Table-B below in case of one item " 12'' Aloo Patty Sub" for which average base price had been calculated during the pre-GST rate reduction period of 01.11.2017 to 14.11.2017 and then profiteering had been calculated for post-GST rate reduction invoice No. 1/A-24756 dated 15.11.2017: -

Table-B (Amount in Rs.)

Name of item (A)	12"Aloo Patty Sub
Total quantity sold from 01.11.2017 to 14.11.2017 (B)	14
Sum of taxable value from 01.11.2017 to 14.11.2017 (C)	3430
Average base price from 01.11.2017 to 14.11.2017 (D=C/B)	245
Base price with denial of input tax credit @8.85% (E=D*1.0885)	266.68
GST @ 5% (F= E*5%)	13.34
Commensurate price to be charged w.e.f. 15.11.2017 (G=E+F)	280.02
Selling price per unit as per Invoice No. 1/A-24756 dated 15.11.2017 (H)	295.00
Total profiteering (I=H-G)	14.98

14. The DGAP has further reported that on the basis of the scrutiny of the Respondent's records (item-wise supply invoices, turnover from supplies other than zero-rated, nil rated, and exempted supplies, ITC availability, and GST returns for the period 15.11.2017 to 31.03.2019), the impact of denial of the input tax credit was worked out. Thereafter the said impact of denial of ITC and the impact of the tax rate reduction were considered to compute the net impact thereof on item-wise prices of various items supplied by the Respondent based on which the item-wise commensurate prices were worked out. The quantum of profiteering was calculated based on the comparison of the said commensurate item-wise prices (average base prices) that ought to have been charged by the Respondent with the actual sale prices of the various items supplied by him in the post-tax-rate reduction period. The profiteered amount worked out to be **₹6,66,700/-**(including GST on the base profiteered amount).The details of the computation were given in the Annex-12 of his report. The DGAP has also intimated that based on the details of outward

supplies of the restaurant service submitted by the Respondent, it was observed that the said service had been supplied by the Respondent in the State of Maharashtra only.

15. The DGAP has also claimed that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling prices or by way of not reducing the selling prices of the products commensurately, despite a reduction in GST rate from 18% to 5% w.e.f. 15.11.2017 stood established against the Respondent and the extent of profiteering was ₹6,66,700/- (inclusive of GST). Given the aforementioned findings, it appeared that Section 171(1) of the Central Goods and Services Tax Act, 2017 requiring 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",* has been contravened in the present case.

16. The above Report of the DGAP was considered by this Authority in its sitting held on 04.02.2020 and it was decided to hear the Respondent on 28.02.2020. The Respondent vide his email dated 27.02.2020 requested that his case be heard on 03.03.2020. The said request was allowed by this Authority vide Order dated 28.02.2020. The case was called for hearing on 03.03.2020 and Sh. Amit Kumar, Authorized representative, represented the Respondent.

17. The Respondent,vide his written submissions dated 03.03.2020, has made the following contentions:-

a. That the DGAP in his report dated 29th January 2020 has reported that average prices during the period from 01.11.2017 to 14.11.2017 has been compared with actual prices post GST rate reduction which was completely arbitrary and there was no uniformity in the mechanism adopted; that it was very common in the restaurant business to offer discretionary discounts to the customers and these discounts largely depended on market practices but all discounts were discretionary and depending upon the sales, inventory position, competitor's strategy, market penetration, customers' loyalty, or other similar factors; that giving a discount was the norm in this competitive world and depended on various business factors; that it was the right of the business to decide the quantum of discount and period that needed to be given to sustain in the competitive markets and attract more customers; that businesses also have the right to withdraw the discounts and other promotional offers any time and there was no rule governing that any deal or discount could not be withdrawn until the expiry of a specified period; that the DGAP has completely ignored the fact that discounts were given under special circumstances only and has instead calculated the average prices based on the total sales, including the discounted as well as normal sales, for the pre-tax rate reduction period from 01.11.2017 to 14.11.2017; that since he was offering discounts regularly and every year in the pre-tax rate reduction period and since he continued to do so as part of his sales promotion, DGAP ought to have calculated the average base

prices of the various items supplied by him only on the basis of the normal sales (non discounted sales) made by him during the period 01.11.2017 to 14.11.2017; that the pre-tax rate reduction average price (without considered discounted sales) ought to have been compared with the post tax rate reduction average price since the basis of such a comparison should have been the same; that the DGAP has improperly calculated the weighted average price for the 83 items being supplied in the pre-tax rate reduction period by taking into account the sales made in the period from July 2017 to October 2017 since the DGAP could not find any sale of these 83 items in the 01.11.2017 to 14.11.2017 period and that this has been done by the DGAP without giving any explanation; that thus, instead of taking a uniform period for the all the items being supplied by him in the pre-tax rate reduction period, the DGAP has improperly considered different periods for different items being supplied without providing any reasonable explanation; that while calculating the quantum of profiteering, the DGAP has even ignored the fact that prices of the items supplied by him had been revised before the date of tax rate reduction although there were no sales of these items during the 01.11.2017 to 14.11.2017 period; that the DGAP ought to have ideally considered the item-wise base prices existing on 15.11.2017 for calculating the amount of profiteering; that a list of such items where the DGAP has considered the sales made prior to the 01.11.2017 to 14.11.2017 period was given in the chart below:-

CHART

SL Number	Product Name	Base Price	Base Price Month
1	12" Aloo Patty Flat Bd	245.00	Oct'17
2	12" Chatpata Chana Patty Sub	225.00	Oct'17
3	12" Green Peas Patty Sub	225.00	Oct'17
4	12" Rst Chicken Flat Bd	290.00	Oct'17
5	12" Veggie Delite Flat Bd	225.00	Oct'17
6	12" Western Egg Bkfst Sub	205.00	Oct'17
7	6" Chicken Slice Flat Bd	160.00	Oct'17
8	6" Chicken Tandoori Flat Bd	160.00	Oct'17
9	6" Chicken Slice Egg Bkfst S	110.00	Oct'17
10	6" Mexican Bean Patty Su	120.00	Oct'17
11	6" Turkey Chicken Slic	165.00	Oct'17
12	6" Veggie Delite Flat Bd	120.00	Oct'17
13	6" Veggie Patty Flat Bd	135.00	Oct'17
14	B.M.T. Extr FT	50.00	Oct'17
15	Chatpata Chana Patty Wr	59.00	Oct'17
16	Chicken Seekh Add Ft	100.00	Oct'17
17	Chicken Slice Add 6in	50.00	Oct'17
18	Chicken Tandoori Ex	50.00	Oct'17
19	Chicken Tandoori Ext	50.00	Oct'17
20	Chicken Tandoori Extr	50.00	Oct'17
21	Chicken Teriyaki	50.00	Oct'17
22	Chicken Teriyaki Extr	50.00	Oct'17
23	Chicken Teriyaki Sala	215.00	Oct'17
24	HaraBharaKabab Extr6	40.00	Oct'17
25	Rst Chicken Portn	50.00	Oct'17
26	SOTD 6in Aloo Pat & Ckn	75.63	Oct'17

27	SOTD 6in Crn Pea Tun	110.00	Oct'17
28	Tuna Add 6 in	50.00	Oct'17
29	Tuna Add Ft	100.00	Oct'17
30	Turkey Chicken Sl	100.00	Oct'17
31	Turkey Chicken Slic	100.00	Oct'17
32	Turkey Extr 6	50.00	Oct'17
33	Veggie Patty Add 6 in	40.00	Oct'17
34	Veg Shammi Add 6 in	40.00	Oct'17
35	12 Cookies	350.00	Sept'17
36	12" Chicken Slice Egg Bkfst S	205.00	Sept'17
37	12" Paneer Tikka Flat Bd	245.00	Sept'17
38	6" Aloo Patty Flat Bd	135.00	Sept'17
39	6" Chicken Slice Egg Bkfst F	110.00	Sept'17
40	6" ChknTikka Flat Bd	160.00	Sept'17
41	6" Corn & Peas Flat Bd	135.00	Sept'17
42	6" Egg Cheese Bkfst Flat	110.00	Sept'17
43	6" Hara Bhara Kabab Flat Bd	120.00	Sept'17
44	6" Subway Club Flat Bd	165.00	Sept'17
45	6" Turkey Flat Bd	165.00	Sept'17
46	B.M.T. Add Ft	100.00	Sept'17
47	Chatpata Chana Patty Add	40.00	Sept'17
48	Chicken Slice Add Ft	100.00	Sept'17
49	Chicken Teriyaki Add 6i	50.00	Sept'17
50	Chicken Teriyaki Portn	50.00	Sept'17
51	Corn & Peas Extr 6	40.00	Sept'17
52	Green Peas Patty Sub	225.00	Sept'17
53	Hara Bhara Kabab Add 6i	40.00	Sept'17
54	Hara Bhara Kabab Extr FT	85.00	Sept'17
55	Liquid Egg Add 6 in	26.00	Sept'17

56	Rst Chicken Add Ft	100.00	Sept'17
57	Turkey Chicken Slice A	50.00	Sept'17
58	Veggie Patty Add Ft	85.00	Sept'17
59	12" Veg Shammi Flat Bd	245.00	Aug'17
60	6" Chicken Seekh Flat Bd	160.00	Aug'17
61	6" Egg Cheese (Liquid) B	110.00	Aug'17
62	6" Westn Omlt (Liq) Bkfst	110.00	Aug'17
63	Chicken Slice Extr FT	100.00	Aug'17
64	Egg Add Ft	53.00	Aug'17
65	Hara Bhara Kabab Add 6	40.00	Aug'17
66	Mexican Bean Patty E	40.00	Aug'17
67	SOTD 6in Aloo Patty o	105.00	Aug'17
68	SOTD 6in Aloo Patty or	105.00	Aug'17
69	SOTD 6in Chatpata or Ck	105.00	Aug'17
70	SOTD 6in Ckn Slice or M	105.00	Aug'17
71	SOTD 6in Ckn Tik or Cor	105.00	Aug'17
72	SOTD 6in Corn Peas	105.00	Aug'17
73	SOTD 6in Corn Peas or	105.00	Aug'17
74	SOTD 6in Hara Bhara or	105.00	Aug'17
75	SOTD 6in Veg Shami or C	105.00	Aug'17
76	Tuna Extr FT	100.00	Aug'17
77	Veggie Patty Extr 6	40.00	Aug'17
78	12" Chicken Tandoori Flat Bd	290.00	July'17
79	6" Chicken Teriyaki Flat Bd	165.00	July'17
80	6" Tuna Flat Bd	165.00	July'17
81	Bottled Soda 600 ml	59.50	July'17
82	Hara Bhara Kabab Add Ft	85.00	July'17
83	Hara Bhara Kabab Extr	40.00	July'17

b. That the GST rate was reduced on restaurant service from 18% to 5% without the benefit of Input tax credit effective from 15.11.2017; that the DGAP has calculated the profiteering of Rs. 6,66,700/- for the period from 15.11.2017 to 31.03.2019 which was 17 months approximately; that even though the GST rate was reduced only in November 2017, DGAP has inappropriately considered all the price revisions effected by him (the Respondent) after 15.11.2017 till the end of the investigation period, i.e. 31.03.2019, for calculation of the profiteered amount, completely ignoring the fact that he had the right to increase his product prices on account of various reasons other than tax; that the taxes were just one of the several elements that he was factoring for fixing the prices of his items; that it was pertinent to state that the right to trade was a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India and the right to trade included the right to determine prices and such right which had been granted by the Constitution of India could not be taken away without any explicit authority under the Law; that therefore, any form of price control was a violation of Article 19(1)(g) of the Constitution of India; that due to incorporation of the higher item-wise prices charged by him after he had increased his product prices in January 2019 after 15 months of the GST rate reduction, the profiteered amount has increased substantially in the months of February, 2019 and March, 2019 when compared with the monthly figures of the period from 01.07.2017 to 31.03.2019 because he had revised the prices of his products/ items in

January 2019 to offset general inflation and higher expenses; that as per the DGAP's report, the quantum of profiteering was 3.19% of his turnover for the entire investigation period before February 2019, but for the period February- March 2019, it rose significantly to 6.53% of the turnover; that the same was reflected in the Chart below:-

Month wise Comparison Chart

Profiteered Amount Analysis month-wise							
Month	Total Profiteered Amount	Total Taxable Turnover	Profiteering as a percentage of the Turnover	Month	Total Profiteered Amount	Total Taxable Turnover	Profiteering as a percentage of the taxable Turnover
Nov'17	19,904.99	534,138.16	3.73	Aug'18	42,298.78	1,295,154.64	3.27
Dec'17	35,480.87	1,008,156.48	3.52	Sept'18	40,782.98	1,226,923.81	3.32
Jan'18	36,690.29	1,054,965.76	3.48	Oct'18	37,228.09	1,280,354.29	2.91
Feb'18	31,073.44	993,298.62	3.13	Nov'18	31,740.65	1,107,416.50	2.87
Mar'18	33,966.52	1,102,907.11	3.08	Dec'18	32,863.87	1,121,431.57	2.93
Apr-18	33,364.22	1,065,751.06	3.13	Jan'19	34,879.86	1,086,010.06	3.21
May'18	34,092.86	1,076,779.77	3.17	Feb'19	78,793.55	1,171,642.86	6.73
June'18	31,800.00	997,419.76	3.19	Mar'19	77,011.38	1,219,328.57	6.32
July'18	34,727.90	1,133,067.62	3.06				
Total	291,101.10	8,966,484.34			375,599.15	9,508,262.30	

c. That in his case, the GST rate reduction from 18% to 5% without the benefit of Input tax credit vide notification number 46/2017-Central Tax (rate) was effective from 15th November 2017 and thereafter there was no such change in tax for restaurant service. However, DGAP has calculated profiteered amount till

June-2019 and compared the base price which were existing on 14.11.2017 with actual Invoice prices till June-2019 and he has completely ignored the fact that business was having fundamental right to increase the prices of its products and he had increased the prices of his products after substantial period approximately 15 months from the date of rate reduction to meet out general inflation and other business related expenditure, that the DGAP was working like a price controlling authority and that there was no stipulation in the statute prescribing the mechanism to be followed by businesses for revision of prices and up to what period prices of products could not be increased.

d. That the amount of profiteering computed by the DGAP included the element of 5% GST which had been paid to the Governments as CGST and SGST; that according to the DGAP, not only the base price should have been reduced but the GST paid should also have been proportionately reduced but fact remained that the entire GST collected by him from the recipients/ customers has already been deposited with the Government of India; that therefore, the addition of 5% GST to the basic profiteered amount was improper and should be removed and that the amount of said excess GST amount should be recovered from the respective Governments and that accordingly his liability would stand reduced by Rs. 31,748/- on this account as shown in the monthly summary in the Chart below:-

CHART

Impact due to Inclusion of GST Amount			
Month	**Profiteered Amount as per DGAP Report-(A)**	**GST Amount Included in Profiteered Amount- (B)**	**Profiteered Amount excluding GST=(C=A-B)**
Nov'17	19,904.99	947.86	18,957.14
Dec'17	35,480.87	1,689.57	33,791.30
Jan'18	36,690.29	1,747.16	34,943.14
Feb'18	31,073.44	1,479.69	29,593.75
Mar'18	33,966.52	1,617.45	32,349.07
Apr'18	33,364.22	1,588.77	31,775.45
May'18	34,092.86	1,623.47	32,469.39
Jun'18	31,800.00	1,514.29	30,285.71
Jul'18	34,727.90	1,653.71	33,074.19
Aug'18	42,298.78	2,014.23	40,284.55
Sept'18	40,782.98	1,942.05	38,840.93
Oct'18	37,228.09	1,772.77	35,455.32
Nov'18	31,740.65	1,511.46	30,229.19
Dec'18	32,863.87	1,564.95	31,298.93
Jan'19	34,879.86	1,660.95	33,218.91
Feb'19	78,793.55	3,752.07	75,041.47
Mar'19	77,011.38	3,667.21	73,344.18
	666,700.25	31,747.63	634,952.62

e. That as per his franchisee agreement with his franchisor, he was under a legal obligation to pay 8% on net sales towards royalty and 4.5% towards advertisement charges to the franchisor, M/s Subway Systems India Private Limited; that accordingly he had paid GST @12% on royalty and GST @18% on advertisement expenses; that both, royalty and advertisement charge, had to be

calculated based on his net taxable sales; that the DGAP has calculated the profiteering amount without considering the increase in royalty expenses (as also advertisement expenses) which were a percentage of the net sales and not a loss of ITC; that DGAP has ignored the fact that in the post-tax-rate reduction period, i.e. post 14.11.2017, his cost of royalty had increased by 1.769% as compared to the period before the tax rate reduction, as was shown in the Table below:-

TABLE

(Amount in Rs.)

Particulars	Before 15.11.2017 (A)	Post 15.11.2017 (B)	Impact (A-B)%
Basic Price – Sample for illustration	100	112.38	
Add: - GST@18%-before 14th Nov Add: - GST@5% Post 14th Nov	18	5.63	
Total Invoice Value	118	118	
Royalty Expenses @8% on Net Sale	8	8.99	
Add: - GST@12% on Royalty charged by Subway India	0.96	1.079	
Advertisement Expenses@4.5% on Net Sale	4.5	5.06	
Add: - GST@18% on Advertisement charged by Subway India	0.81	0.91	
Total Invoice Value including GST	14.27	16.039	1.769%

f. That the impact of the increase in royalty expenses on the profiteered amount worked out to Rs. 2,76,681/- and the same merited to be reduced while calculating the profiteered amount; that an increase in the purchase price/costs has been accepted in the case of Kumar Gandhrav versus M/s KRBL Limited decided by this Authority vide Order No. 03/2018 dated 04-05-2018; that he wished to highlight Para 7 of the above-said Order, which was as

follows:- " *It is also revealed that from the perusal of the tax Invoices submitted by the Respondent that there was an increase in the purchase price of paddy in the year 2017 as compared to its price during the year 2016 which constitutes a major part of the cost of the above product...*" that themonth-wise impact of the increase in royalty on the profiteered amount was given in the Table below:-

TABLE

due to Royalty Expenses			
Month	Total Profiteering Amount (DGAP Working)	Revised Profiteering Impact after royalty expenses adjustment	Difference due to Royalty Expenses adjustment
Nov'17	19,904.99	10,528.76	9,376.23
Dec'17	35,480.87	18,183.02	17,297.85
Jan'18	36,690.29	19,177.16	17,513.13
Feb'18	31,073.44	16,098.99	14,974.45
Mar'18	33,966.52	17,668.40	16,298.12
Apr'18	33,364.22	17,398.22	15,966.00
May'18	34,092.86	17,733.27	16,359.59
Jun'18	31,800.00	16,838.93	14,961.07
Jul'18	34,727.90	18,232.47	16,495.43
Aug'18	42,298.78	22,313.64	19,985.14
Sept'18	40,782.98	21,577.40	19,205.57
Oct'18	37,228.09	19,194.57	18,033.52
Nov'18	31,740.65	16,281.35	15,459.30
Dec'18	32,863.87	16,814.18	16,049.70
Jan'19	34,879.86	19,468.17	15,411.69
Feb'19	78,793.55	61,866.01	16,927.53
Mar'19	77,011.38	60,644.27	16,367.12
	666,700.25	390,018.81	276,681.45

g. That the DGAP had incorrectly applied a methodology similar to the "zeroing methodology" which was used by the anti-dumping

authorities in certain countries like the European Union (EU). According to the said methodology, while calculating the dumping margin, only those SKUs were considered which were being dumped and those SKUs which were not being dumped were not considered. The Government of India had taken a stand against such methodology at the WTO and argued that while determining the dumping margin, all SKUs should be taken into consideration rather than only those showing positive dumping. In the report, WT/DS141/AB/R dated 01.03.2001 of the Appellate Body of WTO regarding Ant-Dumping Duties on Imports of Cotton-Type Bed Linen from India in which Indian exporters faced an anti-dumping action by the EU as the exporters were exporting different varieties of bed linen to the EU. In some cases, the exporters were exporting at positive dumping margins i.e. 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. They applied zero for negative dumping margins and calculated only positive dumping margins and thereby arrived at higher dumping margins for Indian Exporters. The Government of India objected to this approach of the European Commission and the matter was taken to the Dispute Settlement Body of the World Trade Organization (WTO) which held in favour of the Government of India. In the Appeal filed by the EU before the Appellate Body, the Appellate Body held that the practice of not netting off positive dumping margins and negative dumping margins was not correct.

Thus, the Government of India succeeded before the WTO Appellate Body that positive and negative 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 liens cases but also for other cases against India.Therefore, the position taken by the Government of India before the WTO should be considered by the DGAP while calculating the profiteered amount.

h. That accordingly, in his case, the computation of profiteering ought to have taken into account all those cases where he had reduced the prices more than commensurately; that the DGAP had considered the impact of such cases as zero instead of incorporating the negative values during the computation of the profiteered amount; that based on Annexure 12 of DGAP report, the total of such negative entries, where the benefit passed on was more than commensurate, worked out to Rs. 3,21,498/-. The same ought to have been considered which would have reduced the profiteered amount by Rs. 3,21,498/ as detailed in the chart below:-

CHART

Impact on Profiteered amount due to reduction in prices-Annexure F								
Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per our Calculation	Difference	Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per our Calculation	Difference	Total Impact
Nov'17	-	(998.85)	(998.85)	Augt'18	-	(14,600.30)	(14,600.30)	(15,599.15)
Dec'17	-	(1,667.23)	(1,667.23)	Sept'18	-	(18,477.88)	(18,477.88)	(20,145.11)
Jan'18	-	(1,402.28)	(1,402.28)	Oct'18	-	(20,152.09)	(20,152.09)	(21,554.37)

Feb'18	-	(3,474.47)	(3,474.47)	Nov'18	-	(35,714.13)	(35,714.13)	(39,188.60)
Mar'18	-	(5,390.66)	(5,390.66)	Dec'18	-	(37,221.58)	(37,221.58)	(42,612.25)
Apr-18	-	(5,976.95)	(5,976.95)	Jan'19	-	(37,032.26)	(37,032.26)	(43,009.21)
May'18	-	(4,663.13)	(4,663.13)	Feb'19	-	(56,263.38)	(56,263.38)	(60,926.51)
June'18	-	(9,456.98)	(9,456.98)	Mar'19	-	(56,440.96)	(56,440.96)	(65,897.93)
July'18		(12,564.92)	(12,564.92)		-	-	-	(12,564.92)
Total	-	-45,595.47	-45,595.47		0.00	-275,902.58	-275,902.58	-321,498.05

i. That the DGAP should have completed the investigation within a period of six months of the receipt of the reference from the Standing Committee or within such extended period not exceeding a further period of three months for reasons to be recorded in writing as may be allowed by this Authority and, upon completion of the investigation, furnished to this Authority, a report of its findings along with the relevant record. In his case, this Authority had allowed the DGAP to complete the investigation and furnish the Report till 01.02.2020.; that he had only received an unsigned and undated copy of the DGAP's Report from this Authority on 06.02.2020 through email; that thus it has to be construed that the DGAP had failed to complete the investigation within such extended period and had also not approached this Authority for any further extension of time; that hence the proceedings should be dropped as time-barred.

j. That he was also supplying a few MRP-based items like soft drinks, which attracted GST @ 28% plus 12% Cess; that post 14.11. 2017, his cost of supplies had increased because ITC

was no longer available to him in respect of these MRP items despite the high GST rate applicable thereon; that therefore such MRP based products where tax incidence stood increased due to denial of ITC, merited to be removed from the profiteered amount.

k. That the DGAP, while calculating the profiteered amount, has considered supplies made by him during the period November 2017 to March 2019, a period of almost 17 months; that the GST law did not prescribe until when a registered person has to keep the base prices same to comply with the anti-profiteering provisions; that even the general Methodology and Procedure notified by this Authority also did not specify the length of the period of investigation; that since he was operating a restaurant, he was not holding inventory for more than one week due to perishable nature of the items and that his main raw materials were vegetables, prices of which kept changing on a day to day basis; that the pricing of products was a complex exercise and products were not priced individually; that in a free market, several other factors like competition pricing, long term strategies for market penetration, profit margin for sustaining in the market, life cycle of the product, economic and social conditions, cost of the products and capital expenditure, inflation in man power cost, general year on year inflation etc. played important role in the fixing of the price of the products; that the GST law did not prescribe the method of computation of profiteering; that it was a new law and everyone was still trying to understand the

application of the same on their businesses in November 2017; that the tax regime for 'restaurant service' had been changed within a short period of time of 4-month i.e. with effect from 15.11.2017 after the introduction of GST; that for these reasons, the impact of changes should be considered only for a certain specific period and that the period for calculation of profiteering amount should be limited to around 04 months from the date of tax rate reduction i.e. up to the period March 2018; that thus the period of calculation of profiteered amount in this case should be considered up to 31.03.2018 since the investigation period of 17 months was an extraordinarily long period.

l. That given the above submissions, he requested that a considerate approach be adopted in his case since he was operating in a market full of competition and since he had to maintain identical pricing as that of other Subway outlets in Mumbai.

m. That several writ petitions were pending in various High Courts on the issue of profiteering and that all the petitioners have raised the important issues relating to the constitutional validity of anti-profiteering provisions as also on the methodology /procedure adopted for calculating the quantum of profiteering; that some such cases were WP (C) 378 of 2019 (Hindustan Unilever Ltd. Vs Union of India), WP (C) 2347 of 2019 (Jubilant Food works Ltd. Vs Union of India) and WP (C) 4213/2019 (Abbott Healthcare Vs Union of India); that thus the instant

proceedings should be kept in abeyance until the above issues were settled by the courts.

18. A supplementary Report was sought from the DGAP on the various submissions made by the Respondent. In response, the DGAP has, interalia, reported as follows:-

a. That there was no specific mention of discounts in sales data/information provided by the Respondent during the investigation for the period 01.11.2017 to 14.11.2017 which was required under Section 15(3) of the CGST Act, 2017. The Respondent was always at liberty to offer discretionary discounts depending on several variables but these discounts could be excluded from the value of supply only as per the provisions of Section 15(3) of the CGST Act, 2017. The Respondent simply declared the reduced rate (discounted) as the total taxable value in the sales data submitted by him during the investigation. Moreover, the Respondent never claimed this fact in his written submissions made before the DGAP during the investigation. Furthermore, the Respondent had not submitted any documentary evidence to substantiate his claim. Therefore, the discounted prices, considered as normal prices by the DGAP for arriving at the base prices before rate reduction, was correct. Further, to arrive at the base prices of the products before rate reduction, sales during the period 01.11.2017 to 14.11.2017 had been considered. If sale of any particular product/item was not found during that period then the sales of that particular product/item during previous months in a sequential manner

beginning from October 2017, if the same was not found then previous month i.e. September 2017 and so on up to July 2017, had been considered to arrive at the base price of that product/item. Since the sales of 83 items were not found for the period 01.11.2017 to 14.11.2017, therefore, the sales of these items during the months of July to October 2017 had been considered. This had been done to arrive at the base prices of 83 items which was required to establish profiteering in respect of these 83 items as these items had substantial sales in post rate reduction period.

b. That in the instant case, the Standing Committee on Anti-profiteering had examined the complaint and it was decided to refer the matter to the DGAP for detailed investigation, which was received in the office of DGAP on 02.05.2019. Accordingly, a Notice under Rule 129 of the CGST Rules, 2017 was issued to the Respondent on 10.05.2019. Based on the facts and circumstances of the case, the investigation was carried out covering the period from 15.11.2017 to 31.03.2019. Further, the legislative intent behind Section 171 of the CGST Act, 2017, was to pass on the benefit of tax-rate reduction by way of commensurate reduction in price. In other words, every recipient of goods or services had to get the due benefit from the supplier. Every supplier in the supply chain was legally required to pass on the benefit of the tax-rate reduction by maintaining the base price and charging GST at the reduced rate on such base price. Every supplier of goods and services was free to increase the

price of his supply depending upon the various components affecting the cost of production/supply. But under the provisions of Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with a reduction in the rate of tax; the cum-tax selling price would remain unchanged. Therefore, there was no violation of Article 19(1)(g) of the Constitution of India as DGAP has not attempted to examine or question the base price as Section 171 did not mandate control over the prices of the goods or services as they were to be determined by the Respondent. Section 171 only mandated that any reduction in the rate of the tax or the benefit of ITC which accrued to a supplier must be passed on to the consumers as both were the concessions given by the Government and the suppliers were not entitled to appropriate them. Such benefits must go to the consumers and in case they were not identifiable, the amount so collected by the suppliers was required to be deposited in the Consumer Welfare Fund. The DGAP, while investigating the case, has not examined the cost component included in the base price. He had only added the denial of ITC to the pre rate reduction base price. Hence, the provisions of Section 171 of the CGST Act, 2017 neither worked for controlling the price nor were these violative of Article 19(1)(g) of the Constitution of India.

c. That price included both, i.e. the basic price and the tax charged on it. Therefore, any excess amount collected from recipients, even in the form of tax, must be returned to the recipients. In

case, the recipients were not identifiable, the said amount was required to be deposited in the Consumer Welfare Fund. By increasing the base price, the Respondent had forced his customers/recipients to pay extra tax which they were not liable to pay. Therefore, it was clear that the amount of extra tax (GST) on the increased base price was an amount paid by the customers/recipients which they were not supposed to pay. If any supplier had charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or deposited in the Consumer Welfare Fund, regardless of whether such extra tax collected from the recipient had been deposited in the Government account or not. Besides, any extra tax returned to the recipients by the supplier by issuing a credit note could be declared in the return filed by the supplier and his tax liability would stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, the option was always open to the Petitioner to return the tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent.

d. That as per the franchise agreement in the case of the Respondent, the royalty expense and advertisement charges were fixed as a certain percentage of the net sales. These expenses were being paid by the Respondent not only before the tax-rate reduction but also in the period afterthe tax-rate reduction. Hence there appeared to be no increase in the

expenses since there was no increase in the percentage which was fixed in the franchise agreement. Moreover, in respect of GST paid by the Respondent on these expenses, the Respondent was availing Input Tax Credit of the same before rate reduction but after rate reduction, the Respondent could not avail the Input Tax Credit of the same in terms of Notification No. 46/2017 -Central Tax (Rate) dated 14.11.2017 Therefore, this impact of denial of input tax credit had been duly considered and accordingly ratio of Input Tax Credit to Net Outward Taxable Turnover was calculated and Respondent could have increased the base price by that extent during post GST rate reduction period i.e., 15.11.2017 onwards, to negate the impact of ITC denial. Therefore, the benefit of ITC loss had been given to the Respondent. Further, the case cited by the Respondent was different from the instant case as in the case of M/s KRBL, the pre-GST rate was nil and for the first time, a tax rate of 5% was imposed on the impugned product.

e. That Section 171 of the CGST Act, 2017 that governed the anti-profiteering provisions reads as follows- "Any reduction in rate of tax on any supply of goods or services or the benefit of the input tax credit shall be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement was amply clear that in the event of a benefit of input tax credit or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously be in terms of money only so that the final price

payable by a consumer got reduced. The statute did not force the supplier to reduce the price more than the actual required commensurate reduction. There could be many marketing strategies or other promotional schemes which might compel the Respondent to reduce the prices of products more than the actual requirement. The Respondent was always at liberty to reduce the prices of his products up to any extent and bear any loss but this loss could not be appropriated with the due benefit of rate reduction available to the recipients or customers of the other products where the prices were not reduced commensurately by the Respondent. Thus, under the provisions of Section 171 of the CGST Act, 2017, every recipient of goods or services was entitled to get his/her due share of the benefit. Hence, profiteering under the provisions of Section 171 of the CGST Act, 2017 was to be quantified at the products where prices were not reduced commensurately. Furthermore, it was pertinent to mention that every recipient of goods or services was entitled to get his/her due share of the benefit. In case one recipient got more benefit from the supplier than the commensurate benefit the statute did not allow the supplier to reduce the benefit due to another recipient to that extent. In other words, the benefit of rate reduction passed on to one customer more than the commensurate benefit could not be appropriated against the benefit due to other customer. Therefore, the Respondent's contention was beyond the scope of Section 171 of the CGST Act, 2017.

f. That in this case, reference from the Standing Committee on Anti-profiteering was received in the office of DGAP on 02.05.2019 and the time limit to complete the investigation was extended upto 01.02.2020 by this Authority, in terms of Rule 129(6) of the Rules, vide Order dated 31.10.2019. Accordingly, the investigation was completed within the stipulated time and the Investigation Report dated 29.01.2020 was submitted before this Authority on 30.01.2020 under Rule 129(6) of the CGST Rules, 2017. Hence, the report was submitted within the prescribed time limit/period in this case.

g. That the MRP was the maximum price at which goods could be sold in retail. The value of the transaction between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the MRP. Therefore, regardless of whether MRP was marked on the product or not, the pre and post-tax rate reduction transaction values were compared to determine the quantum of profiteering. There was no significance of MRP in establishing profiteering. It was pertinent to mention that since the total impact of ITC denial which included the loss of ITC in respect of MRP goods also, had been duly considered and accordingly ratio of Input Tax Credit to Net Outward Taxable Turnover was calculated for the pre rate reduction period hence the claim of the Respondent had no significance at this point of time.

h. That as per practice, in all the cases of rate reduction, the investigation period was being considered from the date of rate

reduction upto the month before the date of issue of Notice of Initiation of investigation. Accordingly, based on the facts and circumstances of this case, the investigation was carried out covering the period from 15.11.2017 to 31.03.2019.

19. The said supplementary Report of the DGAP dated 29.01.2020 was supplied to the Respondent vide this Authority's order dated 04.02.2020. In response, the Respondent, vide his submissions dated 25.09.2020 sent through his e-mail dated 25.09.2020, filed his submissions against the above Supplementary Report of the DGAP, whereby he has reiterated his contentions made vide his earlier submissions dated 03.03.2020.

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

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

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

21. It is revealed from the record that the Respondent is running a restaurant as a franchisee of M/s Subway India Private Limited in Maharashtra and is supplying various food products to the customers. It is also revealed from the plain reading of Section 171 (1) of the

CGST Act, 2017 that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the record that there has been a reduction in the rate of tax from 18% to 5% w.e.f. 15.11.2017, on the restaurant service being supplied by the Respondent, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 without the benefit of ITC. Therefore, the Respondent is liable to pass on the benefit of tax reduction to his customers in terms of Section 171 (1) of the above Act. It is also apparent that the present investigation has been carried out w.e.f. 15.11.2017 to 31.03.2019.

22. It is also evident that the Respondent has been dealing with a total of 280 items during the period from 15.11.2017 to 31.03.2019. Upon comparing the average selling prices as per the details submitted by the Respondent for the period from 01.07.2017 to 14.11.2017 and the actual selling prices post rate reduction, i.e. w.e.f. 15.11.2017 to 31.03.2019 the DGAP has reported that the GST rate of 5% has been charged w.e.f. 15.11.2017 however the base prices of 170 products have been increased more than their commensurate prices w.e.f. 15.11.2017 which established that because of the increase in the base prices the cum-tax prices paid by the consumers were not reduced commensurately, despite the reduction in the GST rate.

23. While comparing the average pre rate reduction base prices with the post rate reduction actual base prices the DGAP has duly taken in to account the impact of denial of ITC in respect of the "restaurant

service" being supplied by the Respondent as a percentage of the taxable turnover from the outward supply of the products made during the pre-GST rate reduction period by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. This has been done because there was no reversal of ITC on the closing stock of inputs/input services and capital goods as of 14.11.2017 made by the Respondent as per the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the above Rules. Accordingly, the ratio of ITC to the net taxable turnover has been taken for determining the impact of denial of ITC which was available to the Respondent till 31.10.2017. As per the case record, ITC amounting to ₹3,35,471/- was available to the Respondent during the period from July 2017 to October 2017 which was approximately 8.85% of Rs. 37,90,741/- of the turnover during the same period, as has been shown in Table-A supra. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent.

24. It is further revealed from the analysis of the details of item-wise outward taxable supplies made during the period from 15.11.2017 to 31.03.2019 that the Respondent had increased the base prices of 168 items supplied as a part of restaurant service to make up for the denial of ITC post GST rate reduction. The pre and post GST rate reduction prices of the items sold during the period from 01.08.2017 to 14.11.2017 (Pre-GST rate reduction) and 15.11.2017 to 31.03.2019 (Post-GST rate reduction) have been compared and it has been found that the Respondent has increased the base prices

by more than 8.85% i.e. by more than what was required to offset the impact of denial of ITC in respect of 168 items sold during the above period. Thus, it is apparent that the Respondent has resorted to profiteering as the commensurate benefit of reduction in the rate of tax from 18% to 5% has not been passed on by him. However, there was no profiteering in respect of the remaining items on which there was either no increase in the base prices or the increase in base prices was less or equal to the denial of ITC or these were new products launched post-GST rate reduction.

25. Based on the aforesaid change in the tax rates, the impact of denial of ITC and the details of outward supplies (other than zero-rated, nil rated, and exempted supplies) during the period from 15.11.2017 31.03.2019, the amount of net higher sale realization due to increase in the base prices of the products, despite the reduction in the GST rate from 18% to 5% with denial of ITC or the profiteered amount has come to **₹6,66,700/-** as per Annexure 12 of the Report of the DGAP including the GST on the base profiteered amount. The details of the computation have been given by the DGAP his Report.

26. The methodology adopted by the DGAP for computation of the profiteered amount by comparing the average base prices of the products in respect of which the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017 without the benefit of ITC with the actual post rate reduction base prices of these products appears to be correct, reasonable, justifiable, and in consonance with the provisions of Section 171 of the CGST Act, 2017, as it was not possible to

compare the actual base prices prevalent during the pre and the post GST rate reduction periods due to the reasons that the Respondent was (i) selling his products at different rates to different customers based on the various factors such as sales, inventory position, competitor's strategy, market penetration and customer loyalty (ii) the same customer may not have purchased the same product during the pre and the post-tax- rate reduction periods and (iii) a customer may have purchased a particular product during the pre rate reduction period and may not have purchased it in the post-tax- rate reduction period and (iv) the average base prices computed for a period of 14 days w.e.f. 01.11.2017 to 14.11.2017 or for the previous months provide highly representative and justifiable comparable average base prices. Based on the average pre rate reduction base prices, the commensurate base prices have been computed by adding denial of ITC of 8.85% and compared with the invoice wise actual base prices of the products as is evident from Table-B supra, as, the average pre rate reduction base prices were required to be compared with the actual post rate reduction base prices as the benefit is required to be passed on each product to each customer. In case, average to average base prices are compared for both the periods, the customers who have purchased the products on the base prices which were more than the commensurate base prices would not get the benefit of tax reduction. Such a comparison would be against the provisions of Section 171 as well as Article 14 of the Constitution which requires that each customer has to be passed on the benefit of tax reduction on each purchase made by him.

27. The Respondent has vehemently argued that the DGAP while calculating the average pre-rate reduction base prices has considered all the sales including the discounted sales during the period 01.11.2017 to 14.11.2017 which was completely arbitrary. This contention of the Respondent is not correct as the average base prices of the products have been arrived at by dividing the total taxable value by the post discount. Therefore, the computation done by the DGAP is based on the transaction value as per the provisions of Section 15 of the CGST Act, 2017 which reads as under:-

> "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."

Further, Section 15 (3) (a) of the above Act also provides that the value of the supply shall 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 rightly considered by the DGAP for computation of profiteering. The Respondent had simply declared the reduced rate (discounted) as the total taxable value in the sales data maintained by him. The Respondent never claimed this fact in his written submissions made before the DGAP during the investigation. Furthermore, the Respondent had not submitted any documentary

evidence to substantiate his claim. Therefore, the discounted prices, considered as normal prices by the DGAP for arriving at the base prices before rate reduction, were correct. The Respondent has himself submitted that the discounts offered by him were given due to various factors following the general market practices in the course of his business, which every other similar franchisee was also giving to promote his sales and hence, they cannot be considered while computing the average or the actual base prices. The Respondent has also alleged that on 83 items the average base prices have been computed based on July, 2017 to October, 2017 prices. Further, to arrive at the base prices of the products before rate reduction, sales during the period 01.11.2017 to 14.11.2017 had been considered. If the sale of any particular product/item was not found during that period then, in that case, the sales of that particular product/item during previous months in a sequential manner beginning from October 2017, if the same was not found then previous month i.e. September 2017 and so on up to July 2017, had been considered to arrive at the base price of that product/item. Since the sales of 83 items were not found during the period 01.11.2017 to 14.11.2017, therefore, the sales of these items during the month of July 2017 to October 2017 had been considered. This had been done to arrive at the base prices of 83 items, which were required to establish the profiteering in respect of these 83 items, as these items had substantial sales in the post-tax rate reduction period. Therefore, the average base prices have been correctly calculated by the DGAP and

all the claims made by the Respondent in this regard are fallacious and cannot be accepted.

28. The Respondent has also contended that the DGAP has considered all the price revisions made after 15.11.2017 as a part of the profiteered amount and has ignored the fact that a businessman has the right to increase his prices on account of various reasons other than tax. It is pertinent to mention here that the scope of profiteering, as per Section 171 of the CGST Act, 2017, is confined to the question of whether the benefit accruing on account of rate reduction has been passed on to the recipients or not. It is apparent from the above facts that the Respondent could have raised his pre-rate reduction prices by 8.85% to offset the impact of denial of ITC but it has been found that he had increased them more than the permissible limit. Therefore, the Respondent has failed to pass on the benefit of tax reduction. The Respondent has not produced any evidence during the course of the investigation that the price rise affected by him was commensurate with the tax reduction. He has further claimed to have increased his prices in January 2019 on account of inflation and other expenses although at no stage between the period w.e.f. 01.11.2017 till 31.03.2019 he has produced any reliable evidence to show that he has passed on the benefit of tax reduction commensurately. Therefore, the DGAP has rightly computed the profiteered amount. Hence, the above contention of the Respondent is not tenable.

29. The Respondent has further contended that the right to trade was a fundamental right guaranteed under Article 19 (1) (g) of the

Constitution of India and the right to trade incorporated the right to determine prices which could not be taken away without any explicit authority under the law. Therefore, this form of price control was a violation of Article 19 (1) (g) of the Constitution of India. In this connection, it would be relevant to mention that the Respondent has full right to fix his prices under Article 19 (1) (g) of the Constitution but he has no right to appropriate the benefit of tax reduction under the garb of the above right. The DGAP has not acted in any way as a price controlling authority as he does not have the mandate to do so. Under Section 171 read with Rule 129 of the above Rules, the DGAP has only been mandated to investigate whether both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments have been passed on to the end consumers who bear the burden of the tax. The intent of this provision is the welfare of the consumers who are voiceless, unorganized and vulnerable. The DGAP has nowhere interfered with the pricing decisions of the Respondent and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

29. The Respondent has also claimed that the DGAP while calculating the profiteered amount has erroneously added a 5% additional amount on account of GST which has been collected from the customers and deposited with the Government of India with the monthly GST returns. This contention of the Respondent is not correct because the provisions of Section 171 (1) and (2) of the CGST Act, 2017 require that the benefit of reduction in the tax rate is

to be passed on to the recipients/ customers by way of commensurate reduction in price, which includes both the base price and the tax. The Respondent has not only collected excess base prices from the customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on these excess base prices which they should not have paid. By doing so, the Respondent has defeated the very objective of both the Central as well as the State Government which aimed to provide the benefit of rate reduction to the general public. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of tax reduction to his customers by charging excess GST. Had he not charged the excess GST, the customers would have paid lesser item-wise price while purchasing food items from the Respondent, and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. The above amount can also not be recovered from the Government as it is required to be deposited in the CWFs of the Central and the State Government. Therefore, the above amount has been correctly included in the profiteered amount by the DGAP, therefore, the contention of the Respondentis untenable and hence it cannot be accepted.

30. The Respondent has further contended that the franchisor i.e. M/s Subway India Pvt. Ltd. was charging 8% and 4.5% totalling 12.5%

Royalty and Advertisement Charges on his net sales (on which GST @ 12% and 18% was also being charged respectively) and after 01.07.2017 his royalty cost has directly increased by 1.769% which has not been considered by the DGAP. In this connection, it would be appropriate to mention that there has been no change in the rates of royalty and advertisement charges in the post-rate reduction period and hence, they have no impact on the base prices of the Respondent. These charges were already built in the base prices during the pre rate reduction period and hence, they cannot be added again to the base prices. The Respondent has already been given the benefit of denial of ITC on both the above expenses during the computation of the profiteered amount as no profiteered amount has been calculated on the prices which included an increase of up to 8.85% due to denial of benefit of ITC. Moreover, these charges are also bound to increase as the Respondent has increased his base prices by more than the permissible limit of 8.85% which he cannot claim to exclude from the profiteered amount. Therefore, the above claim of the Respondent cannot be accepted.

31. The Respondent has also relied upon the decision of this Authority given in the case of ***Kumar Gandhrav v. M/s KRBL Limited (Case Number 03/2018 dated 04.05.2018)*** to support his case. In this context, it is pertinent to mention that in the above case no benefit of the increase in the cost was given. Instead, the rate of tax had been increased from 0% to 5% on the product and hence the provisions of Section 171 (1) were not applicable as there was no tax reduction.

Therefore, the facts of the above case are different from this case and hence, they cannot help the Respondent.

32. The Respondent has further averred that the DGAP while calculating the profiteered amount has incorrectly applied a methodology similar to the 'zeroing methodology'.In this regard, we observe that no 'netting off' can be applied in the cases of profiteering, as the benefit of tax rate reduction has to be passed on to each customer on each product supplied by a registered person. Netting off, as demanded by the Respondent, would imply that the amount of benefit not passed on certain supplies to certain customers/ recipients would be subtracted from the amount of any excess (more than commensurate) benefit passed on other products and the resultant amount would be determined as the profiteered amount. If this flawed methodology is applied the Respondent would be entitled to deduct the amount of benefit which he has not passed on from the amount of such excess benefit which he has claimed to have passed on which will result in complete denial of benefit to the customers who were entitled to receive it. It has to be kept in mind that every recipient/ customer is entitled to the benefit of the tax rate reduction by way of reduced prices and Section 171 does not offer the Respondent to suo moto decide on any other modality to pass on the benefit of reduction in the rate of tax to his recipients. Therefore, any benefit of tax rate reduction passed on to a particular recipient or customer cannot be adjusted against the benefit of tax rate reduction that ought to accrue to another recipient or customer. Therefore, the above contention of the Respondent is not tenable.

33. The Respondent has also alleged that the DGAP has ignored the negative values and resorted to 'zeroing' to compute higher profiteering which was used by the anti-dumping authorities in certain countries and which had been opposed by the Government of India before the WTO and vide *Report No.* WT/DS141/AB/R dated 1.3.2001 of the Appellate Body of WTO, regarding Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India, the stand of the Indian Government was accepted and it was held that the practice of 'netting off' should be applied and hence the above methodology was binding on the DGAP while calculating profiteering. The above contention of the Respondent is not correct as no netting off can be applied in the cases of profiteering as the benefit has to be passed on to each customer which has to be computed on each product. The customers have to be considered as individual beneficiaries and they cannot be compared with dumped goods and netted off. This Authority has also clarified in its various orders that the benefit cannot be computed at the product, service, or entity level as the benefit has to be passed on each supply of goods and services. Hence, the above contentions of the Respondent are not correct as the Respondent cannot insist on applying the above methodology of netting off as has been approved in the above Report of the WTO as it would result in denial of benefit to the customers which would amount to a violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution.

34. The Respondent has also argued that the DGAP had failed to complete the investigation within the prescribed time i.e. by

01.02.2020. In this case, reference from the Standing Committee on Anti-profiteering was received in the DGAP office on 02.05.2019, and the time limit to complete the investigation was extended up to 01.02.2020 by the Authority, in terms of Rule 129(6) of the Rules, vide order dated 31.10.2019. Accordingly, the investigation was completed within the stipulated time and the Investigation Report dated 29.01.2020 was submitted before this Authority on 30.01.2020 under Rule 129(6) of the CGST Rules, 2017. Hence, the report was submitted within the prescribed time limit/period in this case. The above contention of the Respondent is incorrect and therefore, it cannot be accepted.

35. The Respondent has also contended that he was selling a few MRP-based products and the GST applicable on some of these products was 28% plus 12% Cess. After rate reduction, he was not able to avail the ITC on such items. Therefore, the MRP based products where tax incidence has been increased due to the denial of ITC needed to be removed from the profiteered amount. In this regard, we find no ground to deviate from the submissions of the DGAP that the MRP was the maximum price at which the goods could be sold in retail. The transaction price between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the MRP. Therefore, to determine the profiteering in respect of the MRP based items, the pre and post rate reduction transaction values were compared by the DGAP, regardless of whether the MRP was marked on the product or not. The DGAP has arrived at the profiteered amount by calculating the total impact of ITC denial which

included the loss of ITC in respect of the MRP based items also. Therefore, MRP has no impact on the computation of the profiteered amount. Hence, the above plea of the Respondent is not maintainable.

36. The Respondent has further contended that the CGST Act, 2017, the CGST Rules, 2017 and the Methodology and Procedure notified by this Authority did not prescribe the period up to which the profiteered amount is to be calculated. Therefore, keeping in mind the perishable nature of the items and various other factors the profiteered amount should be restricted up to March 2018. In this context, we observe that while the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017, the Respondent had increased the base prices of his products immediately w.e.f. 15.11.2017 and had taken no steps to pass on the resultant benefit of tax reduction by way of a commensurate reduction in the prices of his supplies at any point of time till 30.06.2019. In other words, the violation of the provisions of Section 171 of the CGST Act 2017 has continued unabated in this case and the offence continues to date. The Respondent has not produced any evidence to prove from which date the benefit was passed on by him. The fact that the Respondent has not complied with the law till 31.03.2019 requires that the profiteering is computed for the entire period and hence we do not see any reason to accept this contention of the Respondent. We further observe that had the Respondent passed on the benefit before 31.03.2019, he would have been investigated only till that date. Therefore, the period of

investigation from 15.11.2017 to 31.03.2019 has been rightly taken by the DGAP for computation of the profiteered amount.

37. The Respondent has further argued that various writ petitions have been filed challenging the orders passed by this Authority. These included ***WP (C) 378 of 2019 (Hindustan Unilever Ltd. v. Union of India), WP (C) 2347 of 2019 (Jubilant Food works Ltd. v. Union of India), and WP (C) 4213/2019 (Abbott Healthcare v. Union of India)*** in which the constitutional validity and computation methodology has been challenged and hence, the present proceedings should be kept pending till the above issues are settled. In this context, it would be relevant to mention that the Hon'ble High Court of Delhi has not directed this Authority to stop the proceedings in respect of the present case.

38. Based on the above facts as per the provisions of Sec 171 (1) read with Rule 133 (1) the profiteered amount is determined as Rs. 6,66,700/- as has been computed in Annexure-12 of the DGAP's Report dated 29.01.2020. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. Further, since the recipients of the benefit, as determined, are not identifiable, the Respondent is directed to deposit an amount of Rs. 6,66,700/- in two equal parts of Rs. 3,33,350/- each in the Central Consumer Welfare Fund and the Maharashtra State Consumer Welfare Fund as per the provisions of Rule 133 (3) (c) of the CGST Rules 2017, along with interest payable @ 18% to be calculated from the dates on which the above amount was realized by

the Respondent from his recipients till the date of its deposit. The above amount of Rs. 6,66,700/- shall be deposited, as specified above, within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned CGST/SGST Commissioners.

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

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

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

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

10.12.2020

(A.K Goel)
NAA, Secretary

F. No. 22011/NAA/127/hungryeyes/2020/6439-40 Dated: 10.12.2020

Copy To:-

1. M/s Hungry Eyes, 1st Floor, A-103, Aster Tower Film City Road, Malad East, Maharashtra- 400097.

O/C

2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
3. Chief Commissioner of Central Goods & Services Tax, Mumbai Zone GST Building, 115 M.K. Road, Opp. Churchagate Station, Mumbai-400020
4. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010.
5. Guard File.