BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	01/2021
Date of Institution	06.07.2020
Date of Order	12.03.2021

In the matter of:

1. Deputy Commissioner of State Tax, Govt. of Maharashtra, E-901, 3rd Floor, GST Bhavan, Yervada, Pune-411006.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

1. M/s Dough Makers India Pvt. Ltd., Plot No 34/2, Rajiv Gandhi Infotech Park, Phase-I, Hinjawadi, Pune-411057.
2. M/s Subway Systems India Pvt. Ltd., Unit No. 20-24, 3rd Floor, MGF Metropolis, MG Road, Sector-28, Gurugram- 122002, Haryana.

Respondents

Quorum:-

1. Dr. B. N. Sharma, Chairman
2. Sh. Amand Shah, Technical Member
3. Sh. Navneet Goel, Technical Member.

Present:-

1. None for Applicant No. 1.
2. None for Applicant No. 2.
3. Sh. Rakesh Kumar, Consultant, Sh. Aneesh Mittal, Advocate and Sh. Unmesh Bhatija for the Respondent No. 1.
4. None for the Respondent No. 2.

ORDER

1. The Present Report dated 28.08.2019 was received from Applicant No. 2 i.e. the Director-General of Anti-Profiteering (DGAP) after a detailed investigation under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that a reference was received from the Standing Committee on Anti-Profiteering on 27.03.2019 by the DGAP, to conduct a detailed investigation in respect of an application (originally examined by the Maharashtra State Screening Committee on Anti-profiteering) filed under Rule 128

of the CGST Rules 2017, alleging profiteering in respect of restaurant service supplied by the Respondent No. 1 (Franchisee of Respondent No. 2) despite the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017. It was alleged that Respondent No. 1 has increased the base prices of his products and has not passed on the benefit of reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017, affected 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 CGST Act, 2017. The DGAP has reported that the summary sheet of the extent of profiteering was prepared by Applicant No. 1, which was also enclosed with the reference received from the Standing Committee on Anti-profiteering. The above issue was examined by the Maharashtra State Screening Committee and upon being prima facie satisfied that Respondent No. 1 had contravened the provisions of Section 171 of the CGST Act, 2017, it forwarded the said complaint with its recommendation to the Standing Committee on Anti-profiteering for further action vide its letter dated 21.02.2019.

2. The above complaint was examined by the Standing Committee on Anti-profiteering in its meeting held on 11.03.2019, and vide its minutes, the said complaint was forwarded to the DGAP for detailed investigation.

3. After completing the investigation, the DGAP submitted his report under Rule 129 (6) of CGST Rules, 2017 on 29.08.2019 pertaining to the period w.e.f. 15.11.2017 to 31.03.2019.

4. The DGAP in his report has stated that on receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 was issued on 09.04.2019 calling upon Respondent No. 1 to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017, had not been passed on to his recipients by way of commensurate reduction in prices and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all supporting documents. Respondent No. 1 was also allowed to inspect the non-confidential evidence/ information which formed the basis of the investigation from 15.04.2019 to 17.04.2019, which was not availed of by Respondent No. 1.

5. The DGAP has further reported that in response to the notice dated 09.04.2019 and subsequent reminders, Respondent No. 1 submitted his replies vide his letters/e-mails dated 18.04.2019, 29.04.2019, 07.05.2019, 20.05.2019, 21.05.2019, 30.05.2019, 31.07.2019, 02.08.2019, 14.08.2019, 16.08.2019, and 22.08.2019. Respondent No. 1 submitted that he had availed Input Tax Credit (ITC) during the period July 2017 till 14th November 2017 and thereafter he has not availed any ITC. Respondent No. 1 further submitted that due to the nature of his business and the fact that he had multiple outlets, a significant

number of invoices were being generated daily, due to which he was unable to provide invoice-wise details of the supplies made by him and could provide day wise outward taxable supplies reconciled with the GSTR-1 and GSTR-3B Returns.

6. Vide the aforementioned e-mails/letters, Respondent No. 1 submitted the following documents/information:

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

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

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

   (d) Copy of Tran-1 Return along with copies of ST-3 returns for the period April 2017 to June 2017

   (e) Copies of sample sale invoices and purchase invoices.

   (f) Price lists of the products.

   (g) Monthly invoice-wise summary of item-wise sales for the period from October 2017 to March 2019.

   (h) Details of ITC availed, utilized, and reversed during the period from July 2017 to 14th November 2017.

   (i) Details of Closing Stock of inputs on 14th November 2017.

7. The DGAP, in his report, has mentioned that in terms of Rule 130 of the CGST Rules, 2017, Respondent No. 1 had been asked by the DGAP vide notice dated 09.04.2019 to indicate whether any information/ documents furnished were confidential.

However, Respondent No. 1 did not classify any of the information/ documents furnished by him as confidential in terms of Rule 130 of the Rules, ibid.

8. The DGAP has reported that the reference from the Standing Committee on Anti-Profiteering, the various replies of Respondent No. 1, and the documents/evidence on record had been carefully examined. The main issues for determination were whether the rate of GST on the service supplied by Respondent No. 1 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 Respondent No. 1 to his recipients, in terms of Section 171 of the CGST Act, 2017.

9. The DGAP has also reported that at the outset, it was noted that the Central Government, on the recommendation of the GST Council, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017, had reduced the GST rate on the restaurant service from 18% to 5% w.e.f. 15.11.2017, with the proviso that ITC on the goods and services used in the supply of said service would not be availed.

10. The DGAP has further stated that before inquiring into the allegation of profiteering, it was important to examine Section 171 of the CGST Act 2017 which governs the anti-profiteering provisions under GST. Section 171(1) and 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 the benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of the goods or services. Further, such a reduction could be in money terms only so that the final price payable by a consumer got commensurately reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax to the consumers under the GST regime and that Section 171 of the CGST Act, 2017 simply did not provide a supplier of goods or services, any other means of passing on the benefit of ITC, or reduction in the rate of tax to the consumers.

11. The DGAP has reported that Respondent No. 1 had been dealing with a total of 255 items while supplying restaurant services before and after 15.11.2017. Upon comparing the average selling prices as per details submitted by Respondent No. 1 for the period 01.10.2017 to 14.11.2017, the increase in base prices after the reduction in GST rate w.e.f. 15.11.2017 was evident in respect of 246 items (96.47% of 255 items) supplied by him. This increase in the base prices has been indicated in **Annexure-16 (Confidential)**. The lower GST rate of 5% had been charged on the increased base prices of these 255 items, which confirmed that the tax amount was computed @18% before 15.11.2017 and @ 5% w.e.f. 15.11.2017. However, the fact was that because of the increase in base

prices the cum-tax price paid by the consumers was not reduced commensurately for all the items, 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 ITC.

12. The DGAP has also stated that the assessment of the impact of denial of ITC, which was an uncontested fact, required determination of the ITC in respect of "restaurant service" as a percentage of the taxable turnover from the outward supply of "products" during the pre-GST rate reduction period. The DGAP has further illustrated with an example that if the ITC in respect of restaurant service was 10% of the taxable turnover of the Respondent No. 1 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 up to 10%, it could be concluded 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 ITC in respect of restaurant service as a percentage of the taxable turnover of the products supplied during the pre-GST rate reduction period has to be carried out by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. The reason for doing the same has been stated by the DGAP as below:-

a. Reversal of ITC on the closing stock of inputs and capital goods as on 14.11.2017 had been effected by Respondent No. 1. The said reversal of credit was not in accordance with the provisions of Section 17 of the CGST Act 2017 read with Rule 42 and 43 of the CGST Rules.

b. The invoice-wise outward taxable turnover for November 2017 was not provided by Respondent No. 1 to compute taxable turnover for the period 01.11.2017 to 14.11.2017.

c. Random checks of the invoices of ITC availed in November 2017 revealed that in some cases, credit was taken by Respondent No. 1 without fulfilling the prescribed conditions, and also some discrepancies were noticed in ITC availed. For instance, Respondent No. 1 availed ITC amounting to Rs. 22,368/- in November 2017 based on invoice no. TRL - 135 dated 01.11.2017, issued by M/s Tremont Reality LLP and ITC amounting to Rs. 25,032/- on the strength of invoice no. 270517180107316 dated 02.11.2017 issued by M/s Vamona Developers Pvt. Ltd. A scrutiny of the above invoices has revealed that while the first of the two invoices pertains to the monthly rental charges paid by Respondent No. 1 for the period from 01.11.2017 to 30.11.2017, the latter invoice relates to the license fee paid for the period from 01.11.2017 to 30.11.2017, implying thereby that the services mentioned in these invoices had not yet been received by the

Respondent No. 1 on the date he had availed the ITC in respect thereof, which was a clear violation of the provisions of Section 16(2) (b) of the CGST Act, 2017.

13. The DGAP has further reported that the ratio of ITC to the net taxable turnover had been taken for determining the impact of denial of ITC (which was available to Respondent No. 1 till 14.11.2017). On this basis of the statutory documents made available by Respondent No. 1, it was found that the ITC amounting to Rs. 17,16,253/- was available to Respondent No. 1 from the period July 2017 to October 2017 which was 8.72% of the net taxable turnover of restaurant service amounting to Rs. 1,96,90,023/- supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to Respondent No. 1. A summary of the computation of the ratio of ITC to the taxable turnover in the case of Respondent No. 1 has been furnished by the DGAP as per Table-A below:-

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

Particulars	Jul-17	Aug-17	Sept.-2017	Oct.-2017	Total
ITC Availed as per GSTR-3B (A)*	3,40,095	4,04,062	5,00,187	4,71,909	17,16,253
Total Outward Taxable Turnover as per GSTR-3B (B)	50,52,696	48,84,153	48,47,832	49,05,342	1,96,90,023
The ratio of ITC to Net Outward Taxable Turnover (C)= (A/B)					8.72%

**ITC availed as per GSTR-3B excludes ITC of Compensation cess amounting to Rs. 13,093/- as Respondent No. 1 did not have any output liability of compensation cess and the same was also reversed on 14.11.2017 by him.*

14. The DGAP has further stated 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 base prices of different items supplied as a part of restaurant service to make up for the denial of ITC post-GST rate reduction had been increased by the Respondent No. 1. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period 15.11.2017 to 31.03.2019 were compared and it was established that Respondent No. 1 had increased the base prices by more than 8.72% i.e., by more than what was required to offset the impact of denial of ITC in respect of 241 items (out of 255 items) sold during the same period and hence, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on. It was also clear that there had been no profiteering in respect of the remaining items on which there was either no increase in the base price or the increase in base price was less or equal to the denial of ITC.

15. The DGAP has also contended that after the establishment of the fact of profiteering, the next issue to be examined was the amount of profiteering made in this case. For this purpose, only those items where the increase in base prices

was more than what was required to offset the impact of denial of ITC had been considered. Based on the aforesaid pre-tax rate reduction GST rate and the post-tax rate reduction GST rate, the impact of denial of ITC and the details of outward supplies (other than zero-rated, nil rated, and exempted supplies) during the period 15.11.2017 to 31.03.2019, as per the item-wise/ product-wise sales registers reconciled with the GSTR-1 and GSTR-3B returns, the amount of net higher sale realization due to increase in the base price of the service, despite the reduction in GST rate from 18% to 5% (with denial of ITC) or in other words, the profiteered amount came to **Rs. 78,41,754/-** (including GST on the base profiteered amount). The details of the computation were furnished by the DGAP vide **Annexure-17 (Confidential).**

16. The DGAP has also mentioned that based on the details of outward supplies of the restaurant service submitted by Respondent No. 1, it was observed that the said service had been supplied by Respondent No. 1 in the State of Maharashtra only.

17. The DGAP, in his report, has concluded that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling price or by way of not reducing the selling prices of the products commensurately, despite the reduction in GST rate from 18% to 5% w.e.f. 15.11.2017 stood confirmed against Respondent No. 1. On this account, Respondent No. 1 has realized an additional

amount to the tune of **Rs. 78,41,754/-** from the recipients which included both the profiteered amount and GST on the said profiteered amount and hence, the provisions of Section 171(1) of the CGST Act, 2017 have been contravened by Respondent No. 1 in the present case.

18. The above Report was considered by this Authority in its sitting held on 30.08.2019 and it was decided to accord an opportunity of hearing to Respondent No. 1 on 17.09.2019. Notice was also issued to Respondent No. 1 directing him to explain why the Report dated 28.08.2019 furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. However, Respondent No. 1 did not appear for the hearing and requested an adjournment. Sh. Rakish Kumar, Consultant, and Sh. Amish Mittal, Advocate, represented Respondent No. 1. Respondent No. 1 also filed his written submissions dated 31.10.2019 and 04.11.2019 against the report of the DGAP.

19. This Authority, after carefully considering the Reports filed by the DGAP, the submissions of the above Applicants and the Respondent No. 1, and other material placed on record had observed certain discrepancies in the DGAP's Report dated 28.08.2019 and accordingly ordered reinvestigation in the matter in terms of 133(4) of CGST Rules, 2017 on the following grounds vide its I.O. No. 11/2020 dated 27.02.2020:-

i. The computation of profiteering undertaken by the DGAP needs to be revisited in as much as the profiteering has been calculated based on a comparison of the item-wise average base price in the pre-rate reduction period with the day-wise average base price of each item being supplied by the Respondent No. 1 in the post-rate reduction period after reconciling the sales data with the GST Returns. However, the profiteering ought to have been computed based on the comparison of pre-rate reduction item-wise average base price with the actual transaction-wise/invoice-wise price charged by Respondent No. 1 in respect of his supplies in line with provisions of Section 171 (1) and Section 171 (2) of the CGST Act as has been done by the DGAP in similar cases.

ii. Respondent No. 1 is a franchise of M/s Subway Systems India Pvt. Ltd and conducts his business in terms of the franchisee-franchisor agreement and pays a royalty to the franchisor in respect of all his sales. Therefore it was imperative that the item-wise invoice-wise / transaction-wise data was being maintained at the end of the franchisor also. Since Respondent No. 1 has expressed his inability to provide the requisite data on account of certain inexplicable technical reasons, we find it a fit case for exercise of the powers granted under the above Rules to

the DGAP to summon the record and to recompute the amount of profiteering accordingly.

20. As per the directions of this Authority passed vide I.O. No. 11/2020 dated 27.02.2020 under Rule 133 (4), the DGAP furnished his Report dated 26.06.2020 in accordance with Rule 129 (6) of the CGST Rules, 2017.

21. The DGAP has reported that after receiving the reference from this Authority, Respondent No. 2 was impleaded as a party, and letters were issued to both the Respondents on 05.03.2020, calling upon them to submit the information/ documents required to re-investigate the matter.

22. The DGAP has further stated that this Authority, vide para-25 of aforesaid I.O. No. 11/2020 dated 27.02.2020, had directed to furnish the report within a period of three months of this order i.e. on or before 26.05.2020. The said time limit was extended up to 30.06.2020 by virtue of Notification No. 35/2020-Central Tax dated 03.04.2020 issued by Central Government under Section 168A of the CGST Act, 2017 which stated that where, any time limit for completion/ furnishing of any report, has been specified in, or prescribed or notified under the CGST Act, 2017 which falls during the period from the 20th day of March 2020 to the 29th day of June 2020, and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action, would be extended up to the 30.06.2020.

23. The DGAP in his report has also reported that in response to notice dated 05.03.2020 and subsequent reminders, Respondent No. 1 submitted his reply vide letters/e-mails dated 12.03.2020, 17.03.2020, 23.03.2020, and 18.05.2020. The reply of Respondent No. 1 has been summed up by the DGAP as follows:-

i. That on account of the very large number of invoices and each invoice having more than one menu item, furnishing of invoice-wise details of outward supplies was not easy and thus he had furnished menu item wise and day-wise details of our outward supplies, that however, since this Authority had directed that the calculation of the profiteered amount had to be invoice-wise, he was asked to furnish invoice-wise details of outward supplies in a prescribed format; that since his POS machine had changed from Sub shop 2000 POS to Subway POS, he was unable to trace the old data and that all he could do was to furnish the total daily sale; that he was furnishing the following information/ documents:-

File Name	Description
Non Unit PLU Sales Volume	Quantity details for sales from Oct-17 to March 18 (Invoice level details are not available)
Sandwich PLU Analysis	
TCS Sale	File for TCS counter sales data, all items are sold at subsidized rates.
Discount Sale	SOTD (Sub of the day) and Online Sales details.

All Stores Sales Data	A file contains invoice details by month for April- 18 to March -19

ii. That as per the observations of this Authority in Para 23 of the Order, the quantum of profiteering had to be calculated not only invoice-wise but item-wise; that the observations of this Authority were as follows- *"the profiteering ought to have been computed on the basis of the comparison of pre-rate reduction item-wise average base price with the actual transaction-wise/ invoice-wise price charged by the Respondent in respect of supplies…".; that,* moreover, as per Orders of this Authority in the cases of *M/s Lifestyle International (order dated NAA25.09.2018 in case No. 8/2018)* and *M/s Kunj Lub Marketing reported as 2018-TIOL-09--GST*, profiteering was to be determined product-wise, not on an overall entity level basis; that he also had more than one channel of sale and each channel of sale has a different pricing policy; that his various channels of sales were as follows:-

a. Sales through his outlet at M/s TCS, Pune in respect of which the price of each menu item was 10% lesser than the pricelist;

b. 'Sub of the day' sales in respect of which the price of a particular menu item sold on a particular day of the week was lower than the price list;

c. Sales through Swiggy, Zomato, Food panda, etc.;

d. Promotional sales at discounts for sales promotion; and

e. Other sales, which were as per the price list.

iii. That he relied on this Authority's order dated 21.11.2019 in case of *Principal Commissioner of CGST, Mumbai West and DGAP Vs. Johnson & Johnson Ltd and others (case No. 59/2019) reported as 2019-TIOL-59-NAA-GST (para 9 of the order),* wherein this Authority has approved the DGAP's methodology of taking separate base price for each category of buyers for pre-rate reduction period when a supplier made supply of his goods through different channels to different categories of buyers at different prices

iv. That for re-computation of the profiteering amount, the above-mentioned order of this Authority ought to be followed; that, in other words, separate calculation of profiteering must be made in respect of each category of sale i.e. the sales through the Respondent No. 1's outlet in M/s TCS, Pune, SOTD sales, Sales through food delivery companies like Swiggy, Zomato, Foodpanda, etc., promotional sales and other sales as per the price list by taking separate pre-rate reduction base price for each of these categories of sales; that unless this was done, the quantum of profiteering would get inflated.

v. That on account of the increase in the cost of inputs, he had increased the menu prices w.e.f. 30.01.2019, therefore, the period of February 2019 and March 2019 ought to be excluded for calculation of the profiteered amount.

vi. That the profiteered amount must not include GST, as the amount collected by him as GST from his customers has already been paid by him to the Government in accordance with the provisions of Sec 76(1) of the CGST Act, 2017.

24. It has also been reported by the DGAP that various discrepancies were noticed in the data/ information submitted by Respondent No. 1 and the same are summed up below:-

i. Respondent No. 1 has submitted invoice wise sales data for the period April 2018 to March 2019 which did not contain any details of Item name/description, quantity, the price per unit, nature of supply (i.e. the sales through Respondent No. 1's outlet in M/s TCS, Pune, SOTD sales, Sales through food delivery companies like Swiggy, Zomato, Foodpanda, etc., promotional sales and other sales) without which the data was not of any use for computation of profiteering. The screenshot of such invoices was submitted by Respondent No. 1 as under:-

DETAILS OF INVOICE WISE OUTWARD TAXABLE SUPPLIES (OTHER THAN ZERO RATED, NIL RATED AND EXEMPTED) :-

LEGAL NAME OF THE SUPPLIER : DOUGHMAKERS INDIA PVT LTD
TRADE NAME , IF ANY :
GST REGISTRATION NO. : 27AACCC8522A1Z3
FOR THE MONTH : Apr-18

S. NO.	INVOICE NUMBER	INVOICE DATE	GOODS / SERVICES CODE	GOODS / SERVICES DESCRIPTION	MRP, IF ANY	QUANTITY	RATE PER UNIT	TOTAL AMOUNT	DISCOUNT, IF ANY	TOTAL TAXABLE AMOUNT	RATE OF GST CHARGED	AMOUNT OF GST	INVOICE VALUE	NATURE OF SALE (STOCK TRANSFER / SCRAP SALE / ZERO RATED SALES ON PAYMENT OF DUTY / CSD /GENERAL TRADE / MODERN TRADE / E-COMMERCE ETC.)	IMPACTED BY GST RATE REDUCTION (YES / NO)
1	3201	1-Apr-18	996331	Restaurants	0	0	0	465.00	0	442.86	5%	22.14	465.00		
2	3202	1-Apr-18	996331	Restaurants	0	0	0	355.00	0	338.10	5%	16.90	355.00		
3	3203	1-Apr-18	996331	Restaurants	0	0	0	325.00	0	309.52	5%	15.48	325.00		
4	3204	1-Apr-18	996331	Restaurants	0	0	0	295.00	0	280.95	5%	14.05	295.00		
5	3205	1-Apr-18	996331	Restaurants	0	0	0	145.00	0	138.10	5%	6.90	145.00		
6	3206	1-Apr-18	996331	Restaurants	0	0	0	450.00	0	428.57	5%	21.43	450.00		
7	3207	1-Apr-18	996331	Restaurants	0	0	0	655.00	0	623.81	5%	31.19	655.00		
8	3208	1-Apr-18	996331	Restaurants	0	0	0	110.00	0	104.76	5%	5.24	110.00		
9	3209	1-Apr-18	996331	Restaurants	0	0	0	566.00	0	539.05	5%	26.95	566.00		
10	3210	1-Apr-18	996331	Restaurants	0	0	0	125.00	0	119.05	5%	5.95	125.00		
11	3211	1-Apr-18	996331	Restaurants	0	0	0	565.00	0	538.10	5%	26.90	565.00		
12	3212	1-Apr-18	996331	Restaurants	0	0	0	185.00	0	176.19	5%	8.81	185.00		
13	3213	1-Apr-18	996331	Restaurants	0	0	0	440.00	0	419.05	5%	20.95	440.00		
14	3214	1-Apr-18	996331	Restaurants	0	0	0	1,055.00	0	1,004.76	5%	50.24	1,055.00		
15	3215	1-Apr-18	996331	Restaurants	0	0	0	250.00	0	238.10	5%	11.90	250.00		
16	3216	1-Apr-18	996331	Restaurants	0	0	0	270.00	0	257.14	5%	12.86	270.00		
17	3217	1-Apr-18	996331	Restaurants	0	0	0	210.00	0	200.00	5%	10.00	210.00		

APR-18 MAY-18 JUN-18 JUL-18 AUG-18 SEP-18 OCT-18 NOV-18 DEC-18 JAN-19 FEB-19 MAR ...

ii. Respondent No. 1 has submitted only the monthly total amount of SOTD Sale, TCS Sale, SWIGGY, FP, ZOMATO SALE (for the period 15.11.2017 to 31.03.2018) without any item wise invoice wise details.

25. The DGAP has further reported that as the details submitted by Respondent No. 1 did not serve the purpose of re-computation of profiteering amount, he was again directed to submit the Invoice-wise details of outward taxable supplies (other than zero-rated, nil rated, and exempted) specifying the description of each item supplied in an invoice duly reconciled with GSTR-1 and GSTR-3B Returns for the period July 2017 to March 2019 vide his office letter dated 11.05.2020. In response to the above letter dated 11.05.2020, Respondent No. 1 vide letter dated 18.05.2020 expressed his inability to submit the item-wise invoice wise details citing the following reasons:-

i. That he had been filing GST returns in compliance with the GST Act and there was no stipulation to map each item supplied through the invoices while filing the returns; on the other hand, the data sought by DGAP

in the tabulated form required him to map the items supplied from his outlets invoice-wise for the period from July 2017 to 31.03.2019; that his POS system did not record the details in the manner sought by the DGAP; that he only had the details of the total number of items sold from a particular outlet in a month and that he could not map the items supplied to his supply invoices.

ii. That while one invoice issued by an outlet on a particular date could contain more than one item, the entry made in the system only depicted the total number of items sold and the total of invoices; that for cross-checking, the total invoice amount was tallied with the total number of items sold for a particular month and the total price thereof; that for this reason, the information in the prescribed format sought by the DGAP could not be generated from his POS system and has to be compiled manually which was not possible as the total number of invoices generated for the period from April 2018 to March 2019 were 2,75,995 (Two lacs Seventy-Five Thousand Nine Hundred and Ninety-Five) and the total number of menu items supplied were 255.; that it was for this reason that he had, vide his e-mail dated 23.03.2020 (para-7a above), sent two datasets (i) Item-wise data

for October 2017 to March 2018 since invoice details were not available due to a change of his POS system and (ii) Invoice-wise data for April 2018 to March 2019, which did not contain the description of the menu items, as for this period, what could be compiled was either the data of item-wise sales along with the quantity and value or the data of invoice-wise sales without the description of menu items, and that a combination of both these data sets was not available on his POS system.

iii. That as an alternative the DGAP could depute an expert to generate the required information in the prescribed format and that he and his staff would cooperate in whatever manner required, as the same was not possible at his end within the specified time frame.

26. The DGAP has also reported that in response to the letter dated 05.03.2020 and subsequent reminders, Respondent No. 2 submitted his reply vide letters/e-mails dated 14.03.2020 and 14.05.2020. The reply of Respondent No. 2 has been summed up by the DGAP as follows:-

i. That the Franchisee (Respondent No. 1) was not related to him in any manner and was running an independent

business as a franchisee under a valid franchise agreement executed on 29.07.2014 between him and Respondent No. 1. He submitted a copy of the Agreement for ready reference.

ii. That the data requisitioned by the DGAP i.e. Invoice wise details of outward taxable supplies (other than zero-rated, nil rated, and exempt supplies) of Respondent No. 1 for the period October 2017 to March 2019 was not available with him; that information was privy to only the Respondent No. 1 and was not collected by him.

27. It has also been reported by the DGAP in his report that as per Para-5(g) and 5(h) of Franchisee Agreement dated 29.07.2014 entered between Respondents No. 1 and 2, Respondent No. 2 had the right to examine and take photocopies of all books of account, records and any electronic data kept/maintained by the franchisee (Respondent No. 1). Therefore, Respondent No. 2 was directed to submit the invoice-wise details of outward taxable supplies of Respondent No. 1 for the period October 2017 to March 2019 vide DGAP's further letters dated 18.03.2020 and 11.05.2020. However, Respondent No. 2 did not submit the required documents to the DGAP.

28. The DGAP has further reported that while a comprehensive investigation covering all the operational franchisees as on the date of the reduction in the rate of GST

w.e.f. 15.11.2017 was initiated on 15.05.2020 against Respondent No. 2 as per the directions of this Authority under Rule 133 (4) of the CGST Rules, revised profiteering could not be computed due to limitations in the data furnished by Respondent No. 1 and the non-submission of documents by Respondent No. 2. Thus, the Report dated 28.08.2020, establishing the profiteering to the tune of **Rs. 78,41,754/-** (including GST on the base profiteered amount) may be considered as the final Report. The DGAP has also stated that a reference to the CGST Act, 2017 and CGST Rules, 2017 in the Report also included a reference to the corresponding provisions under the relevant SGST/UTGST/IGST Acts and Rules.

29. The above Report of the DGAP was considered by this Authority and it was decided to allow Respondent No. 1 to file his consolidated written submissions against the report of the DGAP. Accordingly, notice dated 07.07.2020 was issued to Respondent No. 1 to explain why the Report dated 26.06.2020 should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. Respondent No. 1 filed his submissions dated 24.08.2020 in respect of the report of the DGAP and has stated:-

a. That the DGAP's report had been received by this Authority on 29.08.2019, therefore, this matter was required to be decided by 27.02.2020, that a reference to DGAP for further investigation under Sub-rule (4) of rule

133 could not be treated as a new investigation; that since the Order of this Authority was not in respect of any new item of supply that had not been covered in the earlier report, this could not be treated as a new investigation, it should have been completed within six months i.e. by 27.02.2020. Hence the proceedings have become time-barred.

b. That the profiteered amount of Rs. 78,41,754/- calculated for the period from 15.11.2017 to 31.03.2019 by DGAP was incorrect, as his sales during this period were Rs. 9,44,27,338/- and that the profiteering of Rs. 78,41,754/- for this period implied a profiteering of 8.3% of the sales turnover, which was far more than the 4% difference between the extent of the reduction in the rate of tax (i.e. 13%) and the impact of the withdrawal of ITC benefit (i.e. 9%); that thus there were serious flaws in the calculation of profiteered amount by the DGAP.

c. That while calculating the ITC availment to taxable turnover ratio for the pre-tax rate reduction period, the DGAP has calculated the ratio for the period from 01.07.2017 to 31.10.2017 but has not taken into account the correct figures for ITC availment for the period from 01.07.2017 to 14.11.2017 even though the details of ITC availment and the invoice-wise details of taxable outward supplies had been furnished by him; that the total ITC availment during

the period from 01.07.2017 to 14.11.2017 was Rs. 21,29,317/- and the taxable turnover for this period was Rs. 2,21,63,716/-, which implied that the correct ITC availment to taxable turnover ratio for the pre-rate reduction period was 9.60%; that the reasons given by the DGAP for excluding the period from 01.11.2017 to 14.11.2017 for the calculation of the ITC availed to taxable turnover ratio were not correct for the reasons mentioned below:-

i. That while he could not furnish invoice-wise details of outward taxable supplies for the month of November 2017, he had supplied details of bifurcation of sale details for the month of November 2017 into periods 01.11.2017 to 14.11.2017 and 15.11.2017 to 30.11.2017 to enable the calculation of turnover for the period from 01.11.2017 to 14.11.2017; that he had reversed the credit in respect of inputs and input services lying unutilized as on 14.11.2017 and hence he could not have utilized the credit that he had reversed.

ii. That since there was no credit availed in respect of capital goods, there was no question of

calculating the quantum of reversal in terms of Rule 43 of the CGST Rules.

d. That he was required to pay the rent and license fee in advance and hence the credit taken based on invoices which had been received in the first week of the month ought to have been considered; that since the services covered by the invoices had been actually received by him, there was no question of the same not being considered for the calculation, more so because he had not received any communication from the jurisdictional assessing officer in this regard

e. That no finding has been recorded in the DGAP's report dated 28.08.2019 as to on what basis has he adopted the long period of investigation, covering one year and four and half months (from 15.11.2017 to 31.3.2019); that during this long period, the cost of the inputs had increased and other factors influencing the prices had also changed; that the profiteered amount must be calculated only for a limited period in which the factors like cost of inputs, fixed cost, and other relevant factors did not change; that since the prices of various items had been revised upward w.e.f. 30.01.2019 on account of an increase in the cost of inputs, at least the period from 30.01.2019 to 31.03.2019 should have been excluded while calculating the profiteered amount.

f. That for identifying the items in respect of which increase in base price (sale price excluding GST) in the post-tax rate reduction period w.e.f. 15.11.2017 was more than 8.72% or not, the base price of the item as on 14.11.2017, as per his pricelist, ought to have been compared with the revised base price of the item w.e.f. 15.11.2017 as per his revised price list for the post-tax rate reduction period; that for example, if the base price of an item as on 14.11.2017 was Rs 100 and the revised base price w.e.f. 15.11.2017 was Rs 107, the percentage increase should have been taken as [(107-100)/100]*100 i.e. 7%; that instead of calculating the increase in base price in the above manner, the DGAP has compared the base price during the pre-rate reduction period with the maximum Average Base Price during each month from 15.11.2017 to 31.03.2019; that for example if the maximum average base price of an item was during March 2019, the pre-15.11.2017 base price has been compared with the average base price during March 2019 which was meaningless, as by March 2019 the cost of inputs might have increased and other factors influencing the price may have changed.

g. That another flaw in the calculation by DGAP was in identifying the items where there had been profiteering since despite having been supplied the base prices of all the 255 items supplied by him in the pre-tax rate reduction

period, the DGAP had considered the item-wise average base prices for the period from 01.10.2017 to 14.11.2017 instead of considering the price list in the case of a large number of items; that the DGAP had incorrectly adopted lower item-wise base-prices for the pre-tax rate reduction period and compared the same with the maximum average base prices that existed during the post-tax rate reduction period, thus inflating the profiteered amount; that the average prices could not be equated with actual transaction prices since the prices at his restaurant located at TCS Pune were at 10% lower and since his SOTD sales were made at lower prices; that the average price of an item during any particular period was lower than the actual price of an item listed in the price list; that since the method of identification of the items in respect of which profiteering has been alleged is incorrect, the calculation of the profiteered amount in respect of such items was also incorrect.

h. That in several cases, for calculating the commensurate base price, instead of taking the base price of an item as of 14.11.2017 as per the price list, the DGAP has incorrectly adopted the average base price of that item in the period 01.10.2017 to 14.11.2017, which was lower than the listed base price of that item as on 14.11.2017; that the DGAP has done this on the ground that the item-wise base prices

for the pre-tax rate reduction period were not furnished by him; that for calculating the profiteered amount in respect of an item, its actual transaction price should have been taken for the computation and not the average price.

i. That as per his own calculations, if the actual base price as on 14.11.2017 as per the price list had been adopted instead of the average base price during the 01.10.2017 to 14.11.2017 period, the alleged profiteered amount would stand reduced to Rs. 9,22,410/- as against the alleged profiteered amount of Rs. 78,41,754/- calculated by the DGAP.

j. That the DGAP had added 5% GST to the profiteered amount which was unjustifiable since the GST collected by him from his customers had been paid to the Government; that thus there was no question of recovery of such GST on the alleged excess price charged by him; that if the element of GST was removed from the computation of the DGAP, the profiteered amount would come down to Rs. 8,78,485/- (excluding 5% GST) from Rs. 9,22,410/- (including 5% GST).

k. That while calculating the profiteered amount in Annexure 17, the DGAP has not taken into account the fact that in the case of the item sold as 'Sub of the Day (SOTD) item', the price as on 14.11.2017 was Rs 110/- plus GST and the same had been revised to Rs 125/- including 5% GST

w.e.f. 15.11.2017 which translated into an increase of only Rs 9/- in the base price from Rs 110/- to Rs 119/-; that this implied an increase of only 8.18% in the base price, well within the impact of ITC withdrawal of 8.72%, as calculated by the DGAP; that therefore, there was no profiteering in the case of SOTD sales, which constituted 13% of the total sales and hence SOTD sales should have been excluded while calculating the profiteered amount.

l. That the above mistakes could have been avoided if the calculation of the total profiteered amount had been done separately for each channel of sale i.e. sales through the Respondent No. 1's outlet at TCS, Pune from where the sales were effected at a 10% discount, SOTD Sales, promotional sales at discount, sales through Swiggy, Zomato, Food Panda, etc. and the sales at the normal price list price; that he relied on the Order of this Authority in the case of DGAP Vs M/s Johnson & Johnson Ltd, whereby this Authority has approved the methodology of taking separate base prices for each category of sales for the pre-rate reduction period when a supplier made the supply of his goods through different channels to different categories of buyers at different prices.

m. That no standard computational methodology has been notified, either by the Central Government or by this Authority for determining whether a registered person has

contravened the provisions of Section 171(1) of the CGST Act, 2017 and for computation of the profiteered amount.

n. That in this case, an adverse conclusion has been drawn and profiteering amounting to Rs. 78,41,754/- has been determined because of his inability to furnish item-wise and invoice-wise information about the items supplied by him during the period from 15.11.2017 to 31.03.2019 due to limitations of his POS system and it was impossible to compile the same manually due to the enormity of data.

o. That the way DGAP has concluded that he had profiteered and the way the profiteered amount has been computed was a clear contravention of the provisions of Article 19(1)(g) of the Constitution of India; that since tax was not the only component of the base price of an item, which depended upon several other factors like cost of inputs, fixed cost, supply & demand position, competition, etc; that before holding a registered person guilty of contravention of the provisions of Section 171(1) of the CGST Act 2017, it was absolutely necessary to rule out that increase in base price during post-tax rate reduction period or failure to proportionately decrease the base price on account of changes in the laws resulting in the availability of the higher amount of ITC was not due to any genuine reason like increase in the cost of inputs or fixed cost, supply & demand position, etc. and the burden of proving that the

increase in the base price or failure to decrease the base price was not due to genuine reasons but with the intention to pocket the tax benefit was on the Department and in this regard, the law did not provide for any presumption; that the DGAP, while concluding that he was guilty of contravention of the provisions of Section 171(1) of the CGST Act 2017 has not considered the above-mentioned factors; that the period of profiteering for calculation of profiteered amount could not be arbitrarily adopted as done by the DGAP, as the effect of reduction in the rate of GST would be neutralized after some time on account of increased fixed costs, costs of inputs, etc., and if this happened, the registered person could not be compelled to sell his products at a lower price; that the act of the DGAP in computing the profiteering without delving into the question of the cost of inputs and calculating the profiteered amount for an arbitrarily long period, without considering these factors amounted to dictating the selling price which was in clear contravention of the provisions of Article 19(1) (g) of the Constitution.

p. That on the question of methodology and procedure for determining as to whether a registered person has not passed on the benefit of reduction in rate of tax on supply of goods or services or the benefit of ITC to the recipient by way of commensurate reduction in prices, the practices

adopted in this regard in Australia and Malaysia when the GST had been introduced in these countries in the year 1999 and 2015 respectively; contained anti-profiteering provisions to prevent price rise during the transition period; that in Australia, the Australian Competition & Consumers Commission (ACCC) had been entrusted with the enforcement of Anti-profiteering provisions of the Australian GST law during the transition period; that the Anti-profiteering Provisions of the Australian Goods and Services Tax were contained in the Part VB from Section 75AT to Section 75AZ of the Trade Practices Act, 1974 of Australia pertaining to "price exploitation in relation to the new tax system" (equivalent to profiteering in the GST laws). Section 75 AU(2) gave a clear cut definition of what constituted price exploitation in relation to the new tax system changes and in terms of this sub-section, for determining whether a corporation was guilty of price exploitation, it was seen as to whether the price of the supply during the " transition period" as defined in the Act, was unreasonably high even after taking into account the supplier's cost, supply and demand condition, and any other relevant matter; that Section 75AV authorized the Commission to formulate detailed guidelines for determining whether a corporation has indulged in price exploitation referred to in Section 75 AU(2); that the

guidelines on price exploitation framed by ACCC gave a precise formula that if the new tax system changed cause tax and costs to fall by one dollar, then the prices should fall by one dollar and if on account of changes, the costs of a business rise by one dollar, the prices might rise by no more than that amount and that in any case, no price rise because of new tax system changes should be more than ten percent.

q. That the Malaysian anti-profiteering law [Price Control and Anti-profiteering Act, 2011 read with Price Control and Anti-profiteering (Mechanism to Determine Unreasonably High Profits for Goods) Regulations)] laid down a strict formulaic methodology wherein the net profit margins of a business during the defined transition period could not exceed the business as on 01.01 2015.

r. That in contrast to the above position, absolutely no guidelines have been framed either by the Central Government or by this Authority clearly specifying as to when a registered person would be treated as having contravened the provisions of Section 171(1) of the CGST Act, 2017. Neither Section 171 of the CGST Act defined the term "commensurate reduction in prices" nor has the same been defined in the CGST Rules made under Section 164; that thus the anti-profiteering provisions of Section 171 of the CGST Act, 2017 and the CGST Rules,

2017 without any computational provision either in the Act or in the Rules made thereunder, were unenforceable; further that a tax law was incomplete without the necessary machinery provisions since machinery provisions were an integral part of a tax provision; that as held by the Hon'ble Supreme Court in the **case of Commissioner of Income Tax Vs. B. C. Srinivas Shetty (1981) 2 SCC-460**, machinery provisions could not be treated as an ancillary function and could not be delegated to another authority, and that too, without any clear policy guidelines; that therefore the anti-profiteering provisions of Section 171 of the CGST Act, read with the Rules framed thereunder, suffered from the vice of excessive delegation and were *ultra vires* the Constitutional provisions.

s. That the delegation of power to the Central Government for making rules for determining whether a registered person has contravened the provisions of Section 171(1) of the CGST Act would have been proper if, in Section 171, there had been a precise definition of the expression "commensurate reduction in prices"; that without any such definition in the Act, delegating the authority to the Government to frame rules or guidelines in this regard was a case of delegation of legislative function without any policy guidelines, and, therefore, was a case of excessive delegation; that in this regard, reliance was placed on the

Apex Court's judgement in the case of ***Hamdard Dawakhana and Anr Vs Union of India and Ors.*** AIR 1960 SC-554 (Paras 29 to 35 of the judgement).

t. That the framing of Rules for determining whether a person has contravened the provisions of Section 171(1) has been delegated to the Government but the CGST Rules 2017 nowhere prescribed any machinery provisions or computational methodology for determining whether a registered person has contravened the provisions of Section 171(1) and if so, how the profiteered amount would be calculated and for which period; that in this regard, Rule 126 of the Rules simply further delegated to this Authority the determination of the procedure & methodology for determining as to whether the registered person has passed on the benefit of reduction in the rate of tax or the benefit of ITC to the recipient by way of commensurate reduction in prices; that this amounted to sub-delegation of the legislative function, which was not permissible, as for this there was no provision either in Sec 164 or in Sec 171 of the CGST Act. The maxim *delegatus non potest delegare* was a well-settled law and sub-delegation of legislative function was unauthorized unless the person, on whom such power was conferred, was allowed in the parent Act to delegate, either expressly or by necessary intendment. In this regard, reliance is placed on the

judgment of the Apex Court in the case of ***District Collector, Chittoor Vs Chittoor Groundnut Traders Association*** AIR 1989 SC 989 wherein it was held that when the Essential Commodities Act conferred rule-making powers on the Central Government, which could sub-delegate this power to the State Governments subject to the condition that a State Government before making rules would obtain the prior concurrence of the Central Government, any rule made by the State Government without the concurrence of the Central Government, would be ultra vires; that he also relied on the judgement of ***Hon'ble Kerala High Court in writ appeal no. 917 of 2014 filed by Ultratech Cement Ltd.***; that even if it was assumed that delegating the power to the Government to frame Rules regarding procedure & methodology for determining whether a registered person has contravened the provisions of Section 171(1) of the CGST Act, did not amount to excessive delegation of legislative power, the sub-delegation of this function by the Government to this Authority was, without any doubt, not allowed and thus Rule 126 of the CGST Rules was, therefore, ultra vires the Constitutional provisions. What made this sub-delegation worse was that even this Authority has not notified any computational methodology and determined the same on case to case basis.

u. That the Notification reducing the rate of GST on the restaurant service from 18% with ITC benefit to 5% without ITC benefit w.e.f. 15.11.2017 had been issued based on the recommendations of the GST Council made in its 23rd meeting held on 10.11.2017. From Para 65.23 of the Minutes of the Meeting, it was seen that as observed by the Hon'ble Chairperson, the rationale for reducing the rate of GST on restaurant service from 18% with ITC benefit to 5% without ITC benefit was that while the organized chains of restaurants were factoring the ITC and transferring its benefit to the consumers, the standalone restaurants were not transferring the benefit of ITC to the consumers and those restaurants were indulging in profiteering by pocketing the benefit of additional ITC to the tune of 7-8% which had become available. Respondent No. 1 belonged to an organized chain of restaurants in respect of which the GST Council itself had observed that they were factoring the ITC and transferring its benefit to the consumers. Therefore, the proceedings against Respondent No. 1 were unwarranted and misconceived and were in the nature of a roving inquiry. From the very beginning, Respondent No. 1 emphasized that he had not indulged in profiteering by pocketing the tax concession. If he had been indulging in profiteering, the same would have been reflected in his profits and loss a/c in form of abnormal

profit, which was not the case. There was not even an allegation that Respondent No. 1's profit during the period of investigation was abnormal.

30. A supplementary report was sought from the DGAP on the above submissions of Respondent No. 1 under Rule 133(2A) of the CGST Rules, 2017. The DGAP, vide his Supplementary Report dated 09.09.2020, has filed his clarifications under Rule 133(2A) of the CGST Act, 2017, wherein he has reported as under:-

a. That Respondent No. 1 has reiterated his earlier submissions made vide letter dated 04.11.2019 that have been duly addressed vide DGAP Report dated 28.11.2020.

b. That the concerns related to channel-wise and transactions-wise profiteering raised by Respondent No. 1 were addressed in para-8 to 10 of the DGAP's Report dated 26.06.2020 wherein it was reported that channel-wise and transactions-wise profiteering could not be computed in the absence of requisite documents since the same had not been furnished by Respondent No. 1.

c. That the DGAP has not attempted to examine or question the base price as Section 171 of the CGST Act 2017 did not mandate control over the prices of the goods or services as they were to be determined by the supplier. Section 171 of the Act 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 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 has not examined the cost component included in the base price but has only factored the impact of the denial of ITC to the pre-tax rate reduction base price.

d. That with regard to the period taken for calculation of the profiteering amount, it was reported that the DGAP has consistently determined the period of investigation starting from an event of a reduction in the rate of tax or availability of ITC (i.e. 15.11.2017 in the present case) till the latest month of receipt of a reference from the Standing Committee (i.e. March 2019 in the present case) in all the cases and the same has also been explained in the para-5 of the DGAP's report dated 28.08.2019.

e. That the Respondent No. 1 was absolutely free to exercise his right to practise any profession, or to carry on any occupation, trade or business, as per the provisions of Article 19(1) (g) of the Constitution and the DGAP has nowhere interfered with the business decisions of

Respondent No. 1 and therefore, there was no violation of Article 19(1) (g) of the Constitution.

f. That in terms of Section 171 of CGST Act, 2017 which governed the anti-profiteering provisions under GST read 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 that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously only be in absolute terms so that the final price payable by a consumer got reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax under the GST regime to the consumers. Moreover, it was clear that the said Section 171 simply did not provide a supplier of the goods or services any other means of passing on the benefit of ITC or reduction in the rate of tax to the consumers. Thus, the legal position was unambiguous and could be summed up as follows:-

   i. A supplier of goods or services must pass on the benefit of ITC or reduction in rate of tax to the recipients by commensurate reduction in prices.

   ii. The law did not offer a supplier of goods and services any flexibility to *suo moto* decide on any other

modality to pass on the benefit of ITC or reduction in the rate of tax to the recipients.

g. That the computation of the marginal gain/loss as per financial statements could not be considered in the light of the above statutory provisions.

h. That the contention of Respondent No. 1 that he had not indulged in profiteering was wrong. The DGAP has done a detailed investigation based on the documents and information submitted by Respondent No. 1 and the report indicated the procedure followed by the DGAP and the basis of the computation made by the DGAP for determining the amount of profiteering.

31. The above supplementary report of the DGAP was supplied to Respondent No. 1 to file his consolidated submissions if any. Respondent No. 1 vide his written submissions dated 25.09.2020 has reiterated his earlier submissions dated 24.08.2020. He has interalia also averred as under:-

a. That if the profiteered amount was calculated for the period from 15.11.2017 to 31.03.2019 separately for each channel of sale by taking the impact of the withdrawal of ITC benefit as 9.6%, the same for SOTD sales would be Nil, as the base price increase for SOTD sales was only 8.22% [(119-110)/110], which was well within the impact of the

withdrawal of ITC benefit i.e. 8.72% even as per DGAP's calculation and in respect of the sales through TCS, Pune outlet it would be only Rs 5000/- which was minuscule. In respect of remaining sales at the normal pricelist prices including promotional sales at discounts, (discounts have to be ignored in line with Hon'ble NAA's order dated 18.07.2018 in case of ***Rishi Gupta Vs. M/s Flipkart Internet Pvt. Ltd. 2018-TIOL-04-NAA-GST,*** the profiteered amount would work out to be Rs. 7,21,845/- for the period from 15.11.2017 to 31.03.2019 and if the months of February 2019 and March 2019 were excluded, the profiteered amount would be Rs. 7,16,398/-. The profiteered amount would get further reduced to Rs. 6,82,283/- if the element of GST was also excluded.

b. That if the reduction in the rate of GST on the supply of Restaurant service from 18% ad-valorem with ITC benefit to 5% ad-valorem had been with the ITC benefit intact, there would have been no need for revision of the base prices and the Respondent No. 1 would not have revised the same. But the change in GST rate on Restaurant service w.e.f. 15.11.2017 is from 18% with ITC benefit to 5% without ITC benefit. Since the withdrawal of ITC benefit has the effect of increasing the base price, the upward revision of the base price became necessary. The dispute, in this case, was only on the point of whether the increase

in the base price by Respondent No. 1 was only to that extent which was necessary to offset the effect of withdrawal of ITC benefit. In this regard, Respondent No. 1 decided to follow the recommendation of Respondent No. 2 given vide his email dated 14.11.2017, which was enclosed as Annexure A-1 to the Written Submissions dated 30.10.2019, submitted by Respondent No. 1. Since as per Respondent No. 2's estimate, the average impact of the withdrawal of ITC benefit was 11% with 2% additional ITC loss if a franchisee opened new outlets, the above Respondent No. 2 vide e-mail dated 14.11.2017 recommended a 12.4% increase in the base price of menu items other than those sold on SOTD basis with rounding off to Rs. 5/- or Rs. 10/- and an increase of about 8.4% for the menu items sold as SOTD. Respondent No. 1 had adopted this pricing policy. Respondent No. 1 pleaded that the impact of the withdrawal of ITC benefit during the post-rate reduction period, which, as per the DGAP, was the ratio of ITC availment to the taxable turnover during the pre-rate reduction period, was not a static factor but varied from time to time depending upon the tax element on the major inputs like rentals and in this regard, it would be wrong to assume that the same during post-rate reduction period would remain on the same level as that during pre-rate reduction period. Therefore, revision in the base price

of various menu items w.e.f. 15.11.2017, based on the recommendation of Respondent No. 2, was a prudent business decision to ensure that Respondent No. 1 earned a reasonable profit and at no point of time during post-tax rate reduction ended up selling his products below the cost price and did not pocket the tax concession. In the process of price revision which had become necessary because of withdrawal of ITC benefit, the small difference between the revised menu prices w.e.f. 15.11.2017, as decided by Respondent No. 1, and the revised menu prices as determined by the DGAP by taking the impact of the withdrawal of ITC benefit as 8.72% could not be treated as profiteering. In this regard, sub-section (1) of Section 171 of the CGST Act must be construed based on its heading – "Anti Profiteering Measure" and small gain for a business on account of price revision following the reduction in the rate of GST accompanied by the withdrawal of ITC benefit, should not be construed as profiteering, since as per the Black's Law Dictionary and Oxford Dictionary, the term "profiteering" meant making an excessive profit, taking advantage of unusual or exceptional circumstances by adopting the means which were unfair or illegal. Small and incidental gain when prices were revised on account of reduction in the rate of GST accompanied by the withdrawal of ITC benefit could not be treated as excessive

profit by unfair means and could not be termed as profiteering.

c. That instead of the highly complicated method of calculation adopted by the DGAP, sales category wise profiteering in respect of each menu item could have been easily calculated by (a) taking the difference between the pre-rate reduction base price of a menu item as adjusted for withdrawal of ITC benefit and the actual post-rate reduction base price of that menu item as per post-tax rate reduction pricelist as profiteering per unit; and (b) calculating the profiteering in respect of that item by multiplying the per unit profiteering by the total quantity of the menu item sold during the period of investigation.

d. That the calculation in this manner should have been done separately for each category of the sale in the very beginning when the investigation against Respondent No. 1 was initiated. There was no need for invoice-wise and menu item-wise calculation of profiteering and for asking Respondent No. 1 to give the voluminous invoice-wise and item-wise sales data in a prescribed format. It was unfair to reject Respondent No. 1's request for separate calculation for each category of sale on the ground that he did not give invoice-wise and item-wise data in the prescribed format, which Respondent No. 1 could not furnish, as the invoice-wise and item-wise data in the

prescribed format could not be generated from his system due to various technical reasons as mentioned in his letter dated 18.05.2020 and given the very large number of 2,75,995 invoices for April 2018 to March 2019 period, with each invoice covering more than one of a total of 255 menu items being served, compiling such data manually was impossible.

e. That from the DGAP's above clarification, it was clear beyond doubt that for determining whether a registered person has passed on the benefit of reduction in the rate of tax or ITC to his customers by way of commensurate reduction in prices, he didn't go into the cost component.

f. That the anti-profiteering provisions of Section 171 of the CGST Act, 2017 and the Chapter XV of the CGST Rules, 2017 made under Section 164 of the Act, without any computational provisions either in the Act or in the Rules were unenforceable given the Apex Court's judgment in ***CIT Vs. BC Srinivas Shetty*** (1981) 2 SCC 460.

g. That Rule 126 of the CGST Rules, 2017 sub-delegating the power to determine the "methodology and procedure for determination as to whether the reduction in the rate of tax on the supply of goods or services or the benefit of the input tax credit has been passed on by the registered person to the recipient by way of commensurate reduction in prices" was contrary to the law laid down by the Apex

Court in its judgement in the case of ***Ganpati Singhji Vs State of Ajmer*** *AIR 1955 SC 188* and therefore, was ultra vires.

h. The DGAP's clarifications did not explain as to why the organized chain restaurants have been picked up for anti-profiteering investigation when, as was evident from Para 65.23 of the 23rd meeting of the GST Council held on 10.11.2017, that:-

   i. the Government's view was that while organized chains of restaurants were factoring the Input Tax Credit and transferring its benefit to the consumers, the standalone restaurants were not transferring the benefit of ITC to the consumers and were indulging in profiteering by pocketing the benefit of additional ITC to the tune of 7-8% which had become available; and

   ii. reduction w.e.f. 15.11.2017 in the rate of GST on the supply of restaurant service from the earlier 18% ad-valorem with ITC benefit to 5% ad-valorem without ITC benefit had been done keeping the standalone restaurants in mind

i. That the Report dated 28.08.2019 of the DGAP did not mention any customer as the Applicant. It only referred to a reference received from Maharashtra State Screening Committee on Anti-profiteering along with a 'summary

sheet of the extent of profiteering, prepared by the Deputy Commissioner of State Tax, Pune.

j. That if the reduction in the rate of GST was without withdrawal of ITC benefit, an increase in base price during post- rate reduction period would require an inquiry for ascertaining whether it was due to bonafide commercial reasons or otherwise and in the latter case, would be treated as profiteering. But in this case, the reduction in the rate of GST was from 18% ad -valorem with ITC benefit to 5% ad-valorem without ITC benefit. Since the withdrawal of ITC benefit has the effect of increasing the input cost, revision of base price became necessary for offsetting the effect of withdrawal of ITC benefit. There was no notified standard formula for quantifying the impact of the withdrawal of ITC benefit. The DGAP quantified the impact of the withdrawal of ITC benefit based on ITC availment to taxable turnover ratio for the pre-rate reduction period and applied this ratio to the post-rate reduction period. But it was wrong to treat the ITC availment to taxable turnover ratio to be fixed and unchanging. As per Respondent No. 1's estimate, this ratio might be higher and he would want to revise the base prices during the post-rate reduction period on that basis. When in cases of reduction in the rate of GST accompanied by the withdrawal of ITC benefit, the only point of dispute was whether the increase in base

price was only to that extent which was necessary to offset the effect of withdrawal of ITC benefit or more than that and when there was no notified standard formula for determining the impact of the withdrawal of ITC benefit, it was wrong to initiate inquiry under Sec 171 against an assessee only on account of the small difference between post-tax rate reduction base price as fixed by him and the price as determined by the Department.

k. That these submissions may be considered by the Hon'ble Authority along with Respondent No. 1's earlier submissions dated 30.10.2019, 4.11.2019, 11.12.2019, and 24.08.2020.

32. The above submissions of the Respondent No. 1 were supplied to the DGAP. The DGAP vide his supplementary report dated 08.10.2020 has reiterated his clarifications filed vide earlier report dated 09.09.2020 and 28.11.2019. The DGAP in his supplementary report dated 28.11.2019 has stated:-

a. That as clearly detailed in the Paras 17 and 18 of the report dated 28.08.2019 the Ratio of ITC to Net Outward Taxable Turnover was 8.72% thus the Respondent No. 1 could have increased the base price by 8.72% post GST rate reduction w.e.f. 15.11.2017 in order to negate the impact of ITC denial but as it was clear from Annexures 16 & 17 of the DGAP Report dated 28.08.2019, Respondent No. 1 had increased

the base prices of 241 items in the range of 15% to 102%. Thus, the total profiteered amount had come to around 8.3% of the total turnover during the period of investigation as per Respondent No. 1's calculation.

b. That the argument advanced by Respondent No. 1 that the DGAP has compared the base price during the pre-rate reduction period with the Maximum Average Base price during each month from 15.11. 2017 to 31.03.2019 was wrong and denied. The DGAP had only added the denial of ITC to the pre-tax rate reduction base price and then compared it with the average actual base price of each month from 15.11.2017 to 31.03.2019 due to non-submission of transaction wise outward taxable supplies by Respondent No. 1.

That Section 15(1) of the Central Goods and Services Tax Act, 2017 reads as "*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) provides that the value of the supply shall not include any discount which is given

before or at the time of the supply if such a discount has been duly recorded in the invoice issued in respect of such supply. Thus, GST was chargeable on actual transaction value after excluding any discount (conditional as well as unconditional) and therefore, for the purpose of computation of profiteering menu price or pricelist or MRP could not be considered whereas actual transaction value was the correct amount which had been considered for computation of profiteering amount. The pricelist was the maximum price at which an item might be sold but it was not the actual sale price.

c. That the contention of Respondent No. 1 that maximum of the average base price during post-tax rate reduction period was not correct as the average base price for each month for each SKU had been taken separately for calculation of the amount of profiteering.

d. That Annexure-16 of his Report dated 28.08.2019 indicated the increase in % in the base prices only and it had no relation to the computation of profiteering. The details of SKU wise computation of profiteering were given in Annexure-17 of his report dated 28.08.2019 wherein profiteering had been computed for each SKU by comparing pre-rate reduction average

base price with month-wise post-rate reduction base price as Respondent No. 1 had not submitted the transaction wise details of outward taxable supplies.

e. That Section 171 of the CGST Act, 2017 and Chapter XV of the CGST Rules, 2017, required the supplier of goods or services to pass on the benefit of the tax rate reduction to the recipients by way of commensurate reduction in prices. Price included both, the base price and the tax paid on it. If any supplier had charged more tax from the recipients, the aforesaid statutory provisions would require that such amount be refunded to the eligible recipients or alternatively 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 credit note could be declared in the return filed by such supplier and his tax liability would stand adjusted to that extent in terms of Section 34 of the CGST Act, 2017. Therefore, the option was always open to Respondent No. 1 to return the tax amount to the recipients by issuing credit notes and adjusting his tax liability for the subsequent period to that extent.

f. That Respondent No. 1 neither submitted nor did his documents depict any category of items as "Sub of the

Day (SOTD) item Further, in case of any such category existed and the base price was increased from Rs. 110/- to Rs. 119/- (excluding taxes) i.e. by 8.23% [(119-110)/(110)] which was less than the denial of ITC of 8.72%, then there must be no profiteering computed as already detailed in para-18 of DGAP's report dated 28.08.2019.

g. That in terms of Section 171 of CGST Act, 2017 which governed the anti-profiteering provisions under the CGST Act 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 that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in prices of the goods or services. Such reduction could obviously only be in absolute terms so that the final price payable by a consumer got reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax under the GST regime to the consumers. Moreover, it was clear that the said Section 171 simply did not provide a supplier of the goods or services any other means of passing on the benefit of ITC or reduction in the rate of

tax to the consumers. Thus, the legal position was unambiguous and could be summed up as follows:-

i. A supplier of goods or services must pass on the benefit of ITC or reduction in the rate of tax to the recipients by commensurate reduction in prices.

ii. The law does not offer a supplier of goods and services any flexibility to *suo moto* decide on any other modality to pass on the benefit of ITC or reduction in the rate of tax to the recipients.

Therefore, computation of the marginal gain/loss as per financial statements cannot be considered in the light of said statutory provisions.

h. That Respondent No. 1 had been misleading the proceedings by comparing the reduced rate of GST @ 5% (without ITC) w.e.f. 15.11.2017 with that of GST @ 5% under composition scheme. Under the composition scheme, the supplier could not charge the Tax from the recipient. However, in the present case, Respondent No. 1 had opted for the normal scheme for payment of GST and was charging 18% GST from his recipients, which was reduced to 5%, and the same was charged by Respondent No. 1 w.e.f. 15.11.2019. Therefore, Section 171 of the CGST Act, 2017 got attracted in the present case as Respondent No. 1 had

increased the base prices by more than what he ought to have done to offset the denial of ITC.

i. That the case cited by Respondent No. 1 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. Further, there was no violation of Article 19(1) (g) of the Constitution of India as he had not attempted to examine or question the base prices 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 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 be passed on 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. His investigation had not examined the cost component included in the base price. It had only added the denial of ITC to the pre-tax rate reduction base price.

33. Vide Order dated 13.01.2021, personal hearing through video conferencing was also granted to Respondent No. 1.

Respondent No. 1 again filed his submissions dated 27.01.2021 through e-mail. Upon perusal of the above submissions, it is observed that the Respondent has reiterated his earlier submissions dated 24.08.2020 and 25.09.2020 and has interalia stated:-

a. That he has placed reliance on the decision of Hon'ble Madras High Court in the case of ***KTR Logistic Solutions Pvt. Ltd. Vs. Commr. of Customs and Ors. 2019-TIOL-2828-HC-MAD-CUS*** and the judgement of Hon'ble High Court of Delhi in the case of ***Impexnet Logistics Vs CC 2016-TIOL-1069-HC-DEL-CUS***. The ratio decidendi of these judgements, which were in respect of time limits specified in the Customs Brokers Licencing Regulations/ Customs House Agents Licensing Regulations, were ipso-facto applicable to the present case as the time limit has been prescribed in the CGST Rules, 2017 framed by the Central Government under the legislative authority delegated under Section 164 of the CGST Act, 2017 and in terms of Section 166, these Rules were deemed to have the approval of the Parliament.

b. That this Authority in its Order No. 99/2020 dated 11.12.2020 passed in the case of Hussain Shoaib Kothalia, Chennai & DGAP Vs. M/s Subwest Restaurant LLP has upheld the methodology adopted by the DGAP

for computation of profiteered amount by comparing the pre-rate reduction base price of the menu-item as per the price-list, as adjusted for withdrawal of ITC benefit w.e.f. 15.11.2017, with the post-rate reduction base price as per the post-tax rate reduction pricelist w.e.f. 15.11.2017 and adding 5% GST to the difference. That the above methodology was also evident from Para 23 and 24 of the DGAP's Report dated 27.12.2019 in the case of M/s Subwest Restaurant LLP. This computational methodology has also been accepted by this Authority in Para 19, 20 & 21 of its Order dated 11.12.2020. However, there was no reason for not apply the computational methodology adopted in the case of M/s Subwest Restaurant in this case. Adopting different computational methodology for determining profiteering in the case of two identical assesses was a clear violation of the right to equality before law guaranteed under Article 21 of the Constitution of India. If the same computational methodology had been adopted in the present case, the profiteered amount would have been much less.

c. That Section 171 (3A) of the CGST Act, 2017 has been inserted in the CGST Act, 2017 vide Section 112 of the Finance Act, 2019, and the same became operational w.e.f. 01.01.2020. However, during the period of

investigation i.e. 15.11.2017 to 31.03.2019, there was no penal provision in the CGST Act, 2017 for the contravention of the provisions of Section 171 of the Act. Therefore, no penalty could be imposable on Respondent No. 1 under Rule 133 (3) (c) of the CGST Rules, 2017. The Respondent has also placed reliance on the Order passed by this Authority in the case of M/s Subwest Restaurant LLP.

34. Sh. Unmesh Bhatija and Sh. Rakesh Kumar, authorized representatives appeared for the hearing through a personal hearing on 28.01.2021 and have reiterated their arguments based on the submissions dated 24.08.2020, 25.09.2020, and 27.01.2020.

35. We have carefully considered the Reports furnished by the DGAP, the submissions made by Respondent No. 1, and the other material placed on record. On examining the various submissions we find that the following issues need to be addressed:-

a. Whether Respondent No. 1 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 Respondent No. 1?

36. A perusal of Section 171 of the CGST Act shows that it provides as under:-

(1). Any reduction in rate of tax on any supply of goods or services or the benefit of 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 him.

37. It is observed from the record that Respondent No. 1 is providing restaurant services as a franchisee of Respondent No. 2 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 Respondent No. 1, vide Notification No. 46/2017-Central Tax,

(Rate) dated 14.11.2017 without the benefit of ITC. Therefore, Respondent No. 1 is liable to pass on the benefit of tax reduction to his customers in terms of Section 171 (1) of the above Act. It is also apparent that the DGAP has carried out the present investigation w.e.f. 15.11.2017 to 31.03.2019.

38. It is also evident that Respondent No. 1 has been supplying different items during the period from 15.11.2017 to 31.03.2019 to his customers. It has also been found that the GST rate of 5% has been charged by Respondent No. 1 w.e.f. 15.11.2017, however, the base prices of some of the 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 price paid by the consumers was not reduced commensurately, inspite of the reduction in the GST rate.

39. While comparing the average pre-tax rate reduction base prices with the post-tax 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 Respondent No. 1 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 although there was a reversal of ITC on the closing stock of inputs/input services and capital goods as on

14.11.2017 made by Respondent No. 1, but the reversal of the ITC was not in accordance with the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the above Rules, and the invoice-wise outward taxable turnover in the month of November 2017 was not provided by the Respondent No. 1 to compute taxable turnover for the period from 01.11.2017 to 14.11.2017. 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 Respondent No. 1 till 31.10.2017. As per the record ITC amounting to Rs. 17,16,253/- was available to Respondent No. 1 during the period from July 2017 to October 2017 which was approximately 8.72% of the net taxable turnover of the restaurant service amounting to Rs. 1,96,90,023/- supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to Respondent No. 1.

40. 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 Respondent No. 1 had increased the base prices of his products/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 01.07.2017 to 14.11.2017 (Pre-GST rate reduction) and 15.11.2017 to 30.03.2019 (Post-GST rate reduction) have been compared and it has been found that

Respondent No. 1 has increased the base prices by more than 8.72% i.e. by more than what was required to offset the impact of denial of ITC in respect of the products/items sold during the above period. Thus, it is apparent that Respondent No. 1 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 09 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.

41. Based on the documents submitted by Respondent No. 1 and non-submission of documents by Respondent No. 2, the revised profiteering as per the direction of this Authority has not been computed by the DGAP. Thus, the report dated 28.08.2020 submitted by the DGAP establishing the profiteered amount to the tune of Rs. 78,41,754/- (including GST on the base profiteered amount) has been considered. Based on the aforesaid pre and post-tax rate reduction rates of GST, the impact of denial of ITC, and the details of outward supplies (other than zero-rated, nil rated, and exempted supplies) during the period from 15.11.2017 to 31.03.2019, the amount of net higher sale realization due to the 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 Rs.

78,41,754/- including the GST on the base profiteered amount. The details of the computation have been given by the DGAP in Annexure-17 of his Report dated 28.08.2019.

42. The DGAP, for computation of the profiteered amount, has compared the average base prices of the products which were being charged by Respondent No. 1 during the pre-tax rate reduction period with the actual post-tax rate reduction base prices of these products. It was not possible to compare the actual base prices prevalent during the pre and post-tax rate reduction periods due to the reasons that Respondent No. 1 was (i) selling his products at different rates to different customers based on the various factors (ii) the same customer may not have purchased the same product during the pre-tax rate reduction period and (iii) the average base prices computed for the period from 01.10.2017 to 14.11.2017 provide highly representative and justifiable comparable average base prices. Based on the average pre-tax rate reduction base price the commensurate base price has been computed by adding denial of ITC of 8.72% and compared with the actual base price of the product. However, the average pre-tax rate reduction base price was required to be compared with the actual post-tax rate reduction base price as the benefit is required to be passed on each product to each customer. In case average to average base price is compared for both the periods, the customers who have purchased a particular product on the base price which is

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

43. Respondent No. 1 has vehemently argued that the DGAP has submitted his report to this Authority on 29.08.2019 and this matter was required to be decided by 27.02.2020. This Authority vide its order dated 27.02.2020 had referred back the matter to the DGAP under Rule 133(4) of the CGST Act, 2017. The reference to the DGAP for further investigation under the above Rule was not to be treated as a new investigation. He has also placed reliance on the decision of Hon'ble Madras High Court in the case of ***KTR Logistic Solutions Pvt. Ltd. Vs. Commr. Of Customs and Ors. 2019-TIOL-2828-HC-MAD-CUS*** and the judgement of Hon'ble High Court of Delhi in the case of ***Impended Logistics Vs. CC 2016-TIOL-1069-HC-DEL***-CUS. It is pertinent to mention here that as per Rule 133 (4) of the CGST Rules, 2017, if this Authority opined that further investigation or

inquiry was called for in the matter, it may, for reasons to be recorded in writing, refer the matter back to the DGAP to cause further investigation or inquiry as per the provisions of the Act and the Rules. Therefore, this Authority vide Order No. 11/2020 dated 27.02.2020 had referred back the matter to the DGAP to cause further investigation due to the reason that the profiteering ought to have been computed on the basis of the comparison of pre-rate reduction item-wise average base price with the actual transaction-wise/invoice-wise post-rate reduction price charged by the Respondent No. 1 in respect of his supplies as per the provisions of Section 171(1) and Section 171(2) of the Act. Further, this Authority in Para 10 of guidelines dated 04.10.2019 has also notified that the Reports submitted by the DGAP under Rule 133(4) of the CGST Rules, 2017 shall be construed to be fresh Reports for the purposes of Rule 133(1) of the CGST Rules, 2017. Therefore, the DGAP has further re-investigated the present case which has to be considered as a fresh investigation under Rule 133 (1) of the CGST Rules, 2017. The DGAP has submitted his report under Rule 129 of the CGST Rules, 2017, which is well within the time limit prescribed under the law. Therefore, the cases relied upon by Respondent No. 1 are of no help to him, and hence, the above contention of Respondent No. 1 is not correct and cannot be accepted.

44. Respondent No. 1 has further contended that his sales during the investigation period were Rs. 9,44,27,338/- and

alleged profiteering was Rs. 78,41,754/- which meant profiteering of 8.3% of the sales turnover, while given the 13% reduction in the rate of tax and the impact of the withdrawal of ITC benefit being about 9%, the maximum possible profiteering could be only about 4%. In this regard, it is pertinent to mention that the claim of Respondent No. 1 that there was only profiteering to the extent of 4% is completely wrong as the quantum of profiteering cannot be computed based on the difference between the pre-reduction and post-reduction tax rates. The profiteering amount has to be computed on each item by comparing the average base price which Respondent No. 1 was charging before tax reduction with the actual base price which he has charged post-tax rate reduction. Respondent No. 1 has increased his base prices by more than the denial of ITC of 8.72% or more as is evident from Para 2 (A.1) of the supplementary report dated 02.11.2019 of the DGAP which states that:- *"As clearly detailed in Para 17 and 18 of the report dated 28.08.2019 that the Ratio of Input Tax Credit to Net Outward Taxable Turnover was 8.72% thus the Noticee could have increased the base price by 8.72% post GST rate reduction w.e.f. 15.11.2017 in order to negate the impact of ITC denial but as it is clear from Annexure 16 & 17 of the report dated 28.08.2019, the Noticee has increased the base prices on 241 items in the range of 15% to 102%....."*. Therefore, it is quite clear that the profiteered amount is not to the extent of 4% of the

GST. Hence, the above claim of Respondent No. 1 cannot be accepted.

45. The Respondent No. 1 has further averred that the DGAP has calculated the ratio of ITC to Turnover for the period from 01.07.2017 to 31.10.2017 and has not taken into account the ITC availment for the period from 01.07.2017 to 14.11.2017 even though the details of ITC availment and the invoice-wise details of taxable outward supplies had been provided by the Respondent No. 1. In this regard, we observe that this has been done because although there was a reversal of ITC on the closing stock of inputs/input services and capital goods as on 14.11.2017 made by Respondent No. 1, but the reversal of the ITC was not in accordance with the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the above Rules, and the invoice-wise outward taxable turnover for the month of November 2017 was not provided by the Respondent No. 1 to compute taxable turnover for the period from 01.11.2017 to 14.11.2017. It has also been illustrated that Respondent No. 1 has availed ITC of Rs. 22,368/- in November 2017 on invoice no. TRL - 135 dated 01.11.2017 issued by M/s Tremont Reality LLP and of Rs. 25,032/- on invoice no. 270517180107316 dated 02.11.2017 issued by M/s Vamona Developers Pvt. Ltd. however, Respondent No. 1 had received the former invoice for the monthly rental charges for the period from 01.11.2017 to 30.11.2017 and the latter invoice pertained to the license fee for

the period from 01.11.2017 to 30.11.2017. Thus, Respondent No. 1 had not received the services on the date of availing ITC, which is not in consonance with the provisions of Section 16(2)(b) of the CGST Act, 2017, and hence the Respondent No. 1 cannot claim the benefit of ITC to which he was not legally entitled. Therefore without having the proper documents/information, the ratio of ITC to the net taxable turnover has been rightly computed for determining the impact of denial of ITC which was available to Respondent No. 1 till 31.10.2017. Hence, the above contention of Respondent No. 1 is incorrect and cannot be accepted.

46. It has also been contended by Respondent No. 1 that there isn't any ground to adopt the period of investigation from 15.11.2017 to 31.03.2019 and the period from 30.01.2019 to 31.03.2019 should have been excluded for determination of the profiteering amount on account of an increase in the cost of inputs. In this context, we observe that while the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017, Respondent No. 1 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 at any point of time till 31.03.2019. 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. Respondent No. 1 has not produced any evidence to prove from which date the benefit was passed

on by him. The fact that Respondent No. 1 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 Respondent No. 1. We further observe that if Respondent No. 1 had 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 correctly taken by the DGAP for computation of the profiteered amount.

47. Respondent No. 1 has further contended that for identifying the items in respect of which increase in base prices during post-tax rate reduction period was made the base prices of the items as of 14.11.2017 should have been compared with the revised base prices of the items w.e.f. 15.11.2017 for the post-tax rate reduction period. But instead of calculating the increase in base prices in the above manner, the DGAP has compared the base prices during the pre-rate reduction period with the maximum of Average Base Price during each month from 15.11.2017 to 31.03.2019. The Respondent No. 1 has also claimed that if instead of the average base prices for the period from 01.10.2017 to 14.11.2017, the actual base prices as of 14.11.2017 as per the price list, had been adopted, the alleged profiteered amount would come to Rs. 9,22,410/-. In this context, we observe that the DGAP for computation of the profiteered amount has compared the average base prices of the products

which were being charged by Respondent No. 1 during the pre-tax rate reduction period with the actual post-tax rate reduction base prices of these products. It was not possible to compare the actual base prices prevalent during the pre and the post GST rate reduction periods due to the reasons that Respondent No. 1 was (i) selling his products at different rates to different customers based on the various factors (ii) the same customer may not have purchased the same product during the pre rate reduction period and (iii) the average base prices computed for the period from 01.10.2017 to 14.11.2017 or the previous months provided highly representative and justifiable comparable average base prices. Based on the average pre-tax rate reduction item-wise base prices, the commensurate item-wise base prices have been computed by adding denial of ITC of 8.72% and compared with the actual base price of the product. However, the average pre-tax rate reduction base prices were required to be compared with the actual post-tax rate reduction base prices as the benefit is required to be passed on each product to each customer. In case, a comparison of the average to average base prices for both the periods had been considered for the computation, the customers who have purchased a particular product on the base price which is more than the commensurate base price would not have got the benefit of the said tax reduction. Such a comparison would be against the provisions of Section 171 of the CGST Act 2017 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, it is also revealed that the Respondent No. 1 has not supplied the supply channel-wise details of the outward supplies to the DGAP specifically on account of Sales from the restaurant located in TCS Pune and SOTD sales. The above methodology employed by the DGAP for computing the profiteered amount appears to be correct, reasonable, justifiable, and in consonance with the provisions of Section 171 of the CGST Act, 2017.

48. He has also contended that instead of taking the base prices for the pre-rate reduction period as per Respondent No. 1's price list, the average base price during the period from 01.10.2017 to 14.11.2017 had been adopted, which was lower than the base price, as per the price list and that the Average price couldn't be equated with the Actual Transaction Price, on account of Sales from the restaurant located in TCS Pune, which had 10% lower prices, SOTD sales, promotional sales at discount and sales through Swiggy, Zomato, Food Panda, etc. which were also at a lower price. This understanding had been adopted by this Authority in the case of ***Johnson & Johnson Ltd. (case No. 59/2019), decided vide its Order dated 21.11.2019***. In this connection, it would be relevant to mention that despite the orders of this Authority to Respondent No. 1 to promptly extend all co-operation to the DGAP and furnish the

details/information/documents in the manner required for the investigation, the Respondent No. 1 has not furnished the channel wise details i.e. sales from the restaurant located in TCS Pune, SOTD sales, promotional sales at discount and sales through Swiggy, Zomato, Food Panda, etc. of the outward supplies to the DGAP during the course of the investigation and hence, there was no reason to separately consider the above supplies. Therefore, the allegation made by Respondent No. 1 on this ground is baseless. Further, a perusal of the above case relied upon by the Respondent No. 1 has revealed that in that case, the supplier has submitted the channel wise details of the outward supplies to the DGAP which Respondent No. 1 has not done, and hence the facts of the instant case are at variance with the case cited by the Respondent No.1. Therefore, the above case cited by Respondent No. 1 cannot be relied upon.

49. Respondent No. 1 has also claimed that the DGAP while calculating the profiteered amount has erroneously added a 5% notional amount on account of GST (to the base profiteering amount) which has been collected from the customers and deposited with the Government of India with the monthly GST returns. This contention of Respondent No. 1 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 No. 1 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, Respondent No. 1 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 No. 1 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. It is evident that If Respondent No. 1 had not charged the excess GST, the customers would have paid lesser prices while purchasing products from Respondent No. 1 and would have thus benefitted on account of the net reduction in the rate of tax. Hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by Respondent No. 1 to his customers/ recipients. 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, and

therefore, the above contention of Respondent No. 1 is untenable and hence it cannot be accepted.

50. Respondent No. 1 has further contended that while calculating the profiteered amount vide Annexure 17, the DGAP has not taken into account the fact that in the case of the items sold as 'Sub of the Day (SOTD) items', the price of which as on 14.11.2017 was Rs 110/- plus GST which was revised to Rs. 125/- including 5% GST w.e.f. 15.11.2017, translating into an increase of only 8.18% or Rs. 9/- in the base price from Rs 110/- to Rs 119/-, was well within the impact of ITC withdrawal of 8.72% as calculated by the DGAP and hence there was no profiteering in the case of SOTD sales. However, the record of the case reveals that Respondent No. 1, at no point in time, has furnished any invoice/ document which showed that the price of the SOTD items had been fixed as Rs. 110/- by the Respondent No. 1. It is also apparent that for computing the extent of profiteering, the DGAP has taken the product-wise average base price for the items supplied in the pre-tax rate reduction period from Respondent No. 1's invoices which Respondent No. 1 had himself submitted and not from any secondary data/ source. Therefore, the base price of SOTD computed by the DGAP is based on the information supplied by Respondent No. 1 himself. Further, in case any such category existed and in case the base price thereof was increased from Rs. 110/- to Rs. 119/- i.e.by 8.23% which is less than the denial of ITC of 8.72%, then there

would have been no profiteering computed. Therefore, the above contention of Respondent No. 1 is frivolous and unacceptable.

51. The Respondent No. 1 has further contended that there was no standard computational methodology in this regard notified either by the Central Government or by this Authority and in every case, a separate methodology was adopted about which the registered person did not know. The above contention of Respondent No. 1 is frivolous as the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC or computation of the profiteered amount has been outlined in Section 171 (1) of the CGST Act, 2017 itself which provides that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" It is clear from the plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is effected by the Central or the State Governments or if a registered supplier avails the benefit of additional ITC the same have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their tax revenue. It also provides that the above benefits are to be passed on any supply i.e. on each Stock Keeping Unit (SKU) of each product or unit of construction or service to every buyer and in case they are not passed on, the quantum of denial of these benefit or the

profiteered amount has to be computed for which investigation has to be conducted in respect of all such SKUs/units/services by the DGAP. What would be the 'profiteered amount' has been clearly defined in the explanation attached to Section 171. These benefits can also not be passed on at the entity/organization/branch/invoice/product/ business vertical level as they have to be passed on to each buyer at each SKU/unit/service level by treating them equally. The above provision also mentions "any supply" which connotes each taxable supply made to each recipient thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer on a particular product therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer, on another product. Each customer is entitled to receive the benefit of tax reduction or ITC on each SKU or unit or service purchased by him subject to his eligibility. The term "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the price which has to be computed in respect of each SKU or unit or service based on the price and the rate of tax reduction or the additional ITC which has become available to a registered person. The legislature has deliberately not used the word 'equal' or 'equivalent' in this Section and used the word 'Commensurate' as it had no intention that it should be used to denote proportionality and adequacy. The benefit of

additional ITC would depend on the comparison of the ITC/CENVAT 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 price and quantum of reduction in the rate of tax from the date of its notification. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from SKU to SKU or unit to unit or service to service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer. Similarly, computation of the profiteered amount is also a mathematical exercise that 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 authorized to determine the 'Procedure and Methodology' which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed mathematical formula, in respect of all the Sectors or the SKUs or the services, can be set for passing on the above benefits or for computation of the profiteered amount, as the facts of each case are different. In the case of one real estate project, date of start and completion of the project, price of the flat/shop, mode of payment of price or instalments, stage of completion of the project, rates of taxes pre

and post GST implementation, amount of CENVAT and ITC availed/available, total saleable area, area sold and the taxable turnover received before and after the GST implementation would always be different from the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to the other project. Therefore, no set procedure 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 keep even a single penny in their pocket and therefore, 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 unorganized, voiceless and vulnerable. The Respondent No. 1 is trying to deliberately mislead by claiming that he was required to carry out highly complex and exhaustive mathematical computations for passing on the benefit of tax reduction which he could not do in the absence of the procedure framed under the above Act. However, no such elaborate computation was required to be carried out if Respondent No. 1 had left unchanged the base prices of the products which he was charging as of 14.11.2017 and then added 8.72% of the base price on account of denial of ITC and charged GST @5% w.e.f. 15.11.2017. Instead of doing that he has raised his prices by adding more than 8.72% of the base prices as is evident from Table-A supra. It is clear from the above narration of facts and the law that no procedure or elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of tax reduction. Respondent No. 1 cannot deny the benefit of tax reduction to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides a clear-cut methodology and procedure to compute the benefit of tax reduction and the profiteered amount. Therefore, the above plea of Respondent No. 1 is wrong, and hence, it cannot be accepted.

52. The Respondent No. 1 has also argued that the manner in which the profiteered amount has been calculated is in contravention of the provisions of Article 19 (1) (g) of the Constitution. In this connection, it would be relevant to mention that Respondent No. 1 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. This Authority has not acted in any way as a price controlling authority as it does not have the mandate to do so. Under Section 171, this Authority has only been mandated to examine 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 or not. The intent of this provision is the welfare of the consumers who are voiceless, unorganized, and vulnerable. This Authority has nowhere interfered with the pricing decisions of Respondent No. 1 and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

53. Further, it has been contended by Respondent No. 1 that the DGAP while concluding that Respondent No. 1 was guilty of contravention of the provisions of Sec 171(1) of the CGST Act, 2017 has not considered that the base price of a product depended upon several other factors like cost of inputs, fixed cost, supply & demand position, competition, etc. In this

connection, it would be pertinent to mention that the provisions of Section 171 (1) and (2) of the above Act require that Respondent No. 1 has to pass on the benefit of tax reduction to the consumers only and have no mandate to look into fixing of prices of the products which the Respondent No. 1 is free to fix. However, it cannot be accepted that his costs had increased on the intervening night of 14.11.2017/ 15.11.2017 when the rate reduction had happened which had forced him to increase his prices more than the denial of benefit of ITC. Such an uncanny coincidence is unheard of and hence there is no doubt that Respondent No. 1 has increased his prices for appropriating the benefit of tax reduction to deny the above benefit to his customers. Therefore, the above claim of the Respondent No. 1 cannot be accepted.

54. Respondent No. 1 has also pointed out that the Malaysian Government has enacted the Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profits for Goods) (Net Profit Margin) Act, 2011 which provided the mechanism to calculate profiteering. The anti-profiteering measures in Australia revolved around the 'Net Dollar Margin Rule' serving as the fundamental principle as its guideline. However, no such provision has been made under the CGST Act and the Rules. In this regard, it would be appropriate to mention that the above Act has been repealed by Malaysia as it was not found to be working properly. Moreover, this Act was promulgated to control prices

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

55. The Respondent No. 1 has further contended that neither Section 171 of the CGST Act nor the CGST Rules defined the term "commensurate reduction in prices". In this context, it would be relevant to mention that the term "commensurate" mentioned in Section 171 of the CGST Act, 2017 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 tax reduction would depend upon the price and quantum of reduction in the rate of tax from the date of its notification. Computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from SKU to SKU or unit to unit or service to service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer. Therefore, the above contention of Respondent No. 1 is not maintainable.

56. The Respondent No. 1 has also relied upon the judgements passed by Hon'ble Apex Court in the case of ***Commissioner of Income Tax Bangalore*** v. ***B. C. Srinivasa Setty (1981) 2 SCC 460*** and claimed that in the absence of the machinery provisions the provisions of Section 171 could not be implemented. In this connection, it is mentioned that under Section 171 (1) no tax has been imposed and hence no computation provisions mentioned in the above case are required to be made. As has been explained in Para supra the commensurate price can be fixed by Respondent No. 1 by maintaining the pre-tax rate reduction base price and by

increasing it by 8.72% due to denial of ITC and then by charging GST @ 5%. The whole exercise is purely mathematical and simple. Therefore, the above case-law cited by Respondent No. 1 does not apply in his case.

57. The Respondent No. 1 has further contended that the framing of Rules for determining whether a person has contravened the provisions of Section 171(1) has been delegated to the Government. However, the CGST Rules, 2017 nowhere prescribe any machinery provisions or computational methodology for determining whether a registered person has contravened the provisions of Section 171(1) and if so, how the profiteered amount would be calculated and for which period. Rule 126 simply further delegates to this Authority the determination of the procedure & methodology. This amounted to sub-delegation of the legislative function, which was not permissible as for this there was no provision either in Section 164 or in Section 171 of the CGST Act. The maxim *delegatus non potest delegare* was a well-settled law and sub-delegation of legislative function was unauthorized unless the person on whom such power was conferred was allowed in the parent Act to delegate, either expressly or by necessary intendment. In this regard, reliance was placed on the judgment of the Apex Court in the case of ***District Collector, Chittoor V. Chittoor Groundnut Traders Association AIR 1989 SC 989***. But without any

definition of "commensurate reduction in prices" in the Act, delegating the authority to frame rules or guidelines in this regard was a case of delegation of legislative function without any policy guidelines, and, therefore, was a case of excessive delegation. In this regard, Respondent No. 1 has placed reliance on the Apex Court's judgement in the case of ***Hamdard Dawakhana and Anr. V. Union of India and Ors. AIR 1960 SC 554, Ganpati Singhji V. State of Ajmer AIR 1955 SC-188*** and judgement of Hon'ble Kerala High Court in ***Writ appeal no. 917 of 2014 filed by Ultratech Cement Ltd***. In this context, it is mentioned that the Parliament as well as all the State Legislatures have delegated the task of framing the Rules under the CGST Act, 2017 on the Central Government as per the provisions of Section 164 of the above Act. Accordingly, the Central Government in terms of Section 171 (3) of the CGST Act, 2017 read with Section 2 (87) of the Act, has prescribed the powers and functions of this Authority, on the recommendation of the GST Council, which is a Constitutional federal body created under the 101st Amendment of the Constitution, as per Rule 127 and 133 of the CGST Rules, 2017. Further, the power to determine its own Methodology & Procedure has been delegated to this Authority under Rule 126 of the above Rules as per the provisions of Section 164 of the above Act as such power is generally and widely available to all the judicial, quasi-judicial, and statutory authorities to carry out their functions and duties.

The above delegation has been granted to this Authority after careful consideration at several levels and therefore, there is no ground for claiming that the present delegation is excessive. Since the functions and powers to be exercised by this Authority have been approved by the competent bodies, the same are legally tenable and binding on Respondent No. 1. This Authority, in the exercise of the power delegated to it under Rule 126 of the Rules, ibid, has notified the Methodology and Procedure vide Notification dated 28.03.2018 which is also available on its website. However, it is submitted that no fixed/uniform mathematical methodology can be determined as the facts of each case differ. Therefore, the determination of the profiteered amount has to be done by taking into account the facts of each case. Therefore, the above contention of Respondent No. 1 is not maintainable and cannot be accepted. Hence, the cases relied upon by Respondent No. 1 also cannot be followed as there isn't any excessive delegation or sub-delegation.

58. Respondent No. 1 has further contended that the Notification reducing the rate of GST w.e.f. 15.11.2017 on the restaurant service from 18% with ITC benefit to 5% without ITC benefit had been issued based on the recommendations of the GST council made in its 23rd meeting held on 10.11.2017. From Para 65.23 of the Minutes of the Meeting, it could be seen that the rationale for reducing the rate of GST on restaurant service from 18% with ITC benefit to 5% without ITC benefit was that

while the organized chains of restaurants were factoring the ITC and transferring its benefit to the consumers, the standalone restaurants were not transferring the benefit of ITC to the consumers and these restaurants were indulging in profiteering by pocketing the benefit of additional ITC to the tune of 7-8% which had become available to them. In this regard the Respondent No. 1 has claimed that he belonged to an organized chain of restaurants in respect of which the GST Council itself had observed that they were factoring the ITC and transferring its benefit to the consumers and therefore, the proceedings against him were unwarranted and misconceived and were like a roving inquiry. In this regard, it is pertinent to mention here that the rate of tax had been reduced from 18% to 5% w.e.f. 15.11.2017, on the restaurant service being supplied by Respondent No. 1, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 without the benefit of ITC. Upon perusal of the above Notification, it is observed that the Notification nowhere mentioned that the organized chains of restaurants were factoring the ITC and transferring its benefit to the consumers while the standalone restaurants were not transferring the benefit of ITC to the consumers. The observation of the GST Council was general in nature and does amount to intend that Respondent No. 1 was passing on the benefit of tax reduction. The claim of Respondent No. 1 is also not established by the present investigation which shows that he has not passed

on the benefit of tax reduction and hence, the contention of Respondent No. 1 is frivolous and cannot be accepted. Thus, he has contravened the provisions of Section 171 of the CGST Act, 2017. Therefore, he is liable to pass on the said benefit to his customers/recipients, which he has failed to do.

59. The Respondent No. 1 has also relied upon the case of ***Rishi Gupta V. M/s Flipkart Internet Pvt. Ltd. 2018-TIOL-04-NAA-GST*** wherein this Authority has observed that discounts have to be ignored while calculating profiteering amount. On perusal of the above-cited case, it is observed that the issue in that case related to denial of discount of Rs. 500/-, which had been initially offered by the supplier to the buyer at the time of placing the order, but the same was withdrawn by the supplier at the time of supply. In these circumstances, it was held by this Authority that the withdrawal of such discount did not amount to profiteering, since the said discount had no connection with the base price of the product supplied on the grounds that profiteering has to be calculated based on the transaction value of supply. The facts of that case are totally at variance with the facts of the present case wherein Respondent No. 1 has claimed that giving discounts was a norm in the competitive world and a call of business. It is further observed that the profiteering has been correctly calculated in this case on the basis of the comparision of the transaction values of the supplies made by

the Respondent No. 1 and the case cited by the Responent No. 1 has no relevance.

60. The Respondent No. 1 has further contended that earning profits through lawful means was not a sin and he could be only held liable if he had earned profit by unlawful means. He has also cited the definitions given in Black's Law Dictionary and Oxford Dictionary on profiteering. In this connection, it would be appropriate to refer to the definition of the profiteered amount given in the Explanation attached to Section 171 which states as under:-

"Explanation: For the purposes 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 ITC to the recipient by way of commensurate reduction in the price of the goods or services or both."

Therefore, the definitions of profiteering cited by Respondent No. 1 are not applicable as the definition of profiteered amount has been detailed in the above-cited Explanation to Section 171 of the CGST Act 2017, hence, the above claim of Respondent No. 1 is not correct.

61. The Respondent No. 1 has further contended that the complaint in the present case has not been filed by any customer. The Maharashtra State Screening Committee on Anti-profiteering has referred the case along with a 'summary sheet of the extent of profiteering, prepared by the Deputy Commissioner of State Tax, Pune. In this regard, we observe that the summary sheet prepared by the Deputy Commissioner of State Tax alleging profiteering by the Respondent No. 1 has been considered by the Screening Committee on Anti-profiteering and the Standing Committee on Anti-profiteering and thus, upon being prima facie satisfied that the Respondent No. 1 has contravened the provisions of Section 171 of the above Act forwarded the same to the DGAP for a detailed investigation. It would also be relevant to mention that a complaint alleging non-passing on of the benefit of reduction in the rate of tax or additional ITC by any supplier/registered person can be made by any other person also as per the provisions of Rule 128(1). Therefore, the above claim of Respondent No. 1 is not correct and cannot be accepted.

62. The Respondent has also averred that there would have been no need to revise the base prices of items w.e.f. 15.11.2017 if the reduction in the rate of GST from 18% to 5% had been made without withdrawing the ITC. However, w.e.f. 15.11.2017, the rate of GST on restaurant services was reduced from 18% with ITC to 5% without ITC; therefore, the revision of

base prices w.e.f. 15.11.2017 had become necessary as withdrawal of ITC had increased the cost of inputs. The above contention made by Respondent No. 1 is frivolous. In this regard, we find that while analyzing the item-wise outward taxable supplies, Respondent No. 1 was entitled to increase the base prices of his items by 8.72% to offset the denial of ITC. However, Respondent No. 1 had increased the base prices of different items supplied as a part of restaurant services by more than 8.72% i.e. by more than what was required to offset the impact of denial of ITC. Hence there is no doubt that Respondent No. 1 has increased his prices for appropriating the benefit of tax reduction and to deny the above benefit to his customers. Therefore, the above claim of the Respondent No. 1 cannot be accepted.

63. Respondent No. 1 has also contended that this Authority in its Order No. 99/2020 dated 11.12.2020 passed in the case of Hussain Shoaib v. M/s Subwest Restaurant LLP has upheld the methodology adopted by the DGAP for computation of profiteered amount by comparing the pre-rate reduction base price of the menu-item as per the price-list, as adjusted for withdrawal of ITC benefit w.e.f. 15.11.2017, with the post-rate reduction base price as per the post-tax rate reduction pricelist w.e.f. 15.11.2017 and added 5% GST to the difference. Adopting different computational methodologies for determining profiteering in the case of two identically placed assesses i.e.

two franchisees of the same franchisor selling identical products was in clear violation of the right to equality guaranteed under Article 21 of the Constitution of India. In this regard, upon perusal of the report of the DGAP in the case of M/s Subwest Restaurant LLP, another franchisee of the same franchisor, it is observed that the documents/information i.e. invoice-wise outward supplies, required for the computation of profiteering had not been supplied by M/s Subwest Restaurant LLP. This non-submission of the requisite data, in that case, forced the DGAP to calculate the profiteering based on the comparison of the pre-rate reduction base prices of the menu items (as adjusted for withdrawal of ITC benefit w.e.f. 15.11.2017) with the post-rate reduction base prices culled out from the post-tax rate reduction pricelist, w.e.f. 15.11.2017, as the investigation had to be completed in a time-bound manner within the time limit prescribed under the CGST Rules, 2017. However, in the present case, the requisite documents required for the determination of profiteered amount have been made available to Respondent No. 1 to the DGAP. Hence, the computational methodology adopted in the case of M/s Subwest Restaurant LLP cannot be applied in the present case. Therefore, the above contention made by Respondent No. 1 being frivolous cannot be accepted as the facts of the two cases are different.

64. It has also been claimed by Respondent No. 1 that Section 171 (3A) of the CGST Act, 2017 has been inserted in the CGST Act, 2017 vide Section 112 of the Finance Act, 2019, and the same became operational w.e.f. 01.01.2020. However, during the period of investigation i.e. 15.11.2017 to 31.03.2019, there was no penal provision in the CGST Act, 2017 for the contravention of the provisions of Section 171 of the Act. Therefore, no penalty could be imposable on Respondent No. 1 under Rule 133 (3) (c) of the CGST Rules, 2017. In this regard, it is observed that the provisions of Section 171 (3A) have come into force w.e.f. 01.01.2020 whereas the period during which violation has occurred is w.e.f. 15.11.2017 to 31.03.2019, hence the penalty prescribed under the above Section is not proposed to be imposed on Respondent No. 1 retrospectively.

65. Based on the above facts the profiteered amount is determined as Rs. 78,41,754/- as has been computed in Annexure-17 of the DGAP Report dated 28.08.2019. Accordingly, we direct the Respondent No. 1 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 above are not identifiable, Respondent No. 1 is directed to deposit an amount of Rs. 78,41,754/- in two equal parts of Rs. 39,20,877/- each in the Central Consumer Welfare Fund and the Maharashtra State Consumer Welfare Fund as per the

provisions of Section 171 read with 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 No. 1 from his recipients till the date of its deposit. The above amount of Rs. 78,41,754/- 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 Commissioner.

66. It is evident from the above narration of facts that Respondent No. 1 has denied the benefit of tax reduction to the customers in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus committed an offence under Section 171 (3A) of the above Act and therefore, he is liable for imposition of penalty under the provisions of the above Section. However, since the provisions of Section 171 (3A) have come into force w.e.f. 01.01.2020 whereas the period during which violation has occurred is w.e.f. 01.07.2017 to 31.03.2019, hence the penalty prescribed under the above Section cannot be imposed on Respondent No. 1 retrospectively. Accordingly, Show Cause Notice directing him to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him is not required to be issued.

67. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by Respondent No. 1 as ordered by this Authority is deposited in the CWFs of the Central and the State Governments 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.

68. 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 28.02.2020 the order was to be passed on or before 27.08.2020. However, due to the 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. 91/2020-Central Tax dated 14.12.2020 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Indirect Taxes & Customs under Section 168 A of the CGST Act, 2017.

69. A copy each of this order be supplied to the Applicants, Respondents No. 1 & 2 and to the concerned Commissioners CGST /SGST for necessary action. File be consigned after completion.

Sd/-
(Amand Shah)
Technical Member

Sd/-
(Navneet Goel)
Technical Member

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

Certified Copy

12.3.2021

(A.K.Goel)
Secretary, NAA

National Anti-profiteering Authority
राष्ट्रीय मुनाफाखोरी-रोधी प्राधिकरण
NAA
Dept. of Revenue
Ministry of Finance
Govt. of India

File No. 22011/ NAA/57/Dough Makers/2019/ 1362-1371 Dated: 12.03.2021

Copy To:-

1. M/s Dough Makers India Pvt Ltd, Plot No 34/2, Rajiv Gandhi Infotech Park, Phase-I, Hinjawadi, Pune-411057.
2. M/s Subway Systems India Pvt. Ltd., Unit No. 20-24, 3rd Floor, MGF Metropolis, MG Road, Sector-28, Gurugram- 122002, Haryana.
3. Deputy Commissioner of State Tax, E-901, 3rd Floor, GST Bhavan, Yervada, Pune-411006.
4. 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.
5. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010.
6. Chief Commissioner of Central Goods & Services Tax, Pune zone GST Bhawan Ice House, 41A, Sasoon Road, Opp. Wadia college, Pune-411001.
7. The Commissioner of State Tax, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula, Haryana-134151.
8. The Commissioner, CGST Gurugram, Plot No. 36 & 37, Sector-32, Gurugram, Haryana-122001.
9. Guard File.

12.3

A. K. GOEL
SECRETARY, NAA