BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

I.O. No.	01/2022
Date of Institution	20.08.2020
Date of Order	13.04.2022

In the matter of:

1. Deputy Commissioner of State Tax, PUN-INV-E-002, Investigation Branch, Vikrikar Bhavan, 3rd Floor, Airport Road, 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

M/s A. J. Enterprises, Sun Orbit, Flat No. B-201, S. No. 12, Suncity Road, Vadgaon, Maharashtra- 411041.

Respondent

Quorum:-

1. Sh. Amand Shah, Technical Member & Chairman
2. Sh. Pramod Kumar Singh, Technical Member
3. Sh. Hitesh Shah, Technical Member

Present:-

1. None for the Applicant No. 1
2. Sh. Raminder Singh, Assistant Commissioner, for the Applicant No. 2.
3. Sh. Nikhil Gupta, Advocate and Sh. Avinash Joshi, Proprietor, for the Respondent.

ORDER

1. The present Report dated 20.08.2020 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) after detailed investigation under Rule 129 (6) of the Central Goods & Service Tax (CGST) Rules, 2017. The brief facts of the present case are that a reference was received by the DGAP from the Standing Committee on Anti-Profiteering on 09.10.2019 recommending a detailed investigation in respect of an application alleging profiteering in respect of restaurant service supplied by Respondent despite reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 by way of commensurate reduction in prices, in terms of Section 171 of the CGST Act, 2017. A summary sheet showing extent of profiteering, prepared by the Applicant No. 1 received from the Screening Committee, had also been enclosed with the reference received from the Standing Committee on Anti-profiteering.
2. The aforesaid issue was examined by the Maharashtra State Screening Committee which observed that the Respondent had not passed on the appropriate benefit to his customers on account of reduction in tax rate

and forwarded the complaint to the Standing Committee on Anti-profiteering for further action.

3. The Standing Committee on Anti-profiteering examined the reference received from the Maharashtra State Screening Committee, whereby it was decided to refer the matter to the DGAP to initiate an investigation and collect evidence necessary to determine whether the benefit of reduction in the rate of GST on supply of "restaurant service" had been passed on by the Respondent to the recipients.

4. The DGAP in his report has stated that on receipt of the aforesaid reference from the Standing Committee on Anti-profiteering on 09.10.2019, a Notice under Rule 129 of the Rules was issued by the DGAP on 22.10.2019, calling upon the Respondent to reply as to whether the benefit of reduction in GST rate from 18% to 5% w.e.f. 15.11.2017, had been passed on to the recipients by way of commensurate reduction in prices and if so, to *suo moto* determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all documents in support of his reply. Further, the Respondent was afforded an opportunity to inspect the non-confidential evidence/information which formed the basis of the said notice, during the period 31.10.2019 to 01.11.2019. However, the Respondent did not avail of the said opportunity.

5. The DGAP has further stated that the time limit to complete the investigation was extended up to 07.07.2020 from 08.04.2020 by this Authority, vide its Order dated 24.03.2020, in terms of Rule 129(6) of the CGST Rules, 2017. However, due to prevalent pandemic of COVID-19 in the country the DGAP was not able to complete the investigation on

the above date i.e. 07.07.2020. Further, in terms of Notification No. 35/2020 –Central Tax dated 03.04.2020 as issued by the Central Govt. under Section 168 (A) of the CGST Act, 2017, where, any time limit for completion or compliance of any action, which fell during the period from the 20th day of March, 2020 to the 30th day of August, 2020, and where completion or compliance of such action had not been made within such time, then the time limit for completion or compliance of such action, was extended up to 31.08.2020, including for the purpose for furnishing of any report under the provision of the Central Goods and Service Tax Act, 2017. Therefore, the present Report has been submitted within the prescribed period of limitation as per Rule 129(6) of the CGST Rules, 2017. The period covered by the current investigation was from 15.11.2017 to 30.09.2019.

6. The DGAP further stated that in response to the notice dated 22.10.2019 and subsequent reminder letters dated 07.11.2019, 18.11.2019, 19.12.2019, 27.12.2019, 31.01.2020 & 03.03.2020 and Summons dated 08.01.2020 & 20.01.2020, the Respondent submitted his reply vide emails/letters dated 27.12.2019, 03.01.2020, 15.01.2019 28.01.2020, 31.01.2020, 28.02.2020, 10.03.2020, 12.03.2020 14.03.2020, 16.03.2020, 17.03.2020, 18.03.2020, 14.05.2020 22.05.2020, 25.05.2020, 26.05.2020, 28.05.2020, 12.06.2020 13.06.2020, 18.06.2020 and 29.06.2020.

7. The DGAP in his report has mentioned that vide the aforementioned emails/letters, the Respondent had also submitted the following documents/information:

   (a) Copy of GSTIN Registration.

(b) Copies of GSTR-1 Returns for the period from July, 2017 to September, 2019.

(c) Copies of GSTR-3B Returns for the period from July, 2017 to September, 2019.

(d) Sales details for the period from July, 2017 to September, 2019.

(e) Price list of products (pre and post 15.11.2017).

(f) Sample invoices issued during the pre and post 15.11.2017.

(g) Input Tax Credit Register from Oct, 2017 to September, 2019.

8. The DGAP has also claimed that in the notice dated 22.10.2019, the Respondent was informed that if any information/documents were provided on confidential basis, in terms of Rule 130 of the Rules, a non-confidential summary of such information/document was required to be furnished. However, the Respondent had not classified his information/documents as confidential in terms of Rule 130 of the Rules.

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

10. The DGAP has further reported that at the outset, it was noted that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on the restaurant service from 18% to 5% w.e.f. 15.11.2017 with the condition that the ITC on the goods and services

used in supplying the service was not to be availed, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017.

11. The DGAP has reported that before enquiring into the allegation of profiteering, it was important to examine Section 171 of CGST Act, 2017 which governed the anti-profiteering provisions under GST. Section 171(1) reads as "Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices." Thus, the legal requirement was abundantly clear that in the event of a benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in the prices of the goods or services. Such reduction could obviously be in money terms only, so that the final price payable by a consumer got reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in rate of tax to the consumers under the GST regime. Moreover, it was also clear that the said Section 171 simply did not provide a supplier of goods or services, any other means of passing on the benefit of ITC or reduction in rate of tax to the consumers.

12. The DGAP has reported that the assessment of the impact of denial of input tax credit, which was an uncontested fact, required the 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. To illustrate, if the ITC in respect of restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017, was up to 10%, one could conclude that there was

no profiteering. However, if the increase in the pre-GST rate reduction base prices 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 from products during the pre-GST rate reduction period had to be carried out, though by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017, because of the following reasons:-

a. There was no reversal of ITC on the closing stock of inputs and capital goods as on 14.11.2017 by the Respondent, which was required as per the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the Rules.

b. The invoices on which ITC was availed during the month of November, 2017 pertained to the whole month whereas ITC was not available to the Respondent after 14.11.2017.

13. The DGAP has also 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 the Respondent till 31.10.2017). On this basis, the finding was that ITC amounting to Rs. 2,04,744/- was available to the Respondent during the period July, 2017 to October, 2017 which was approximately 8.21% of the net taxable turnover of restaurant service amounting to Rs. 24,94,509/-, supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the

Respondent. A summary of the computation of ratio of ITC to the taxable turnover of the Respondent is given below at Table-A:-

Table –A					Amount in (Rs.)
Particulars	**Jul-17**	**Aug-17**	**Sept.-2017**	**Oct.-2017**	**Total**
ITC Availed as per GSTR-3B (A)*	32,997	82,912	29,315	59,520	2,04,744
Total Outward Taxable Turnover as per GSTR-3B (B)	7,13,975	4,80,571	6,26,541	6,73,422	24,94,509
Ratio of ITC to Net Outward Taxable Turnover (C)= (A/B)*100					**8.21%**

14. The DGAP has also reported that on further analysis of the details of item-wise outward taxable supplies during the period of 15.11.2017 to 30.09.2019, it has been revealed that the Respondent had increased 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. 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 30.09.2019 were compared and it was established that the Respondent had increased the base prices by more than 8.21% i.e., by more than what was required to offset the impact of denial of ITC in respect of products sold during the same period. Thus, the conclusion was that in respect of these items the commensurate benefit of reduction in rate of tax from 18% to 5% had not been passed on. It was also clear that there was no profiteering in regard to the remaining items on which there was either no increase in base prices or the increase in base prices was less than or equal to the denial of ITC or these were new products launched post GST rate reduction, or the product was not sold after rate reduction.

15. The DGAP has further reported that having established the fact of profiteering to the extent aforementioned, the next step was to quantify the same. 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. The calculation has been explained in Table-B below in case of item "6" Veggie Delite Sub" for which average base price had been calculated during the pre-GST rate reduction period of 01.11.2017 to 14.11.2017 and then profiteering had been calculated for post-GST rate reduction invoice No. 1/A 23830 dated 01.12.2017:-

Table –B **(Amount in Rs.)**

Name of the product (A)	6" Veggie Delite Sub
Total Quantity sold during 1st Nov, 2017 to 14th Nov, 2017 (B)	65
Sum of taxable Value during 1st Nov, 2017 to 14th Nov, 2017 (C)	7620
Average base price during 1st Nov, 2017 to 14th Nov, 2017 (D=C/B)	117.23
Base price with denial of ITC @ 8.21% (E=D+D *8.21%)	126.86
GST @ 5% (F=E*5%)	6.34
Commensurate price to be charged(G=E+F)	133.20
Selling price per unit as per invoice no. 1/A 23830 dated 01.12.2017 (H)	140.00
Total profiteering (I=H-G)	6.80 (140.00-133.20)

16. The DGAP in his report has also reported that on the basis of the aforesaid pre and post reduction GST rates, the impact of denial of ITC and the details of outward supplies (other than zero rated, nil rated and exempted supplies) during the period 15.11.2017 to 30.09.2019, as per the product wise sales registers reconciled with the 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 input tax credit) or in other words, the profiteered amount came to Rs. 15,66,821/- (including GST on the base profiteered amount).

17. The DGAP has stated that on the basis of the details of outward supplies of the restaurant service submitted by the Respondent, it was observed that the said service had been supplied by the Respondent in the State of Maharashtra only.

18. The DGAP has also reported that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling prices or by way of not reducing the selling prices of the products commensurately, despite a reduction in GST rate from 18% to 5% w.e.f. 15.11.2017 stood established against the Respondent. On this account, the Respondent had realized an additional amount to the tune of Rs. 15,66,821/- from the recipients which included both the profiteered amount and GST on the said profiteered amount. In view of the aforementioned findings, it appeared that Section 171(1) of the CGST Act, 2017 requiring that *"any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices",* had been contravened by the Respondent in the present case.

19. During the course of the proceedings before this Authority, the Respondent has filed written submissions on 11.11.2020, 08.01.2021 and 16.03.2022. Vide his above-mentioned submissions, the Respondent has interalia submitted:

    a. That the Respondent had taken the Subway franchisee from M/s Subway Systems India Private Limited *(hereinafter referred to as*

"Subway India") and in consideration, the Respondent was periodically paying royalty at 8% of the base prices for the items sold through these outlets. In addition, the Respondent was contributing 4.5% of the base prices towards common advertisement cost incurred by Subway India.

b. That the Respondent occasionally offered discounts to its customers depending upon the order size and frequency of their visit/order. In addition, like any other business, the Respondent ran special promotional schemes from time to time for both online and offline customers in accordance with guidelines issued by Subway India. During these schemes, discounts were primarily offered on Subs. Sub-of-the-Day (*hereinafter referred to as 'SOTD'*) and Buy-One-Get-One (*hereinafter referred to as 'BOGO'*) were two most common schemes across the globe.

c. That it was also pertinent to note that, in the course of its business, the Respondent regularly changed the product prices, from time to time as per the guidance received from Subway India/Local Development Agent for the State of Maharashtra, considering the increase in cost of operations and inflation.

d. That the Respondent in compliance with the Notice dated 22.10.2019 had submitted information from time to time. However, it appeared that the DGAP acted with a pre-meditated mindset and never sought any explanation or justification from the Respondent on any aspect before concluding his investigation in the report dated 20.08.2020.

e. That Section 171 of the CGST Act was in violation of Article 19 (1) (g) of the Constitution. In this regard, as the provisions of Section 171 of the CGST Act and Chapter XV of the CGST Rules were not akin to any price control regulations enacted in pursuance of Entry 34 of the Concurrent List. Therefore, any effort of controlling prices would be a violation of the freedom of trade guaranteed under the Constitution of India.

f. That the methodology adopted by the DGAP for computation of alleged profiteering amount was arbitrary and lacked any statutory guidance by the Government. It was pertinent to note that although this Authority had notified Methodology and Procedure, 2018, but unlike Customs and GST Valuation provisions, it only provided the procedure relating to initiation and conclusion of proceedings including enquiry and investigation and there was no prescription of any mechanism for calculation of profiteering amount, due to which the DGAP had arbitrarily adopted a methodology that best suited his motive.

g. That, the impugned proceedings were in gross violation of principles of natural justice as the Maharashtra State Screening Committee, Standing Committee and DGAP had drawn adverse conclusions against the Respondent without providing any opportunity of being heard at any stage.

h. That the impugned proceedings had been initiated by this Authority suo moto i.e. without any complaint from any third party. However, except as provided in Point 9 of this Authority's Methodology and Procedure, 2018, there was no other enabling provision under the

CGST Act or the Rules, which empowered this Authority to initiate anti-profiteering proceedings on its own motion. The Respondent submitted that the statue and rules framed thereunder nowhere envisaged this Authority in the capacity of complainant as well. However, this Authority appeared to have arbitrarily gained this power through this Authority's Methodology and Procedure, 2018 and thus, same was *ultra vires* the Statutory provisions itself.

i. That post completion of such enquiry, it was again this Authority which was adjudicating this matter, thus, this Authority was acting in a dual capacity i.e. as a complainant and as an adjudicating authority, which was clearly in conflict with the settled legal position regarding the constitution and functioning of quasi-judicial authorities.

j. That there was an apparent inconsistency between the DGAP's Report dated 20.08.2020 and DGAP's Profiteering Computation excel worksheet. It was submitted that the relevant period for computation of the alleged profiteered amount in the DGAP's report was from **15.11.2017 to 30.09.2019**, while in the computation worksheet, demand had been computed from **15.11.2017 to 31.10.2020**. Therefore, without prejudice, the DGAP's Report, had computed excess amount to the extent of **Rs. 74,739/-** and accordingly, alleged profiteered amount should be reduced to **Rs. 14,92,068/-** only.

k. That it was ex-facie evident that the profiteering computation worksheet shared by the DGAP was erroneous to the extent it included 5 % GST component in alleged profiteered amount, as

same had already been deposited by the Respondent with the exchequer. Accordingly, if the alleged profiteered amount was not reduced to that extent then it would result in excess recovery from the Respondent and same was not permissible under any law.

l. That the DGAP had arbitrarily selected the period of investigation of 22.5 months/ 684 days i.e. from 15.11.2017 to 30.09.2019 (actual computation is till 31.10.2019) for computing the alleged profiteered amount and there was no rationale behind the same.

m. That in order to comply with the requirements of Section 171, the Respondent was required only to undertake commensurate reduction in prices to the extent of reduction in taxes or unlocking of ITC subject to adjustment of increase in cost.

n. That as per DGAP's computation, loss of ITC for the Respondent was **8.21%** only. Nevertheless, as on 15.11.2017, gross profiteering in Respondent's case, without adjusting increase in cost should not exceed **4.38%**. This computation of maximum gross profiteering was very much in accordance with the view expressed by DGAP at Para 13 of the Report dated 20.08.2020.

If the methodology adopted by DGAP was correct then the maximum gross profiteering at transaction level should have been restricted to 4.38% for all the transactions. Yet in most of the cases gross profiteering percentage at transaction level was far in excess of 4.38% and in certain cases as high as 920%. Copy of screenshot of sample transactions for such cases was enclosed as Annexure-18. Further, at the entity level, the alleged profiteering of Rs. 14,92,068/- (from 15.11.2017 to 30.09.2019) on the turnover of Rs.

1,80,17,094/- (from 15.11.2017 to 30.09.2019) was around **9.03%**. Thus, it was evident that the computation shared by DGAP was flawed.

It might be noted that the Respondent had increased the base prices of its products by around 13% (on an average) only subject to rounding off. This increase in price was lower than the actual increase in cost and loss of ITC. The Respondent submitted that loss of ITC alone was around 10% to 11% (inclusive of loss of ITC on direct incremental costs like royalty, commission, advertisements, rentals and periodic capex cost). In addition, there was substantial increase in other associated costs immediately w.e.f. 15.11.2017 i.e. royalty, advertisement contribution, rentals and online delivery charges.

o. That cost of online delivery charges had gone up pursuant to increase in online sales. It might also be noted that during the period July 2017 to 14.11.2017, contribution of online sales was around 22.4% of the Respondent's total revenue, but this had gone up to 35.4% during the period 15.11.2017 to 30.09.2019. Thus, it was not proper to completely dis-regard this factor while computing alleged profiteered amount.

p. That the computation of ITC entitlement of 8.21% (based on 4 months' data for the period 01.07.2019 to 31.10.2019) was flawed, as other aspects like incremental GST on online delivery expenses, rent, royalty, advertisement expenses and periodic capex cost etc. had been totally ignored by the DGAP while deciding the rate of ITC entitlement for the Respondent. It might be noted that after every 7

years, the Respondent was required to invest heavily on the renovation of the premises interiors and disallowance of ITC on that cost in itself has a huge impact. As per Subway India/ Local Development Agent, loss of ITC on that account alone was around 2% on an average. If all these facts were considered then loss of ITC alone would be at least around 11%.

q. That this Authority and the DGAP had no jurisdiction to recover any amount over and above the actual tax forgone by the exchequer. In simple words, if the loss of tax in hands of exchequer was Rs. 100/- , then by no means liability exceeding Rs. 100/- could be created against the Respondent under the provisions of Section 171.

r. That one of the major reasons of such a high profiteered amount in the DGAP's Report, was for the reason that the DGAP had arbitrarily adopted average base prices for 14 days (i.e. 01.11.2017 to 14.11.2017) which was illogical and also incorrect. Further, basis that average base prices, it had computed profiteering for 684 days, by comparing them with the actual transaction values, ignoring all future price revisions.

s. That in the cases of other franchisees, SOTD transactions had been considered as a separate segment altogether while computing the average base prices. It might be noted that on 01.11.2017 and 08.11.2017, in compliance with Subway India guidance, the Respondent had sold 6" Hara Bhara Kabab Subs under SOTD scheme. Likewise, various other Subs were sold under SOTD scheme on different days during the period 01.11.2017 to

14.11.2017 and thus, all such discounted transactions should be ignored while computing the adjusted base prices.

t. That the DGAP while calculating the amount of alleged profiteering had ignored the transactions where prices were effectively reduced. In essence, it meant that where tax benefit had been passed on to the customers by the Respondent (w.r.t. specific products) in excess of the required amount, the DGAP had conveniently chosen to ignore such instances. This effectively meant that the DGAP had not offset positive profiteering (Rs. 10) against the negative profiteering (-Rs. 10) (treating these as 'zero' for the purpose of profiteering computation) and had arrived at an inflated and arbitrary figure of profiteering. It was wrong on the part of DGAP, in the absence of any statutory guidance, to compute transaction wise profiteering instead of looking at wholistic picture at least when the Central Government itself in the anti-dumping cases had been adopting completely opposite position.

u. That DGAP had computed profiteering even in the case of MRP based products like bottled beverages, water, chips etc, which were procured by the Respondent from the market for trading purposes. It was pertinent to note that the prices of these goods were not fixed by the Respondent and therefore, question of profiteering did not arise at all for goods purchased on or after 15.11.2017.

v. That the DGAP had computed alleged profiteered amount by adopting incorrect sale prices of certain products and few sample transactions for the same were enclosed along with underlying invoices as Annexure-22 and 23 of his submission dated

11.11.2020. It could be seen from the sample transactions that prices adopted in column M for these transactions were ex-facie incorrect and did not reflect the correct sale prices, which might be on account of inadvertent mistake by DGAP officials, e.g. price for 6" Hara Bhara Kabab adopted in the DGAP report for Invoice No. 1/A-95294 was Rs.1,200/- per unit, which was not correct. Thus, entire worksheet was required to be revisited before any demand should be confirmed against the Respondent.

20. A supplementary Report dated 24.11.2020 was submitted by the DGAP on the various submissions dated 11.11.2020 made by the Respondent, whereby, the DGAP has interalia reported:-

a. That the contention of the Respondent that the profiteered amount had been computed till 31.10.2019 was correct but not acceptable. The Respondent was issued Notice for initiation of investigation on 22.10.2019. Therefore, for the convenience of the Respondent, the information/data was sought upto 30.09.2019 as the information/data for the month of October, 2019 might not have been available at that time. However, during investigation, the Respondent submitted the data for the period upto 31.10.2019 and accordingly, the profiteered amount was also computed till 31.10.2019. Since, there was no provision/stipulation in the law to restrict the investigation upto 30.09.2020, the total profiteered amount for the period 15.11.2017 to 31.10.2019, as computed in Annexure 25 of the Report dated 20.08.2020 might be treated as final profiteering and investigation period might be considered as 15.11.2017 to 31.10.2019 in the Report submitted on 20.08.2020.

b. That the mandate of DGAP was to conduct investigation based on the recommendation of the Standing Committee on Anti-profiteering. DGAP submitted report of its findings to this Authority under Rule 129 of the CGST Rules, 2017 and this Authority passed the order under Rule 133 of the CGST Rules, 2017. The DGAP had no authority to initiate *suo-moto* enquiry under Section 171 of the CGST Act against the Respondent or Subway India.

c. That the DGAP submitted report of its findings based on the information/data and documents provided, to this Authority under Rule 129 of the CGST Rules, 2017. Therefore, in the instant case also, the DGAP had conducted its investigation within the confines of the law and hence it was incorrect to say that the DGAP had acted with a premeditated mindset. Further, there was no provision/stipulation in the law authorizing DGAP to seek any explanation or justification from the Respondent before concluding its investigation. Since the DGAP was an investigating agency, the power to establish profiteering or the absence of it, was with this Authority.

d. That Section 171 of the CGST Act, 2017 and Rule made there under were neither unconstitutional nor did they infringe upon the fundamental rights of the Respondent enshrined under Article 19(1)(g) of the Constitution of India. Section 171(1) of the CGST Act, 2017 was very clear which stated that any reduction in the rate of tax or the benefit of input tax credit had to be passed on to the recipient by way of commensurate reduction in prices.

e. Section 171 (1) of the 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 input tax credit (hereinafter referred to as "ITC") or reduction in rate of tax, there must be a commensurate reduction in prices of the goods or services.

f. That the GST Council had been constituted under Article 279A of the Constitution as a federal, constitutional body, comprising of all the Finance Ministers of all the States and UTs and the Union Finance Minister which in its wisdom has rightly not prescribed any specific guidelines/mechanism/methodology to determine profiteering in Section 171 of the Act and the Rules made thereunder as the facts and circumstances of each case were different for different sectors as well as in same sector also. Hence, no fixed mechanism could have been provided for in the Act or Rules. However, it was submitted that the Methodology and Procedure had been notified by the Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017.

g. That the mandate of the DGAP was to conduct investigation as per the directions and recommendation of the Standing Committee on Anti-profiteering. The DGAP submitted Report of its findings based on the information/data and documents provided, to this Authority under Rule 129 of the CGST Rules, 2017. In the instant case also,

the reference from the Standing Committee was received by the DGAP for detailed investigation against the Respondent.

h. That Section 171 of the CGST Act, 2017 required the supplier of goods or services to pass on the benefit of reduction in tax rate or input tax credit to the recipient by way of commensurate reduction in prices. If such benefit was not passed on by way of reduction in prices and the benefit was appropriated by the supplier, it amounted to profiteering. The Respondent had not complied with the requirements of Section 171 of the CGST Act, 2017 as detailed in the Report dated 20.08.2020 of the DGAP.

i. That the price included both basic price and the tax charged on it. Therefore, any excess amount collected from recipients, even in the form of tax, must be returned to the recipients. In case, the recipients were not identifiable, the said amount was required to be deposited in the Consumer Welfare Fund. By increasing the base prices the Respondent had forced his customers/recipients to pay extra tax which they were not liable to pay. Therefore, it was clear that the amount of extra tax (GST) on the increased base prices was an amount paid by the customers/recipients which they were not supposed to pay.

j. That the scope of profiteering, as per Section 171 of the CGST Act, 2017, was confined to the question whether the benefit accruing on account of rate reduction had been passed on to the recipient or not. In the instant case, the Respondent had failed to pass on the benefit of rate reduction. Moreover, the Respondent failed to produce any evidence during the course of investigation to the

effect that the price rise effected by him was commensurate with tax rate reduction. Further, at no stage between the period from 15.11.2017 to 30.09.2019 (investigation period), the Respondent could establish that he had passed on the benefit of rate reduction commensurately. Moreover, the Respondent had continued to increase his prices more than what he could have done to set off the denial of ITC and he had not fixed the prices commensurately even once during the above said period which could prove that he had passed on the benefit of rate reduction.

k. That the entire investigation was based upon the data/information submitted by the Respondent. Therefore, the profiteering computed by the DGAP had no relevance with the percentage cap of 4.38% as asserted by the Respondent. This percentage cap of 4.38% could only be possible when the Respondent maintained the same cum-tax selling prices of all the products/items in post-rate reduction period. It was pertinent to mention here that the entire computation made in the DGAP's Report dated 20.08.2020 was completely based on the data/figures submitted by the Respondent. Therefore, it could be inferred that the Respondent had increased the base prices more than the required increase upto 8.21%. Further, the increase in cost of royalty, advertisement cost, lease rentals and commission was a factor for determination of price but this factor was independent of the output GST rate. It could not be asserted that elements of cost unrelated to GST were affected by the change in the output GST rate.

l. That every supplier of goods and services was free to increase the price of his supply depending upon the various components affecting the cost of production/supply. But under the provisions of the Section 171 of the CGST Act, 2017, no supplier could increase the base prices of the products overnight in such a manner that even with reduction in the rate of tax, the cum-tax selling price would remain unchanged or increased.

m. That the average base price in the pre rate reduction period had been calculated separately for each product on the basis of data supplied by the Respondent. This base price was exclusive of taxes like GST, Central Excise duty, Service Tax etc. Thus, the DGAP got the base price for a particular product which was then compared with the transaction wise taxable value for the period after rate reduction for the same product. The benefit of this was that it avoided fluctuations in pre reduction base price as the same product could be sold at different rates depending on the discount given, quantity sold etc. In the post rate reduction period, the transaction wise value had to be considered as the profiteering had to be calculated separately for each transaction and for each customer. Section 171(1) stated 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"*. The words used in the statute were "on any supply" and "to the recipients". This clearly showed that the benefit of reduction in tax had to be calculated on every supply that was transaction wise and benefit had to be passed to each recipient

individually. Thus, for the post reduction period profiteering had to be calculated transaction wise. Further, the profiteering in any one transaction/product or recipient could not be set off against any other transaction/product or recipient.

n. That the Respondent had not given any remarks against these sales (like SOTD sale). Moreover, there was no specific mention of discounts in sales data/information provided by the Respondent during investigation which was required under Section 15(3) of the CGST Act, 2017. The Respondent simply declared the reduced rate (discounted) as taxable value in the sales data submitted by him during investigation. Moreover, the Respondent never claimed this fact in his written submissions made by him before the DGAP during investigation. Therefore, the discounted prices on a specific day were considered as normal prices by the DGAP for arriving at the base prices before rate reduction.

o. That as per the provisions of Section 171 of the CGST Act, 2017, every recipient of goods or services was entitled to get his/her due share of benefit. Hence, profiteering under the provisions of Section 171 of the CGST Act, 2017 was to be quantified at the products where prices were not reduced commensurately by the Respondent.

p. That MRP is the maximum price at which goods can be sold in retail. The value of transaction between the manufacturer and the wholesaler or the wholesaler and the retailer was invariably less than the MRP. Therefore, regardless of whether MRP was marked on the product or not, the pre and post tax rate reduction

transaction value was compared to determine profiteering. There was no significance of MRP in establishing any profiteering.

q. That the averment made by the Respondent that prices adopted in column M were *ex-facie* incorrect and did not reflect the correct sale prices which might be on account of inadvertent mistake by DGAP officials was not correct. In this regard, it was submitted that data was provided by the Respondent for post rate reduction period and all the figures in column M were reflected/entered by the Respondent only. However, it was submitted that if Respondent had submitted wrong data, he might be advised to provide revised data and same might be forwarded to the DGAP so that computation of profiteering might be revisited and revised accordingly.

21. The DGAP Report dated 20.08.2020 was considered by the Authority in its meeting held on 26.08.2020 and it was decided that the Applicant No. 1 and the Respondent be directed to submit their consolidated reply/written submissions before the Authority by 14.09.2020 and any specific request for hearing if required. The Respondent was issued notice on 01.09.2020 to explain why the above Report of the DGAP should not be accepted and his liability for violating the provisions of Section 171 of the CGST Act, 2017 should not be fixed. The Respondent vide his submissions dated 11.11.2020 as detailed in para 19 above requested to be heard in person. In response the DGAP submitted his supplementary Report dated 24.11.2020 as detailed in para 20 above. Personal hearing was held on 12.01.2021 via video conferencing. No one appeared for the Applicant No. 1 whereas Sh. Avinash Joshi, Proprietor and Sh. Nikhil Gupta, Advocate appeared for

the Respondent. The proceedings in the matter could not be completed by the Authority due to lack of required quorum of members in the Authority during the period 29.04.2021 till 23.02.2022, and the requisite quorum was restored only w.e.f. 23.02.2022 and hence the matter was taken up for the current proceedings vide Order dated 24.02.2022 and the Respondent and the Applicant No. 1 was given opportunity for hearing. During the course of hearing which was held on 16.03.2022 via video conferencing no one appeared for the Applicant No. 1, Sh. Raminder Singh, Assistant Commissioner represented the Applicant No. 2 and Sh. Avinash Joshi, Proprietor and Sh. Nikhil Gupta, Advocate, Authorized representative, represented the Respondent.

22. We have carefully considered the Report furnished by the DGAP, the submissions made by the Respondent and the other material placed on record. On examining the various submissions, the observations of this Authority are as follows:-

a. The Respondent vide his submissions dated 11.11.2020 has inter-alia contended that the DGAP had computed alleged profiteering amount by adopting incorrect sale prices of certain products, e.g. in the DGAP Report dated 20.08.2020 price for 6" Hara Bhara Kabab for Invoice No. 1/A-95294 has been taken as Rs.1,200/- per unit. The Respondent has also submitted few sample transactions vide Annexure-22 and 23 of his submissions. The DGAP vide his Clarifications dated 24.11.2020 has claimed that the data was provided by the Respondent for post rate reduction period and all the figures in column M of Annexure-25 of Report dated 20.08.2020 were reflected/entered by the Respondent only. The DGAP has

further submitted that if the Respondent had submitted wrong data, he might be advised to provide revised data so that computation of profiteering might be revisited and revised accordingly.

On perusal of the above submissions of the DGAP, we observe that there is anomaly in prices of various products in the Annexure 25 of the DGAP's Report e.g. price of 6" Hara Bhara Kabab Sub for invoice No. 1/A-95294 has been taken Rs.1,200/- per unit whereas the same invoice submitted by the Respondent in his submissions dated 11.11.2021 showed that Rs. 1200/- was price for 8 units of 6" Hara Bhara Kabab Sub. It is clear from the counter claims made by the Respondent and the DGAP that there is serious difference on the figures of the sale prices per unit of the various products. Accordingly, the above issue is required to be investigated to arrive at the correct amount of profiteering.

b. The Respondent has contended that the relevant period for computation of the alleged profiteered amount in the DGAP report is 15.11.2017 to 30.09.2019, while in the computation worksheet i.e. Annexure 25 of the DGAP's Report dated 20.08.2020 profiteering had been computed from 15.11.2017 to 31.10.2020. Therefore, the DGAP's Report has computed excess amount to the extent of Rs. 74,739/- and accordingly, profiteered amount should be reduced to Rs. 14,92,068/- only. The DGAP vide his clarification dated 24.11.2020 has claimed that the Respondent was issued notice for initiation of investigation on 22.10.2019. Therefore, for the convenience of the Respondent, the information/data was sought upto 30.09.2019 as the information/data for the month of October,

2019 might not have been available at that time. However, during investigation, the Respondent submitted the data for the period upto 31.10.2019 and accordingly, the profiteered amount was also computed till 31.10.2019.

On perusal of the above, we observe that the DGAP in his Report dated 20.08.2020 has mentioned the investigation period from 15.11.2017 to 30.09.2019 while the profiteering has been computed upto 31.10.2019 as has been shown in Annexure 25 of his Report. The DGAP vide his supplementary Report dated 24.11.2020 has also admitted that the profiteering amount has been computed for the period 15.11.2017 to 31.10.2019. Accordingly, the DGAP is directed to compute the profiteered amount till 30.09.2019 as per the notice issued to the Respondent.

23. Based on the above reasons and without going into the merits of the other submissions filed by the Applicants and the Respondent at this stage, we find this to be a fit case for further investigation as per the provisions of Rule 133(4) of the CGST Rules 2017. Accordingly, this Authority directs the DGAP to reinvestigate the above issues and furnish his Report under Rule 129 (6) of the CGST Rules, 2017. On his part, the Respondent is directed to fully cooperate with the DGAP in the process of reinvestigation which includes submission of the requisite documents/details/information pertaining to his supplies.

24. 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

20.08.2020 the Order was to be passed on or before 19.02.2020. However, due to prevalent pandemic of COVID-19 in the Country this order could not be passed on or before the above date. In this regard it would be relevant to mention that the Hon'ble Supreme Court vide its Order dated 08.03.2021 passed in Suo Moto Writ Petition (Civil) No. 3 of 2021 vide Para 2.3 has ordered as under:-

> *"3. The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and concillation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."*

Further, the Hon'ble Supreme Court, vide its subsequent Order dated 10.01.2022 has extended the period(s) of limitation till 28.02.2022 and the relevant portion of the said Order is as follows:-

> *"The Order dated 23.03.2020 is restored and in continuation of the subsequent Orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general of special laws in respect of all judicial or quasi-judicial proceedings."*

Accordingly this Order having been passed today falls within the limitation prescribed under Rule 133(1) of the CGST Rules, 2017.

25. A copy each of this Order be supplied to the Applicants and the Respondent free of cost. File be consigned after completion.

Sd/-
(Amand Shah)
Technical Member &
Chairman

Sd/-
(Pramod Kumar Singh)
Technical Member

Sd/-
(Hitesh Shah)
Technical Member

Certified Copy

(Dinesh Meena)
Secretary, NAA

File No. 22011/NAA/193/A.J./2020 | 3895—3898 O/C Dated: 13.04.2022

Copy To:-

1. M/s A.J. Enterprises, Sun Orbit, Flat No. B-201, S.No. 12, Suncity Road, Vadgaon, Maharashtra-411041.
2. Deputy Commissioner of State Tax, PUN-INV-E-002, Investigation Branch, Vikrikar Bhavan, 3rd Floor, Airport Road, Yervada, Pune-411006.
3. 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.
4. NAA Website/Guard File.