BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDERTHE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	:	04/2022
Date of Institution	:	29.10.2020
Date of Order	:	09.05.2022

In the matter of:

1. M/s Deshpande Constructions (Prop Shri Sunil V. Deshpande), 102-C, UshaKinara, Behind Teleigao Church, Goa-403002.
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 Anutone Acoustics Ltd., 95, KIADB Industrial Area, Malur, 3rd Phase, Nosigere Malur, Taluk Malur, Karnataka-563130.

Respondent

Quorum:-

Sh. Amand Shah, Technical Member and Chairman.

Sh. Pramod Kumar Singh, Technical Member.

Sh. Hitesh Shah, Technical Member.

Present:-

1. Shri Sunil Deshpande, Applicant No. 1 in person.
2. Shri Reji Mathew, Chartered Accountant, Shri Aditya Chatterjee and Shri Sumer Dev Seth, Advocates and Shri Sandeep Mittal, Managing Director for the Respondent.

ORDER

1. A Report dated 29.10.2020 has been received from the Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP) on 29.10.2020 after detailed investigation under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the Report are that the Applicant No. 1 had filed application before the Standing Committee on Anti-profiteering, under Rule 128 (1) of the CGST Rules, 2017 and alleged profiteering in respect of the supply of 04 goods namely Anutone Serge Astral Lay-in Aluminium Unperforated Aquila 595*595*0.6mm, Anutone Serge Astral Lay-in Aluminium Unperforated Aquila 1200*1200*0.6mm, Anutone Serge Astral Lay-in Aluminium Perforated Mensa (2.5 mm dia) 595*595*0.6mm and Anutone Serge Astral Lay-in Aluminium Perforated Mensa (2.5 mm dia) 1200*1200*0.6 mm by the Respondent.
2. The DGAP has submitted that the Applicant No. 1 vide his submissions had mentioned that the Respondent supplied the above 04 goods as per the order placed during February 2017 on the prices agreed as per the offer of the Respondent given during November 2016. At the time of

placing order, since it was inter-state transaction, CST of 2% was applicable. Consequent to the introduction of GST, IGST @ 18% was applicable on the inter-state supply of such goods. The Respondent had been charging 2% CST prior to July 2017 and started charging 18% IGST from July 2017 but the basic price of the goods remained unchanged. The Respondent, an importer of the said goods, was not eligible to avail the input tax credit (ITC) of Additional Duty of Customs (referred as CVD) paid on such goods at the time of import till June 2017 as the goods imported were traded. With the introduction of GST from July 2017, the Respondent became entitled to avail the ITC of IGST paid at the time of import of such goods and therefore, the incidence of tax on import of goods stood reduced for the Respondent. However, the Respondent had not reduced the basic price of the said goods commensurate with the ITC of IGST paid at the time of import available with the introduction of GST w.e.f. 01.07.2017.

3. The DGAP has further reported that the aforesaid application was initially examined by the Screening Committee on Anti-Profiteering, Karnataka State and forwarded to Standing Committee for further examination and necessary action. The Standing Committee examined the application in its meeting. Thereafter, it was decided to refer the same to the DGAP, to conduct a detailed investigation in the matter, in terms of Rule 129 of the Rules.

4. The DGAP has further submitted that on receipt of the aforesaid reference from the Standing Committee on Anti-profiteering, a Notice dated 24.10.2019, under Rule 129 of the Rules was issued by the DGAP calling upon the Respondent to submit his reply as to whether he

admitted that the benefit of ITC, had not been passed on to his recipients by way of commensurate reduction in price and if so, to *suomoto* determine the quantum thereof and indicate the same in his reply as well as furnish all documents in support of his reply. Further, in the said Notice dated 24.10.2019, the Respondent was also given an opportunity to inspect the non-confidential evidences/ information which formed the basis of the said Notice, during the period 30.10.2019 to 31.10.2019, which the Respondent did not avail of.

5. It has been further reported by the DGAP that even after giving several reminder letters dated 25.11.2019, 03.01.2020, 24.01.2020 and 06.05.2020, the Respondent had not submitted the requisite documents. Hence, a Summon dated 02.06.2020 was issued to the Respondent to submit the complete requisite documents by 08.06.2020. In response to Summons, the Respondent submitted his reply and certain details vide his e-mail dated 03.06.2020.

6. The DGAP has submitted that another Summon dated 03.07.2020 was issued to the Respondent to submit the complete requisite documents by 20.07.2020. In response to the Summon, the Respondent requested extension of time due to lockdown in the state to submit the requisite documents. Another Summon dated 27.07.2020 was issued to the Respondent to submit the complete requisite documents by 07.08.2020. In response to the Summon, the Respondent replied vide e-mail dated 05.08.2020 and submitted certain documents.

7. The DGAP has also reported that in addition to the above, letter dated 27.07.2020 was sent to the jurisdictional office to obtain the desired

documents from the Respondent and forward the same to the DGAP. In response to that no reply was received from the jurisdictional office.

Further, on scrutiny of the documents submitted it was observed that the Respondent had not submitted the complete documents, hence reminder letters were issued to the Respondent again and the Respondent submitted requisite documents vide e-mails dated 21.09.2020, 22.09.2020, 25.09.2020 and 05.10.2020.

8. The DGAP has further submitted that vide e-mail dated 07.10.2019, the Applicant No. 1 was given an opportunity to inspect the non-confidential evidences/ documents submitted by the Respondent on 09.10.2020 or 12.10.2020. In response, the Applicant No. 1 replied vide e-mail dated 08.10.2020 and stated that he resided in Goa and being a senior citizen, coming to Delhi all the way to inspect the non-confidential documents in the Covid-19 pandemic was very difficult. He requested to send the copy of the documents submitted by the Respondent during the investigation. Further, the DGAP vide e-mail dated 16.10.2020 requested the Respondent to provide the non-confidential summary of the documents submitted by them for the present investigation. The Respondent replied vide e-mail dated 19.10.2020 that he had submitted all the documents and no action was pending from his side. Further, an e-mail dated 19.10.2020 was again sent to the Respondent to provide the confidential/non-confidential summary of the documents by 20.10.2020. However, the reply of the same was not received in the DGAP and hence the documents were not supplied to the Applicant No. 1.

9. Further it has been reported that the period covered by the current investigation was from 01.07.2017 to 30.09.2019.

10. The DGAP has also submitted that the time limit to complete the investigation was 08.04.2020. However, due to prevalent pandemic of COVID-19 in the country, vide Notification No. 35/2020-Central Tax dated 03.04.2020 issued by the Central Government under Section 168 (A) of the CGST Act, 2017, it was notified that where any time limit for completion/ furnishing of any report, had been specified in, or prescribed or notified under the CGST Act, 2017 which fell 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 had not been made within such time, then, the time limit for completion or compliance of such action, would stand extended upto the 30.06.2020. Further, vide Notification No. 55/2020-Central Tax dated 27.06.2020 and Notification No. 65/2020 dated 01.09.2020, it was extended upto 30.11.2020.

11. Further, the DGAP has stated that this Authority vide its Order dated 24.03.2020 had granted three months extension in terms of Rule 129 of the CGST Rules, 2017. Accordingly, time limit to complete the investigation was 28.02.2021.

12. The DGAP has further reported that the Respondent had submitted his replies to the said Notice vide letters/ e-mails dated 16.11.2019, 11.12.2019, 08.01.2020, 13.01.2020, 31.01.2020, 01.02.2020, 11.02.2020, 12.03.2020, 13.03.2020, 19.05.2020, 03.06.2020, 17.07.2020, 05.08.2020, 21.09.2020, 22.09.2020, 25.09.2020, 05.10.2020 and 19.10.2020. Vide above letters/ e-mails the Respondent submitted: -

(i) That he was engaged in manufacturing and trading of wall and ceiling panels. The manufacturing unit at 95, KIADB Phase-3, Malur, Kolar District had stopped the production activities due to continuous loss in the business and therefore it was used as warehouse for trading. Also, he had a trading warehouse at Bhiwandi, Maharashtra, which had been closed due to loss in the business. Further, the Corporate Office at 231, 7th Cross, Indira Nagar 1st Stage, Bangalore -560038 had also been closed due to financial activities. Only one unit at 3A, Visvesaraya Industrial Area, Mahadevapura, Bangalore-48 was operating on a low-key basis.

(ii) That he had submitted the details pertaining to the Applicant No. 1 only, as it was the first time he got the order for the said specified 04 goods and after that he had not imported the said goods for any other buyers.

(iii) That he had 2 GST registrations i.e. 29AADCA1269K1ZH (Active) and 27AADCA1269K1ZL (De-registered).

13. The DGAP has also reported that vide the aforementioned letters/ e-mails, the Respondent submitted the following documents/ information:

a) Copy of sale invoices pertaining to the supply of the said 04 goods made to the Applicant No. 1.
b) Copy of Bill of Entry pertaining to the supply of the said 04 goods made to the Applicant No. 1.
c) Copy of purchase order made with the Applicant No. 1 for the supply of the said 04 goods.
d) Details of IGST credit availed for the said 04 goods.
e) List of GST registrations.

f) Copy of balance sheets for the F.Y.2016-17, 2017-18 and 2018-19.

g) GSTR-1 Returns in excel format for the period July, 2017 to September, 2019.

h) GSTR-3B Returns for the period July, 2017 to September, 2019.

i) Electronic Credit Ledger for the period July, 2017 to September, 2019.

j) Sales Tax Returns for the period April, 2016 to June, 2017.

14. The DGAP has also reported that the various replies of the Respondent and the documents/ evidence on record had been carefully examined. The main issues for determination were:

(i) Whether there was any benefit of ITC to the Respondent after implementation of GST w.e.f. 01.07.2017 and if so,

(ii) Whether the benefit of such ITC had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

15. The DGAP has stated that the Central Government implemented GST w.e.f 01.07.2017 which subsumed various taxes levied by the Central Government and State Governments. In the erstwhile pre-GST regime, the following taxes and cesses were being levied by the Central Government and the State Governments: -

Taxes which were subsumed in the Goods and Services Tax (GST)	
Central Taxes	**State Taxes**
Central Excise Duty	State VAT/ Sales Tax
Additional Duties of Excise (Goods of special importance)	Central Sales Tax
Additional Duties of Excise (Textiles and Textile products)	Entertainment Tax (other than by local bodies)
Excise Duty levied under Medicinal & Toilet Preparation Act	Entry Tax/ Octroi (all forms)
Additional Duties of Customs (commonly known as CVD)	Purchase Tax
Special Additional Duties of Customs (SAD)	Taxes on lottery, betting & gambling
Service Tax	Luxury Tax
Central Surcharges and Cesses	State Surcharges and Cesses

These taxes got subsumed in the GST. Out of the above taxes, the ITC on some taxes was not being allowed in the erstwhile tax regime. Such input taxes, the credit of which was not allowed in the erstwhile tax regime, used to get embedded in the cost of the goods or services supplied, resulting in increased price. With the introduction of GST with effect from 01.07.2017, all these taxes got subsumed in the GST and the ITC of GST was available in respect of all goods and services, unless specifically denied. Thus, the additional benefit of ITC in the GST regime would be limited to those input taxes, the credit of which was not allowed in the pre-GST regime but was allowed in the GST regime. This additional benefit of ITC in the GST regime was required to be passed on by the suppliers to the recipients by way of commensurate reduction in price, in terms of Section 171 of CGST Act, 2017. This was a matter of fact which had not been contested by the Respondent.

16. The DGAP has further reported that before enquiring into the allegation of profiteering, it was important to examine Section 171 of the CGST Act, 2017 which governed the anti-profiteering provisions under GST. Section 171(1) of the CGST Act, 2017 reads as "*any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices*". Thus, the legal requirement was abundantly clear that in the event of benefit of ITC or reduction in rate of tax, there must be a commensurate reduction in the prices of the goods or services. Such reduction could only be in terms of money, so that the final price payable by a recipient got reduced commensurate with the reduction in the tax rate or benefit of ITC. This was the only legally prescribed mechanism to pass on the benefit of ITC or reduction in rate of tax to the recipients under the GST regime and there was no other method which a supplier could adopt to pass on such benefits.

17. The DGAP has also reported that on examining the documents and evidences on record, it was seen that a quotation as per the purchase order no. 025 dated 18.02.2017, for a total amount of Rs.1,72,51,634.71/- (plus CST 2%, if applicable), was given to the Applicant No. 1 by the Respondent. Thus, as per the quotation, the total

amount which had to be paid by the Applicant No. 1, have been furnished by the DGAP in the table below:-

S.No.	Description	Size	Qty(as mentioned in bill of entry)	Price	Amount	Plus (CST @ 2%), if applicable
1	Anutone Serge Astral Lay-in, Aluminium, Unperforated, Aquila	595*595*0.6mm	17416.80	533.80	9297088	
2	Anutone Serge Astral Lay-in, Aluminium, Perforated Mensa (2.5mm dia)	595*595*0.6mm	2304.00	873.80	2013235	
3	Anutone Serge Astral Lay-in, Aluminium, Unperforated, Aquila	1200*600*0.6mm	2878.56	740.52	2131631	
4	Anutone Serge Astral Lay-in, Aluminium, Perforated, Mensa (2.5mm dia)	1200*600*0.6mm	856.80	1080.52	925790	

18. The DGAP has further stated that against the aforementioned quotation, the tax invoices nos. - 1790122 dated 07.10.2017, 1790123 dated 07.10.2017, 1790079 dated 03.08.2017, 1790080 dated 03.08.2017, 1790081 dated 03.08.2017, 1790142 dated 04.11.2017, 1790127 dated 13.10.2017, 1790142 dated 04.11.2017, 1790127 dated 13.10.2017 and 1790135 dated 25.10.2017 were issued as furnished by the DGAP in the table below:-

S.No.	Description	Invoice No. & Date	Qty	Price	Amount	Plus (IGST @ 18%), if applicable
1	Antuone Serge Astral Lay-in, Aluminium, Unperforated, Aquila 595*595*0.6mm	1790123, 1790122- 07.10.2017 1790079, 1790080, 1790081- 03.08.2017 1790127- 13.10.2017	17416.80	533.80	9297088	1673475.81

2	Anutone Serge Astral Lay-in, Aluminium, Perforated Mensa (2.5mm dia) 595*595*0.6mm	1790142-04.11.2017 1790127-13.10.2017	2304.00	873.80	2013235	362382.34
3	Anutone Serge Astral Lay-in, Aluminium, Unperforated, Aquila 1200*600*0.6mm	1790142-04.11.2017 1790135-25.10.2017	2878.56	740.52	2131631	383693.63
4	Anutone Serge Astral Lay-in, Aluminium, Perforated, Mensa (2.5mm dia) 1200*600*0.6mm	1790142-04.11.2017	856.80	1080.52	925790	166642.12

19. The DGAP has further submitted that had the import of the said 04 goods taken place prior to implementation of GST, when the quotation dated 18.02.2017 was provided to the Applicant No.1, the Respondent would have suffered Countervailing Duty (CVD) @ 12.5% and Special Additional Duty of Customs (referred as CVD) paid by the Respondent would not have been available, and would have formed an embedded part of the cost of the products in the said quotation. However, the actual import of the said 04 goods had taken place vide Bill of Entries No. 2638860 dated 28.07.2017 and 3139630 dated 07.09.2017, i.e., after implementation of GST, when the CVD and SAD were replaced by IGST and the full amount of IGST @ 18% paid at the time of actual import was available as ITC to the Respondent.

20. The DGAP has also submitted that in the light of the aforementioned legal position regarding the duties payable and the credits available (or not available), both at the time, the quotation was

given and when the actual import took place after introduction of GST, the finding was that the Respondent should have reduced the base price to the extent of the CVD that was no longer to be paid as well as to the extent of the IGST, the credit of which was now available. However, the invoices raised by the Respondent for the supply of said 04 goods on which IGST @18% was charged show that the base price of the goods remained the same, as reflected in the purchase order dated 18.02.2017. Thus, the base price was not reduced to the extent of CVD that was not payable post GST.

21. The DGAP has further reported that the perusal of the Bills of Entry 2638860 dated 28.07.2017 and 3139630 dated 07.09.2017 revealed that the taxable value of the product "Anutone Serge Astral

implementation of GST, was Rs. 5,64,472/-. Thus, the Respondent would have been liable to pay the CVD @12.5% amounting to Rs. 70,559/- for the above said product without getting the benefit of ITC of the same. However, as the import of the product took place after the implementation of GST, the Respondent did not have to suffer the burden of the same and hence, the base prices of the product "Anutone Serge Astral Lay-in, Aluminium, Perforated, Mensa (2.5mm dia) 1200*600*0.6mm" should have been reduced by Rs. 70,559/-. Accordingly, the base price should have been Rs. 8,55,231/- [Rs. 9,25,790 (-) Rs. 70,559] for the product "Anutone Serge Astral Lay-in, Aluminium, Perforated, Mensa (2.5mm dia) 1200*600*0.6mm". The

commensurate cum-tax prices of the product "Anutone Serge Astral Lay-in, Aluminium, Perforated, Mensa (2.5mm dia) 1200*600*0.6mm" inclusive of GST @18% would have been Rs. 10,09,173/-. Thus, the total price charged for the said product should have been Rs. 10,09,173/- instead of Rs. 10,92,431/- and the amount of profiteering by the Respondent in respect of the above said product was Rs. 83,259/- [Rs. 10,92,431 (-) Rs. 10,09,431]. The calculation of the 04 goods/products and their amount of profiteering have been summarised by the DGAP in the Table below:-

S.No.	Description of the goods (A)	BOE NO. (B)	Quantity (C)	Taxable value at the time of import (D)	CVD @ 12.5% of taxable value at the time of placing the order (E= 12.5% of D)	Base Price charged by the Noticee (F)	Commensurate base price (G=F-E)	IGST 18% (H= 18% of G)	Commensurate cum-tax price (I=G+H)	Price actually charged by the Noticee (J)	Profiteering amount (K= J-I)
1	Antuone Serge Astral Lay-in, Aluminium, Unperforated, Aquila 595*595*0.6mm	2638860 & 3139630	17416.80	5590434	698804.3	9297088	8598283.74	1547691	10145974.82	10970563.40	824588.58
2	Anutone Serge Astral Lay-in, Aluminium, Perforated Mensa (2.5mm dia) 595*595*0.6mm	3139630	2304.00	1224676	153084.4	2013235	1860150.56	334827.1	2194977.66	2375617.54	180639.88
3	Anutone Serge Astral Lay-in, Aluminium, Unperforated, Aquila 1200*600*0.6mm	3139630	2878.56	1293671	161708.9	2131631	1969922.08	354586	2324508.05	2515324.88	190816.83
4	Anutone Serge Astral Lay-in, Aluminium, Perforated, Mensa (2.5mm dia) 1200*600*0.6mm	3139630	856.80	564471.9	70558.99	925790	855231.01	153941.6	1009172.59	1092431.65	83259.06
										Total Profiteering (In Rs.)	1279304

22. The DGAP has further reported that the benefit of the ITC would be available to the Respondent in those situations where the Respondent had quoted the prices of his supplies in pre-GST regime and supplies of same were made in post-GST regime. Therefore, the profiteering on account of benefit of ITC would be restricted to said 04 goods which were supplied to the Applicant No. 1 only. The Respondent had submitted that during the period 01.07.2017 to 30.09.2019, he had supplied only the aforesaid 04 goods for the first time to the Applicant

No. 1, for which quotation was given in the pre-GST era. Further, the Respondent had also submitted that he had not sold the subject goods to any other buyers. Therefore, based on the submission of the Respondent during the period of the current investigation i.e., from 01.07.2017 to 30.09.2019, the amount of profiteering by the Respondent was worked to Rs.12,79,304/- (Rupees Twelve Lakh Seventy Nine Thousand Three Hundred and Four only) in respect of aforesaid 04 goods.

23. The DGAP has further concluded that as the benefit of ITC had not been passed on to the Applicant No. 1, the provisions of Section 171(1) of the CGST Act, 2017 had been contravened in the present case. The amount of profiteering by the Respondent was Rs.12,79,304/- (inclusive of GST @18% amounting to Rs. 1,95,148/-).

24. The above Report was carefully considered by this Authority and a Notice dated 05.11.2020 was issued to the Respondent to explain why the Report dated 29.10.2020 furnished by the DGAP should not be accepted and his liability for profiteering in violation of the provisions of Section 171 should not be fixed. The Respondent was directed to file written submissions which have been filed on 26.11.2020 wherein the Respondent has submitted:-

a) That he vide his letter dated 31.01.2020 and e-mail dated 03.06.2020 to the DGAP had given all the necessary details and had also stated that though during the relevant period there was a price variation in the raw materials cost, he had not passed on the same to his buyers and absorbed the same and hence he had not made any undue profiteering in the case as alleged by the Applicant No. 1.

b) That the investigation was carried at a time when there was a breakout of huge pandemic and since 23.03.2020 all activities were shut down due to lockdown. Not only his industry but there might be many such industries which were badly affected due to the pandemic and in his case during the period of investigation the factory and office was closed, no staff members were available and hence there might have been some genuine reasons for non-submissions of timely replies and that did not mean that he had evaded and ran away from his responsibilities as alleged by the Applicant No. 1 in his letters.

c) That he was one of the few companies which released a price list effective from 01.07.2017 after considering ITC of GST. In the instant case the purchase order was received prior to introduction of GST and supplies had to take place subsequent to GST and consequently though there was increase in cost of raw materials supplied, the same could not be passed on and had to be absorbed.

d) That he was not able to recover from the loss in business caused due to pandemic and his financial position was also clearly explained in his letters dated 31.01.2020 and his e-mail dated 03.06.2020.

e) That assuming but not admitting, he was still liable to pay the amount determined as profit by the DGAP in the transaction, he prayed that he might be permitted to pay the amounts in instalments and also in view of his precarious financial position and continued losses and in ordinate delay in revival caused by the pandemic

situation, further he prayed for waiver of interest and penalty in the interest of justice.

25. The Applicant No.1 has also filed his written submissions dated 26.11.2020 wherein he has stated:-

a) That the non-confidential evidences/ documents submitted by the Respondent on 9/10/2020 and 12/10/2020 to the DGAP had not been sent to him despite DGAP's directions as mentioned in para 10 of the Report. However, the Applicant No. 1 requested to go ahead with the proceedings initiated vide Notice dated 05.11.2020.

b) That if the Respondent by mentioning about the financial losses and shutting down of his manufacturing/ trading units was trying to justify his action of not passing on the legitimate tax benefit to him, then the same was not acceptable as the same was irrelevant.

c) That by not passing on the tax benefit to him, he was the one who had suffered heavy losses by way of bank interest charged on cash credit limits. Due to shortage of funds caused by the Respondent, he had not been able to carry out his regular business effectively. Covid-19 lockdown scenario had added fuel to the fire and his business was suffering badly. He immediately needed his legitimate money along with interest @18% in terms of Rule 127 of the CGST Rules, 2017.

d) That nowhere in the Report of the DGAP, there was any mention of interest @18% to be recovered from the Respondent and paid to him as per Rule 127 of the CGST Rules, 2017.

"Rule 127 of CGST Rules was reproduced below:

127. Duties of the Authority. -

It shall be the duty of the Authority, -

(i) to determine whether any reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices;

(ii) to identify the registered person who has not passed on the benefit of reduction in the rate of tax on supply of goods or services or the benefit of input tax credit to the recipient by way of commensurate reduction in prices;

(iii) to order,

(a) reduction in prices;

(b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be, in case the eligible person does not claim return of the amount or is not identifiable, and depositing the same in the Fund referred to in section 57; [Emphasis supplied]

(c) Imposition of penalty as specified in the Act; and

(d) Cancellation of registration under the Act.

(iv) To furnish a performance report to the Council by the tenth [day] of the close

of each quarter."

e) That as per the above Rule, it was the duty of this Authority to compel the defaulter to return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent from the date of collection of higher amount till the date of return of such amount.

f) That the Goa State Infrastructure Development Corporation (GSIDC) for whom the work was executed by him, had aptly and immediately reduced the prices by almost 14% post GST scenario. Copy of the relevant Office Memorandum of Govt. of Goa dated 06.11.2017 had been already submitted as Exhibit VIII of his Application.

g) That an Order on merits to be passed directing the Respondent to return to him, the amount of Rs.12,79,304/- as mentioned in the Report of the DGAP being the amount not passed on by way of commensurate reduction in prices to him along with interest at the rate of eighteen per cent from the date of collection of higher amount till the date of return of such amount at the earliest.

h) That he had been requesting the Respondent to pay him the amount commensurate to reduction in prices vide his several e-mails dated 09/04/2019, 15/05/2019, 27/05/2019, 03/06/2019. However, he chose to not only ignore his requests but it was also seen from the DGAP's observations made at paras 5,6,7,8,9 and 10 of his Report, that the Respondent had been showing scant regard to the legal provisions and not respecting this Authority. Hence, it was requested to deal with the matter with an iron hand and do justice to a sincere business organization like his which was an MSME too.

i) The Applicant No. 1 further requested to grant him his long outstanding dues along with interest @18% and provide relief to his already suffering business as explained above.

26. Copy of the above submissions dated 26.11.2020 and 10.11.2020 filed by the Respondent and the Applicant No. 1 were supplied to the DGAP for clarifications under Rule 133(2A) of the CGST Rules, 2017. The DGAP filed his clarifications on the Respondent's submissions dated 26.11.2020 vide supplementary Report dated 14.12.2020 and has clarified:-

a) That the Respondent's contention that during the relevant period there was a price variation in the raw materials cost and that he had not passed on the same to his buyers and absorbed the same and hence he had not made any undue profiteering in the case was not correct as vide Report dated 29.10.2020 the DGAP had computed the profiteered amount of Rs.12,79,304/- for the period 01.07.2017 to 30.09.2019.

b) That the averment made by the Respondent that the purchase order was received prior to introduction of GST and supplies had to take place subsequent to GST and consequently though there was increase in cost of raw materials supplied, the same could not be passed on and had to be absorbed was not correct.

The mandate of the DGAP was not to examine cost components of the goods or services supplied by the Respondent. Every supplier of goods and services was free to increase the price of his supplies depending upon the various components affecting the cost of goods/services. But under the provisions of Section 171 of the CGST

Act, 2017, incidence of tax reduction or ITC benefit had to be passed on to the recipient by way of commensurate reduction in price.

c) Further, the DGAP submitted clarifications on the Applicant No. 1's submissions dated 26.11.2020 wherein he has clarified:-

i) That the Applicant No. 1's contention that the non-confidential evidences/ documents submitted by the Respondent on 09.10.2020 and 12.10.2020 to the DGAP had not been sent to him despite the DGAP's directions had already been addressed vide para 10 of the DGAP's Report.

ii) For the averment made by the Applicant No. 1 that nowhere in the Report of the DGAP there was any mention about interest @18% to be recovered from the Respondent and paid to him as per Rule 127 of the CGST Rules, 2017, the DGAP has clarified that the mandate of DGAP was to conduct investigation based on the recommendation of the Standing Committee on Anti-Profiteering. The DGAP submitted Report of his findings to this Authority under Rule 129 of the Rules and this Authority passed the Order under Rule 133 of the Rules. While the DGAP was the Investigating Agency, the adjudication to establish profiteering or the absence of it, was done by this Authority. Therefore, the DGAP had no authority to direct the Respondent to pay the applicable interest @ 18% on the profiteered amount which was to be determined by this Authority.

27. On the basis of the above clarifications of the DGAP, the Respondent and the Applicant No. 1 were directed to file rejoinder/ reply. The Applicant No. 1 vide his submissions dated 04.01.2021 has

filed his rejoinder on the DGAP's clarifications dated 14.12.2020 wherein he has stated:-

a) That he reiterates submissions made by him at para 25 (d) & (e) above vide his reply dated 10.11.2020.

b) That interest provisions were statutory as could be seen in Rule 127 of the CGST Rules, 2017 which needed to be considered as rightly pointed out by the DGAP in his comments.

c) That the profiteered amount calculated by the DGAP after his investigations was Rs. 12,79,304/- as submitted vide his report dated 29.10.2020. The Applicant No. 1 submitted invoice-wise and date-wise details of the cost of material purchased by him along with corresponding profiteering amount worked out by the DGAP. The Applicant No. 1 also enclosed worksheet showing quantification of simple interest @18% as per Rule 127 of CGST Rules and that he had worked out the interest payable for ease of understanding.

d) That the entire amount towards purchase of material had been paid to the Respondent in advance i.e. before raising any invoice. Copy of Ledger Account of the Respondent duly certified by Chartered Accountant A. K. Mahabal & Co. was enclosed along with these submissions showing advance payment details. Date wise details of the invoices raised against him by the Respondent have been furnished below:-

Invoice no.	Date of invoice
1790079	03/08/2017
1790080	03/08/2017
1790081	03/08/2017
1790122	06/10/2017

1790123	06/10/2017
1790127	13/10/2017
1790127	13/10/2017
1790142	04/11/2017
1790142	04/11/2017
1790135	25/10/2017
1790142	04/11/2017

That as per the above table, it could be seen that the last invoice raised against him was on 04.11.2017. As per Rule 127 of CGST Rules, "*interest is to be calculated at the rate of eighteen per cent from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be".* However, for the sake of simplicity, he was ready to accept interest payable to him from 05.11.2017 (04.11.2020 being the latest date of issue of invoice by the Respondent) as shown in his worksheet enclosed with the above submissions.

e) That total simple interest amount payable to him @ 18% p.a. on the profiteering amount of Rs. 12,79,304/- w.e.f 05.11.2017 to 31.12.2020 was Rs. 7,26,785/-. Additional interest @ Rs.6311- per day was to be paid to him w.e.f. 01.01.2021 till the date of actual payment.

f) That the DGAP had rightly observed that his mandate was not to examine cost component of goods and services supplied by the Respondent. Under the provisions of Section 171 of the CGST Act, 2017, incidence of tax reduction or ITC benefit had to be passed on to the recipient by way of commensurate reduction in price.

g) That the Applicant No. 1 reiterated his entire submissions made vide his reply dated 10.11.2020 which might be considered before passing the final order.

h) The Applicant No. 1 further requested to pass an Order directing the

Respondent to return to him, the amount of Rs.12,79,304/- as mentioned in the DGAP's Report being the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent from the date of collection of higher amount till the date of return of such amount at the earliest.

28. The Respondent vide his submissions dated 15.02.2021 has filed his consolidated written submissions wherein he has stated:-

A) That alleged Notice issued by the DGAP was defective and did not meet the mandate of Rule 129(3) of the CGST Rules, 2017 and the investigation was in violation of principles of natural justice:-

a) It was settled law that due and sufficient Notice was a *sine qua non* to any administrative or quasi-judicial action. In the present case, the Alleged Notice issued by the DGAP was defective, inadequate and did not contain material particulars to form effective and sufficient Notice. Pertinently, it did not comply with the mandatory provisions of Rule 129 of the CGST Rules, 2017.

b) A bare perusal of Rule 129(3) of the CGST Rules mandated that the DGAP should before initiation of the investigation, have issued a Notice to the interested parties containing, inter alia, information on the following, namely—

"(a) the description of the goods or services in respect of which the proceedings have been initiated;

(b) Summary of the statement of facts on which the allegations are based; and

(c) The time limit allowed to the interested parties and other persons who may have information related to the proceedings for furnishing their reply."

c) Rule 129(3)(a) of the CGST Rules, 2017 obliged the DGAP to specifically intimate the Respondent of the "description of the goods... in respect of which proceedings..." were sought to be initiated. A perusal of the alleged Notice made it evident that beyond making a generic reference to the supposed goods involved as "false ceiling materials", the DGAP failed to sufficiently particularise the same. The very purpose of Rule 129(3)(a) requiring the "description of the goods" to be detailed was intended towards enabling the recipient of the Notice to know with certainty the specific goods in relation to which he was being proceeded against. It stood to reason that unless the Respondent, in this particular case, was made aware of the specific goods in relation to which he was being investigated, there was little to no avenue for him to proffer his defence.

d) As was evident from his Report, the DGAP was aware at all material times that the investigation pertained to four very specific types of goods that the Respondent dealt in – viz. (i) Anutone Serge Astral Lay-in Aluminium (595*595*0.6mm) Plain Aquilla; (ii) Anutone Serge Astral Lay-in Aluminium (1200*1200*0.6mm) Plain

Aquilla; (iii) Anutone Serge Astral Lay-in Aluminium (595*595*0.6mm) Perforated Mensa and (iv) Anutone Serge Astral Lay-in Aluminium (1200*1200*0.6mm) Perforated Mensa. Consequently, despite the specific description of the goods involved being well within the DGAP's knowledge, only a generic reference to "false ceiling materials" was made in the alleged Notice. Pertinently, the Respondent whose business primarily involved ceiling materials (which it marketed to several of his clients) was hardly put to due and sufficient Notice by the DGAP when the Alleged Notice failed to identify with even a modicum of specificity, the description of the goods involved.

e) It was settled that when the law required a certain thing to be done in a certain way, it could be done in that way alone and no other. Resultantly, the alleged Notice failed to comply with Rule 129(3) of the CGST Rules. In such circumstances, the Alleged Notice was no Notice at all and therefore rendered the entire proceedings a non-starter.

B) That DGAP had wrongly assumed the following admissions on part of the Respondent:-

a) In para 17 of his Report the DGAP recorded a baseless unilateral finding against the Respondent in the context of the way in which the charging provision of Section 171 of the CGST Act, ought to have been complied with. Therein, the DGAP Report wrongfully noted that *"this is a fact which has not been contested by the*

Respondent." The Respondent pleaded that the said assumption on part of the DGAP demonstrated the non-application of mind to the response and defences urged by the Respondent. Accordingly, in the event this Authority was unwilling to reject the DGAP's Report as prayed for, it might, in the alternative, exercise powers available under Rule 133(4) of the CGST Rules and directed the matter to be inquired in to further.

b) The Respondent had at no point admitted to any allegation of profiteering, or any part thereof. Therefore, none of his submissions either to this Authority or to the DGAP ought to have been treated as admissions to any of the allegations levelled against him. At best, without prejudice to any of his contentions on merits, the Respondent made a mere prayer for leniency and equity to be exercised in his favour since his business had suffered huge losses and severe disruptions before and during the pandemic year.

C) That DGAP's Report erred in assuming that non-reduction of base price amounted to "profiteering"; ITC had accrued to Applicant No. 1's benefit through non-increase of base price:-

a) The entire DGAP's Report was based on the singular assumption that the base price of the aluminium goods contracted to be sold by the Respondent to the Applicant No. 1 was crystallised vide the Sales Order dated 17 February 2017 ('**SO 002**'). In doing so the DGAP had erred grossly since it led to other assumptions such as – (a) the base price of the goods to be sold by the Respondent to

the Applicant No. 1 was not subjected to change or escalation; (b) that irrespective of the change in variable costs, such as raw material procurement etc., the price contained in SO 002 was static; (c) that the base price would not respond to real-time changes in the market and was not subject to conditions inherent in every purchase order in the relevant market.

b) A bare perusal of SO 002, at point 8 of the Terms indicated that the said Sales Order was valid only till the end of the month concerned, i.e. February 2017 – which was a mere 11 days. For ease of reference, Term No. 8 from SO 002 was extracted herein below:

"8) Validity Till the end of the current month only. Please always refer to Anutone if this investment offer has lapsed"

c) It was pertinent to note that SO 002 was prepared in the pre-GST regime and the process quoted therein was as per the cost of raw material at that point in time. Evidently, the base price quoted therein was bound to commensurately change based on the change in the price of variables, including the cost of raw material. In other words, the base price quoted in SO 002 would be the same only if the incidence of sale took place in the month of February 2017. This aspect had been completely ignored by the DGAP's Report.

d) Pertinently, the eventual sale of the four distinct aluminium products took place *vide* invoices dated 3 August 2017, 7 October 2017, 13 October 2017, 25 October 2017 and 4 November 2017.

e) It was thus evident that none of the sales was subjected to the same base price as indicated in SO 002. In fact, while the base price quoted in SO 002 was valid only until the end of February 2017, the earliest sale in pursuance thereof took place only in August 2017. Notably, in the interim the raw material price of aluminum in the international market had increased significantly. Yet, the Respondent did not make any commensurate change to the base price of the aluminum goods listed in SO 002 since the natural increase in price had been absorbed by the ITC.

f) That the Applicant No. 1 continued to enjoy the benefit of purchasing the concerned goods as per the base price in SO 002, though the same were not valid beyond February 2017 and even though the same products costed significantly more due to the drastic escalation in the price of raw materials. In other words, the Applicant No. 1 had, in fact, received the benefit of lower base prices since the Respondent did not impose an increased base-price on the Applicant No. 1 due to the change in raw material costs. As a result, there had been no profiteering by the Respondent. The DGAP's Report had failed to appreciate the same and accordingly deserved to be rejected.

D) That the DGAP's Report failed to account for increased raw material prices and increased Customs Duty while ascertaining alleged incidence of profiteering:-

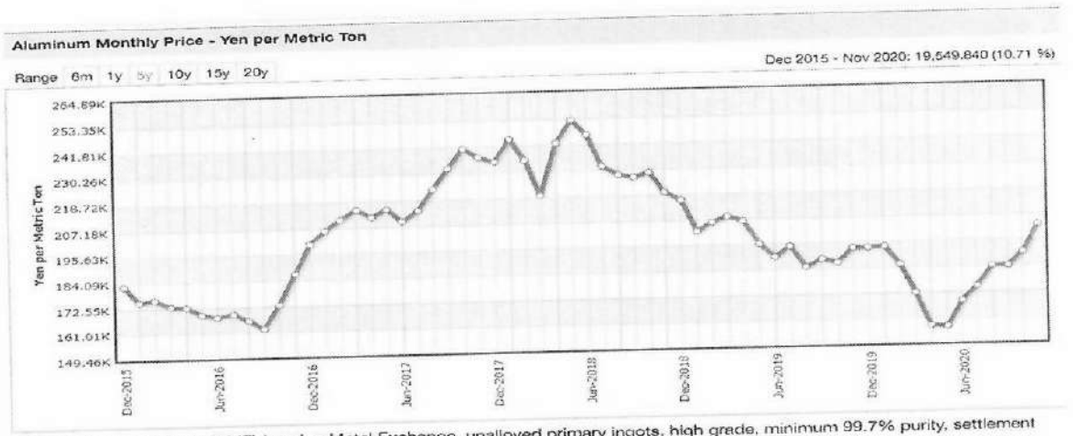
a) The actual increase in the base price of the aluminium products sold may be identified by the following factors:

i. The Respondent received the quotation for the aluminum goods from Foshan Tianli Jianlong Import & Export Co., Ltd, located in China, ('**International Vendor**') based on a request for quote sent in September 2016.

ii. However, the actual invoice for the goods ordered wasas per the International Vendor's invoice dated 6 July 2017. Notably, the International Vendor charged higher than what had been initially quoted due to increase in demand and increase in price of the concerned goods. Similarly, a comparison showed a hike in prices of the goods from the time that the quotation was received from the International Vendor to the commercial invoices received from the International Vendor. Accordingly, there was increase in basic price of the material by Rs. 7,21,449.58/-.

iii. In addition to the above, there was also an increase in payment of customs duty by Rs. 75,262/-.

iv. The international Vendor increased the prices of his products in view of increase in commodity prices of aluminum for the relevant period of consideration. A graphical depiction of the price movement of raw aluminum in the international market has been extracted below:



Description: Aluminum (LME) London Metal Exchange, unalloyed primary ingots, high grade, minimum 99.7% purity, settlement price beginning 2005; previously cash price

Source:www.indexmundi.com

b) For all the above reasons, the Respondent submitted that he was not liable for profiteering under Section 171 of the CGST Act. It was submitted that the purpose of Section 171 of the CGST Act, as was evident from the Explanation thereto was to arrest and curb 'profiteering'. In a difference context, the Hon'ble Apex Court in***Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 697,** relied on the definition of 'Profiteering' as contained in the Black's Law Dictionary, 5th Edn. and held it to mean *"taking advantage of unusual or exceptional circumstances to make excessive profits"*.

c) In this context the text of Section 171(1) of the CGST Act and the Explanation therein might also be considered; the same are reproduced below for ease of reference:

> ***171. Anti-profiteering measure.***—*(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.*
>
> ***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 input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.]*

d) Evidently, it was clear from the scheme of Section 171 of the CGST Act and the definition of profiteering, that implicit therein was wrongful or unjust gain. Section 171 of the CGST Act and the Explanation therein also suggested 'profiteering' to mean the wrongful retention of the benefit of ITC and denying the end recipient of the good or service the commensurate reduction in price. In the present case however, the facts clearly established that:

i. The Respondent had not unjustly retained for himself any benefit or gain;

ii. The Respondent had ensured that benefit of ITC in monetary terms was passed on to the end recipient by ensuring that

the prices of goods sold were not increased despite increase in the raw material prices of the same; and

iii. The Respondent had not earned any profit, in fact, it had suffered losses. Therefore, the question of having profiteered did not arise.

e) That neither the CGST Act nor the CGST Rules provided the methodology for calculating profiteering:-

i. The methodology for calculation adopted by the DGAP in his Report was erroneous. Notably, the DGAP did not consider the price variation/increase in cost of the raw materials and had based his conclusions by only comparing the base prices of the said goods in SO 002 and the Tax Invoices in a pedantic manner. On a perusal of the provisions of the CGST Act and the CGST Rules, it was evident that no computational methodology or formula for the calculation of the quantum of profiteering was prescribed either in Chapter XV of the CGST Rules or in 'Procedure and Methodology' for anti-profiteering proceedings notified by this Authority under Rule 126 of the CGST Rules.

ii. Therefore, the methodology adopted for calculation of any alleged profiteering must necessarily take into account the business realities of the industry in which the Respondent operated. However, the DGAP had completely ignored business realities and had proceeded in a blinkered formulaic manner and had resultantly arrived at erroneous conclusions. For these reasons, the Respondent pleaded that this

Authority be pleased to reject the DGAP's Report and find the Respondent to be innocent of any allegations of profiteering.

f) Without prejudice, no penalty ought to be imposed on the Respondent as Section171(3A) of the CGST Act (inserted w.e.f. 01.01.2020) could not be applied retrospectively to the present case:-

i. Section 171(3A) of the CGST Act, which provides for imposition of penalty, was inserted in the CGST Act w.e.f. January 1, 2020 vide Section 112 of the Finance Act, 2019. There was no doubt therefore that the said provision was not in force during the period when the Respondent had allegedly profiteered. Therefore, the penalty provisions prescribed under Section 171(3A) of the CGST Act could not be invoked with retrospective effect in the present case. As a result, without prejudice to the Respondent's case that it was not liable for alleged profiteering at all, no penalty could be imposed on the Respondent in the facts of the present case.

ii. It was settled law that no person could be subjected to imposition of a penalty higher than what was prescribed in law, which was in force at the time of the commission of the offence. As per Article 20(1) of the Constitution of India, "*No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater*

than that which might have been inflicted under the law in force at the time of the commission of the offence". Therefore, Section 171(3A), which came into force only on 1 January 2020 could not be applied retrospectively to impose a penalty on the Respondent as the alleged profiteering, even as per the Applicant No. 1 and the DGAP, took place in the year 2017.

iii. The Constitution of India protected the fundamental rights of the Respondent from being subjected to penalty by virtue of an *ex post fact* law or an enhanced punishment prescribed by a later amendment. [*T. Barai v. Henry Ah Hoe, (1983) 1 SCC 177, Supdt., Narcotic Control Bureau v. Parash Singh, (2008) 13 SCC 499, Nemi Chand v. State of Rajasthan, (2018) 17 SCC 448*]. In the landmark judgment of *State v. Gian Singh* [*(1999) 9 SCC 312 : 1999 SCC (Cri) 1512*], the Hon'ble Supreme Court laid down that it was a Fundamental Right of every person under Article 20(1) of the Constitution that he should not be subjected to greater penalty than what the law prescribed and no *ex post fact* legislation was permissible for escalating the severity of the punishment.

iv. It was further submitted that this Authority in the case of *Hussain Shoaib vs Subwest Restaurant LLP [Case No. 99/2020]* has held that the provision of Section 171(3A) of the CSGT Act could not be applied retrospectively. In that case, this Authority observed as follows,

"48. It is also evident from the above narration of the facts the Respondent has denied the benefit of GST rate reduction to the customers of his products w.e.f. 15.11.2017 to 30.06.2019, in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus resorted to profiteering. Hence, he has committed an offence under Section 171 (3A) of the CGST Act, 2017, and therefore, he is liable for imposition of penalty under the provisions of the above Section. However, a perusal of the provisions of Section 171 (3A) under which penalty has been prescribed for the above violation shows that it has been inserted in the CGST Act, 2017 w.e.f. 01.01.2020 vide Section 112 of the Finance Act, 2019 and it was not in operation during the period from 15.11.2017 to 30.06.2019 when the Respondent had committed the above violation and hence, the penalty prescribed under Section 171 (3A) cannot be imposed on the Respondent retrospectively. Accordingly, notice for the imposition of penalty is not required to be issued to the Respondent."

v. For all the above reasons, without prejudice to the Respondent's case that he had not violated Section 171 of the CGST Act or that he was liable for profiteering, no penalty might be imposed on the Respondent.

vi. It was pertinent to note that the constitutional validity of Section 171 of the CGST Act and Chapter XV of the CGST Rules (more particularly, Rules 126, 127 & 133 of the CGST Rules) had been challenged as being unconstitutional and violative of Articles 14 & 19(1)(g) of the Constitution of India in *Man Realty Ltd. and Another vs. Union of India and Others* [W.P. (C) 997/2021], which was pending before the Hon'ble Delhi High Court.

vii. The Respondent submitted that the Annexures to the above submissions contained highly confidential and sensitive business information. Necessary instructions may be issued to ensure that none of the documents submitted herein were made available to the Applicant No. 1 or any other third party. Necessary directions might accordingly be issued to the registry as well as the DGAP.

g) Further the Respondent submitted that:-

i. The alleged Notice issued by the DGAP was defective and did not meet the mandate under Rule 129(3) of the CGST Rules, 2017. Accordingly, DGAP's investigation was in violation of principles of natural justice and could not be relied on for the findings recorded therein.

ii. The DGAP had wrongly assumed admissions on part of the Respondent without basis.

iii. The DGAP's Report erred in assuming that non-reduction of base price amounts to "profiteering". The fact that ITC had accrued to Applicant No. 1's benefit through non-increase of

base prices despite significant rise in prices of raw aluminium in the international/ import market had been ignored.

iv. The DGAP Report completely failed to account for increased raw material prices and increased Customs Duty while ascertaining alleged incidence of profiteering. The fact that SO 002 was valid only till the end of February 2017 has been lost sight of. There was no positive finding that the Respondent has, in fact, profiteered.

v. Neither the CGST Act nor the CGST Rules provided the methodology for calculating profiteering. Therefore, the methodology adopted for calculation of any alleged profiteering must necessarily take into account the business realities of the industry in which the Respondent operated.

h) Accordingly, the Respondent prayed to this Authority to:-

i. Take the instant written submissions on record, along with its Annexures;

ii. Permit the Respondent to address oral submissions through counsel; accordingly, a specific request for grant of personal hearing was made.

iii. Dismiss the proceedings against the Respondent in view of the contentions detailed above; and

iv. Direct the DGAP to ensure confidentiality of any and all information/evidence/documents supplied by the Respondent. It was submitted that the same were highly sensitive and confidential in nature and were not to be

disclosed or made available, in any manner whatsoever, to the Applicant No. 1.

v. Issue necessary directions to ensure that the records supplied were maintained with utmost confidentiality, during the pendency of the present proceedings and thereafter.

29. Personal hearing in the case was scheduled on 04.03.2021. Applicant No. 1 vide his letter dated 19.02.2021 (received on 22.02.2021) requested for a copy of consolidated written submissions filed by the Respondent and a copy of non-confidential evidence/documents as recorded at Para 10 of the DGAP's Report dated 29.10.2020. It is to mention here that as per the Respondent's consolidated written submissions dated 15.02.2021 Para no. 33 (d) & (e), the Respondent had prayed to ensure that the records supplied by him were to be maintained with utmost confidentiality, during the pendency of the proceedings and thereafter. Therefore, request of the Applicant No. 1 could not be accepted. Therefore, only copy of the Respondent's written submissions dated 15.02.2021 (without the confidential records) was supplied to the Applicant No. 1.

30. The Applicant No. 1 vide his submissions dated 03.03.2021 has submitted:-

A. That since a personal hearing had been granted in the matter on 04.03.2021, as a matter of following of principles of natural justice, the Applicant No. 1 had requested to provide him a copy of the consolidated written submissions against the Report of the DGAP filed by the Respondent.

B. That the Applicant No. 1 be provided the copy of the non-confidential evidence/ documents filed by the Respondent as recorded at para 10 of the DGAP's Report issued vide F. No. 22011/ API/153/2019/3384 dated 29.10.2020 which had not been provided so far despite various requests to the Respondent by the DGAP.

C. That in the above order sheet F. No. 22011/NAA/220/AAL/2020/963-966 dated 24.02.2021 it had been mentioned that since the Respondent had prayed to ensure that the records supplied by him were to be maintained with utmost confidentiality during the pendency of the proceedings and thereafter, therefore the request of the Applicant No. 1 could not be accepted. Therefore, only copy of Respondent's consolidated written submissions dated 15.02.2021 minus annexures (without annexures) had been ordered to be supplied to Applicant No. 1.

D. That page 6 of the Respondent's consolidated written submissions dated 15.02.2021 that contained information regarding price movement of aluminium in the international market had not been attached. The same needed to be provided to him.

E. That vide DGAP's email dated 07.10.2020 the Applicant No. 1 was requested to visit DGAP's office in Delhi on 09.10.2020 to 12.10.2020 (during office hours) to inspect the non-confidential information furnished by the Respondent.

F. That vide his reply dated 08.10.2020 the Applicant No. 1 had humbly expressed his inability to come to Delhi from Goa where he lived, being a senior citizen, due to Covid-19 pandemic and

critical financial position. The Applicant No. 1 had requested to either send the copy of the documents to him or instruct the Respondent to send the copy of one set of the documents.

In this regard, relevant portion of Para 10 of the DGAP Report has been reproduced below:

"Further this office vide email dated 16.10.2020 requested the Respondent to provide the non- confidential summary of the documents submitted by them for present investigation. The Respondent replied vide e-mail dated 19.10.2020 that they have submitted all the documents and no action is pending from their side. Further an email dated 19.10.2020 was again sent to the Respondent to provide the confidential/non-confidential summary of the documents by 20.10.2020. However, the reply of the same has not received in this office hence the documents are not supplied to the Applicant."

It could be safely inferred from the above that had the Applicant No. 1 visited Delhi at the cost of the risk of Covid-19 pandemic then, the said documents would have been seen by him. Moreover from above para, it could be seen that the Respondent himself vide e-mail dated 19.10.2020 had stated that he had submitted all the documents and no action was pending from his side. Hence question of now refusing to show the Applicant No. 1 the said documents did not arise.

G. That the Applicant No. 1 reserved his right to call for the non-confidential information furnished by the Respondent for which the Applicant No. 1 was asked to come to Delhi and inspect and subsequent evidence/ documents submitted by the Respondent.

H. That the Applicant No. 1 agreed with the DGAP's investigation Report wherein he had worked out an amount of Rs.12,79,304/- being the amount profiteered by the Respondent on account of change in the tax structure after introduction of GST. In case there was going to be any reduction in the said quantification the Applicant No. 1 reserved his right to obtain the above documents to fulfil the principles of natural justice.

I. Referring to the written submissions filed by the Respondent , the Applicant No. 1 made the following submissions:

(i) With regard to the arguments submitted by the Respondent in his submissions dated 15.02.2021 regarding the change or escalation in the base price of the aluminium goods, it was pointed out that "the National Anti-Profiteering Authority (NAA) was a statutory body constituted by the Central Government to examine whether the ITC availed by any registered person or reduction in tax rates have actually resulted in corresponding reduction in prices of goods or services supplied". The inflation occurred because the suppliers did not pass on the benefit to the consumers as they intended to earn illegal profits. So, to keep a check on such illegal practices, the central

government had constituted the National Anti-Profiteering Authority.

(ii) Therefore variation in international prices affecting the base prices and their consequent effect on the agreed prices between buyer and seller as contended by the Respondent was subject matter not within the purview of the National Anti-Profiteering Authority.

(iii) The above argument regarding price escalation of the Respondent was an afterthought. The Respondent might like to approach the appropriate forum settling such a dispute. However it was emphatically stated that never could the Govt. tax be over charged and adjusted for profits against loss due to increase in raw material price, labour cost, inflation etc. No law provided for such an adjustment.

(iv) That the agreed price between the Applicant No. 1 and the Respondent was crystallized by way of offer letter dated 20.11.2016 from the Respondent and purchase order dated 18.02.2017 from the Applicant No. 1. [Copies enclosed as Exhibit A and B respectively]. Therefore, there was no scope for variation in the base price whatsoever in terms of the said offer letter and purchase order.

(v) That the Respondent executed the order without any issues or hint or communication to the Applicant No. 1 was evidence enough to prove that they had accepted the base price throughout. Any business house always kept a scope

for absorption of the price variation while fixing the base price. In case of any eventuality of price escalation the buyer/ Applicant No. 1 in this case, was not responsible for the same. The supplier/ Respondent had to keep the commitment and never earn illegal profits by overcharging Govt. taxes due to change in tax regime even to adjust the losses, if any. The Respondent would have never passed on the benefit to the Applicant No. 1 in case of reduction in international prices, in any case.

(vi) It was noticed from the worksheet provided by the DGAP that the Respondent had earned a substantial profit out of the sales transactions made with the Applicant No. 1 in this case.

(vii) The Goa State Govt. had already recovered the differential amount of about 9% from the Applicant No. 1's quoted rates, to adjust the reduction in tax rates after introduction of GST. It was not understood as to why the Respondent considered his case as special? The DGAP and Standing Committee had rightly noticed profiteering and accordingly quantified the said amount.

(viii) With regard to the argument of the Respondent that neither the CGST Act nor the rules made thereunder provided for the methodology for calculating profiteering, it was submitted that it could be clearly seen from the chart provided by the DGAP that the profiteering amount had

been worked out on the basis of facts and actual figures and there was no scope for dispute whatsoever.

(ix) With regard to submissions of the Respondent regarding Sec 171 of the CGST Act, it was submitted that this Authority might like to decide on the same. However, it was pointed out that interest element was applicable in terms of Rule 127 of CGST 2017 and the same should be given to him as he had faced heavy financial losses because of reduced rates and non-availability of funds for business. It was the duty of this Authority to return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen per cent from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be.

J. Therefore, the Applicant No. 1 requested to direct the Respondent to forthwith pay an amount of Rs. 12,79,304/- as per DGAP's investigation being the profiteering amount, along with applicable interest in terms of Rule 127 of the CGST Rules, 2017.

31. The Respondent vide his submissions dated 15.02.2021 requested for Personal Hearing in the case. Personal hearing via video conferencing in the matter was held on 04.03.2021. Same was attended by Shri Sunil Deshpande, Applicant No. 1 in person and Shri Reji V. Mathew, Chartered Accountant, Shri Aditya Chatterjee and Shri Sumer Dev Seth, Advocates, and Shri Sandeep Mittal, Managing Director for

the Respondent. During the personal hearing the Respondent has re-iterated his arguments based on his written submissions dated 26.11.2020 and 15.02.2021. In addition the Respondent vide his email dated 04.03.2021 has submitted the copies of the following judgements relied upon by him during the personal hearing:-

A. Islamic Academy of Education v. State of Karnataka (2003) 6 Supreme Court Cases 697.

B. NAA's Order No. 03/2018 dated 04.05.2018 in the case of Kumar Gandharv v. KRBL Limited.

32. Further, the Respondent vide his email dated 08.03.2021 has submitted his additional/ supplementary written submissions to his earlier written submissions dated 15.02.2021 wherein he has stated:-

A. That DGAP's Report had wrongly come to the conclusion that the Respondent had "profiteered" an amount of Rs.12,79,304/- (inclusive of GST @18% amounting to Rs. 1,95,148/-). It was submitted that any alleged "profiteering" had to be considered on the market price of the goods in question and not the discounted price of the goods in question. A perusal of the Sales Order dated 17 February 2017 along with the invoices dated 3 August 2017, 7 October 2017, 13 October 2017, 25 October 2017 and 4 November 2017 and the table annexed to the above submissions would show that a 32% trade discount was given to the Applicant No. 1 on the original price of goods, as a result of which, a benefit of approximately Rs. 75,76,925.30/- had accrued to the Applicant No. 1.

B. That Section 171 of the CGST Act, 2017 and Rules 122-137 of the CGST Rules,2017 did not define the term "price" as used in these provisions. However, for the purposes of determining any alleged "profiteering", the price of the goods in question ought to have been calculated and determined as per "market value" of the goods and not the discounted price of the goods. As per Section (73) "market value" should mean the "full amount" which a recipient of a supply was required to pay in order to obtain the goods or services or both of like kind and quality at or about the same time and at the same commercial level where the recipient and the supplier were not related.

C. Despite the fact that the price quoted in the Sales Order dated 17.02.2017 was valid only till the end of the month concerned, i.e. February 2017 - which was a mere 11 days, and that the raw material price of aluminium in the international market had increased significantly; yet the Respondent did not make any commensurate change to the discounted price of the goods. Despite the aforesaid change in circumstances, the Applicant No. 1 continued to enjoy the benefit of purchasing the concerned goods at a discounted price of 32%, though the same was not valid beyond February 2017 and the raw material price of aluminium in the international market had increased significantly. It was further submitted that the discount of 32% on the market price given to the Applicant No. 1 was in fact a special discount since the usual trade

discounts were around 15~20% for direct sales and dealer discounts were a maximum of 25% as per dealer agreements. Thus, it was clear that Applicant No. 1 was asking for a "further discount" on an already discounted product. It was also pertinent to note that the Applicant No. 1 never raised any objection, protest or dispute about the price of the goods while accepting the delivery between August to October 2017. Thus, the contention/ argument of the Applicant No. 1 that hehad objected to the additional taxation at the time of sale/ delivery was blatantly false and misleading. In fact, the Applicant No. 1 had directly approached the DGAP sometime in 2019 in this regard without raising any objection or protest with the Respondent. It was therefore submitted that the present proceedings were merely an afterthought and gross abuse of process of the law.

D. That reliance was placed on the decision of this Authority in the case of *Kumar Gandharv vs. KRBL Ltd.* [Case No.3 of 2018, Date of Decision - 04.05.2018], wherein this Authority had dismissed a complaint against a basmati rice-exporting firm KRBL Ltd. for allegedly not reducing the price of his goods after introduction of GST. While dismissing the complaint, this Authority observed as follows:

"Therefore, due to the imposition of the GST on the above product as well as the increase in the purchase price of the paddy there does not appear tobe denial of benefit of ITCas has been alleged by the Applicant as there has been no net benefit of ITC available to the Respondent which could

be passed on to the consumers. Accordingly, there is no substance in the application filed. "

E. That in the light of the written submissions, arguments advanced and the present supplementary submissions, this Authority might be pleased to:

(i) Reject the DGAP's report as it had *inter alia* erroneously considered the discounted price and not the market price;

(ii) Dismiss the Applicant No. 1's complaint/ application since the Respondent had not profiteered and had actually suffered losses due to giving a heavy discount of 32% and having also itself borne the increased raw material cost.

33. The Applicant No. 1 vide his email dated 04.03.2021 has also submitted his supplementary written submissions during the personal hearing wherein he has submitted:-

A. That the Applicant No. 1 had quoted for the work of "Providing False Ceiling to District Hospital Margao, Goa" tendered by the Goa State Infrastructure Development Corporation Ltd. [GSIDC for short]. A Goa Govt. undertaking which was a Special Purpose Vehicle for speedy implementation of important projects.

B. That the Applicant No. 1 was declared as the lowest bidder on 16.09.2016. The approved makes/brands of false ceiling items in the above tender were of the following companies viz. Armstrong, St. Gobain, Hunter Duglas, Aerolite and Anutone [Respondent].

Accordingly the Applicant No. 1 had been approached by the representatives of the above companies with their best discounted rates for supply of the subject items.

C. The Respondent offered the lowest price among the above parties by offering discount on the quoted price. During negotiations, the Respondent had stated that they would match the lowest rates. Accordingly, the Respondent submitted his offer letter 29.11.2016. Work order was issued by GSIDC Ltd. on 20.12.2016 and the work commencement date was 30.12.2016. The Applicant No. 1 issued Purchase Order to the Respondent on 18.02.2017. Supply was complete by 04.11.2017.

D. Chain of events in chronological order was as below for ease of understanding:

Tender Notice date	26/08/2016
Last date of submission of tender	14/09/2016
Tender opening date	16/09/2016
Offer date from M/s Anutone/Respondent	29/11/2016
Work order date	20/12/2016
Work commencement date	30/12/2016
Purchase Order to M/s Anutone/Respondent	18/02/2017
Date of completion of supply	04/11/2017

E. That the rates as per the Applicant No. 1's Purchase Order were firm for the entire project with no provision for escalation on any account. Purchase Order was placed during VAT/ pre-GST regime and the material was supplied post VAT/ during GST regime. The supplier billed the Applicant No. 1 against 100% advance at the same rates quoted as per Purchase Order plus charged GST on

the same. Hence the Applicant No. 1 did not realize that he was overcharged.

F. That the work was for GSIDC Ltd. a Government undertaking. While submitting the bill to GSIDC Ltd., the Applicant No. 1 was asked by the GSIDC Ltd. to reduce the basic quoted rates and charge GST on reduced rates as all the taxes were subsumed in GST. Accordingly, the Applicant No. 1 had to reduce the rates by about 9%. By that time the Applicant No. 1 had procured the entire material for the project against 100% advance from the Respondent.

G. That the Applicant No. 1 had come across a news item reading that a multinational company had been fined by this Authority for not reducing the rates on account of subsuming of taxes and that was how the Applicant No. 1 came to know about this Authority and the entire process.

H. That having been enlightened on the issue by way of the above news item, the Applicant No. 1 realized that there was a platform for redressal of such issues provided by the Government of India. The Applicant No. 1 thus requested the Respondent by way of several emails, letters, telephonic requests and personal discussions with their local executive to reduce the rates accordingly. However there was no positive response from the Respondent. Therefore vide his email dated 27.05.2019 the Applicant No. 1 had given the Respondent a 24 hrs notice. The said e-mail is reproduced below:

"**From:** Sunil Deshpande<deshpandeconstructions@yahoo.in>
To: Bharathi<bharathi@anutone.com>; 'Harshada Trading Company' <harshadaint@outlook.com>
Cc: 'Manoj Asho Joshi' <goa@anutone.com>
Sent: Monday, 27 May, 2019, 06:30:03 pm IST
Subject: Re: Regarding reduced rates on account of GST.

Dear Bharti Madam,

We wish to bring to your kind notice that we are requesting you to refund the amount of taxes, which you are not required to pay on account of GST. These taxes are Central Excise, Countervailing Duties, Special Additional Duties etc., which you were not required to pay as the same was merged in GST.

However, in post GST regime you have kept the basic material rate same as prior to GST rate and above this you have charged GST. We are requesting you to refund only the amount to theextend you were not required to pay in the basic cost on account of old taxes and duties and nothing else.

We have also brought to your notice that GSIDC Ltd. has reduced our rates for the same reasons which your dealer M/s Harshadda trading company is aware off.
Please note that if we do not receive positive replay within 24 hours, we shall be free to represent our case before National Anti-profiteering Authority or any other forum.

Please also note that GSIDC Ltd (Government of Goa undertaking) registers brands of companies which follow ethical and good business practices.

Thanks and Regards,
Deshpande Constructions"

I. That consequent to the above e-mail even the Respondent's executive met the Accounts Officer of GSIDC Ltd. on 03.06.2019 and understood the process. However, the Respondent replied that he had charged taxes at prevailing GST rate. Therefore, after exhausting all the means, as a last resort the Applicant No. 1

approached this Authority for justice vide his application dated 11.06.2019.

J. Because of overcharging by the Respondent and reduction in rate by GSIDC Ltd. the Applicant No. 1 suffered heavy financial losses. The Applicant No. 1 also paid huge bank interest. Besides, large amount of Rs.12,79,304/- was blocked and the Applicant No. 1's business was hampered. In addition, owing to Covid-19 pandemic the Applicant No. 1's business had suffered badly. Hence, it was requested to pass order in favour of the Applicant No. 1 for immediate release of tax difference with 18% interest.

K. That during the personal hearing the Respondent's Advocate mentioned the following three main points:

(i) Overall discount of 32% was already given to the Applicant No. 1 by the Respondent; hence it was the Applicant No. 1 who had benefited. The calculation done by the DGAP was erroneous as they had considered the discounted price as the base price instead of non-discounted price:-

In this regard the Applicant No. 1 has stated that he had procured the material from the Respondent because his rates were the lowest after offering 32% overall discounts. Otherwise, the Applicant No. 1 could have purchased the said material from other approved brands. Order was placed at discounted rates. 32% overall discount was not over and above the agreed price but the agreed price was sealed after discount. The profiteered amount had been worked out by the DGAP on the basis of facts and actual figures and there

was no scope for dispute whatsoever. The Offer letter dated 20.11.2016 from the Respondent and Purchase Order dated 18.02.2017 of the Applicant No. 1 were self-explanatory wherein the rate of individual item was reduced to the extent of the discount.

(ii) The sales order was valid till only end of February 2017:-

In this regard the Applicant No. 1 has stated that it was not correct to state that the sales order was valid till only February 2017 as the Respondent went ahead with the complete supply without any issues. The Applicant No. 1's purchase order did not speak of any time limit. Also, this issue was not a subject matter before this Authority. It was categorically pointed out that the agreed price between the Applicant No. 1 and the Respondent was crystallized by way of offer letter of the Respondent and purchase order of the Applicant No. 1. Therefore, there was no scope for variation of the base price whatsoever in terms of the said offer letter and purchase order.

(iii) There was escalation in raw material price hence no profiteering:-

In this regard the Applicant No. 1 has stated that even if there was an escalation in raw material price, the same could never be adjusted by over charging the Govt. taxes. Even this was not a subject matter before this Authority. For

that matter a firm purchase order was placed by the Applicant No. 1 on 18.02.2017, hence the Respondent should have taken immediate action to import the material in order to avoid issues arising out of escalation. In any case, it was a matter of speculation by the Respondent. It was not the concern of the Applicant No. 1 whether there was any escalation or otherwise in the import prices. Needless to mention that standard businesses were accustomed to such kind of price variations. For that matter it was normal business practice to provide a cushion to absorb such price variations.

L. Further, this Authority raised a specific query that whether the Applicant No. 1 did not come to know about overcharging before purchase:-

In this regard the Applicant No. 1 stated that he had already explained the same in the above paras about the chain of events and how the Applicant No. 1 came to know about the concept of profiteering and such a forum as this Authority.

M. Further the Applicant No. 1 requested this Authority to direct the Respondent to forthwith pay an amount of Rs.12,79,304/- as per the DGAP's investigation being the profiteering amount along with applicable interest in terms of Rule 127 of CGST 2017.

34. Further, the Respondent vide his e-mail dated 15.03.2021 has stated that while this Authority's Order dated 04.03.2021 had been

circulated to the parties, confidential material submitted by the Respondent that was not to be shared with the Applicant No. 1 had also been forwarded. The Respondent in his written submissions dated 15.02.2021 had made a specific request to this Authority not to share such confidential material.

Such concern had been duly noted in this Authority's Order dated 23.02.2021 duly accepting the same in the following terms:

"It is to mention that as per the Respondent's consolidated written submission dated 15.02.2021 para no. 33(d) and (e), the Respondent has prayed to ensure that the records supplied by him are maintained with utmost confidentiality, during the pendency of the proceedings and thereafter. Therefore, request of Applicant No. 1 cannot be accepted.

In view of the above, only copy of Respondent's consolidated written submissions dated 15.02.2021 minus annexures be supplied to the Applicant No. 1."

35. Clarifications were sought from the DGAP on the Respondent's submissions dated 15.02.2021 and 08.03.2021. The DGAP vide his Report dated 24.03.2021 has submitted the following clarifications:-

<u>Clarifications on the Respondent's written submissions dated 15.02.2021</u>

A. For the Respondent's contention that the alleged Notice issued by DGAP was defective and did not meet the mandate of Rule 129(3) of the CGST Rules, 2017; the investigation was in violation of principles of natural justice, the DGAP has clarified that the State Screening Committee Karnataka vide its letter dated 12.07.2019 to the Standing Committee on Anti-Profiteering had mentioned that

Applicant No. 1 had in his complaint alleged that the Respondent had not passed on the benefit of additional ITC available after the introduction of GST on 'false ceiling materials'. The description of goods was mentioned as 'false ceiling materials' in the NOI dated 30.04.2019 as per the description of goods used in Screening Committee Report. It was during the course of Investigation that the exact detailed description of the 'false ceiling materials' was found while scrutinizing the documents filed by the Respondent and accordingly, the Notice was issued with correct description on 30.10.2019 under Rule 129(3).

B. For the Respondent's contention that DGAP had wrongly assumed admissions on part of the Respondent, the DGAP has stated that Para-17 of his Report dated 29.10.2020 mentioned that in terms of Section 171 of the CGST Act, 2017 the additional benefit of ITC in the GST regime was required to be passed on by the supplier to the recipients by way of commensurate reduction in price, the Respondent had not contested that there was no additional benefit of ITC available to him. The Report submitted by the DGAP was based on the submission made by the Respondent.

C. Further for the Respondent's contentions that the DGAP's Report erred in assuming that non-reduction of base price amounted to "profiteering"; ITC had accrued to the Applicant No. 1's benefit through non-increase of base price, the DGAP has submitted that while arriving at profiteering in terms of Section 171 of the CGST Act, 2017, the costs or escalations were not considered. The only point which was examined was whether the Respondent had been

benefited by additional amount of ITC, and if so, he was obliged to pass on the said benefit commensurately to the recipients. It was a fact that the Respondent had not contested that there was no benefit of additional ITC.

D. Further for the Respondent's contention that the DGAP's Report failed to account for increased raw material prices and increased Customs Duty while ascertaining alleged incidence of profiteering, the DGAP clarified that Para-21 to 24 of his Report described in a detailed manner the amount that had been profiteered. The cost component was not taken into cognizance while determining profiteering.

E. For the contention raised by the Respondent that Neither the CGST Act nor the CGST Rules provided the methodology for calculating profiteering the DGAP has submitted that the "Methodology and Procedure" has been notified by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. The main contours of the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the additional benefit of ITC are enshrined in Section 171 (1) of the CGST Act, 2017 itself which states that "Any reduction in rate of tax on any supply of goods or services or the benefit input tax credit shall be passed on to the recipient by way of commensurate reduction in prices". The word "commensurate" mentioned in the above Section gives the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each product based on the tax reduction

as well as the existing base price (price without GST) of the product. The computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from product to product 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 recipient or the profiteered amount.

A single formula, which fits all, cannot be set while determining such a "Methodology and Procedure" as the facts of each case are different. For example, in one real estate project, the variables are different from the other project and hence the amount of benefit of additional ITC to be passed on. Also, the facts of the cases relating to the Fast-Moving Consumer Goods (FMCGS), restaurants, construction and cinema houses are completely different and therefore, the mathematical methodology adopted in the case of one sector cannot be applied in the other sector otherwise it would result in denial of the benefit to the eligible recipients.

Moreover, both the above benefits have been granted by the Central as well as the State Governments by sacrificing their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and hence, they have to pass on the above benefits as per the provisions of Section 171 (1) of the CGST Act, 2017.

Moreover, profiteering was not a tax as had been interpreted by the Respondent but it was a benefit which had accrued to him

on account of additional ITC which he needed to pass on to the eligible customers. The CGST Rules have provided an elaborate mechanism for determination of the benefits and hence there is sufficient machinery to implement the anti-profiteering provisions.

F. The DGAP further submitted that his Report dated 29.10.2020 had provided the methodology and procedure regarding the computation of profiteering amount and concluded that the Respondent had profiteered an amount of Rs. 12,79,304/- contravening the provisions of Section 171 of the CGST Act, 2017.

Clarifications on the Respondent's submissions dated 08.03.2021

G. That the Respondent did not provide any documentary evidence that the 32% trade discount given to the Applicant No. 1 was in any way related to the benefit of ITC the Respondent ought to have passed on to the Applicant No. 1. Therefore, any such benefit could not be considered akin to the benefit enshrined under Section 171 of the CGST Act, 2017.

H. That in terms of Section 171 of the CGST Act, 2017 the Respondent was required to reduce the base price to the extent mentioned in Para 23 of the DGAP's Report dated 29.10.2020.

I. That the cost component had not been taken into cognizance while determining profiteering. As per Section 171 of the CGST Act, 2017 the Respondent was required to pass on the commensurate benefit of additional ITC accrued to him to the Applicant No. 1.

J. That had the import taken place prior to implementation of GST, the Respondent would had been liable to pay CVD @ 12.5 %

without getting the benefit of ITC. Since the import took place in the post-GST period, the full amount of IGST @ 18% paid at the time of actual import was available to the Respondent as ITC. Hence, there had been additional benefit of ITC to the Respondent. Accordingly, the cited decision was not applicable.

36. The Respondent vide his email dated 05.04.2021 submitted his rejoinder to the above clarifications of the DGAP wherein the Respondent has stated that the DGAP's clarifications were devoid of any merit and application of mind. The DGAP had ignored the Respondent's legal submissions *inter alia* with respect to: (a) the DGAP's error in considering the discounted price as the base price, instead of the actual price at which the goods in question were sold in the market while attempting to determine alleged profiteering; (b) increase of cost price of raw materials and non-consideration of trade discount availed by the Applicant No. 1.

A. In response to Paragraph A of the DGAP's Report dated 24.03.2021, the Respondent submitted that the Alleged Notice dated 24.10.2019 issued by the DGAP under Rule 129(3) of the CGST Rules, which formed the basis for the purported investigation to be commenced, was defective, inadequate and non *est* in law as it did not contain material particulars regarding the "description of the goods... in respect of which proceedings..." were sought to be initiated. By merely making a passing reference to the supposed goods involved as "false ceiling materials", the DGAP failed to discharge his duty and obligation to give sufficient notice to the Respondent in accordance with law. It was denied

that the exact detailed description of the 'false ceiling materials' was found only while scrutinising the documents and thereafter a Notice was issued with the correct description on 30.10.2019 under Rule 129(3). In fact, the DGAP was well aware of the "detailed description of the goods" from the very inception of the proceedings as the same were expressly mentioned by the Applicant No. 1 in his purported complaint to the State Screening Committee/ Standing Committee on Anti-Profiteering along with documents submitted by him. Therefore, despite the specific description of the goods involved being well within the DGAP's knowledge, only a vague reference to "false ceiling materials" was made in the Alleged Notice. Pertinently, the Respondent whose business primarily involved ceiling materials (which it marketed to several of his clients) was hardly put to due and sufficient notice by the DGAP when the Alleged Notice failed to identify with even a modicum of specificity, the description of the goods involved. A grossly defective Notice such as the alleged Notice caused, and had, in fact, caused prejudice to the Respondent's ability to sufficiently defend himself right from the inception.

B. In response to Paragraph B of the above said Report, the Respondent submitted that although he had availed ITC, however, there was no admission by the Respondent that he had indulged in profiteering, as alleged by the DGAP in his Report. It was submitted that the DGAP had again misconstrued the submission since the Respondent had at no point admitted to any allegation of profiteering, or any part thereof. On the contrary, the Applicant No.

1 had benefited from a huge 32% discount on the cost of the goods purchased by him already. In any event, none of his submissions either to this Authority or to the DGAP ought to have been treated as admissions to any of the allegations levelled against him.

C. In response to Paragraphs C, the Respondent submitted that the DGAP had completely misinterpreted Section 171 of the CGST Act. The submission of the DGAP that "while arriving at profiteering in terms of Section 171 of CGST Act, the costs or escalations are not considered" was vehemently denied. If such an interpretation of the provision were to be accepted by this Authority, it would defeat the very essence of the provision itself. For, every act of adjustment/ increase/ correction of sale price due to rising costs of raw materials, would amount to an act of profiteering. It was submitted that the same would lead to disastrous consequences and would make the provision vulnerable to being misused by the DGAP.

D. In response to Paragraph D of the DGAP's Report dated 24.03.2021, it was stated that the contention of the DGAP that "the cost component is not taken into cognizance while determining profiteering" was fundamentally flawed as the increase/decrease of cost prices of raw materials was an important factor to be taken into consideration while determining profiteering. It was submitted that "profiteering" cannot be determined in isolation of costs. In the present case, despite the fact that the price quoted in the Sales Order dated 17.02.2017 was valid only till the end of February

2017 - which was a mere 11 days, and that the raw material price of aluminium in the international market had increased significantly; yet the Respondent did not make any commensurate change to the discounted price of the goods. Despite the aforesaid change in circumstances, the Applicant No. 1 continued to enjoy the benefit of purchasing the concerned goods at a heavily discounted prices of 32%, though the same were not valid beyond February 2017 and the raw material price of aluminium in the international market had increased significantly.

E. That this Authority in the case of *Kumar Gandharv v. KRBL Ltd.* [Case No. 3 of 2018, Date of Decision-04 05 2018], had accepted the contention of the Respondent therein that increase of purchase price of paddy led to an increase in the sale price of Basmati Rice. It was submitted by the Respondent therein that the cost of price of paddy, which amounted to 75% of the cost of production, had increased by more than 30% in the FY2017 as compared to the FY 2016. The Respondent therein submitted that because of the stiff competition in the market, they couldn't pass on the increased cost entirely to the consumer, and instead increased the Maximum Retail Price 'MRP' by 8% only from 540/- to 585/-. Consequently, this Authority did not find that the Respondent therein had violated section 171 of the CGST Act 2017. While dismissing the complaint, this Authority observed as follows:

"Therefore, due to the imposition of the GST on the above product as well as the increase in the purchase price of the paddy there

does not appear to be denial of benefit of ITC as has been alleged by the Applicant as there has been no net benefit of ITC available to the Respondent which could be passed on to the consumers. According, there is no substance in the application filed."

F. In response to Paragraph E of the DGAP's Report dated 24.03.2021, it was submitted that "Methodology and Procedure" notified by this Authority under Rule 126 of the CGST Rules did spell out the parameters to be considered while determining whether or not there was incidence of "profiteering". It was, however, obvious that in order to examine whether there had been profiteering or not, it was incumbent on the DGAP to consider the market price as the base price. A discount was after all, a loss to the seller which it chose to absorb internally. Therefore, a discounted price, which by definition was a loss to the seller, could not be the basis to claim "profiteering". Accordingly, the existing base price would necessarily have to mean the non-discounted price and not the discounted price. In other words, in order to calculate the "commensurate reduction in prices", this Authority ought to have considered the base price of the goods supplied *de hors* the discounts offered to the Applicant No. 1. Therefore, the contention of the DGAP that "existing base price" of the product was to be taken into account while computing "commensurate reduction in prices" must be interpreted taking into account this factor in the present case, a "special" discount of 32% on the market price was given to the Applicant No. 1 in the month of

February 2017 - which was valid for a mere 11 days i.e. till the end of the month as per the SO 002.

G. That the eventual sale of the four distinct aluminium products took place vide Invoices dated 3 August 2017, 7 October 2017, 13 October 2017, 25 October 2017 and 4 November 2017. It was thus evident that none of the sales were subject to the same base price as indicated in SO 002. In fact, while the base price quoted in SO 002 was valid only until the end of February 2017, the earliest sale in pursuance thereof took place only in August 2017. Notably, in the interim the raw material price of aluminium in the international market had increased significantly. Yet, the Respondent did not make any commensurate change to the base price of the aluminium goods listed in SO 002 (which was already a discounted price) since the natural increase in price had been absorbed by the ITC. On the contrary, in the entire aforesaid transaction, a benefit of approximately Rs. 75,76,925.30/- had accrued to the Applicant No. 1 due to the special discount and unchanged purchase price of the goods.

H. In response to the Paragraph F, it was submitted that the DGAP had failed to apply/use the correct methodology and procedure to compute the alleged profiteering amount of Rs. 12,79,304/-. It was submitted that any alleged "profiteering" had to be considered on the market price of the goods in question (non-discounted price) and not the discounted price of the goods in question. Further, the DGAP must also consider the change or escalation in the cost

price of the goods in question as was done by this Authority in the case of *Kumar Gandharv v. KRBL Ltd.* (supra).

I. In response to the Paragraph G of the DGAP's Report dated 24.03.2021, the Respondent submitted that he had provided this Authority and the DGAP with all the documentary evidence during the course of Investigation itself to show that a trade discount of 32% was given to the Applicant No. 1 and that the same was absorbed in ITC of the goods. In fact, this was self-explanatory from SO 002 dated 17.02.2017.

J. In response to Paragraph J of the DGAP's Report dated 24.03.2021, it was denied that there had been any additional benefit to the Respondent. The cited decision of *Kumar Gandharv v. KRBL Ltd* (supra) was squarely applicable to the facts of the present case for the reasons mentioned herein above in Paragraphs D and F.

37. 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 that the minimum quorum was restored only w.e.f. 23.02.2022 and hence the matter was taken up for proceedings vide Order dated 23.03.2022 and hearing in the matter through Video Conferencing was scheduled to be held on 31.03.2022.

38. Personal Hearing was held on 31.03.2022. Same was attended by Shri Sunil Deshpande for the Applicant No. 1, Shri Lal Bahadur, Assistant Commissioner for the DGAP and Shri Reji Methew, Chartered Accountant and Shri Aditya Chatterjee,

Advocate for the Respondent. The Respondent and the Applicant No. 1 were heard. During the personal hearing the Respondent has re-iterated his arguments based on his written submissions dated 26.11.2020, 15.02.2021, 04.03.2021 and 08.03.2021. The Respondent and the Applicant No. 1 further requested time till 04.04.2022 to file their consolidated written submissions.

39. The Respondent vide his letter dated 05.04.2022 submitted his consolidated written submissions wherein he has re-iterated his earlier written submissions.

40. The Applicant No. 1 vide his letter dated 04.04.2022 also submitted his consolidated written submissions wherein he has stated:-

a. That he had purchased material from the Respondent, partly before GST as well as after GST. Part material had been supplied to him under the old regime at the rates agreed upon in the Purchase Order with 2% CST as per the then prevailing tax structure. Major material had been supplied to the Applicant No. 1 after introduction of GST by charging GST @ 18% on the very same rates as mutually agreed in the Purchase Order.

b. That the Respondent was not disputing the fact that the rates had been maintained the same despite reduced input taxes on account of GST. This has led to profiteering by the Respondent. As per this Authority in GST any reduction in rate of tax on any supply of goods, the benefit of ITC should have been passed on to the recipient by way of commensurate

reduction in prices. This had led to increase in the price of the items purchased by the Applicant No. 1.

c. That the claim of the Applicant No. 1 was duly supported by concrete evidence, copies of invoices relating to goods purchased from the Respondent as per Purchase Order, before GST regime and the details are given below:-

Sr. No.	Invoice No.	Date	Taxable Value	CST @2%	Total invoice value
1	1720057	15/06/2017	Rs. 14,16,447.48	Rs. 28,328.93	Rs.14,44,776/-
2	1720056	15/06/2017	Rs. 14,67,443.40	Rs. 29,348.87	Rs.14,96,792/-
		Total	Rs. 28,83,890.88	Rs. 57,677.80	Rs. 29,41,568/-

d. Goods purchased from the Respondent as per PO, after GST regime as per the details given below:

Sr. No.	Invoice No.	Date	Taxable Value	GST @18%	Total invoice value
1	1790135	25/10/17	Rs. 17,06,158.08	Rs. 3,07,108.53	Rs.20,13,266/-
2	1790142	04/11/17	Rs. 20,49,603.67	Rs. 3,68,928.61	Rs.24,18,532/-
3	1790127	13/10/17	Rs. 14,64,785.28	Rs. 2,63,661.41	Rs.17,28,447/-
4	1790079	03/08/17	Rs. 20,75,414.40	Rs. 3,73,574.59	Rs. 24,48,989/-
5	1790080	03/08/17	Rs. 20,75,414.40	Rs. 3,73,574.59	Rs.24,48,989/-
6	1790081	03/08/17	Rs. 20,75,414.40	Rs. 3,73,574.59	Rs.24,48,989/-
7	1790122	06/10/17	Rs. 9,60,840.00	Rs. 1,72,951.20	Rs.11,33,791/-
8	1790123	06/10/17	Rs. 19,60,113.60	Rs. 3,52,820.45	Rs.23,12,934/-
		Total	Rs. 1,43,67,743.83	Rs. 25,86,193.97	Rs. 1,69,53,937.00

e. That the Respondent continued to supply material to the Applicant No. 1 at quoted rates as per Purchase Order plus 18% GST without reducing tax component ofCustoms and other duties that were subsumed in GST.

f. That the Applicant No. 1 had committed to GSIDC and the project management consultant that he would be using the

Respondent's make/ products for the metal false ceiling, and therefore the Applicant No. 1 continued with purchases from the Respondent as it was certain that he would definitely follow the taxation law of the land and pass on the tax benefit if any as per law.

g. That the Applicant No. 1 raised running account bill to GSIDC Ltd. in the post GST era at his rates prior to GST regime. However GSIDC reduced his rates effectively to an extent of 9% on each item. This was on the basis of an Office Memorandum No. 38/5/2017-Fin. (R&C) dated 6/11/2017 issued by the Government of Goa, Finance (Revenue & Control Department), Secretariat, Porvorim, Goa as a consequence of introduction of GST. This Office Memorandum stated that for the goods component (items including material supply, machinery, equipment etc.), the rate quoted by the contractor should be reduced by the relevant Excise Duty/ Countervailing Duty and Special Additional Duty) in case of import) /CST or VAT and thereafter appropriate incidence of GST should be applied.

h. That his rates had been reduced by over 14% by GSIDC. This reduced percentage of 14% included VAT element [State works contract tax] to the extent of about 5% which otherwise would have to be borne by the Applicant No. 1. Thus the net deduction had been worked out to around 9% of the quoted prices as stated above. The amount quoted by the Applicant No. 1 was reduced by around Rs.54 lakhs by GSIDC.

i. That various requests were made to the Respondent via email,

telephonic calls, personal meetings with the Respondent's dealer and his local company representative and letters to reduce the prices to the extent of reduction in taxes like Customs Duty, Excise Duty etc. in the basic quoted price but there was no positive response from the Respondent.

j. That profiteering has occurred on the part of the Respondent beyond doubt, the said amount needs to be paid to the Applicant No. 1. Interest @18% had to be recovered from the Respondent and paid to the Applicant No. 1 as per Rule 127 of the CGST Rules, 2017 .

k. An order may be passed directing the Respondent to return the amount of Rs.12,79,304/- as mentioned in the DGAP's Report being the amount not passed on by way of commensurate reduction in prices along with interest at the rate of eighteen percent from the date of collection of higher amount till the date of return of such amount, at the earliest.

41. This Authority has carefully considered the Reports filed by the DGAP, all the submissions and the documents placed on record and the arguments advanced by the Respondent and the Applicant No. 1.

42. This Authority finds that, the prices (exclusive of Central Sales Tax i.e. CST) quoted by the Respondent for supply of goods to the Applicant in the pre GST period and the prices (exclusive of IGST on supply) at which such goods were supplied during the GST regime remained the same as is evidenced in the Tables at paragraphs 17, 18 and 21 above.

43. This Authority also finds that, the Respondent supplied the above 04 categories of goods i.e. Anutone Serge Astral Lay-in Aluminium Unperforated Aquila 595*595*0.6mm, Anutone Serge Astral Lay-in Aluminium Unperforated Aquila 1200*1200*0.6mm, Anutone Serge Astral Lay-in Aluminium Perforated Mensa (2.5 mm dia) 595*595*0.6mm and Anutone Serge Astral Lay-in Aluminium Perforated Mensa (2.5 mm dia) 1200*1200*0.6mm, as per the order placed during February 2017 on the prices agreed as per the offer of the Respondent given during November 2016. At the time of placing order, since it was an inter-state transaction, CST of 2% was applicable. Consequent to the introduction of GST, IGST @ 18% was applicable on the inter-state supply of such goods. The Respondent had been charging 2% CST prior to July 2017 and started charging 18% IGST from July 2017, but, the basic price of the goods remained unchanged. The Respondent, an importer of the said goods, was not eligible to avail the input tax credit (ITC) of Additional Duty of Customs (referred as CVD) paid on such goods at the time of import till June 2017 as the goods imported were traded. With the introduction of GST from July 2017, the Respondent became entitled to avail the ITC of IGST paid at the time of import of such goods and therefore, the incidence of tax on import of goods stood reduced for the Respondent. However, the Respondent had not reduced the basic price of the said goods commensurate with the ITC of IGST paid at the time of import available with the introduction of GST w.e.f. 01.07.2017.

44. The Authority further finds that, the Additional Duty of Customs (referred as CVD) was subsumed under the GST in the

GST regime. The Authority finds that, as no credit was available of the Additional Duty of Customs (referred as CVD above) paid at the time of import to the Respondent in the pre GST period, hence, the incidence of such tax was factored into the price quoted by the Respondent. However, both import and supply were made, by the Respondent, during the GST regime. Hence, the benefit of ITC of IGST paid at the time of import was available to the Respondent. Hence, on account of availability of ITC of such IGST, the price of supply should have been reduced commensurate to the amount of Additional Duty of Customs (referred as CVD) which was factored into the price quoted by the Respondent.

45. With respect to the 04 categories ofgoods i.e. Anutone Serge Astral Lay-in Aluminium Unperforated Aquila 595*595*0.6mm, Anutone Serge Astral Lay-in Aluminium Unperforated Aquila 1200*1200*0.6mm, Anutone Serge Astral Lay-in Aluminium Perforated Mensa (2.5 mm dia) 595*595*0.6mm and Anutone Serge Astral Lay-in Aluminium Perforated Mensa (2.5 mm dia) 1200*1200*0.6mm, prices of which were quoted for sale and supply by the Respondent to the Applicant No. 1, it was found that an amount of Rs. 12,79,304/- equivalent to the amount of Additional Duty of Customs (referred as CVD above) to be paid at the time of import by the Respondent in the pre GST period was factored into the price quoted by the Respondent, as tabulated in the Reports of the DGAP cited above. The Authority finds that, as both import and supply were made by the Respondent during the GST regime, the benefit of ITC of IGST paid at the time of import was

available to the Respondent. Hence, on account of availability of ITC of such IGST, the price of supply should have been reduced commensurate to the amount of such ITC of IGST the amount of Rs. 12,79,304/- which is the amount factored into the base prices quoted by the Respondent on account of the incidence of Additional Duty of Customs (referred as CVD) in the pre GST period. The benefit equal to such amount should have been passed on to the Applicant No. 1 by the Respondent by commensurate reduction in prices. There has been no commensurate reduction in prices and hence, this Authority finds that, the provisions of Section 171(1) of the CGST Act, 2017 had been contravened in the present case.

46. The Respondent vide his written submissions contended that the Notice issued by the DGAP was defective and did not meet the mandate under Rule 129(3) of the CSGT Rules, 2017 and that, the investigation was in violation of principles of natural justice. Further, the Respondent contended that the DGAP has wrongly assumed admissions on part of the Respondent. This Authority finds that, the State Screening Committee of the State of Karnataka vide its letter dated 12.07.2019 to the Standing Committee on Anti-Profiteering had mentioned that the Applicant No. 1 had in his complaint alleged that the Respondent had not passed on the benefit of additional ITC available after the introduction of GST on 'false ceiling materials'. The description of goods was mentioned as 'false ceiling materials' in the Notice of Investigation dated 30.04.2019 as per the description of goods used in Screening Committee Report. It was during the course of

investigation that the exact detailed description of the 'false ceiling materials' was found while scrutinizing the documents filed by the Respondent and accordingly, the Notice was issued with correct description on 30.10.2019 under Rule 129(3) by the DGAP.

Further, this Authority finds that, Section 171 of the CGST Act, 2017 mandates that, the supplier should pass on the benefit of reduction in rate of tax or the benefit of ITC availed by the supplier to the recipients by way of commensurate reduction in prices. The investigation by the DGAP was conducted under the provisions of Section 171 of the Act read with Rule 129 of the CGST Rules, 2017, on the recommendation of the Standing Committee on Anti-Profiteering and the Investigation Report was submitted to this Authority under Rule 129(6) of the Rules in terms of the mandate of law. Therefore, this Authority finds that, there has been no violation of the principles of natural justice and the Notice issued by the DGAP under Rule 129(3) of the Rules is perfectly legal and maintainable and hence there is no merit in this submission of the Respondent.

47. It has also been contended by the Respondent that there was no 'profiteering' on their part as the ITC had accrued to the Applicant No. 1's benefit through non-increase of base price. The Respondent has submitted that, the purchase order was received prior to introduction of GST and supplies had to take place subsequent to the introduction of GST and consequently though there was increase in cost of raw materials supplied, such increase in cost had been absorbed by them by not increasing the base price.

This Authority has examined the sequence of events and the documents placed on record. This Authority finds that, the supply of goods by the Respondent to the Applicant no. 1 was made as per the order placed during February 2017 on the prices agreed as per the offer of the Respondent given during November 2016. In such offer and quote, the amount of Additional Duty of Customs (referred as CVD), payable at the time of import and on which no ITC was then available, was necessarily factored into the prices. As per the mandate of Section 171 of the CGST Act, 2017, if the benefit of ITC, which was not available earlier, was made available to the Respondent in the post GST period, it was incumbent on the Respondent to pass on such benefit to the Applicant no. 1 by commensurate reduction in price.

Hence, this Authority finds that, while arriving at profiteering in terms of Section 171 of the CGST Act, 2017, the DGAP has correctly examined as to whether the Respondent had benefited by any additional amount of ITC, and if so, the quantum thereof, and whether the Respondent had passed on the said benefit to the Applicant No. 1 by commensurate reduction in prices.

The Authority also finds that, Section 171 of the CGST Act 2017 itself defines, the term "profiteered" which means the amount determined on account of not passing on the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.

It is also apparent to this Authority that the DGAP has based the calculations in his Reports on each supply/ transaction/ invoice

from the Respondent to the Applicant No. 1 during the relevant period, comparing the prices mentioned therein with the prevailing base prices before the availability of ITC.

This Authority holds that, the DGAP has correctly calculated, as mandated by the law, the amount profiteered by the Respondent in this case.

This Authority is obligated by Section 171of the CGST Act, 2017 to ensure that the benefit of the reduction in the rate of tax and/ or benefit of ITC is passed on to the recipients by the suppliers.

48. This Authority finds, as per the discussion and findings above that, in this case such benefit has not been passed on by the Respondent to the Applicant No.1 by way of commensurate reduction in the price.

Therefore, the submission made by the Respondent has no basis in law.

49. The Respondent also stated that the DGAP's Report had incorrectly considered the discounted price offered to the Applicant No. 1 instead of the market price while making its calculations. According to the Respondent, if the market price was considered, it could be shown that there was no profiteering and in fact the Applicant No. 1 had benefited hugely.

In this context, this Authority finds that, Section 171 of the CGST Act, 2017 requires passing of the benefit of tax reduction or availability of ITC by commensurate reduction in prices only. The above mentioned discounts had been offered by the Respondent

in the prices quoted by them in the pre GST period after factoring into the said price the incidence of Additional Duty of Customs (referred as CVD) of which no credit was then available.

Hence, the Authority finds that, the Respondent has no basis to claimthat, the 32% trade discount given to the Applicant No. 1 was in any way related to the benefit of ITC the Respondent ought to have passed on to the Applicant No. 1.

This Authority also finds that, such discounts were offered to increase the sales of the Respondent in the normal course of their business which do not constitute passing on of the benefit which accrued to the Respondent on account of availability of ITC of IGST paid at the time of import during the GST period. The Respondent is legally bound to pass on the above benefit through commensurate reduction in prices.

Hence, the Authority holds this contention of the Respondent devoid of any merit.

50. The Respondent has contended that, neither the CGST Act nor the CGST Rules provide the methodology for calculating the amount of profiteering.

The Authority finds that, the main contours of the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and the benefit of ITC are enshrined in Section 171 (1) of the CGST Act, 2017 itself. It mandates 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"*.

Section 171(2) requires the Authority "*...to examine whether input tax credits availed by a registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of goods or services or both supplied by him*".

Therefore, Section 171 itself provides the procedure and methodology for passing on the said benefit by way of commensurate reduction in the price.

The Respondent has got benefit of ITC which he is required to pass on by commensurate reduction in price.

51. The Respondent has submitted that, no penalty ought to be imposed on the Respondent as Section 171(3) of the CGST Act could not be applied retrospectively to the present case. This Authority finds that, vide Section 112 of the Finance Act, 2019 specific penalty provisions have been added for violation of the provisions of Section 171(1) which have come in to force w.e.f. 01.01.2020, by inserting Section 171(3A).

The Authority holds that, as no penalty provisions were in existence between the period w.e.f. 01.07.2017 to 30.09.2019 when the Respondent had violated the provisions of Section 171(1), the penalty prescribed under Section 171(3A) cannot be imposed on the Respondent.

52. The Respondent vide his e-mail dated 15.03.2021 has raised a concern and stated that vide this Authority Order dated 04.03.2021, confidential material submitted by the Respondent had been forwarded to the Applicant No. 1. In this regard, it is to

mention that the Applicant No. 1 vide his letter dated 19.02.2021 requested for a copy of consolidated written submissions filed by the Respondent before hearing. In this regard it is to mention that as per this Authority's Order dated 23.02.2021 only copy of the Respondent's written submissions dated 15.02.2021 was supplied to the Applicant No. All the Annexures marked as the "Confidential" were not supplied to the Applicant No. 1.

53. The Respondent has also cited the decision of this Authority in the case of *Kumar Gandharv v. KRBL Ltd.,* the Hon'ble Supreme Court's decision in *Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 697 and in *Man Realty Ltd. and Another vs. Union of India and Others* [W.P. (C) 997/2021], which was pending before the Hon'ble Delhi High Court. In this regard it is to mention that the facts of the above cases referred by the Respondent are different from his case and are of no help to the Respondent.

54. It is clear from a plain reading of Section 171(1) cited above that, it deals with two situations i.e. one relating to the passing on the benefit of reduction in the rate of tax and the second pertaining to the passing on the benefit of the ITC. The issue to be examined by the Authority is as to whether there was any net benefit of ITC with the introduction of GST. On this issue it has been revealed from the DGAP's Report that, the Respondent should have reduced the base prices to the extent of the Additional Duty of Customs (referred as CVD) that was no longer to be paid by the Respondent as well as to the extent of the IGST paid at the time of import, the credit of which was now available. This proceeds on the fact that, in the GST period, the

Additional Duty of Customs (referred as CVD) is subsumed under the GST and in particular by the IGST to be paid at the time of import. On the one hand, there has been no incidence of the Additional Duty of Customs (referred as CVD) on the goods imported and supplied by the Respondent to the Applicant No. 1, whereas on the other hand such Additional Duty of Customs (referred as CVD) had been subsumed in the IGST paid on such goods by the Respondent and ITC of such IGST was made available for to the Respondent for paymentof IGST on the same goods supplied to the Applicant No. 1. This Authority finds that, the invoices raised by the Respondent to the Applicant No. 1, for the supply of said 04 goods on which IGST @18% was charged by the Respondent show that, the base prices of the goods remained the same, as reflected in the purchase order dated 18.02.2017. The benefit of the ITC of IGST paid at the time of import of the said goods, (the Additional Duty of Customs (referred as CVD) having been subsumed under such IGST) was not passed on to the Applicant No.1. Thus, the Authority finds that, the methodology and procedure adopted by the DGAP for calculation of the amount 'profiteered' by the Respondent i.e. equivalent to the Additional Duty of Customs (referred as CVD) that was not payable post GST is appropriate and correct.

The base price was not reduced by the Respondent to the extent of Additional Duty of Customs (referred as CVD) that was not payable post GST.

Further, the DGAP has calculated the amount of ITC benefit to be passed on to Applicant No. 1 during the period 01.07.2017 to 30.09.2019 as Rs.12,79,304/- on the basis of the information

supplied by the Respondent and hence the amount of profiteering computed by the DGAP is hereby accepted as correct.

55. In view of the discussions and findings above, this Authority finds that the Respondent has profiteered by an amount of Rs. 12,79,304/- during the period of investigation i.e. 01.07.2017 to 30.09.2019. The above amount of Rs. 12,79,304/- (including 18% GST) that has been profiteered by the Respondent from Applicant No. 1, shall be refunded by him, alongwith interest @18% thereon, from the date when the above amount was profiteered by him till the date of such refund, in accordance with the provisions of Rule 133 (3) (b) of the GCST Rules 2017.

56. This Authority, in terms of Rule 136 of the CGST Rules 2017, directs the jurisdictional Commissioners of CGST/SGST, State of Karnataka to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by the Authority is passed on to the Applicant No. 1. A Report in compliance of this order shall be submitted to this Authority by the said Commissioners of CGST /SGST within a period of 4 months from the date of receipt of this order.

57. This Authority finds it pertinent to mention that the Hon'ble Supreme Court, vide its Order dated 23.03.2020, while taking *suo-moto* cognizance of the situation arising on account of Covid-19 pandemic, has extended the period of limitations prescribed under general law of limitation or any other specified laws (both Central and State) including those prescribed under Rule 133(1) of the

CGST Rules, 2017, as is clear from the said Order which states as follows:-

"A period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present 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.

58. A copy of this order be sent to the Applicant No. 1, the Respondent, Commissioners of CGST/SGST, State of Karnataka, free of cost for necessary action.

59. A copy of this order be supplied to the Applicants and the Respondent. File of the case be consigned after completion.

S/d
(Amand Shah)
Technical Member &
Chairman

S/d
(Pramod Kumar Singh)
Technical Member

S/d
(Hitesh Shah)
Technical Member

Certified copy

(Dinesh Meena)
NAA, Secretary

DINESH MEENA, IRS
Secretary
National Anti-Profiteering Authority
Govt. of India

4695—4700

F. No. 22011/NAA/220/AAL/2020 Date:-10.05.2022

Copy To:-

1. M/s Anutone Acoustics Ltd., 95, Kiadb Industrial Area, Mular, 3rd Phase, Nosigere Malur, Taluk, Malur, Karnataka-563130, (GSTIN:29AADCA1269K1ZH).
2. M/s Deshpande Constructions (Prop. Sh. Sunil V Deshpande), 102-C, UshaKinara, Behind Teleigao Church, Goa-403002.
3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2ndFloor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. The Commissioner of State Tax, First Main Road, Gandhinagar, Bangalore-560009.
5. The Pr. Chief Commissioner, CGST, Bengaluru Zone, C.R. Building, Queen's Road, Shivaji Nagar, Bengaluru, Karnataka-560001.
6. Guard File.