BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	17/2020
Date of Institution	16.09.2019
Date of Order	13.03.2020

In the matter of:

1. State Tax Officer, C-130, Cabin No. 320, Vikrikar Bhavan, 3rd Floor, Airport Road, Yervada, Pune-411006.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Bonne Sante, Shop No. J5/J6, Empire Estate, Old Mumbai Pune Highway, Chinchwad Station, Pune-411019.

Respondent

Quorum:-

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

13.3.2020

Present:-

1. None for the Applicant No. 1.
2. None for the Applicant No. 2.
3. Sh. Neeraj Rai, Partner, in person for the Respondent.

ORDER

1. The Present Report dated 13.09.2019, received on 16.09.2019 by this Authority, has been furnished by Applicant No. 2 i.e. the Director General of Anti-Profiteering (DGAP), under Rule 129(6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the present case are that a reference was received from the Standing Committee on Anti Profiteering on 27.03.2019 by the DGAP with a recommendation to conduct a detailed investigation in respect of an application filed by the Applicant No. 1, originally examined by the Maharashtra State Screening Committee on Anti-profiteering under Rule 128 of the CGST Rules 2017. The Applicant No. 1 has alleged profiteering, in respect of restaurant service supplied by the Respondent (Franchisee of M/s Subway Systems India Pvt. Ltd.). It was alleged that despite the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017, the Respondent had increased the base prices of his products and had not passed on the commensurate benefit of reduction in the GST rate from 18% to 5% w.e.f.

15.11.2017, effected vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017.

2. The DGAP, in his report, has stated that on receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 was issued on 09.04.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017, had not been passed on by him to the recipients by way of commensurate reduction in prices and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all the supporting documents to evidence the same. The Respondent was also allowed to inspect the non-confidential evidence/information contained in the application from 15.04.2019 to 17.04.2019, which formed the basis of the investigation, which was not availed of by the Respondent.

3. The DGAP has reported that the period covered by the investigation was from 15.11.2017 to 31.03.2019 and that this Authority, vide its Order dated 19.06.2019, had extended the time limit to complete the investigation up to 26.09.2019, in terms of Rules 129(6) of the CGST Rules.

4. The DGAP has further stated that in response to the notice dated 09.04.2019 and subsequent reminders, the Respondent has submitted replies, vide his letters/e-mails dated 09.05.2019, 12.06.2019, 17.07.2019, 24.08.2019 and 05.09.2019. The Respondent has, inter-alia summited that he had availed ITC (ITC) during the period 01.07.2017 till 14.11.2017, and

thereafter, no ITC has been availed. Vide his aforementioned e-mails/letters, the Respondent submitted the following documents/information:

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

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

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

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

(e) Price lists of the products.

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

(g) Details of ITC availed and utilized for the period from 01.07.2017 to 14.11.2017 by the Respondent.

5. The DGAP has reported that in terms of Rule 130 of the CGST Rules, 2017, the Respondent was informed by the DGAP that if any information/documents provided by him were confidential, a non-confidential summary of such information/documents could be furnished by him. However, the Respondent did not classify any information/documents furnished by him, as confidential in terms of Rule 130 of the Rules.

6. The DGAP has also reported that the reference from the Standing Committee on Anti-Profiteering, the various replies of the Respondent and the documents/evidence on record were carefully examined. The main issues for determination were

whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

7. The DGAP in his report has stated that vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017, GST rate on restaurant services has been reduced from 18% to 5% w.e.f. 15.11.2017 by the Central Government, on the recommendation of the GST Council with the condition that the ITC on the goods and services used in supplying the service was not taken.

8. The DGAP has further stated that before inquiring into the allegation of profiteering, it was important to examine Section 171 of the CGST Act, 2017 which governed the anti-profiteering provisions under GST. Section 171(1) reads as "*Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement as per the above provisions was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of the goods or services being supplied by a registered person and the final price being charged for each supply had to be reduced commensurately with the extent of the benefit and there was no other legally tenable mode of passing on such benefit of rate reduction or ITC to the recipients/consumers.

9. The DGAP has also mentioned that the assessment of the impact of denial of ITC, which was an uncontested fact, required the determination of ITC in respect of the restaurant service, as a percentage of the taxable turnover from the outward supply of "products", during the pre-GST rate reduction period. In his report, the DGAP has also explained that if the ITC in respect of restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017, was up to 10%, it could be concluded that there was no profiteering. However, if the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017, was by 14%, the extent of profiteering would be 14% - 10% = 4% of the turnover. Therefore, this exercise to work out the ITC in respect of restaurant service as a percentage of the taxable turnover of the products supplied during the pre-GST rate reduction period, was carried out by taking into consideration the period from 01.07.2017 to 14.11.2017. However, it was also observed by the DGAP that some of the invoices received by the Respondent during the period 01.11.2017 to 14.11.2017 pertained to the services rendered for the entire month of November 2017 and there was no reversal of ITC reflected in GSTR-3B Return of November 2017 on account of closing stock of inputs as on 14.11.2017, which was to be used after 14.11.2017. Therefore, the taxable turnover and ITC for the period 01.11.2017 to

14.11.2017 has not been taken into account by the DGAP for calculation of the percentage of ITC available to the Respondent.

10. The DGAP in his report has further stated that the ratio of ITC to the net taxable turnover has been taken for determining the impact of denial of ITC which was available to the Respondent till 31.10.2017. On this basis, it was found by the DGAP that ITC amounting to Rs. 1,87,608/- was available to the Respondent during the period July 2017 to October 2017 which was 7.39% of the net taxable turnover of restaurant service amounting to Rs. 25,40,127/- supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent. A summary of the computation of the ratio of ITC to the taxable turnover of the Respondent has been furnished by the DGAP in Table-A below:-

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

Particulars	Jul-17	Aug-17	Sept.-2017	Oct.-2017	Total
Total Outward Taxable Turnover as per GSTR-3B (A)	6,39,314	6,12,618	6,41,782	6,46,413	25,40,127
ITC Availed as per GSTR-3B (B)	42,104	48,405	51,075	46,024	1,87,608
The ratio of ITC to Net Outward Taxable Turnover (C)= (A/B)					**7.39 %**

11. The DGAP has further reported that the analysis of the details of item-wise outward taxable supplies made during the period from 15.11.2017 to 31.03.2019 revealed that the Respondent

had increased the base prices of different items supplied as a part of restaurant service to make up for the denial of ITC post-GST rate reduction. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period 01.07.2017 to 14.11.2017 (Pre-GST rate reduction) and 15.11.2017 to 31.03.2019 (Post-GST rate reduction) were compared and it was established that the Respondent had increased the base prices by more than 7.39% i.e., by more than what was required to offset the impact of denial of ITC in respect of items sold during the same period and hence, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on.

12. The DGAP has also reported that the next issue to be examined was to determine the quantum of profiteering made in this case and for this purpose, only those items where the increase in base prices was more than what was required to offset the impact of denial of ITC, had been considered and the DGAP has furnished the calculation in Table-B below in respect of item "12" Chicken Tandoori Sub" for which average base price had been calculated during the pre-GST rate reduction period of 01.11.2017 to 14.11.2017 and then profiteering had been calculated for post-GST rate reduction (Invoice no. 1/A-13083 dated 15.11.2017):-

Table–B **(Amount in Rs.)**

Name of the product (A)	12" Chicken Tandoori Sub
Total Quantity sold during 1st Nov 2017 to 14th Nov 2017 (B)	5
Sum of taxable value during 1st Nov 2017 to 14th Nov 2017 (C)	1305
Average base price during 1st Nov 2017 to 14th Nov 2017 (D=C/B)	261.00
Base price with denial of ITC @ 7.39% (E=D+D *7.39%)	280.29
GST @ 5% (F=E*5%)	14.01
Total price to be charged(G=E+F)	294.30
Selling price per unit as per invoice no. 1/A-13083 dated 15.11.2017 (H)	340
Total profiteering (I=H-G)	45.70 (340-294.30)

13. The DGAP has further stated that based on the aforesaid post GST rate reduction, the impact of denial of ITC and the details of outward supplies (other than zero-rated, nil rated and exempted supplies) during the period 15.11.2017 to 31.03.2019, as per the product-wise sales registers reconciled with the GSTR-1 and GSTR-3B Returns, the amount of net higher sale realization due to increase in the base prices of the service, despite the reduction in GST rate from 18% to 5% (with denial of ITC) or in other words, the profiteered amount came to Rs. 7,33,043/- (including GST on the base profiteered amount). The details of the computation have been furnished by the DGAP in Annexure-10 of his report. The DGAP has also stated that the said service had been supplied by the Respondent in the State of Maharashtra only.

14. The DGAP in his report has concluded that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling price or by way of not reducing the selling prices of the products commensurately, despite a reduction in GST rate from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent. This additional amount of Rs. 7,33,043/- had been realized by the Respondent from the recipients which included both the profiteered amount and GST on the said profiteered amount. Hence, the provisions of Section 171(1) of the CGST Act, 2017 had been contravened by the Respondent in the present case.

15. The above Report was considered by this Authority in its sitting held on 17.09.2019 and it was decided to accord an opportunity of hearing to the Applicants and the Respondent on 03.10.2019. Notice was also issued to the Respondent directing him to explain why the Report dated 13.09.2019 furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. Sh. Neeraj Rai, Partner appeared for the hearings.

16. The Respondent vide his written submissions dated 18.10.2019 has made the following submissions stating:-

a. That the methodology applied in DGAP's report dated 13.09.2019 to arrive at profiteering was incorrect as the data used to arrive at profiteering was not a comparable data since average base prices in the pre-rate reduction regime were compared with the item-wise transactions in

the post rate reduction. Further, the DGAP has used two sets of the average base prices, first from 01.11.2017 to 14.11.2017 and second from 01.07.2017 to 31.10.2017 for comparison with the item-wise transactions post 14.11.2017. Further, the DGAP has calculated the average base prices for the period from 01.11.2017 to 14.11.2017 after factoring the discount although the actual base prices of the menu were much higher. He has further stated that giving discount was a norm in the competitive world and depended on various factors. It was the call of the business to decide upon the period and quantum of discounts that were needed to be given to sustain in business and to attract more customers. He has contended that this Authority should factor in the average base price (without discount) for the period from 01.11.2017 to 14.11.2017 for Store No. 58855 and that he has submitted the correct average base prices before this Authority.

b. That Sub of The Day (SOTD) has been a highly popular product and was sold at a base price of Rs. 110/- across all outlets before 15.11.2017. However, the base price of SOTD was incorrectly mapped as Rs. 105 in many cases for the period from July-2017 to October-2017. The same needed to be corrected and all SOTD should be worked with base price of Rs. 110/-.

c. That M/s Subway Systems India Pvt. Ltd. charged 8% and 4.5% totaling 12.5% Royalty and Advertisement Charges

on the taxable sales and after moving to composition scheme, his royalty cost was directly increased by 1.77%. He has also furnished calculation sheet in respect of the same as mentioned below:-

Calculation of GST Impact on Royalty and Advertisement Expenses			
Particulars	Before 15.11.2017	After 15.11.2017	Incremental Cost (%)
Sales Price Including GST	118	118	
Basic Price	100	112.38	
GST	18%	5%	
GST Amount	18	5.62	
Total	118	118	
Royalty Expenses	8% of Basic Price	8% of Basic Price	
Royalty Amount	8	8.99	
GST on Royalty	12%	12%	
GST Amount	0.96	1.079	
Total Amount	8.96	10.07	1.11
Advertisement Expenses	4.5% of Basic Price	4.5% of Basic Price	
Advertisement Amount	4.5	5.06	
GST on Advertisement	18%	18%	
GST Amount	0.81	0.910	
Total Amount	5.31	5.97	0.66
Total	14.27	16.037	1.77
% of Incremental Cost			1.77

d. That after moving to the composition scheme w.e.f. 15.11.2017, he was not allowed to avail ITC on Capital Goods. Hence, to calculate the profiteered amount, he needed to factor in the loss of ITC from Capital Goods, which was 1.074% and the same was needed to be considered for arriving at profiteering. He has also illustrated his loss of ITC on Capital Goods in the Table below:-

Non Availability of ITC of Capital Goods			
Party Name	Date of purchase	Basic Amount	GST Paid
Stellar Gastronom Pvt. Ltd.	27.04.2018	71045	12788.1
Nirmal Sales Agencies	23.04.2018	16299	2933.84
Stellar Gastronom Pvt. Ltd.	04.05.2018	41640	7495.2
Stellar Gastronom Pvt. Ltd.	11.05.2018	5280	950.2
Stellar Gastronom Pvt. Ltd.	11.05.2018	1750	210
Stellar Gastronom Pvt. Ltd.	22.05.2018	249409	44893.62
Stellar Gastronom Pvt. Ltd.	14.06.2018	78200	14076
Rajseva Enterprises Pvt. Ltd	23.06.2018	12203.42	2196.62
Power Solutions	16.07.2018	70000	12600
Stellar Gastronom Pvt. Ltd.	14.08.2018	62139	11185.02
Total		607965.42	109328.8
Turnover of 2018-19 (Rs.)	10179424.60		
% loss of GST on Capital Goods	1.074%		

e. That he operated the Buy One Get One (BOGO) offer and gave free Sub for every single Sub purchased. However, the DGAP in his Report has calculated profiteering on the second Sub despite giving it free of cost. On 02.11.2018 he ran the BOGO offer on his Store No. 58855 and the profiteering calculated on the same should be completely removed from the sales made on 02.11.2018.

f. That the inflation cost was approximately 6% and the profiteering has been calculated till 31.03.2019. However, keeping in mind the inflation cost, the same should be calculated until 31.03.2018.

g. That due to the above-stated reasons, the profiteering amount of Rs. 7,33,043/- was incorrect and due weightage should be given to the above-mentioned points in the final calculation.

h. That as per the calculation factoring in the above points, the profiteering worked out to merely Rs. 66,010/- which was less than 1% of taxable sales from period 15.11.2017 to 31.03.2018.

17. A supplementary report was sought from the DGAP on the issues raised by the Respondent vide his above-mentioned submissions and the DGAP vide his submissions dated 31.10.2019 has clarified as under:-

a. That as per the provisions of the CGST Act, 2017 and Rules made thereunder, the effective price on which tax was levied was discounted price. Hence, the DGAP has taken the discounted price in the pre and post GST rate reduction regime. In his report dated 13.09.2019, the DGAP has arrived at the reference base prices of the products by dividing the total quantity supplied to the total taxable value charged (after discount) for the products during the period 01.11.2017 to 14.11.2017. Further, the reference base prices of the products which were not supplied during the period from 01.11.2017 to 14.11.2017, were taken from the sales data for the period from July-2017 to October-2017.

b. That the reference base price for SOTD products have been taken as Rs. 110/-. Further, the reference base price of SOTD product which was not supplied during the period from 01.11.2017 to 14.11.2017, was taken from the sales data for the period from July-2017 to October-2017 which was Rs. 105/- during the period.

c. That the payment of royalty and advertisement charges was a purely internal agreement between the Respondent and M/s Subway Systems India Pvt. Ltd.

d. That the concern of the Respondent in respect of the non-availability of ITC on Capital Goods has already been addressed in para 13 to 15 of the DGAP's Report dated 13.09.2020 and it was revealed that the base prices of the products had been increased by the Respondent to factor the denial of credit.

e. That in DGAP's Report dated 13.09.2019, the profiteered amount has been arrived at by comparing the average of the base prices of the products supplied during the period 01.11.2017 to 14.11.2017, with the actual invoice-wise base prices of such products supplied during the period from 15.11.2017 to 31.03.2019. The reference base prices of the products which were not sold during the period from 01.11.2017 to 14.11.2017 were taken from the sales made during the period from July-2017 to October-2017. Only those invoices, where the transaction prices of the products during the period from 15.11.2017 to 31.03.2019

were more than the commensurate base prices of the impugned products had been taken into account for computing profiteering and the invoices where the transaction prices were less than the commensurate base prices of the impugned products, they had not been considered.

18. The Respondent vide his submissions dated 11.11.2019 filed against the supplementary report dated 31.10.2019 filed by the DGAP, has submitted as follows:-

i. That he did not agree with the findings of the DGAP's Report dated 31.10.2019. In the restaurant business, it was very common to offer discretionary discounts to the customers and these discounts largely depended on market practices but all discounts were discretionary depending upon the sales, inventory position, competitor strategy, market penetration, customers' loyalty or other similar factors. He has relied upon the order passed by this Authority in the case of Flipkart (Case no 5/ 2018 dated July 18, 2018) wherein it had been recorded that withdrawal of discounts was the prerogative of the supplier and did not amount to profiteering.

ii. That he has the right to withdraw discounts and other promotional offers anytime and no rule implied that a discount could not be withdrawn until the expiry of a specified period. The DGAP has completely ignored the fact

that only under special circumstances discount was given and the average base prices had been calculated based on discounted and normal sales during the period from 01.11.2017 to 14.11.2017, whereas they ought to have been calculated only based on normal sales made during that period.

iii. That the comparison of base prices done against all the items for the period July-2017 to October-2017 should be excluded from the scope of calculation of profiteering.

iv. That as per the attached SOTD sample bills of Store No. 58855, the base rate was as follows:-

(a) No 12730 Dt 10/11/17 SOTD Base Rate Rs. 110/- Total bill Rs 130/- (inclusive 18% GST).

(b) No 12836 Dt 11/11/17 SOTD Base Rate Rs. 110/- Total bill Rs 130/- (inclusive 18% GST).

(c) No 12730 Dt 10/11/17 SOTD Base Rate Rs. 110/- Total bill Rs 130/- (inclusive 18% GST).

(d) No 13078 Dt 14/11/17 SOTD Base Rate Rs. 110/- Total bill Rs 130/- (inclusive 18% GST).

(e) No 13059 Dt 14/11/17 SOTD Base Rate Rs. 110/- Total bill Rs 130/- (inclusive 18% GST).

That after taking the correct SOTD base price of Rs 110/-, the Profiteering would be reduced by Rs. 12990/-.

v. That due to the increased royalty and advertisement charges, his cost had gone up by 1.77%. Hence, he has

increased the base prices of the products to compensate for the loss of denial of ITC in the rate reduction regime.

vi. That in BOGO offer, there were 2 Subs, one free of cost and second was charged at the normal price. By doing this, he claimed to have passed on the benefit to the customers through the same Invoice; that all the sales made in respect of the BOGO offer on 02.11.2018 should be excluded from the scope of profiteering and hence, the profiteered amount would reduce by Rs. 4,970/-. He has also enclosed the following sample invoice of BOGO offer for Store No 58855:-

(a) Inv No. 45425 dated 2/11/18 Amount Rs 190/-.

(b) Inv No. 45436 dated 2/11/18 Amount Rs 215/-.

(c) Inv No. 45449 dated 2/11/18 Amount Rs 220/-.

vii. That on point No. 6 of his previous submissions dated 18.10.2019 which related to inflation, the DGAP has not given any comment. In this regard, he has to submit that he was not holding inventory for more than one week due to the perishable nature of the items. One of his main raw materials was vegetables prices of which keep changing on day to day basis. Various factors like competition pricing, long term strategies for market penetration, the profit margin for sustaining in the market, life cycle of the product, economic and social conditions, cost of the products and capital expenditure, inflation in man-power cost and general year on

year inflation, etc. played an important role at the time of fixing the prices of the products. After GST rate reduction i.e. from 15.11.2017, he had increased the base sale prices of his products on different dates after 15.11.2017 as part of his normal business practice and to offset inflation which has not been considered by the DGAP. Hence, the profiteered amount should be calculated based on the difference in base prices which existed just before the reduction in rate and immediately after that.

viii. That no specific period has been prescribed under Section 171 of the CGST Act and the Rules to keep the base prices the same. The DGAP while calculating the profiteered amount, has considered sales up to the period from November-2017 to March-2019, i.e. a period of almost 16 months for his investigation, which was unacceptable. Hence, the profiteered amount should be calculated up to 31.03.2018. Beyond that period any increase in prices should be purely considered as a business decision and should not be part of the profiteered amount

ix. That right to trade was a fundamental right guaranteed under Article 19 (1) (g) of the Constitution of India, which included the right to determine prices and the same could not be taken away without any explicit authority under the Law. Therefore, this form of price control was a violation of Article 19 (1) (g) of the Constitution of India.

x. That the DGAP, while calculating the profiteered amount, wrongly added a 5% notional amount which was charged and collected from customers on the profiteered amount and deposited with the Government. Therefore, the addition of this 5% amount should be removed and hence the profiteered amount should be reduced by Rs. 34,906/-.

19. This Authority has carefully examined the DGAP's Reports and the written submissions filed by the Respondent placed on record. The issues to be decided by the Authority in the present case are as under:-

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

b) Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 in this case?

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

"(1). Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.

(2). The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether ITCs availed by any registered person or the reduction in the

tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.

(3). The Authority referred to in sub-section (2) shall exercise such powers and discharge such functions as may be prescribed.

(3A) Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section comes to the conclusion that any registered person has profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten per cent. of the amount so profiteered:

PROVIDED that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

Explanation:- For the purpose of this section, the expression "profiteered" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services of both."

21. It is clear from the definition of the term "profiteered" contained in Section 171 of the CGST Act 2017 that the amount on account of not passing on the benefit of reduction in the rate of tax on supply

of goods and services or both or the benefit of ITC to the recipient by way of commensurate reduction in the prices of the goods or services or both shall be the profiteered amount. We find it pertinent to mention that Section 171 of the CGST Act, 2017 provides that the benefit has to be passed on in respect of each supply made by a registered person. As per the above provisions of Section 171 of the Act, there is no connection between the term "profiteering" and "Profit". The scope of profiteering is confined to the question of whether the benefit accruing on account of reduction in the tax rate or the benefit of ITC as the case may be, has been passed on to the recipient/consumer or not. In the context of the same, the Respondent has made submissions relating to increase in his costs on account of royalty, advertisement charges and inflation which does not have any ramification on the computation of the amount of profiteering. Further, provisions of Section 171 of the Act mandates that profiteering has to be calculated on each supply/transaction and therefore it has to be calculated on each actual invoice/actual supply in the relevant period, comparing the prices mentioned therein with the prevailing base prices before the reduction in the tax rate and in the availability of ITC. It is also pertinent that the actual transaction values of the products in the pre and post-tax rate reduction periods are compared for the computation of profiteering. Hence, the actual pricing and the amount of profit/loss at the end of the supplier becomes irrelevant for the computation of profiteering. We also find it pertinent to mention

that this Authority has no legislative mandate to fix the prices or the profit margins in respect of any supply (which are the rights of the supplier) and it is obligated by Section 171 of the CGST Act, 2017 to ensure that benefit of the reduction in the rate of tax and/ or benefit of ITC which is a sacrifice of revenue from the kitty of Central and State Governments in a welfare state is passed on to the recipients, and, if tracked down the entire value chain, to the end consumers. The welfare of the consumers who are voiceless, unorganized and scattered is the soul of the above provision. This Authority has been working in the interest of consumers as the trade is bound to pass on the benefit of tax reduction and ITC which becomes available to it due to revenue sacrificed by the Government. This Authority does not, in any manner, interfere in the business decisions of the Respondent and hence the functioning of the Authority and the anti-profiteering machinery is within the confines of the four walls of the provisions of Section 171 of the CGST Act 2017 and in no way violates the tenets of Article 19 (1) (g) of the Constitution. Keeping the above observations in mind, we proceed to address the specific issues raised by the Applicants and the Respondent in the present case.

22. The Respondent has claimed that the methodology applied to arrive at profiteering was incorrect as the data used to arrive at profiteering was not a comparable data as two sets of average base prices have been used to compare the item-wise transactions post 14.11.2017, first during the period from 01.11.2017 to 14.11.2017 and second from 01.07.2017 to

31.10.2017. The above claim made by the Respondent is not correct. As is evident from the DGAP Report it is clear that the reference base prices of the items have been arrived at by dividing the total quantity supplied to the total taxable value charged after discount for the items during the period from 01.11.2017 to 14.11.2017. Further, the base prices of the products which were not supplied during the period 01.11.2017 to 14.11.2017 were taken from the sales data for the period July-2017 to October-2017. Hence, the above claim of the Respondent cannot be accepted.

23. The Respondent has argued that the methodology adopted by the DGAP was not correct and the CGST Act has no mentioned it. In this regard, it is pertinent to mention 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 which states that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" It is clear from the perusal of the above provision that it mentions "reduction in the rate of tax on any supply of goods or services or benefit of ITC" which means that the benefit of tax reduction or ITC has to be passed on at the level of each supply of Stock Keeping Unit (SKU) or unit to each buyer of such SKU or unit and in case it is not passed on the profiteered amount has to be calculated on each SKU unit. Further, the above Section mentions "any supply"

i.e. each taxable supply made to each recipient thereby clearly indicating that netting off of the benefit of tax reduction by any supplier is not allowed. A supplier cannot claim that he has passed on more benefit to one customer therefore he could pass less benefit to another customer than the benefit which is actually due to that customer. Each customer is entitled to receive the benefit of tax reduction or ITC on each product or unit purchased by him. 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 or unit based on the tax reduction as well as the existing base price of the product or unit or the additional ITC available. 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 or unit to unit and hence no fixed 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. However, to give further clarifications and to elaborate upon this legislative intent behind the law, this Authority has been empowered to determine/expand the Procedure and Methodology in detail which has been notified by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, one formula which fits all cannot be set while determining such a "Methodology and Procedure" as the facts of each case are different. In one real estate project, date of start and completion of

the project, price of the house/commercial unit, mode of payment of the price, stage of completion of the project, rates of taxes, amount of ITC availed, total saleable area, area sold and the taxable turnover realized before and after the GST implementation would always be different from the other project and hence the amount of benefit of additional ITC to be passed on in respect of one project would not be similar to another project. Issuance of Occupancy Certificate/ Completion Certificate would also affect the amount of benefit of ITC as no such benefit would be available once the above certificates are issued. Therefore, no set parameters can be fixed for determining methodology to compute the benefit of additional ITC which would be required to be passed on to the buyers of such units.

Further, 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 employed 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) which are abundantly clear, unambiguous and mandatory which truly reflect the policy of the legislatures.

24. The Respondent has further contended that for calculating the average base price, the DGAP has calculated the price after factoring the discount however, the actual base price of the menu was much higher than the price after factoring the discount. Therefore, the average base price of the items should be considered without excluding the discounts. In this context, the argument of the Respondent is not sustainable. The effective price on which tax was levied was discounted price and hence, to determine the base price of an item, the discounted price was taken for the pre and post rate reduction period. Further, the base price of the product had been arrived at by dividing the total quantity supplied to the total taxable value charged after discount. As per the sample invoices submitted by the Respondent vide submissions dated 11.11.2019, it was observed that he did not mention that the discounts were given due to the GST rate reductions. These invoices revealed that the discounts offered (Sub of The Day-SOTD) were following the general discount pattern which was being followed by the Respondent in the course of his business. Therefore, the above discounts cannot be construed to have been given due to the GST rate reduction and hence, the above claim of the Respondent cannot be accepted.

25. The Respondent further contended that the base price in respect of Sub of the Day (SOTD) was Rs. 110/- which was incorrectly mapped to Rs. 105/- by the DGAP in many cases while working out the base rates for the period from July-2017 to October-2017. In this context, it has been revealed from the records that the

Respondent, at no point in time, has furnished any invoice/supply document that showed SOTD as an item supplied/sold by him. Therefore, there is no ground for accepting Respondent's contention regarding SOTD. Further, it was found that for computing the extent of profiteering, the product-wise average base prices for the items supplied in the pre rate reduction period had been taken from the Respondent's invoices which were furnished by him and not from any secondary data/ source. We also take note of the fact that the average pre rate reduction base prices have been compared by the DGAP with the actual post rate reduction prices of all the products supplied by the Respondent, including SOTD, due to the reason that it was not possible to compare the average base prices pre and post rate reduction as the post rate reduction the benefit has to be legally passed to each buyer on the actual transaction value received by the Respondent from each of such buyer. Further, the comparison of the actual to actual base prices pre and post rate reduction (of SOTD or any other product) is also not possible as the same buyer may not have purchased the very same product during both the above periods and some of the buyers may have purchased some products during the post rate reduction period and not during the pre-rate reduction period or vice versa. It has been admitted by the Respondent that he had charged different base prices to his customers for the same product on different days of a particular week/month during the pre-rate reduction period and therefore, the only alternative available was to compute the

average base prices for the above period so that comparison could be made with the post rate reduction actual base prices. Therefore we do not find any merit in the above claim of the Respondent.

26. The Respondent has further contended that in India, Subway Systems India Pvt. Ltd. charges 8% and 4.5% totalling 12.5% Royalty and Advertisement Charges and after moving to the composition scheme, his royalty cost has directly increased by 1.77%. In this connection, it would be appropriate to refer to the definition of the profiteered amount given in the Explanation attached to Section 171 which has been quoted above.

It is clear from the above explanation that an increase or decrease in the cost of a supplier, due to increase in royalty, advertisement charges or the costs towards the renovation of the store, has no ramification on the amount of profiteering which is computed in line with the provisions of Section 171 of the CGST Act. In case a supplier has not passed on the benefit of the tax rate reduction by way of a commensurate reduction in prices in each of his supplies at the level of each invoice, anti-profiteering provisions will apply to him, irrespective of his costs or whether he makes profits or losses. In any case, the payments made by the Respondent on account of Royalty and Advertisement Charges are purely an internal agreement between the franchiser and the franchisee without any connection with the anti-profiteering provisions applicable to the franchisee, i.e. the Respondent. Hence, this contention of the Respondent is not accepted.

27. The Respondent has also contended that after moving to the composition scheme w.e.f. 15.11.2017, he was not allowed to avail ITC on Capital Goods. Hence, for calculating the base prices after the reduction in the rate of tax with simultaneous denial of ITC, the loss on account of denial of ITC on capital goods ought to have been factored in the computation of profiteering by the DGAP since before 14.11.2017, he was allowed to take ITC on his purchases of capital goods. In this regard, we find that the DGAP has already factored the fact of denial of ITC to the Respondent w.e.f. 15.11.2017 in the computation which is based on the comparison of ratios of the Total ITC available to the Net Taxable Turnover in the pre rate reduction regime with the post rate reduction regime. It is pertinent to mention that ITC on capital goods, if any, availed by the Respondent in the pre-rate-reduction period, has already been accounted for in the computation. Hence, the contention of the Respondent is without any merit.

28. The Respondent has further contended that Buy One Get One offer was extended by him by giving a free Sub(item/product) for every single Sub purchased, however, the DGAP in his Report has calculated profiteering on the second Sub despite giving it absolutely free of cost. The Respondent has also contended that the DGAP has not taken into account those invoices of the post reduction period (15.11.2017 to 31.03.2019), wherein the transaction prices were lesser than the commensurate base prices of the products supplied by him, i.e. where he had passed on excess benefit to his customers/recipients. The above

contention of the Respondent is not correct because the computation done by the DGAP, is based on the transaction value as per the provisions of Section 15 of the CGST Act, 2017 and all discounts including the supply of free Sub, which do not form part of such value, cannot be included in the price of the product. The Respondet has himself submitted that the discounts offered by him were in accordance with his general market practice which was being followed by him in the course of his business, which every other similar franchisee was also doing to promote his sales. The excess benefit passed on one product can also not be set off against the other product since the benefit is required to be passed on to every buyer and no buyer can be denied the benefit on the ground that it has been passed on the other buyer. Therefore, the above contentions of the Respondent cannot be accepted.

29. The Respondent has further contended that the annual inflation cost was approximately 6% and hence, profiteering should be calculated until 31.03.2018. It is pertinent to mention here that the scope of profiteering is confined to the question of whether the benefit accruing on account of rate reduction has been passed on to the recipients or not. The Respondent had not ground to increase his prices on the intervening night of 14/15th November, 2017 on account of inflation as he had no data to substantiate the above increase on the above date. Therefore, the contention of the Respondent relating to the increase in his costs on account of inflation does not have any remification on the computation of

profiteering. Therefore, this contention of the Respondent is not maintainable.

30. The Respondent has further contended that no period has been prescribed under the Act to keep the base prices the same so the anti-profiteering provisions should not be invoked. The DGAP while calculating profiteered amount has arbitrarily considered sales from November-2017 to March-2019 i.e. almost 16 months after the change in GST rate, which was an unduly long period. Therefore, the period of calculation for profiteering should be kept shorter and as such be considered only up to 31.03.2018. In this context, we observe that in this case, while the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017, the Respondent increased the base prices of his products immediately thereafter and did not pass on the resultant benefit by way of commensurate reduction in the prices of his supplies at any point of time till 31.03.2019. In other words, the violation of the provisions of Section 171 of the CGST Act 2017 has continued unabated in this case and the offence continues to date. The Respondent has nowhere produced any evidence to prove from which date the benefit was passed on by him. The fact that the Respondent has not complied with the law till 31.03.2019 implies that profiteering has to be computed for the entire period and hence we do not see any reason to accept this contention of the Respondent. We further observe that had the Respondent passed on the benefit before 31.03.2019, he would have been investigated only till that

date. Therefore, the period of investigation i.e. from 15.11.2017 to 31.03.2019 has been rightly taken by the DGAP.

31. The Respondent has also contended that right to trade was a fundamental right guaranteed under Article 19 (1) (g) of the Constitution of India and the right to trade including the right to determine prices and such right which had been granted by the Constitution of India could not be taken away without any explicit authority under the Law. The contention of the Respondent is not correct as this Authority or the DGAP has not acted in any way as a price controller or regulator as they do not have the mandate to regulate the same. The Respondent is absolutely free to exercise his right to practice any profession or to carry on any occupation, trade or business, as per the provisions of Article 19 (1) (g) of the Constitution. He can also fix his prices and profit margins in respect of the supplies made by him. Under Section 171 this Authority has only been mandated to ensure that both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments are passed on to the end consumers who bear the burden of the tax. The intent of this provision is the welfare of the consumers who are voiceless, unorganized and vulnerable. This Authority is charged with the responsibility of ensuring that both the above benefits are passed on to the general public as per the provisions of Section 171 read with Rule 127 and 133 of the CGST Rules, 2017. This Authority has nowhere interfered with

the business decisions of the Petitioner and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

32. The Respondent has further contended that the DGAP, while calculating the profiteered amount, was wrongly added a 5% notional amount without explaining any reasons and hence, the profiteered amount be reduced appropriately. This contention of the Respondent is not correct because the provisions of Section 171 (1) and (2) of the CGST Act, 2017 mandate that the benefit of reduction in the tax rate is to be passed on to the recipients/ customers by way of commensurate reduction in price, which includes both, the base price and the tax paid. In this connection, it would be appropriate to mention that the Respondent has not only collected excess base prices from the customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to pay additional GST on these excess base prices which they should not have paid. By doing so, the Respondent has defeated the very objective of both the Central as well as the State Governments which aimed to provide the benefit of rate reduction to the general public. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of tax reduction to his customers by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing goods from the Respondent.

and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. The above amount can also not be paid to the eligible buyers from the Consumer Welfare Funds as the Respondent has not deposited it in the above Fund. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted.

33. The Respondent has relied upon the judgment passed by this Authority in the case of M/s Flipkart vide Order No. 05/2018 dated 18th July 2018 wherein it had been recorded that withdrawal of discounts was the prerogative of the supplier and did amount to profiteering. On perusal of the above-cited case, it is observed that the issue in that case related to denial of discount of Rs. 500/-, which had been initially offered by the supplier to the buyer at the time of placing the order, but the same was withdrawn by the supplier at the time of supply. In these circumstances, it was held by this Authority that the withdrawal of such discount does not amount to profiteering, since the said discount offered had no connection with the base price of the products supplied. The facts of that case are totally at variance with the facts of the present case wherein the Respondent has claimed that giving discounts was a norm in the competitive world and a call of business. Therefore, the case cited above has no relevance in the context of the present case.

34. It is clear from the plain reading of Section 171(1) mentioned above that it deals with two situations one relating to the passing

on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the DGAP's Report that there has been a reduction in the rate of tax from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 in the post GST period. It has been revealed from the DGAP's Report that the ITC which was available to the Respondent during the period July 2017 to October 2017 is 7.39% of the net taxable turnover of restaurant services supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the ITC was not available to the Respondent. The DGAP in his Report has stated that the Respondent had increased the base prices of different items by more than 7.39% i.e. by more than what was required to offset the impact of denial of ITC, supplied as a part of restaurant services to make up for the denial of ITC post-GST rate reduction and on comparison of pre and post GST rate reduction prices of the items sold in respect of items sold. Accordingly, the quantum of profiteering has been computed to Rs. 7,33,043/- as per Annexure-10 of the DGAP's Report dated 13.09.2019, which is correct and can be relied upon.

35. Based on the above facts the profiteered amount is determined as Rs. 7,33,043/- as has been computed in Annexure-10 of the DGAP Report dated 13.09.2019. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. The Respondent is also directed

profiteered by the Respondent as ordered by this Authority is deposited in the CWFs of the Central and the State Government of Maharashtra as per the details given above. A report in compliance of this order shall be submitted to this Authority by the concerned SGST Commissioner within a period of 4 months from the date of receipt of this order.

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

Sd/-
(B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Technical Member

Certified Copy

13.3.2020

(A.K. Goel)
Secretary, NAA

File No. 22011/ NAA/77/Bonne/2019/1583-88 Dated: 13.03.2020
Copy To:-

1. M/s Bonne Sante, Shop No J5/J6, Empire Estate, Old Mumbai Pune Highway, Chinchwad Station, Pune-411019.
2. State Tax Officer, C-130, Cabin No. 320, Vikrikar Bhavan, 3rd Floor, Airport Road, Yervada, Pune-411006.

3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010.
5. Chief Commissioner of Central Goods & Services Tax, Pune zone GST Bhawan Ice House, 41A, Sasoon Road, Opp. Wadia college, Pune-411001.
6. Guard File.

13.3.2020

A. K. GOEL, IRS
Secretary
National Anti-Profiteering Authority (GST)
DOR, Ministry of Finance, New Delhi