**BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY**

**UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017**

| | | |
|---|---|---|
| IO No. | : | 24/2022 |
| Date of Institution | : | 27.11.2020 |
| Date of Order | : | 30.09.2022 |

**In the matter of:**

1. **Sh. K.G.M. Bhushan**, 17, Rajalakshmi Sadan, 8th Cross, B. Channasandra, Kasturi Nagar, Behind Bosch Car Service, Bangaluru-560043.
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 Praxis Home Retail Ltd.**, Survey No.31, Kacharakanahalli Village, Jadigenahalli, Soukya Road, Hoskote Taluk, Bengaluru-562114.

**Respondent**

**Quorum:-**

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

**Present: -**

1. None for the Applicants.
2. Sh. Adarsh Somani, CA, Sh. Mohammad Asif Mansoory, CA, Sh. Gaurav Rawat, CA and Sh. Vikash Kabra, authorized representative for the Respondent.

**ORDER**

1. The Present Report dated 27.11.2020 was received in National Anti-Profiteering Authority (NAA or the Authority) from the Director General of Anti-Profiteering (hereinafter referred to as '**DGAP**') after a detailed investigation under Rule 129(6) of the Central Goods & Services Tax (**CGST**) Rules, 2017. The brief facts of the case are that the Maharashtra State Screening Committee on Anti-Profiteering received an application, filed under Rule 128 of the CGST Rules, 2017, by Applicant No. 1 alleging profiteering by the Respondent in respect of supply of "Modular Kitchen Components" (hereinafter referred to as the '**subject goods**'). The Applicant No. 1 alleged that the Respondent had not reduced the price in respect of the supply of "Modular Kitchen Components" when the GST rate was reduced from 28 % to 18 % w.e.f. 15.11.2017, vide Notification No. 41/2017 – Central Tax (Rate) dated 14.11.2017 and thus the benefit of GST rate reduction was not passed on to the Applicant No. 1 by way of commensurate reduction in the prices.

2. The DGAP in its Investigation Report dated 27.11.2020, has inter-alia, submitted as under:-

2.1 The aforesaid reference was initially examined by the Maharashtra State Screening Committee and forwarded to the Standing Committee on Anti-profiteering for necessary action. The Standing Committee on Anti-Profiteering had examined the Application in its meeting held on 13.09.2019. Thereafter, it was decided to forward the same to the DGAP 09.10.2019 to conduct a detailed investigation in the matter. Accordingly, investigation was initiated by the DGAP to collect evidence necessary to determine whether the benefit of GST rate reduction had been passed on by the Respondent to the Applicant No. 1 and other recipients in respect of supply of impacted goods.

2.2 After receipt of the reference from the Standing Committee on Anti-profiteering, a Notice was issued to the Respondent by the DGAP on 24.10.2019, under Rule 129 of the CGST Rules, 2017, seeking his reply as to whether he admitted that the benefit of GST rate reduction had not been passed on to the recipients by way of commensurate reduction in price and if so, to *suo-moto* determine and indicate the same in his reply to the Notice as well as to furnish all supporting documents. Further, in the said Notice dated 24.10.2019, the Respondent was given an opportunity to inspect the non-confidential evidences/information furnished by the Applicant No. 1 on 31.10.2019 or 01.11.2019., which the Respondent didn't avail.

2.3 In response to the Notice, the Respondent did not submit the complete requisite documents on due date. Hence, reminder letters were issued to the Respondent on 25.11.2019, 07.01.2020, 20.01.2020, 12.02.2020 and 23.04.2020. The Respondent did not submit complete requisite documents even after several reminder letters, therefore, summons under Section 70 of the Central Goods and Service Tax Act, 2017 read with the Rule 132 of the Rules was issued on 27.05.2020 to Sh. Anil Chandak (CFO) of M/s Praxis Home Retail Limited to submit the relevant details on or before 06.06.2020.

2.4 In compliance of the said summons, the Respondent replied vide e-mail dated 06.06.2020, but did not submit any relevant details/documents. Hence 2nd summons, under Section 70 of the Central Goods and Service Tax Act, 2017 read with the Rule 132 of the Rules, were issued on 06.07.2020 to Sh. Anil Chandak (CFO) of M/s Praxis Home Retail Limited. to submit the relevant details on or before 24.07.2020.

2.5 In compliance of the 2nd Summons, the Respondent submitted certain details, which were neither complete nor in the prescribed format. Therefore, again letters were sent to the Respondent to submit the details/documents in the prescribed format. In response to said letters, the Respondent submitted relevant details/documents vide letter dated 25.08.2020 and 28.09.2020.

2.6 The time limit to complete the investigation was 08.04.2020. However, due to prevalent pandemic of COVID-19 in the country, vide Notification 35/2020-Central Tax dated 03.04.2020 issued by the Central Board of Indirect Taxes and Customs 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 Central Goods and Service Act, 2017 which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020, and where completion or compliance of such action had not been made within such time, then, the time limit for completion or compliance of such action, shall be extended upto the 30.06.2020. Vide Notification 55/2020-Central Tax dated 27.06.2020 and Notification No. 65/2020 dated 01.09.2020, it was further extended upto 30.11.2020. Further, the National Anti-Profiteering Authority, vide letter dated 24.03.2020, granted three months' extension in terms of Rule 129(6) of the Rules. Thus, the time limit to complete the investigation was on or before 28.02.2021.

2.7 Vide e-mail dated 01.10.2020, the Applicant No. 1 was given an opportunity to inspect the non-confidential documents/reply furnished by the Respondent. However, the Applicant No. 1 did not avail the opportunity.

2.8 The period covered by the current investigation was from 15.11.2017 to 30.09.2019.

2.9 In response to the Notice dated 24.10.2019 and subsequent reminders, the Respondent submitted his reply vide e-mails/letters dated 06.11.2019, 05.12.2019, 25.01.2020, 29.01.2020, 24.02.2020, 12.05.2020, 06.06.2020, 24.07.2020, 25.08.2020, 28.09.2020, 05.11.2020 and 09.11.2020. The replies of Respondent were summed up as follows: -

(a) That he was engaged in the business of customized offerings to his customers (like modular kitchens etc), which was made to order and customized to the last mile. The consideration for each transaction was also, therefore negotiated separately, since such offerings were not priced like off the shelf products. Therefore, there was no case of comparability between any two given transactions as neither the deliverable was comparable (as size, fit outs, material quality, etc might differ) nor the prices were comparable (since negotiated each time afresh). Further, the total agreed price might then be broken up into per item price merely for the sake of billing and as such had not been agreed with the customer in that manner. These per item prices (even though visible on the invoice) were therefore only for the sake of presentation and hence, cannot be construed as dependable data point for any analysis. Thus, it was unclear as to how the profiteering, if at all, could be examined or computed in the present case. Further, the Respondent stated that the pricing in customized projects was agreed on lump sum basis and then merely split or segregated at item level for billing purposes. This was evident from the documents submitted in respect of complainant's case as well. Given this, considering the item wise pricing in such cases would be erroneous to say the least.

(b) That the prices, in retail business, were purely based on business and market dynamics and were not comparable

across location, formats and different periods. Further, his sales follow multiple formats such as regular store sales (stores being located in a standalone building or mall), e-commerce sales, etc and these aspects had a direct bearing on prices of sales/ supplies. Accordingly, comparison was not practicable. Also, the retail offerings were linked to customer taste and seasonality and the products despite static description was evolving on regular basis. No two products were comparable since these weren't machine made items and differ in quality, design and durability notwithstanding a standard description being attached to same. It was a well-established fact that commercial aspects, business dynamics and dynamic pricing was a natural business outcome in the modular kitchen/ retail industry, implying that prices of two or more supplies was incomparable. Hence, the difference in pricing was purely attributable to genuine business reasons and not due to any mala fide intention to take benefit of reduction in GST rates.

(c) That his business was divided by various channels i.e. (a) mode – normal in store sales vs sales through ecommerce platforms; and (b) customized and non-customized offerings. The pricing in these combinations was neither inter-linked nor dependent on same factors and thus, such channels should also be duly considered in arriving at any conclusion in these present investigations.

(d) That the complaint had already been withdrawn and, it was not warranted that the present proceedings continue despite the withdrawal of complaint, as there was no legal tenability in continuation of these proceedings sans the complaint. It was a settled position that without complaint and/ or prima facie evidence against the taxpayer, a profiteering complaint cannot be pursued. It is, therefore,

requested to discontinue the present investigation or otherwise provide the relevant evidence and basis to continue the same (i.e. other than the original complaint, which stands withdrawn).

(e) That profiteering provisions were transitional by nature and hence, review for over a period of 22 months, from the rate change, for investigation was neither legitimate nor just. As over a period as long as 22 months, the following factors would change considerably:

- Costing of the product & inflation trends;
- Market trends (most products/ offering types last 3-6 months) and therefore, there would not be a comparable price to investigate; and
- Marketing strategies, market cycle of the product/ offering per se had a bearing on the pricing of the product

In any case, if such a long period of investigation was adopted, allowance must also be given for (a) changes in cost structure; (b) periodic increase in prices; and (c) economic effect of demand and supply over such period. A straight jacket comparison over such long period was erroneous.

(f) That the stock transfers to be excluded from computation of profiteering as the stock transfers from one branch to another, across different stated was deemed to be a supply under the GST and was accordingly, liable to GST. However, since, the transaction was undertaken within the company itself (i.e intra same legal entity and was not even considered as revenue in the financial statements), the same should be excluded from the computation of profiteering, in any manner.

(g) That the present investigation should be limited to the complaint instance. Since the withdrawn complaint was initially lodged in respect of 'Modular Kitchen Components' and in terms of Rule 129 of the CGST Rules, the Screening Committee forwarded the case to the Standing Committee, which referred the matter to this good office for further investigation limited to the said goods. Accordingly, it was submitted that without any specific complaint, any evidence or any description whatsoever in the Notice, the scope of investigation cannot be extended to products other than those which had been referred by the Standing Committee. This view was further buttressed by the fact that Rule 133 of the CGST Rules was amended prospectively by insertion of sub-rule (5) vide *Notification No. 31/2019 – Central Tax* dated 28.06.2019, granting powers to Authority to actually expand the scope of investigation. In-fact, even in that scenario, Authority had to had *reasons to believe* that there was a contravention of the provisions of Section 171 of the Central Goods & Services Tax Act, 2017. Therefore, the Respondent submitted that the present investigation proceedings should be confined to the complaint product against alone i.e. only for Modular Kitchen line of business.

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

a) GSTR-1 and GSTR-3B for the period November,2017 to September,2019.

b) Invoice wise details of outward taxable supplies reconciled with GSTR-1 & 3B for the period August, 2017 to September, 2019.

c) Sample Invoices pre and post 15.11.2017.

d) Applicant's letter for withdrawal of his complaint.

e) List of all GST registrations.

2.11 The subject application, the various replies of the Respondent and the documents/evidence on record had been carefully examined. The main issues for determination are:

(i) Whether the rate of GST on the products/goods supplied by the Respondent was reduced from 28% to 18% w.e.f. 15.11.2017 and if so,

(ii) Whether the Respondent passed on the benefit of such reduction in GST rate to the recipients, in terms of Section 171 of the CGST Act, 2017.

2.12 At the outset, it was noted that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on "the subject Goods" from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017.

2.13 Now, before enquiring into the allegation of profiteering, it was important to examine Section 171 of the CGST Act, 2017 which governs the anti-profiteering provisions under GST. Section 171(1) of the CGST Act, 2017 reads as "*any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement was abundantly clear that in the event of 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 gets reduced commensurate with the reduction in the tax rate or benefit of Input Tax Credit. This was the legally prescribed mechanism to pass on the benefit of ITC or reduction in rate of tax to the recipients under the GST regime. Moreover, it was also clear that the said Section 171 simply does not provide a supplier of any goods or services, any other means of passing

on the benefit of ITC or reduction in rate of tax to the consumers.

2.14 The Respondent's contention that the complaint had already been withdrawn and there was no legal tenability in continuation of present proceedings cannot be considered as the Application was received in the DGAP from the Standing Committee on Anti-Profiteering with a remark that the complaint had been forwarded to the DGAP for carrying out investigation. Thus, the said action was totally in consonance with the contents of the Rule 129 of the Rules. Further, there was no such provision in the CGST Act,2017 and Rules relating to Anti-Profiteering which stipulates that investigation would not be carried out where complaint had been withdrawn by the complainant.

2.15 The Respondent had also contended that he had different prices depending on various factors/channels of supply such as e-commerce, normal sales, customised and non-customized sales. In this regard, the Respondent submitted the outward taxable supplies in which channels of supply like normal sales, e-commerce, etc. was clearly shown and the same was considered by computing channel-wise profiteering, if any. Further, stock transfers were excluded from the calculations of profiteering.

2.16 It was also noted that the Respondent raised concern over the period of investigation. In this regard, it was submitted that the period of investigation had been prescribed neither in the Central Goods and Service Tax Act,2017 nor in the corresponding Rules/Notifications. the DGAP had received reference from the Standing Committee on Anti-Profiteering on 09.10.2019 to investigate the matter, hence the period from 15.11.2017 up to the preceding month of receipt of reference was taken up for investigation i. e. from 15.11.2017 to 30.09.2019.

2.17 The Respondent raised concern that the present investigation must be restricted to the complained product only. In this regard, it was submitted that the mandate of the Section 171 of the CGST Act,2017 was very clear which stated that any reduction in the rate of tax or the benefit of ITC had to be passed on to the recipient by way of commensurate reduction in price. In other words, every recipient of goods or services had to get the due benefit from the supplier and hence, this benefit had to be calculated for each and every product supplied by the Respondent. Thus, it was pertinent to mention that if the investigation was restricted to the alleged product then the recipients/customers of the other impacted products who had not made any complaint against the Respondent, would never get the commensurate benefit from the Respondent. Further, there was no stipulation in the law to restrict the investigation only to the alleged product or to the complainant/Applicant.

2.18 In order to explain the methodology adopted for determining the amount of profiteering an illustration was given below in Table-A in which the calculation in respect of a specific item i.e. "Slide on Hinge" sold through a particular channel (i.e. Normal sales Modular Kitchen Customized ) during the month of November, 2017 (pre GST rate reduction) was taken and an average base price was obtained on dividing the total taxable value by total quantity of this item sold during the period 01.11.2017 to 14.11.2017. The average base price of this item was compared with the actual selling price of the same item sold during post-GST rate reduction i.e. on or after 15.11.2017 as illustrated in the table-A below:

**Table-A**

(Amount in Rupees)

| Sl. No. | Description | Factors | Pre Rate Reduction (From 01.11.2017 to 14.11.2017) | Post Rate Reduction (From 15.11.2017 onwards) |
|---|---|---|---|---|
| 1. | Product | A | Slide On Hinge Normal Sales Modular Kitchens – | |

| | Description | | Customised | |
|---|---|---|---|---|
| 2. | Notification No. | B | 41/2017-Central Tax (Rate) dated 14.11.2017 | |
| 3. | Total quantity of item sold | C | 194 | |
| 4. | Total taxable value | D | 5387.27 | |
| 5. | Average base price (without GST) | E=D/C | 27.77 | |
| 6. | GST Rate | F | 28% | 18% |
| 7. | Average selling price (pre rate reduction with GST) | G=E*1.28 | 35.54 | |
| 9. | Commensurate Selling price (post Rate reduction-with GST) | H=E*1.18 | | 32.77 |
| 10. | Invoice No. | I | | WB7540044565 |
| 11. | Invoice Date | J | | 17.11.2018 |
| 12. | Total Billed quantity (above invoice) | K | | 5 |
| 13. | Transaction Value in the invoice | L | | 305 |
| 14. | Actual Selling price per unit (post rate reduction-with GST) | M=L/K | | 61 |
| 15. | Excess amount charged or profiteering | N=M-H | **28.23** | |
| 16 | Total Profiteering | O= N*K | **141.15** | |

From the above table, it was observed that the Respondent did not reduce the selling price of the "Slide On Hinge" sold through a particular channel (Normal Sales Modular Kitchens – Customised), when the GST rate was reduced from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/2017 Central Tax (Rate) dated 14.11.2017 and hence profiteered an amount of Rs. 141.15/- on a particular Invoice No. WB7540044565 dated 17.11.2018 and thus the benefit of reduction in GST rate was not passed on to the recipients by way of commensurate reduction in the price, in terms of Section 171 of the CGST Act, 2017. Similarly, profiteering in respect of two more products of the Respondent had been reflected in the illustration below Table-B and Table-C.

## Table-B

(Amount in Rupees)

| Sl. No. | Description | Factors | Pre Rate Reduction (From 01.11.2017 to 14.11.2017) | Post Rate Reduction (From 15.11.2017 onwards) |
|---|---|---|---|---|
| 1. | Product Description | A | WalTile 303X450 KCH-3127 Normal Sales– Non-Customised | |
| 2. | Notification No. | B | 41/2017-Central Tax (Rate) dated 14.11.2017 | |
| 3. | Total quantity of item sold | C | 224 | |
| 4. | Total taxable value | D | 19249.88 | |
| 5. | Average base price (without GST) | E=D/C | 85.93 | |
| 6. | GST Rate | F | 28% | 18% |
| 9. | Average selling price (pre rate reduction with GST) | G=E*1.28 | 109.99 | |
| 10. | Commensurate Selling price (post Rate reduction-with GST) | H=E*1.18 | | 101.39 |
| 11. | Invoice No. | I | | UP7540002689 |
| 12. | Invoice Date | J | | 28.12.2017 |
| 13. | Total Billed quantity (above invoice) | K | | 130 |
| 14. | Transaction Value in the invoice | L | | 15340 |
| 15. | Actual Selling price per unit (post rate reduction-with GST) | M=L/K | | 118 |
| 16. | Excess amount charged or profiteering | N=M-H | **16.61** | |
| 17. | Total Profiteering | O= N*K | **2159.30** | |

## Table-C

(Amount in Rupees)

| Sl. No. | Description | Factors | Pre Rate Reduction (From 01.11.2017 to 14.11.2017) | Post Rate Reduction (From 15.11.2017 onwards) |
|---|---|---|---|---|
| 1. | Product Description | A | Top mark Wenge Executive Table Normal Sales- Non-Customized | |
| 2. | Notification No. | B | 41/2017-Central Tax (Rate) dated 14.11.2017 | |
| 3. | Total quantity of item sold | C | 1 | |

| | | | | |
|---|---|---|---|---|
| 4. | Total taxable value | D | 46796.88 | |
| 5. | Average base price (without GST) | E=D/C | 46796.88 | |
| 6. | GST Rate | F | 28% | 18% |
| 7. | Average selling price (pre rate reduction with GST) | G=E*1.28 | 59900 | |
| 8. | Commensurate Selling price (post Rate reduction-with GST) | H=E*1.18 | | 55220.31 |
| 9. | Invoice No. | I | | MH7540000470 |
| 10. | Invoice Date | J | | 23.11.2017 |
| 11. | Total Billed quantity (above invoice) | K | | 2 |
| 12. | Transaction Value in the invoice | L | | 145800 |
| 13. | Actual Selling price per unit (post rate reduction-with GST) | M=L/K | | 72899.99 |
| 14. | Excess amount charged or profiteering | N=M-H | **17679.68** | |
| 15. | Total Profiteering | O= N*K | **35359.36** | |

On the basis of aforesaid calculation as illustrated in table A, table B and table C above, profiteering in case of all goods impacted by the GST rate reduction vide Notification No. 41/2017 Central Tax (Rate) dated 14.11.2017, supplied by the Respondent during the period 15.11.2017 to 30.09.2019 had also been arrived in similar way.

**2.19** The issue was the determination and quantification of profiteering, by the Respondent, in terms of Section 171 of the CGST Act, 2017. From the invoices and outward taxable supplies made available by the Respondent, it appears that the Respondent increased the base prices of "the subject goods" when the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017, thus the commensurate benefit of GST rate reduction was not passed on to the recipients by way of commensurate reduction in price. On the basis of aforesaid pre

and post-reduction GST rates and the details of outward taxable supplies (other than zero rated, nil rated and exempted supplies) of the impacted goods during the period 15.11.2017 to 30.09.2019, as furnished by the Respondent, the amount of net higher sales realization due to increase in the base prices of the impacted goods, despite the reduction in the GST rate from 28% to 18% or in other words, the profiteered amount, comes to Rs. 3,67,88,027/- The amount of Rs.3,67,88,027/- included Rs. 21,200/- as profiteering amount collected by the Respondent from the applicant, vide invoice no. KA 7540001326 dated 30.11.2017 and invoice no. KA 7540001855 dated 07.12.2017. The details of the computation were given with the DGAP's Investigation Report dated 27.11.2020. The said profiteered amount had been arrived at by comparing the channel wise average of the base prices of the impacted goods sold during the period 01.11.2017 to 14.11.2017. If sale of any particular good/item was not found during this period, then in that case, the base price of that particular good/item was arrived by taking the sales of that particular good/item during previous months in a sequential manner beginning from October, 2017, if the same was not found then previous month i.e. September, 2017 and so on upto August, 2017 and then compared with the actual invoice-wise base prices of such products sold during the period 15.11.2017 to 30.09.2019. The excess GST so collected from the recipients, was also included in the aforesaid profiteered amount as the excess price collected from the recipients also included the GST charged on the increased base price.

**2.20** The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. **3,67,88,027**/- was furnished in table-C below:

**Table-D**

| S. No. | State Code | State | Profiteered Amount (Rs.) |
|---|---|---|---|

| | | | |
|---|---|---|---|
| 1 | 01 | Jammu & Kashmir | 0 |
| 2 | 02 | Himachal Pradesh | 1422 |
| 3 | 03 | Punjab | 11599 |
| 4 | 04 | Chandigarh | 427 |
| 5 | 05 | Uttarakhand | 3558 |
| 6 | 06 | Haryana | 1001674 |
| 7 | 07 | Delhi | 646151 |
| 8 | 08 | Rajasthan | 18032 |
| 9 | 09 | Uttar Pradesh | 2849079 |
| 10 | 10 | Bihar | 29827 |
| 11 | 11 | Sikkim | 59487 |
| 12 | 12 | Arunachal Pradesh | 38912 |
| 13 | 13 | Nagaland | 31882 |
| 14 | 14 | Manipur | 3268 |
| 15 | 15 | Mizoram | 0 |
| 16 | 16 | Tripura | 10294 |
| 17 | 17 | Meghalaya | 95375 |
| 18 | 18 | Assam | 1440273 |
| 19 | 19 | West Bengal | 6824656 |
| 20 | 20 | Jharkhand | 803844 |
| 21 | 21 | Orissa | 67992 |
| 22 | 22 | Chhattisgarh | 623994 |
| 23 | 23 | Madhya Pradesh | 226151 |
| 24 | 24 | Gujarat | 198043 |
| 25 | 27 | Maharashtra | 8500621 |
| 26 | 29 | Karnataka | 4900367 |
| 27 | 30 | Goa | 10444 |
| 28 | 31 | Lakshwadeep | 13728 |
| 29 | 32 | Kerala | 427569 |
| 30 | 33 | Tamil Nadu | 371900 |
| 31 | 34 | Pondicherry | 477 |
| 32 | 35 | Andaman & Nicobar Islands | 8144 |
| 33 | 36 | Telangana | 4450097 |
| 34 | 37 | Andhra Pradesh (New) | 1368742 |
| | Grand Total | | 36788027 |

**2.21** In this case, the allegation of the Applicant No. 1 was that the base prices of the subject goods were increased when there was a reduction in the GST rate from 28% to 18% w.e.f. 15.11.2017, so that the benefit of such reduction in GST rate was not passed on to the recipients by way of commensurate reduction in price. From the details furnished, it appears that the base prices of the goods under investigation were indeed increased post GST rate reduction w.e.f. 15.11.2017. Thus, by increasing the base prices of the goods consequent to the reduction in GST rate, the commensurate benefit of reduction in GST rate from 28% to

18%, was not passed on to the recipients. The total amount of profiteering covering the period 15.11.2017 to 30.09.2019 had been worked out as Rs.3,67,88,027/- which included Rs. 21,200/- as profiteering amount collected by the Respondent from the Applicant No. 1.

**3.** The above Investigation Report was received by this Authority from the DGAP on 27.11.2020 and was considered in its sitting and Notice dated 04.12.2020 was issued to the Respondent and the Applicant No. 1 directing them to explain why the Report dated 27.11.2020 furnished by the DGAP should not be accepted and liability of the Respondent should not be fixed for violating the provisions of Section 171 of the CGST Act, 2017.

**4.** In response to the abovesaid Notice the Respondent had filed his submissions dated 18.01.2021 on 21.01.2021, and, inter-alia, stated as under:-

**4.1 NO EVIDENCE OF PROFITEERING AS COMPLAINT WAS WITHDRAWN BY THE CUSTOMER**

4.1.1 The complaint was based upon comparison of the estimate (given in pre-rate change period) with the Tax Invoice (issued in post-rate change period). It appears that the State-Level Screening/Standing Committee and DGAP might had erred in appreciating the difference in deliverables listed in the estimate and those finally invoiced and hence, merely as cum-tax value remained unchanged, it led to a distorted conclusion that the Respondent might had profiteered out of the GST rate change event. This overlooking event had occurred despite complainant's written submissions that it had been given extra worth beyond the GST savings and hence, the GST benefit had been passed on to him in kind.

4.1.2 This implies that there was no prima facie evidence against the Respondent and hence, if conscientiously evaluated, the

complaint could have been amicably closed at the State-Level itself. Nonetheless, the comparative details of deliverables corresponding to the estimate and final invoice was respectively provided.

4.1.3 The Respondent, at the stage when complaint was made to the State Level screening committee, had explained the whole issue to the customer concerned, who admitted being misled by third parties and hence, was willing to withdraw the complaint at that stage itself. However, the complaint could not be withdrawn due to procedural reasons (as told by the State Level screening committee). The customer, however, had now provided us with the declaration of no dispute and withdrawal of complaint (enclosed as Annexure 2), which elaborates all the said aspects.

4.1.4 Given that the complaint itself had been undone, it was not warranted that the present proceedings continue despite the withdrawal of complaint, as there was no legal tenability in continuation of these proceedings sans the complaint.

4.1.5 Rule 129 of the CGST Rules duly provides for collation of information from the interested parties (i.e. complainant included). Given that the complainants view on the matter was now duly available on record, the matter should had been squarely eligible for closure at that stage of State Level screening committee.

4.1.6 It was a settled position that without complaint and/ or prima facie evidence against the taxpayer a profiteering complaint cannot be pursued. Thus, the Respondent submitted that the Impugned Report was therefore liable to be quashed on this ground alone.

## 4.2 COMPARISON OF PRE & POST RATE REDUCTION PRICE OF A PRODUCT WAS INAPPROPRIATE AS THE RESPONDENT WAS ENGAGED IN OFFERING CUSTOMIZED SOLUTIONS TO HIS CUSTOMERS AND AS SUCH THERE WAS NO COMPARABLE PRODUCTS

4.2.1 The Respondent was engaged in the business of customized offerings to his customers (like modular kitchens etc.), which was made to order and customized to the last mile.

4.2.2 The consideration for each transaction was also, therefore negotiated separately, since such offerings was not priced like off the shelf products. Therefore, there was no case of comparability between any two given transactions as neither the deliverable was comparable (as size, fit outs, material quality, etc. might differ) nor the price was comparable (since negotiated each time afresh).

4.2.3 Further, the total agreed price might then be broken up into per item price merely for the sake of billing and as such had not been agreed with the customer in that manner. These per item prices (even though visible on the invoice) was therefore only for the sake of presentation and hence, cannot be construed as dependable data point for any analysis.

4.2.4 Thus, it was unclear as to how the profiteering, if at all, could be examined or computed in the present case. Further, it was stated that the pricing in customized projects was agreed on lump sum basis and then merely split or segregated at item level for billing purposes. This was evident from the documents submitted in respect of complainant's case as well. Given this, considering the item wise pricing in such cases would be erroneous to say the least.

4.2.5 In order to better demonstrate the business facet, he had summarized below the manner in which transaction was undertaken by Respondent:

a) Contract had been executed on lump sum basis without assigning any individual values to the various Items forming part of the customized package:

b) Discount, if any, was offered to customers was reduced from the amount of lump sum consideration and not with respect to individual products;

c) After finalizing the lump sum value for the deliverable with the customer, only for invoicing purpose the lump sum value was allocated to the individual items of products in the ratio of the standard amount (as per the system) with the total lump sum consideration; and

d) This standard amount was only an allocation key and was no way connected with the sales price or indicative of the value at which the products was sold.

4.2.6Further, in case of non-customized products though the generic description of the product remains constant for invoicing purposes over time, the underlying inputs, materials, quality, technology etc. undergo a change and was as such not comparable. For e.g. a product named 3 Seater Sofa' might differ on account of usage of wood (teak or sal), fabric (leather or rexine), reclining (manual or motorized) etc. The price might also vary due to such distinctions, whereas the Invoice might still contain a generic description of 3 Seater Sofa Given this, a comparison of items over a long period of 22 months was nothing more than haste & pre-determined objective of confirming profiteering.

4.2.7Further, retail businesses, was purely based on business and market dynamics and was not comparable across location, formats and different periods. The retail offerings were linked to customer taste and seasonality and the products, despite static description, was evolving on regular basis. No two products were comparable since these aren't machine made items and

differ in quality, design and durability notwithstanding a standard description being provided in the Invoice.

4.2.8 It was a well-established fact that commercial aspects, business dynamics and dynamic pricing was a natural business outcome in the modular kitchen/ retail industry, implying that prices of two or more supplies was incomparable. Hence, the difference in pricing was purely attributable to genuine business reasons and not due to any mala fide intent to take benefit of reduction in GST rates. Thus, the Respondent submitted that the Impugned Report was therefore liable to be quashed as difference in pricing cannot be attributed to reduction in GST rate, but was linked to customized business dynamics:

## 4.3 RESPONDENT OBTAINED GST REGISTRATION W.E.F. 21.11.2017 ONWARDS AND HENCE, IT DID NOT UNDERTAKE ANY SALES IN THE PERIOD PRIOR TO CHANGE OF GST RATE

4.3.1 The home retail business of FRL was demerged and transferred to the Respondent as per the Composite Scheme of Arrangement approved by the NCLT vide his order dated 10.11.2017, which was received on 20.11.2017. Accordingly, the Respondent applied for GST registrations w.e.f. 21.11.2017, in all the stated from where the home retail business was being carried on by FRL.

4.3.2 As per the Scheme approved by the NCLT, the transfer of business was effected only on 20.11.2017 (actual transfer date, which falls after the rate change event). Legally and practically, all sale transactions (including 100% of the transactions in the period prior to rate change) were being undertaken and executed by FRL without any involvement of say of Respondent.

4.3.3 The Respondents had thus, undertaken business operations only from 21.11.2017 onwards and not before.

4.3.4 This factual aspect was very crucial in the present context, since the date of GST rate change on various products as investigated by the DGAP was 15.11.2017 i.e. prior to actual takeover of business by the Respondent in altogether different legal entity on 21.11.2017 vis-à-vis all prior transactions being done in name of a completely delineated and separate legal entity i.e. FRL. The factual position was tabulated below for ease of understanding:

| Particulars | Period Prior to Rate Change i.e. up to 14.11.2017 | 15.11.2017 to 20.11.2017 | 21.11.2017 onwards |
|---|---|---|---|
| Supplier Entity | FRL | FRL | Respondent |
| Entity Liable for GST payment on above | FRL | FRL | Respondent |

Effectively, the Respondent had not undertaken any sales in the period prior to rate change as was evident from above. The DGAP, however, despite in the know of this factual position pushed the Respondent to furnish data from FRL (for period prior to rate change) and used the sales data of a third party/ separate legal entity to undertake price comparison and consequently examine profiteering, if any.

4.3.5 It was beyond common understanding as to how and why a comparison of prices charged by two different legal entities was done. This only shows the straight jacket approach of the DGAP to merely confirm profiteering in all cases without delving into merits of the underlying facts. Though not recorded in the Impugned Report, it appears that the DGAP compared Respondent's data with that of FRL owing to effective date of business transfer being 01.08.2017 as per the scheme approved by NCLT, which practically had no meaning since the order itself was served on 20.11.2017.

4.3.6Thus, it was only for period commencing from 21.11.2017 that the Respondent had been undertaking relevant business including open projects transferred from FRL on the date of business transfer.

4.3.7The Impugned Report could, therefore, be closed on this basis alone without any further delay or demur. The order of the NCLT was enclosed.

4.3.8The provisions of Section 171 of the CGST Act, was valid only if there were comparable transactions in the period prior to and post change of GST Rate and this provision had to be read qua the same legal entity. However, in the instance case, since no sales transactions were undertaken by the Respondent in the period prior to change in rate of GST: accordingly, the anti-profiteering provisions cannot be triggered. The fact that the Respondent took GST registrations only w.e.f. 21.11.2017 was a testimony to the averments above that he did not undertake transactions prior to that.

4.3.9Reliance in this regard, was placed on the judgment of this Authority in the case of Shri Devroop Guha wherein it was upheld that "Since the subject project was not under execution in the pre-GST period, no comparison could be made between the ITC ("ITC") which was unavailable to the Respondent before 01.07.2017 and available after 01.07.2017 to determine whether the Respondent had profiteered due to implementation of GST. Hence, the provisions of the Section 171 were not attracted in the present case and the allegations of profiteering was not established".

4.3.10 Given the above, as no sales was made by the Respondent in the period prior to change of GST Rate and accordingly, the question of profiteering does not arise in the present case.

## 4.4 DGAP HAD EXCEEDED HIS POWER BY INVESTIGATING PRODUCTS BEYOND CONTOURS OF THE COMPLAINT WHICH GOES TO THE VERY ROOT OF HIS JURISDICTION

4.4.1 The impugned Report of DGAP travels far beyond the complaint filed before the State Level screening committee. The investigation and the Impugned Report were liable to be rejected, as investigation goes beyond the jurisdiction.

4.4.2 A complaint was lodged in respect of Modular Kitchen Components (i.e. Subject Goods) and in terms of Rule 129 of the CGST Rules, the State Level Screening Committee forwarded the case to the Standing Committee, which referred the matter to DGAP for further investigation limited to the Subject Goods only qua the State of Karnataka. However, the DGAP suo-moto expanded the scope of investigation to cover all other goods/ services, sold by the Respondent.

4.4.3 The investigation had been initiated by the DGAP on all products without the approval of the Standing Committee, a pre-requisite under Rule 129(1) of the CGST Rules.

4.4.4 Further, sub-rule (3) of Rule 129 stated that the notice issued by DGAP before start of the investigation shall inter-alia mention in his notice the "the description of the goods or services in respect of which the proceedings had been initiated". The specific requirement to mention the description of the goods or services was a clear indication of the fact that the proceedings could be initiated only in respect of those goods which was described in the Notice. But in the present proceedings, the DGAP in his Notice had nowhere provided that an investigation was being initiated for all the items. Thus, the Respondent submitted that the scope of the proceedings was dictated or restricted by clear reference to the description of the subject

product in the Notice itself and cannot be *suo-motu* expanded by DGAP at a later stage.

4.4.5In this regard, reliance was placed on the following orders passed by the Authority wherein the investigation had been restricted to the products against which the complaint was filed:

- *Sh. Rishi Gupta v. M/s Flipkart Internet Pvt. Ltd*
- *Sh. Ankur Jain v. M/s. Kunj Lub Marketing Pvt. Ltd.*
- *Sh. Sandeep Puri v. M/s. Glenmark Pharmaceutical Ltd*"

4.4.6If the manner of doing a particular act was prescribed under any statute, the act must be done in an unambiguous manner so prescribed or should not be done at all, Assumption/ presumption about the scope of investigation cannot be left to the mercy of interpretation, where the rules clearly warrant that the scope be defined. Reliance in this regard was placed on the case of State of **Uttar Pradesh v. Singhara Singh.**

4.4.7The aforesaid principle was first laid down in the case of **Taylor v. Taylor** and thereafter was followed by Lord Roche in the case of **Nazir Ahmad v. King Emperor**.

4.4.8The DGAP in the given scenario was mandated by GST law to follow a pattern of action while carrying out the investigation. In light thereof, the Respondent submitted that without any specific complaint, any evidence or any description whatsoever in the Notice, the DGAP could not had suo-motu broadened the scope of the investigation to products other than those which had been referred to it either by the Standing Committee or the NAA. It was for this reason that Rule 133 of the CGST Rules had been amended prospectively by insertion of sub-rule (5) vide Notification No. 31/2019-Central Tax dated 28.06.2019 granting powers to Authority (and not to the DGAP) as the authority who could actually expand the scope of investigation.

In-fact, even in that scenario, Authority had to had reasons to believe that there was a contravention of the provisions of Section 171. The said amendment, which, was clearly prospective in application had been extracted herein below:

*"(5) (a) Notwithstanding anything contained in sub-rule (4), where upon receipt of the report of the Director General of Anti-profiteering referred to in sub-rule 16) of rule 129, the Authority had reasons to believe thot there had been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing, within the time limit specified in sub rule (1) direct the Director General of Anti-profiteering to cause investigation or Inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules"*

4.4.9 Had the DGAP been given the powers to expand the scope of the investigation as it deemed fit, there was no need to insert the sub-rule 5 to Rule 133 granting powers (only) to the Authority to expand the scope of investigation. Hence, even after the amendment, it was only the Authority which had the power to expand the scope of the investigation, however, before the Authority does so, it was incumbent upon it to clearly record the reasons for the same.

4.4.10 However, in the present facts, the DGAP without authority in law, had already commenced enquiry in respect of all the items without any instructions whatsoever from the NAA. This was a substantive omission of duty, which goes to the very root of the investigation conducted by DGAP-which was clearly without authority of law, and, was a preliminary question of jurisdiction and therefore, renders the entire investigation as void ab initio.

The issue of *suo-motu* assuming jurisdictional powers by DGAP assumes far greater significance because the anti-profiteering provisions purport to had stigmatic and penal consequences. The same was also highlighted by the Hon'ble Bombay High Court in the recent case of Hardcastle Restaurants Pvt. Ltd. v.

UOI wherein, while guiding the Authority on the importance of fair-decision making, the Hon'ble Court stated that the term profiteering was used under the CGST Act and CGST Rules in a pejorative sense with penal consequences that even extends to cancellation of registration. Hence, the authorities (DGAP, NAA) ought to be circumspect while exercising his powers while undertaking investigation and issuing rulings.

4.4.11 At this juncture, attention of the Authority was also driven towards the recent stay order issued by the Hon'ble Delhi High Court in the case of M/s S. C. Johnson Products Private Limited. In this case, the Authority had instructed the DGAP to re-compute the amount of profiteering by comparing pre and post GST rate reduction price in respect of "all products" i.e. other than the compliant product. The Hon'ble High Court directed the DGAP to investigate the matter only with respect to the compliant product i.e. "Kiwi Shoe Polish", till further orders. It was also settled rule of law that when a statute was penal in character, it must be strictly followed.

In the case of State of Jharkhand v. Ambay Cements, the Hon'ble Supreme Court held as under:

*"It was the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It was also settled rule of interpretation that where a statute was perial in character, It must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission was mandatory, therefore, non-compliance with the some must result in cancelling the concession made in favour of the grantee, the respondent herein."*

4.4.12 Reliance was placed on the recent decision of the Hon'ble Delhi Court in the case of **Reckitt Benckiser India Pvt. Ltd. v. UOI** wherein the Court directed that no information was required to be submitted to DGAP other than the information pertaining to the Subject Goods. In other words, DGAP could investigate

only those products which had been referred to it either by the Standing Committee or the Authority.

4.4.13 DGAP was a creature of a statute and had been conferred powers under the statute or under the rules. His jurisdiction was circumscribed by the specific powers granted under the aforementioned provisions. Therefore, the DGAP cannot confer on themselves additional jurisdiction vested other than as provided under the law. In this regard, reference was made to the case of **Northern Plastics Limited v. Hindustan Photo Films Mfg. Co. Ltd**. wherein the Hon'ble Supreme Court inter-alia held that the Tribunal being a creature of the statute and deriving his jurisdiction and powers from the statute cannot venture into an exercise beyond the mandate of the statute.

4.4.14 The Respondent provided the complete information/ details as sought by the DGAP as a responsible corporate assessee and in good order to facilitate the investigation proceedings. The Respondent further submitted that this act by no stretch of imagination should be considered as an acquiescence of the fact that the DGAP had jurisdiction powers to investigate in respect of all products.

4.4.15 In any event, in so far as the issue of jurisdiction was concerned, the provisions had to be strictly construed and no authority could confer to itself a jurisdiction wider than that vest in it. It was well settled that where there was an absence of jurisdiction, even by consent of parties, the jurisdiction cannot be expanded. Reliance in this regard was placed on the case" of CIT v. Dalipur Construction Pvt. Ltd. by the Hon'ble Allahabad High Court wherein the department inter-alia argued that once objection regarding jurisdiction was not taken before the assessing officer, the order cannot be challenged. However, Hon'ble High Court while rejecting the argument of the Department Inter-alia observed that lack of jurisdiction was not

a mere irregularity but nullity in the eyes of law and if an authority had no jurisdiction, the same cannot be conferred even by the consent of parties.

4.4.16The Hon'ble Court in the decision of Dalipur Construction (supra) inter-alia relied on the following decisions to enunciate that jurisdiction cannot be conferred by consent or acquiescence:

| Judgements | Relevant Text |
|---|---|
| **United Commercial Bank Limited v. his Workmen** | "No acquiescence or consent could give a jurisdiction to a court of limited jurisdiction which it does not possess." |
| **Kiran Singh v. Chaman Paswan** | "A defect of jurisdiction …strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by consent of parties" |
| **Benarsi Silk Palace v. CIT** | "Jurisdiction could be conferred only by statute and not by consent and acquiescence. Since jurisdiction was conferred upon Income Tax Officer to proceed under Section 34 (1) only if a issues a notice an assessee cannot confer jurisdiction upon him by waiving the requirement of a notice because jurisdiction cannot be conferred by consent or acquiescence." |

4.4.17In view of the above, the DGAP had exceeded his jurisdiction and had thus travelled far beyond his power by investigating all products which neither formed part of the complaint examined by the Standing Committee nor the Notice issued by the DGAP. The investigation conducted by DGAP was therefore in gross violation of the mandate in terms of Rule 129 of the CGST Rules and goes to the very root of the investigation. The Respondent submitted that the entire investigation and the proceedings was therefore liable to be quashed on this ground alone.

## 4.5 NO METHODOLOGY PRESCRIBED TO DERIVE PROFITEERING, THUS, LEADING TO ARBITRARY EXERCISE OF POWERS BY DGAP

4.5.1 The CGST Act and CGST Rules do not prescribe any procedure or mechanism for calculation of profiteering due to which the DGAP arbitrarily adopted a methodology that best suits his motive. Given the absence of knowledge of the basis on which the DGAP had to act, the Respondent was compelled to accept any procedure adopted by DGAP and the opportunity of full defence to the Respondent was also curtailed. This was in violation of principles of natural justice.

4.5.2 Rule 126 of the CGST Rules, empowers the Authority to determine the methodology and procedure.

4.5.3 As per Rule 126, it was the Authority which might determine the methodology and the procedure. However, in the present proceedings, the DGAP had used his own methodology and procedure to determine the alleged profiteering amount. This was in violation of the mandate given under Rule 126. The DGAP does not had the statutory power to determine the methodology and procedure that had to be considered while computing the profiteering amount.

4.5.4 It was not a case that a basic need of having a mechanism to compute "profiteering with proper checks and balances was being raised by the Respondent alone. The same was also raised by the Advisor to the Chief Minister, Punjab as well as the Chief Economic Advisor In the 17 GST Council Meeting held on 18.06.2017. The Respondent submitted that inspite of all the concerns raised by several authorities and an interested party, the issue remains unattended, resulting in grave injustice to the Respondent. A relevant extract from the minutes of the 17" GST Council Meeting was quoted below

*"The Adviser to the Chief Minister, Punjab stated that profit should be carefully defined as to whether it referred to profit at the product and service level, vertical level or entity level. He added that it was necessary to see how credit was being*

*allocated to each product and thereafter determine the profitability for each product. The Chief Economic Adviser stated that the anti-profiteering clause was a mistake and the discretion It provided might lead to his abuse and cause harassment. Therefore, it was necessary to circumscribe it. He added that it would be difficult to implement it because of the difficulty in determining what profit was, what profiteering was, etc."*

4.5.5 Furthermore, similar anti-profiteering provisions existed in Australia and the Australian Competition and Consumer Commission entrusted with overseeing the price responses pursuant to implementation of GST, laid down guidelines to provide greater certainty for determination/ quantification of profiteering. This included the net dollar margin method and the price margin method which were the fundamental principles for determination of price variances and changes. Similarly, under the erstwhile Malaysian GST law, proper mechanism with formulas were provided under the Price Control and Anti-Profiteering (Mechanism to Determine Unreasonably High Profits) Regulations 2018. Any profit charged over and above the determined 'Net Profit Margin' during a given time frame was considered as 'unreasonably high profit and was liable for penal action under the law.

4.5.6 Reliance was placed on the decision of the Hon'ble Supreme court in the case of Commissioner of Central Excise and Customs Kerala v. Larsen and Toubro Limited wherein it had been held that in absence of machinery provisions for computation of taxable value, the levy of tax would become non-existent. Reliance was also placed on the decision of the Hon'ble Supreme court in Commissioner of Income Tax, Bangalore v. B.C. Srinivasa Shetty. The Apex Court while considering Section 45 of the Income Tax Act held that in absence of methodology of computation, the charging section would fail the test of scrutiny. The anti-profiteering provisions was part of taxing statute and the same principles as enunciated in the judgments quoted above would apply to it. It was well

settled in taxation law that the absence of the method of computation of quantum of demand payable would result in the demand itself being declared as invalid.

4.5.7During the course of the prolonged investigation or even thereafter, it had never been put to notice or offered any reasoning (through grant of a hearing or otherwise) as how the DGAP was going to derive profiteering. Non-provision of hearing by the DGAP before alleging profiteering against the Respondent was in gross violation of the principles of natural justice. Reliance on the decision of the Hon'ble Supreme Court in the case" of Automotive Tyre Manufacturers Association v. Designated Authority, wherein the Directorate General of Anti-dumping and Allied Duties passed an order without granting a personal hearing to the parties and the order was quashed as it was found to be in violation of principles of natural justice. The relevant extract from the judgment was quoted herein below:

*"83. The procedure prescribed in the 1995 Rules imposes a duty on the DA to afford to all the parties, who had filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments was no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witnesses, etc. and also clear up his doubts during the course of the arguments. Moreover, it was also observed in Gullapalli (AIR 1959 SC 308), if one person hears and other decides, then personal hearing becomes an empty formality"*

4.5.8The DGAP cannot be given a free pass to compute profiteering in a random manner without paying any heed to commercial/ business realities or mathematical principles. There was a complete lack of transparency and a patent disconnect in the approach followed by the DGAP which varies from case to case. For instance, in the present case, the DGAP had considered an exceedingly long Impugned Period from 15.11.2017 to 30.09.2019 (nearly 2 years). The only reason provided in the Impugned Report was that since the reference

was received from Standing Committee in October 2019, the review was done until September 2019.

4.5.9 The DGAP being a specialist in carrying out anti-profiteering investigations, cannot be believed to be oblivious of the fact that the forwarding of compliant along with recommendation from the Screening Committee to the Standing Committee was in respect of invoice dated 30.11.2017. It appears that the DGAP had wilfully elected to ignore the period of invoice and arbitrary conducted the investigation for a long period of 22 months.

4.5.10 The Respondent cited the following cases as examples where the DGAP had considered a different time period to compute the amount of profiteering:

| SN | Case No. | Investigation Period | Total Period |
|---|---|---|---|
| 1. | 20/2018 | From 15.11.2017 to 28.02.2018 | 3.5 months |
| 2. | 02/2019 | From 15.11.2017 to 31.03.2018 | 4.5 months |
| 3. | 59/2019 | From 27.07.2018 to 30.09.2018 | 2 months |
| 4. | 46/2019 | From 01.01.2019 to 31.03.2019 | 3 months |
| 5. | 14/2018 | From 15.11.2017 to 31.01.2018 | 2.5 months |
| 6. | 08/2018 | From 15.11.2017 to 31.01.2018 | 2.5 months |
| 7. | Current Investigation | From 15.11.2017 to 30.09.2019 | 22 months |

4.5.11 The above submissions clearly show the arbitrariness and inequality with which DGAP had carried out the investigation against the Respondent. The period/ method which was best suited for it to reach his preconceived objective was taken as the period of investigation. Such an approach of the DGAP was violation of Article 14 of the Constitution of India and the concept of equality before law. Reliance in this regard was placed on the decision of the Hon'ble Supreme Court in the case of Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors

wherein it was inter-alia observed that wherever there was arbitrariness in the State action, whether it be of the legislature or of the executive, Article 14 immediately springs into action and strikes down such action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and was a golden thread which runs through the whole of the fabric of the Constitution.

4.5.12 The Respondent relied upon the following decisions to submitted that the taxing statutes must be in conformity with Article 14 of the Constitution of India:

- State of A.P. and another v. Nalla Raja Reddy and others
- Kunnathat Thathunni Moopil Noir etc. v. State of Kerala and another

4.5.13 On the strength of above submissions, the absence of any prescribed mechanism so as to compute the "profiteering" coupled with inexplicable prolonged investigation of "22 months when many other investigations was between 2 to 4.5 months clearly manifests arbitrariness and was violative of Article 14 of the Constitution of India. This was a sufficient ground to strike down the Impugned Report.

## 4.6 PROVISION OF SECTION 171 (1) CANNOT BE APPLIED TO PRESENT CASE IN ABSENCE OF ANY TRANSITIONAL SUPPLY CONTRACT

4.6.1 The provision of Section: 171 (1) could be made applicable to only such contracts that transition an event of downward revision of GST rates.

4.6.2 The anti-profiteering provisions were introduced to contain profiteering impact of any favourable change in rate of tax or allowance of input tax credits i.e. by pushing businesses to passing on GST benefits, if any. Given this, it would merit

perceiving the impact of these provisions only on such commercial contracts (for buying and selling of goods/ services), which existed and were not completely serviced at the time of change in the rate of tax and/ or ITC allowance. All subsequent supplies/ sale contracts under such existing contract warrant compliance with anti-profiteering provisions.

4.6.3 However, there might be contracts negotiated/ executed completely post the new rate regime come into effect le with facts & GST rate aspects known to all parties concerned before agreeing to the contract of sale. Hence, since the price itself was agreed post the rate change event, as per Section 64A of the Sale of Goods Act, 1930, the agreed prices cannot be further examined for profiteering as for this new contract the conditions of Section 171(1) of the CGST Act had not even been triggered.

4.6.4 Thus, by perceiving the impact of a past event of GST rate change on a transaction that was agreed, executed & consummated post facto, the implication of the action was no better than that of fixing or containing prices. However, from a constitutionality standpoint such powers were not vested in the Anti-Profiteering authorities. Such action is, therefore, violative Article 191(g) of the Constitution of India.

4.6.7 The said aspect treads even more dangerously in the present case since the authorities, as seen above, was extending the profiteering enquiry for a period as long as 22 months. Thus, by confirming profiteering over such long period, the DGAP viciously implicated that prices should not had been increased/ changed/ revised for period as long as that & since the prices were increased/changed/ revised, the incremental amounts cannot be retained by the Respondent by virtue of Section 171(1). It would be plausible to argue that DGAP was abusing his powers to indirectly contain/limit prices, which it was not constitutionally and statutorily empowered to.

4.6.8 The above comes on the backdrop of the NAA's own comments, which were published vide press release on 04.10.2018, which provided as under

*....National Anti-Profiteering Authority, assured companies that the Authority was not a price regulator and neither does it had legislative intent.....*

4.6.9 The Impugned Report had an effect of regulating prices for a long period, it would be upon Authority to quash such approach in spirit of the remarks his previously made, which were in the right spirit of the attendant legal provisions

## 4.7 ANTI-PROFITEERING PROVISION, IF AT ALL, COULD BE TRIGGERD ONLY IN INSTANCES WHERE UNLAWFUL MANNER OF BUSINESS WAS ESTABLISHED

4.7.1 Section 171(1) of the CGST Act lays down the framework for anti-profiteering in context of GST laws.

4.7.2 A perusal of the key provision, on anti-profiteering, per above it was seen that the GST laws promulgate that no profiteering should be done in the name of GST in an event of (a) reduction in tax rate or (b) benefit of enhanced ITC. The impact of this should be passed on to the recipient of supply by way of commensurate reduction in prices.

4.7.3 The key aspect to be analysed was what factual scenario would constitute profiteering. FAQ published on CBIC website on the subject matter provide as under:

*Q1 What was profiteering?*

*Ans. In terms of Section 171 of the CGST Act, 2017, the suppliers of goods and services should pass on the benefit of any reduction in the rate of tax or the benefit of ITC to the recipients by way of commensurate reduction in prices. The willful action of not passing on the above benefits to the recipients in the manner prescribed was known as "profiteering".*

4.7.4The key aspects that emerge about profiteering was that (a) there must accrue a benefit from the specified event; and (b) The benefit was wilfully not passed on to the recipient by commensurate reduction in prices (i.e. the prescribed action in Section 171(1) of the CGST Act). Further, it must be noted that profiteering could be confirmed only if the benefits was not passed on to a recipient wilfully by the supplier, implying a mala fide intent on part of the supplier must be proved.

4.7.5Earning profits through lawful means was not a sin. In this regard, it must be noted that, as far as, the provisions of Section 171 of the CGST Act were concerned, it seems that it could be triggered only in a case where a registered person makes exorbitant profits albeit through unlawful means. The term 'profiteering' was not defined anywhere under the GST law or the rules made thereunder; however, the marginal note to Section 171 stated "Anti Profiteering measure". It was a settled law that marginal notes could be referred for understanding the intention of the legislature. In this regard reliance was placed on the decision of Commissioner of Income, Tax, Gujarat vs. Vadilal Lallubhai wherein the Court held that the "marginal note also gives an Indication as to what exactly was the mischief that was intended to be remedied." Similarly, reliance was placed on the decision of Indian Aluminium Company vs. Kerala State Electricity Board wherein the Hon'ble Supreme Court held that marginal notes could be relied to show what the section was dealing with.

4.7.6The term "Profiteering" had been defined as under:

| Sr. No. | Particulars | Reference |
|---|---|---|
| 1 | The taking advantage of unusual or exceptional circumstances to make excessive profits | Black's Law Dictionary |
| 2 | Make or seek to make an excessive profit | Shorter Oxford |

| | | |
|---|---|---|
| | | English Dictionary |
| 3 | To seek or obtain excessive profits, one who was given to making excessive profits | Law Lexicon |
| 4 | As nouns the difference between profit and profiteering was that profit was total income or cash flow minus expenditures the money or other benefit a business receives in exchange for products and services sold at an advertised price while profiteering was the act of making an unreasonable profit not justified by the corresponding assumption of risk, or by doing so unethically | Wiki Diff online |
| 5 | Any conduct or practice involving the acquisition of excessive profits | Mount vs Welsh |

The above meanings/ definitions/ connotations read together with the FAQ (supra), suggest that profiteering could be concluded only if wilful lack of fairness was noted in a given profiting scenario. This was possible only when (a) actually any incremental margins or profits was made (in comparison to the base scenario with similar facts & circumstances) and (b) such incremental profit was not a derivative of action, which confirms established practice and pricing trends (and is, therefore, unfair businesswise).

Further, a bare reading of the aforementioned definitions clearly suggest that profiteering was only when a person makes excessive, unreasonable or exorbitant profits. The act of earning profits per se was not profiteering. In the present case it had not made any exorbitant or unreasonable profits in an unlawful manner. Accordingly, it cannot be said that the Respondent had profiteered.

4.7.7 The Respondent in the present case was engaged in business of customized offerings to his customers, which was made to order and customized to last mile. Thus, the prices were very dynamic and was incumbent up on multiple factors that keep changing rapidly, irrespective of the static product description (a fact that

was well evidenced by the historical data of operations), such as follows:

- Depending on the Customer Taste
- Seasonality
- Location of Store
- Quality of material used, size etc.

4.7.8 It was a well-established fact in the modular kitchen/ retail industry that commercial aspects, business dynamics and dynamic pricing was a natural business outcome, implying that, prices of two or more supplies were incomparable. Hence, the difference in pricing was purely attributable to genuine business reasons and not due to any mala fide intent to take benefit of reduction in GST rates. Given this, every supply was unique and no comparison could be made for prices charged pre & post certain event.

4.7.9 Also, in view of the above, the supply of customized offering cannot be compared with the supply of off the shelf products, where the price was fixed on the basis of standard material and quantity & no scope was given for customization. In case of modular kitchen/ retail industry, the prices were dynamic and revised frequently based on customer preference, seasonality, material preferred by the customer etc. Therefore, computation of profiteering should be undertaken only in view of business nuances and uniqueness.

4.7.10 The supply price data depending upon Modular Kitchen Items, in question, and keeping in view the factors above; the prices might be dynamic on same date (for static product description) or for static product description (for different customer). It signifies that a customer preference, size, 85 locations, quality etc. allows differentiation in pricing, which this was completely business driven.

4.7.11 Thus, in the present case, no two supplies were comparable and prices were extremely dynamic and could go up and down depending upon the parameters stated above and any change in price, therefore, cannot lead to any profiteering by the Respondent.

4.7.12 Thus, it was proven beyond doubt that the dynamic pricing (and frequent price changes) was a natural business outcome of the industry in which the Respondent operates, implying that prices of any 87 given two or more instances was rendered incomparable to the said fact itself.

The DGAP, however, conveniently chose to ignore the said key business aspect/ natural business outcome despite that fact that the NAA, in his old press release had indicated that the authorities need to be sensitive to any such natural business outcomes (refer press release on 04.10.2018):

*.....that authorities was sensitive to natural business outcomes and appreciate that several factors contribute to pricing decisions such as supply and demand, supplier's cost and taxes, etc. Hence, it was not justified to lay down uniform parameters across sectors.*

The DGAP has, therefore, concluded the Impugned Report by overlooking NAA's direction available in public domain. Given this, the straight-jacket approach followed by the DGAP in the Instant case was against the stated objective and directions of the Authority and hence, should be set aside.

## 4.8 ADOPTING 22 MONTHS AS PERIOD OF INVESTIGATION TO DETERMINE ALLEGED PROFITEERING ACTS AS A PRICE-CONTROL MECHANISM AND WAS CLEARLY VIOLATIVE OF THE RIGHT TO TRADE

4.8.1 There was no time period prescribed under the CGST Act to check the period of investigation conducted by the DGAP. The DGAP had abused this freedom to consider the entire time period from 15.11.2017 to 30.09.2019 as the period of investigation. By implication, the undertone of DGAP's action it follows that once a GST rate event occurs, there cannot be a revision of prices even if attributable to business causes. It was unconceivable that a business cannot revise the prices for such a prolonged period of time.

It had a long history of varying the prices of the items dependent upon his business factors as enumerated above. Owing to these factors the prices over different periods were rendered Incomparable let alone a possibility of comparison across 22 months period.

4.8.2 The other factors that contribute or trigger a price revision were (a) Impact of costs; (b) Market trends (most products/ offering types last 3-6 months) and therefore, there would not be a comparable price to investigate; and (c) Marketing strategies, market cycle of the product/ offering per se had a bearing on the pricing of the product. In any case, if such a long period of Investigation was adopted, allowance must also be given for (a) changes in cost structure; (b) periodic increase in prices; and (c) economic effect of demand and supply over such period. A straight jacket comparison over such long period was erroneous.

The DGAP had failed to consider factors such as increase in the input cost, economic effect of demand and supply over such period etc.

Further, certain expenses rise periodically for example labour & staff (a periodic pay increase was an acceptable and publicly known fact), anniversary increase was pay out to contractors, etc. was some of these examples. Thus, increase in revenues do

not directly accrue to Respondent as profit, some portion of the same was diverted at source itself. Additionally, most of these expenses, was also liable to GST and hence, an increased quantum of expense leads to incremental GST outflow, which was not recoverable due to the amended position of law.

4.8.3 In dynamic pricing industry in which the Respondent operates, tax was not a relevant factor in determination of prices. Even if it was for sake of argument, then also it was merely one of the many components and hence, the other factors cannot be ignored. Therefore, the entire exercise undertaken by the DGAP should be set aside as the DGAP had arbitrarily computed the amount of profiteering.

4.8.4 The provisions of Section 171 of the CGST Act cannot restrict the right of the Respondent to increase prices in the normal course of business for such a prolonged period. The DGAP had assumed that the powers under Chapter XV of the CGST Rules was akin to price control mechanism and seeks to impinge on the fundamental right of the Respondent to decide the selling price of the goods.

4.8.5 There were no guidelines regarding the period for which further prices could or cannot be revised. As per the Impugned Report, the alleged profiteering figures had been calculated for the price increase undertaken upto September 2019. This was completely arbitrary and directly in the teeth of settled principles of law. The DGAP had stretched the investigation to nearly 2 years and appears to had formed an opinion that there could be no subsequent rise in price of Subject Goods pursuant to the reduction of tax rate w.e.f. 15.11.2017. There was no rhyme or reason for the DGAP to adopt such a course or form such an opinion.

The impugned Report was silent about till when the increase in prices undertaken by the Respondent would be considered as profiteering. In absence of any period of limitation, it would imply that any increase in price by Respondent would be considered as profiteering till the time he was in business. It means that the Respondent was bound by the Authority in taking commercial decisions qua the pricing of the product even if it had valid reasons to do so. This was in violation of Article 19(1) (g) of the Constitution of India.

By computing profiteering for such a long period, the DGAP had infringed on the right of the Respondent to decide the selling price of his products because such revision in price was in the normal course of business. It was an attempt by DGAP to indirectly put a cap on the sale price of the products being sold by Respondent that violates his right to carry on trade as per Article 19(1)(a) of the Constitution. Accordingly, the DGAP had tried to step into the shoes of a price regulator as such an action implies that the Respondent could never increase the prices of his products pursuant a GST rate reduction.

4.8.6 The anti-profiteering provisions as well as the constitution of the DGAP was part of a taxing statute. The unfettered way in which the period of investigation had been stretched by the DGAP brings the entire exercise into the realm of price regulation act. Without any explicit authority under the law passed by the Parliament or the State Legislature. The DGAP cannot force a blanket mandate to keep the prices in check as the same was violative of the freedom of trade and commerce. Reliance was placed on the case of Petroleum and Natural Gas Regulatory Board v. Indraprastha Gas Limited & Ors. Wherein it had been held that in absence of any statutory power to fix tariffs, a delegated authority could not frame regulations to cover the area pertaining to determination of tariffs and such regulations were held to be ultra vires.

The price revisions, if any, had happened only in the ordinary course of business and the same should not be seen as contravention of Section 171 of the CGST Act.

**5.** The above submissions filed by the Respondent were forwarded to the DGAP to file his clarification under Rule 133(2A) of the CGST Rules, 2017. In response, the DGAP had filed his clarification dated 12.02.2021, that is summarized as follow:

**5.1 NO EVIDENCE OF PROFITEERING AS COMPLAINT WAS WITHDRAWN BY THE CUSTOMER.**

5.1.1 The investigation had been carried out on receiving a reference from the Standing Committee for a detailed investigation in terms of Rule 129 of the CGST Rule, 2017. Further, in Para 15 of the Report dated 27.11.2020 the DGAP had clarified, that the Respondent contention that the complaint had already been withdrawn and there was no legal tenability in continuation of present proceedings, cannot be considered as the Application was received in the DGAP from the Standing Committee on Anti-Profiteering with a remark that the complaint had been forwarded to the DGAP for carrying out investigation. Thus, the said action was completely in consonance with the contents of the Rule 129 of the Rules. Further, there was no such provision in the CGST Act, 2017 and Rules relating to Anti-Profiteering which stipulates that investigation would not be carried out where complaint had been withdrawn by the complainant.

**5.2 COMPARISON OF PRE & POST RATE REDUCTION PRICE OF A PRODUCT WAS INAPPROPRIATE AS THE RESPONDENT WAS ENGAGED IN OFFERING CUSTOMIZED SOLUTIONS TO HIS CUSTOMERS AND AS SUCH THERE WAS NO COMPARABLE PRODUCTS.**

5.2.1 In Para 19 of the Report dated 27-11-2020, illustrations in respect of one customized and two non-customized products of

the Respondent had been detailed which show that the Respondent was engaged in supply of certain products which was non-customized as well and that the products were comparable. The Report was based on the fact that GST rate was reduced vide Notification No. 41/2017-CT(Rate) dated 14.11.2017 and comparison of Pre & Post Notification data as supplied by Respondent.

**5.3 RESPONDENT OBTAINED GST REGISTRATION W.E.F. 21.11.2017 ONWARDS AND HENCE, IT DID NOT UNDERTAKE ANY SALES IN THE PERIOD PRIOR TO CHANGE OF GST RATE.**

The Respondent had themselves supplied data/documents for the period prior to the date of Notification no. 41/2017-CT(Rate) dated 14.11.2017 in response to the Notice of initiation of investigation dated 14.10.2019 issued to them. The Respondent's contention that, he did not undertake any sales in the period prior to change of GST rate, was not correct as the Respondent had submitted the data/documents for the said period. The contention could had been raised at initial stage by the Respondent but the Respondent failed to do so. The investigation against the Respondent had been carried out only on the basis of the data/documents submitted by the Respondent.

**5.4 DGAP HAD EXCEEDED HIS POWER BY INVESTIGATING PRODUCTS BEYOND CONTOURS OF THE COMPLAINT WHICH GOES TO THE VERY ROOT OF HIS JURISDICTION.**

5.4.1 In terms of Rule 129(2) of the CGST Rule, 2017 the DGAP was obliged, to conduct investigation and collect evidence necessary to determine whether the benefit of reduction in the rate of tax on any supply of goods or services/goods or the benefit of ITC had been passed on to the recipient by way of commensurate reduction in prices. It was evident that the law provides for conducting investigation in respect of any supply of goods or

services. Therefore, the Respondent's contention that DGAP had exceeded his power by investigating products beyond contours of the complaint was incorrect and unacceptable.

## 5.5 NO METHODOLOGY PRESCRIBED TO DERIVE PROFITEERING; THUS, LEADING TO ARBITRARY EXERCISE OF POWERS BY DGAP.

5.5.1 The contentions of the Respondent were wrong as the impugned Report had been issued as per Section 171 of CGST Act, 2017. Further, as per Rule 126 of the CGST Rules, 2017, the Authority (NAA) had been empowered to determine the methodology and procedure for determination as to whether the reduction in the rate of tax or the benefit of ITC had been passed on by the registered person to the recipients by way of commensurate reduction in prices. The Authority had already notified the methodology and procedure under Rule 126 on 28.03.2018. The extent of profiteering had to be arrived at on a case-to-case basis, by adopting appropriate method based on the facts and circumstances of each case as well as the nature of goods or services supplied. However, considering the vast difference in the nature and type of goods and services supplied by various trade and industry, it would not be feasible to prescribe a uniform method /practice/principle/rule to calculate profiteering which would vary depending on the conditions of the supply as well as the nature of goods or services supplied and had to be determined on a case-to-case basis, in terms of Chapter XV of the CGST Rules, 2017.

## 5.6 PROVISION OF SECTION 171 (1) CANNOT BE APPLIED TO PRESENT CASE IN ABSENCE OF ANY TRANSITIONAL SUPPLY CONTRACT.

5.6.1 In the instant case there was a downward revision of GST rates in respect of supplies made by the Respondent vide Notification no. 41/2017-CT(Rate) dated 14.11.2017. This fact had been explained in detail in the Report dated 27.11.2020 along-with

illustrations. Section 171 of the CGST, Act 2017 clearly lays down that the Respondent was obliged to pass on commensurate benefit of rate reduction to the recipients of his services/goods and in the above case the GST rates were reduced vide Notification no. 41/2017-CT(Rate) dated 14.11.2017 as Respondent was obliged to pass on the benefit of reduced tax to the recipients.

**5.7 ANTI-PROFITEERING PROVISION, IF AT ALL, COULD BE TRIGGERD ONLY IN INSTANCES WHERE UNLAWFUL MANNER OF BUSINESS WAS ESTABLISHED.**

5.7.1 The intent of Section 171 of the CGST Act, 2017 was amply clear that any reduction in rate of tax on any supply of goods or services/goods or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices. The intention behind the said provision was to provide relief to the common man of the reduced rate of taxation. The contention of Respondent was wrong that the said provision might be involved only in instances where unlawful manner of business was established.

In this case there was reduction in the rate of tax from 28% to 18% vide Notification no. 41/2017 dated 14.11.2017 in respect of the goods supplied by the Respondent. Therefore, the Respondent was obliged to pass on commensurate benefit to the recipients. Therefore, the profiteering by the Respondent on account of non-passage of benefit of reduced tax was aptly covered under section 171 of the CGST Act, 2017.

**5.8 ADOPTING 22 MONTHS AS PERIOD OF INVESTIGATION TO DETERMINE ALLEGED PROFITEERING ACTS AS A PRICE-CONTROL MECHANISM AND was CLEARLY VIOLATIVE OF THE RIGHT TO TRADE.**

The Respondent had raised objection over the period of investigation. In this regard, it was submitted that the period of investigation had neither been prescribed in the Central Goods and Service Tax Act, 2017 nor in the corresponding Rules/Notifications. the DGAP had received reference from the Standing Committee on Anti-Profiteering on 09.10.2019 to investigate the matter, hence the period from 15.11.2017 (date of Notification) up to the preceding month of receipt of reference was taken up for investigation i.e., from 15.11.2017 to 30.09.2019. This practice was uniformly adopted by DGAP in respect of all investigations to cover the period of investigation up to the last date of previous month, when the reference was received in this office.

**6.** Copy of the above clarification filed by the DGAP, was supplied to the Respondent to file his re-joinder, if any, before the Authority. In response, the Respondent had filed his re-joinder dated 03.03.2021, wherein, he has submitted as under:

**6.1** The home retail business was previously conducted in Future Retail Limited ("FRL"). The scheme of demerger of said business into PHRL was approved by NCLT order dated 10.11.2017, which was received, by PHRL, on 20.11.2017.

Pursuant to above, the sales of period between appointed date and effective date of the demerger (i.e. between 01.07.2017 up to 20.11.2017) were accounted by PHRL only on a post facto basis. Reiteratively, none of these sales transactions were as such undertaken by PHRL first-hand.

**6.2** Upon occurrence of above, PHRL applied for GST registrations for the first time in the month of November, 17 and all the Sales undertaken by PHRL was post rate change date i.e. 15.11.2017.

In such peculiar fact pattern, PHRL believes that since the past sales were not undertaken by the same legal entity-a comparison

to alleged profiteering was not even possible in first place let alone profiteering being confirmed.

**6.3** The Respondent also submitted the following Documents/ Details, that he had also submitted with DGAP's office:-

- Copy of PHRL registration certificates that duly reflects the start date of registration being 20.11.2017
- Sales reconciliation (financial statements vs GST returns)-the fact that pre-sales were undertaken by FRL was clearly evidenced therein

**7.** The above submissions filed by the Respondent were then supplied to the DGAP for filing Clarifications under Rules 133 (2A) of the CGST Rules, 2017. In response, the DGAP furnished his clarifications dated 01.04.2021, wherein, the DGAP has inter-alia submitted as under: -

**7.1** M/s Praxis Home Retails Ltd. had come into existence consequent to the demerger of the Future Group, wherein the Future Group separated his home business operated through his HomeTown stores under Future Retail and had it listed as a separate company. The company M/s Praxis Home Retails Ltd. operates 49 stores across 28 cities in retail business of furniture and home fashion under the brand name HomeTown as per the company's website. The same brand name was also used earlier by Future Retail Limited. The website of M/s Praxis Home Retail Limited also mentioned that he started his journey in 2007 with his first store in Noida, which indicates that existence of his business was not new but was only a continuum of the earlier business under the name of a new company.

**7.2** The same was also corroborated by the fact that in the instant case, the applicant Sh. KGM Bhushan got a quotation on 03.11.2017 from Future Retail Limited for the impugned supply

and against the same quotation Tax invoice dated 20.11.2017 was issued to him by M/s Praxis Home Retail Limited. It was thus apparent that M/s Praxis Home Retail Limited was complying with the quotations raised by Future Retail Limited. As M/s Praxis Home Retail Limited, had carried forward the retail business of M/s Future Retail Limited after demerger, his argument that he got GST registration in the month of Nov, 2017 and all the sales were undertaken by him post rate change date i.e., 15.11.2017 does not carry weight. M/s Praxis Home Retail Limited might had become a separate legal entity after demerger but he was carrying forward the business legacy of the Future group and therefore the legal/taxation issues arising had to be addressed by M/s Praxis Home Retail Limited.

**7.3** Further, during the course of investigation the documents/data pertaining to pre-rate reduction period i.e., before 15.11.2017 were provided by the Respondent. Had the Respondent been not operating during pre-rate reduction period, he should have informed the same at that time. Now since the Respondent had submitted the above data, it implies that he was in possession of the same and also authorized to submitted the same to this office.

**8.** Since, the quorum of the Authority of minimum three Members, as provided under Rule 134 was not available till 23.02.2022, the matter was not decided. With the joining of two new Technical Members in February 2022, the quorum of the Authority was restored from 23.2.2022, and a copy of the above clarifications dated 01.04.2021, was supplied to the Respondent to file his re-joinder, if any, and personal hearing was scheduled to be held on 07.04.2021, wherein, the Respondent re-iterated his previous submissions. The Respondent also filed his additional submissions dated 12.04.2022, subsequent to the hearing, wherein, he has re-iterated his previous submissions.

9. We have carefully considered the Report furnished by the DGAP, the clarifications filed by him and the records of the case. There is no dispute with regard to the reduction of the tax in respect of subject products supplied by the Respondent with effect from 15-11-2017. The Government by Notification No 41/2017-CT (Rate) dated 14-11-2017 has reduced rates on subject products. In view of the above said facts and the records, the Authority is required to give its decision in respect of following issues: -

a. Whether the Respondent has passed on the commensurate benefit of reduction of GST to its recipient after issuance of the above said Notification in terms of Section 171 of the CGST Act, 2017? If not, the Authority is mandated to determine the profiteered amount in terms of the said section along with the relevant rules made thereunder?

b. Whether DGAP has calculated the profiteered amount in adopting appropriate methodology and has addressed various issues raised by Respondent during the proceedings?

c. Whether Respondent is liable for penalty for its failure to pass on the commensurate benefit to its recipients?

Section 171 of the CGST Act, 2017 provides that any reduction in the rate of tax on any supply of goods or services or benefit of Input Tax Credit shall be passed on to the recipient by way of commensurate reduction in prices. In the instant case, it is noted that the Central Government, on the recommendation of the GST Council, had reduced the GST rate on many goods & services including 'the subject goods' from 28% to 18% w.e.f. 15.11.2017, vide Notification No. 41/21017-Central Tax (Rate) dated 14.11.2017. Now, the issue which is required to be decided by the Authority is as to whether Respondent is required to pass on the benefit of reduction in the rate of tax in the form of commensurate reduction in the price of the goods and, if yes, whether the same was passed on. As mentioned in earlier paragraphs, DGAP has carried out investigation in the subject matter and collected relevant information/evidences

from the Respondent and after the analysis of the same the DGAP has come to a conclusion that the Respondent has gained benefit of reduction of rate of GST on the supply of the subject goods w.e.f. 15.11.2017 and the Respondent was required to pass on such benefit to the recipients by way of commensurate reduction in prices in terms of Section 171 of the CGST Act, 2017 during the period 15.11.2017 to 30.09.2019. The DGAP has calculated that an amount of benefit not passed on to the recipients or in other words, the profiteered amount comes to Rs. 3,67,88,027/- which includes Rs. 21,200/- as profiteering amount collected by the Respondent from the Applicant No. 1. The period of investigation covers the period from 01.07.2017 to 30.09.2019.

**10.** Section 171 of the CGST Act 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."*

Section 171 (1) of CGST Act, 2017 provides that any reduction in the rate of tax on any supply of goods or services or benefit of input tax credit should be passed on to the recipient by way of commensurate reduction in prices. The Authority constituted under section 171(2) of the said Act is mandated to examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in the commensurate reduction in the prices of goods or services or both supplied by him. Rule 127 of the CGST Rules, 2017 empowers the Authority to determine as to whether any reduction in the rate of tax on any supply of goods or services or benefit of input tax credit has been passed on to the recipient by way of commensurate reduction in prices; and to identify the registered person who has not passed on the benefit of reduction in the tax rate or the benefit of the input tax credit to the

recipient and to order, inter-alia, reduction in the prices or return to the recipient of an amount equivalent to the amount not passed on by way of commensurate reduction in the prices along with interest.

**11.** The Authority finds that the DGAP claimed that he has collected all relevant data and information including documents from the Respondent and have carried out in-depth investigation. However, after going through the DGAP's investigation report, its annexures & calculations, the Respondent's submissions and the other facts on record, the Authority finds that: -

(i) The DGAP's report mentions that, vide Notification No. 41/2017-Central Tax (Rate) dated 14.11.2017, the rate of tax (GST) was reduced from 28% to 18% on subject goods and profiteering had been calculated on such subject goods. To cross verify the same, we had gone through the Annexure 19, i.e. the calculation sheet, to the DGAP's Report dated 27.11.2020, and checked random entries. It has come to light that at Serial nos. 69694 and 71039, goods were taxed at 12% and 5% respectively and profiteering of Rs. 394.43/- and Rs. 25.23/- respectively have been calculated on such goods as well. Many such entries have been observed by the Authority.

(ii) At Serial No. 91 for the product "**Screw On front connector 2Pcs",** it has been observed that the base price in pre-GST was Rs. 7.27/- and in post-GST it was Rs. 0.85/-. Further, at Sr. No. 994 for the product "**SS16 LUMOS METALLIC BASE LAMP ASRTD"** the base price in pre-GST era is Rs. 934.38/- and in post-GST, it is taken Rs. 3.47/-. It is observed that there is a substantial difference in the base prices of the same product and, at Serial No. 111 for the product "**Screw On front connector**

**2Pcs",** the base price of the goods is in negative, that appears to be erroneous.

(iii) In Table - D, the state wise break up of amount of profiteering has been given and in the last row the sum of the profiteering is given as Rs. 3,67,88,027/-. However, at the time of verification, it has come to notice that the actual sum of the entries is Rs. 3,50,38,029/- in the table and there is a difference of Rs. 17,49,998/-.

(iv) The Respondent in his submissions has contended that he applied for GST registrations for the first time in the month of November, 17 and all the Sales undertaken by him were post rate change date i.e., 15.11.2017. Since the past sales were not undertaken by the same legal entity, a comparison to alleged profiteering was not even possible. He is a completely new entity that came into existence only in post rate reduction period and hence, comparison of prices of two different entities holding different GSTINs cannot be compared.

12. In view of the above facts and observations, the Authority holds that the present Report including data considered and calculations made therein do not appear to be correct. The Authority without going in to the merits of the case, directs the DGAP to re-investigate and recalculate the amount of profiteering under Rule 133(4) of the CGST Rules, 2017 strictly in accordance with the provisions of Section 171 of the CGST Act, 2017 and Rules made thereunder and on the basis of authentic, verifiable data collected after due security from authentic and reliable legal sources ad after due application of mind in respect of the findings made in para 11 (i) to 11 (iv) above.

13. Further, the Hon'ble High Court of Delhi, vide its Order dated 10.02.2020 in the case of Nestle India Ltd. & Anr. Vs. Union of India has held that: -

*"We also observe that prima facie, it appears to us that the limitation of period of six months provided in Rule 133 of the CGST Rules, 2017 within which the authority should make its order from the date of receipt of the report of the Directorate General of Anti Profiteering, appears to be directory in as much as no consequence of non-adherence of the said period of six months is prescribed either in the CGST Act or the rules framed thereunder."*

14. A copy of this order be supplied free of cost to all the Applicants, the Respondent and the concerned Central and State GST Commissioners and the file of the case be consigned after completion.

Sd/-
(Amand Shah)
Technical Member &
Chairman

Sd/-
(Pramod Kumar Singh)
Technical Member

Sd/-
(Hitesh Shah)
Technical Member

Certified Copy

30.9.22

(Rajarshi Kumar)
Secretary, NAA

F. No. 22011/NAA/233/Praxis/2020 Date: 30.09.2022

Copy To:-

1. M/s Praxis Home Retail Ltd., Survey No.31, Kacharakanahalli Village, Jadigenahalli, Soukya Road, Hoskote Taluk, Bengaluru-562114
2. Sh. K.G.M. Bhushan, 17, Rajalakshmi Sadan, 8th Cross, B. Channasandra, Kasturi Nagar, Behind Bosch Car Service, Bangaluru-560043 .
3. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
4. Guard File.