BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	69/2022
Date of Institution	28.01.2021
Date of Order	31.08.2022

In the matter of:

1. Dr. Meenakshi Agrawal, 168, Vidhya Apartments, near Hinduja Hospital, Veer Savarkar Marg, Mahim West, Mumbai-400016.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

1. M/s Rajkotia Medicare Pvt. Ltd., 19/19A Nand Deep Industrial Estate, Kondivita Lane Andheri Kurla Road, Andheri (E) Mumbai- 400059.
2. M/s Allergan Healthcare India Pvt. Ltd., Lever 6&7, Prestige Obelisk, No. 3, Kasturba Road, Ambedkar Veedhi, Bengaluru, Karnataka-560001

Respondents

Quorum:-

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

Present:-

1. Ms. Meenakshi Agrawal, Applicant No. 1 in person.
2. Sh. Karan Rajkotia & Sh. Raghavendra CR (Advocate) for the Respondent No. 1.
3. Sh. Prashant Acharya, Sh. Anand Kamath, Sh. Ashish Maloo and Ms. Jayashree for the Respondent No. 2.
4. Sh. Manoj Singh, Assistant Commissioner, for the DGAP.

ORDER

1. The present Report dated 28.01.2021 had been furnished by the Director General of Anti-Profiteering (DGAP), under Rule 129 (6) of the Central Goods & Services Tax (CGST) Rules, 2017. The brief facts of the case were that an application was filed by the Applicant No. 1 alleging profiteering by the Respondent No. 1 in respect of supply of three products namely "Juvederm Voluma with Licodaine, Juvederm Ultra Plus XC and Juvederm Ultra". The Applicant No.1 alleged that the Respondent increased the base prices of the subject goods in spite of GST rate reduction from 28% to 18 % vide Notification No. 41/2017 – Central Tax (Rate) dated 14.11.2017 w.e.f. 15.11.2017, indicating that the benefit of reduction in the GST rate from 28% to 18% was not passed on to the recipients.

2. The above application was forwarded to the DGAP by the Standing Committee on 09.10.2019 along with the report of the preliminary enquiry conducted by the Screening Committee of Maharashtra. On scrutiny of the purchase invoices of the Respondent enclosed with the application, issued by the Respondent No. 2 it was observed by the Committee that the benefit of reduction in the GST rate was not passed on to the recipients by way of commensurate reduction in the price.

3. After receipt of the above reference from the Standing Committee, the DGAP initiated his investigation to collect evidence necessary to determine whether the benefit of GST rate reduction had been passed on by the Respondent No. 1 and No. 2 to the recipients in general and to the Applicant No.1 in respect of supply of subject goods in particular. The DGAP has carried out the investigation and submitted the report dated 28.01.2021 to the Authority, stating therein that:-

    a. on receipt of the reference from the Standing Committee on Anti-profiteering on 09.10.2019, notice was issued to the Respondent No. 1 and 2 on 21.10.2019, under Rule 129 of CGST Rules, 2017, seeking their replies as to whether they 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 their reply to the notice as well as furnish all supporting documents. Further, in the said notice dated 21.10.2019, the Respondent No. 1 & 2 were given an opportunity to inspect the non-confidential evidences/information furnished by the Applicant No.1, on 29.10.2019 or 30.10.2019, which the Respondent No. 1 didn't avail. However, the Authorized Representative of the

Respondent No. 2 visited the DGAP's office on 30.10.2019 and collected the non-confidential data/ information received from the Applicant No. 1.

b. Vide e-mail dated 03.09.2020, the Applicant No.1 was also given an opportunity to inspect the non-confidential documents/reply furnished by the Respondent No. 1 & 2, on 09.09.2020 or 10.09.2020. However, the opportunity was not availed of by the Applicant No. 1.

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

d. The Respondent No. 1, in response to the Notice dated 21.10.2019 and subsequent reminders, submitted his reply vide e-mails/letters dated 23.10.2019, 10.01.2020, 25.01.2020, 27.01.2020, 06.02.2020, 11.02.2020, 17.08.2020 and 30.12.2020 and stated that he was the only authorized distributor for the manufacturer and he didn't have any control on the aspect of MRP of the product and requested to drop the proceedings. Vide the above replies, the Respondent No. 1 submitted the following documents:-

   i. GSTR-1 and GSTR-3B for the period November-17 to September-19.
   ii. Sample Invoices pre and post 15.11.2017.
   iii. Invoice wise details of outward taxable supplies for the period July, 2017 to September, 2019.
   iv. Letter received from Maharashtra SGST Department.

e. The Respondent No. 2 replied to the said notice, vide letters and emails dated 30.10.2019, 12.11.2019, 15.11.2019, 10.12.2019, 16.01.2020, and 27.01.2020, 05.08.2020, 01.09.2020 and 15.10.2020 and stated that the supplies of subject goods took place from the state of Maharashtra only. He further submitted that from Karnataka, only stock transfers and other supplies of the nature of scrap sales, sale of assets were effected to pay recoveries etc. Vide e-mail dated 15.10.2020, it has also been stated by the Respondent No. 2 that 02 goods namely "Juvederm Volbella and Juverderm Volift", were not sold in pre-rate reduction period as they were launched in the market in January, 2018. Thus, the said two goods did not form part of profiteering calculation. Vide the above submissions, the Respondent No. 2 has submitted the following documents:-

i. GST registration confirmation for Maharashtra and Karnataka.

ii. GSTR-1 and GSTR-3B for the period November-17 to September-19 for both GST registrations.

iii. Price list of the subject goods.

iv. Sample Invoices.

v. Invoice wise details of outward taxable supplies for the period July, 2017 to September, 2019.

f. The DGAP has further stated that he has carefully examined the subject application and various replies of the Respondent No. 1 & 2 and the documents/evidence on record along with the preliminary report of the Maharashtra Screening Committee. The findings were as follows:-

i. Initially, the said complaint was forwarded to the Standing Committee by the Maharashtra Screening Committee stating that the Respondent No. 1 had not revised the price to gain the profit out of rate of change of GST, and that the Respondent No. 2 (the subject goods manufacturer) from whom the Respondent No. 1 purchased the subject goods had increased the base price to keep the final price same even after reduction in GST rate and the benefit of rate reduction was not passed on to the recipients.

ii. However, the Standing Committee in its meeting dated 13.09.2019 forwarded the complaint to the DGAP for further detailed investigation stating that *prima-facie* evidence was found against M/s Rajkotia Medicare Pvt. Ltd. Accordingly, the DGAP initiated investigation against both the Respondent No. 1 & 2 vide notice dated 21.10.2019.

iii. On further examination, the DGAP noted that the findings of the Screening Committee differed from the recommendation of the Standing Committee. Accordingly vide letters dated 24.02.2020, 12.03.2020 and 24.06.2020, the Standing Committee was requested to clarify whether the said complaint was to be constructed against the Respondent No. 1 only or both the Respondent No. 1 (dealer) & Respondent No. 2 (manufacturer).

iv. The Standing Committee vide letter dated 13.07.2020 stated that the said complaint might be taken up for detailed investigation only against the Respondent No. 2 (manufacturer).

v. Further, the invoices enclosed with Application forwarded by the Standing Committee were scrutinized. Invoice no. R/1140/17-18 dated 21.07.2017 consigned to Dr. Rashmi Shetty for the product " Juvederm Voluma with Lidocaine (2x1 ml) and invoice no. R/1782/18-19 dated 29.09.2018 consigned to Dr. Meenakshi Agrawal (the Applicant No. 1) for the same product were taken up for scrutiny. It was observed that the per unit price of impugned product charged by the Respondent No. 1 was increased in the invoice issued post GST rate reduction period (i.e. after 14.11.2017) as compared to per unit price charged in the pre GST rate reduction period. Resultantly, it appeared that the benefit of reduction in tax rate was not intended to be passed on to the recipients.

vi. The DGAP, therefore, once again sent a letter dated 06.11.2020 to the Standing committee to inform the basis on which the DGAP was advised to investigate only against the manufacturer (Respondent No. 2) and not the dealer (Respondent No. 1). The Standing Committee, however, maintained his stand and replied vide letter dated 23.11.2020 that as per the attached invoices and report of the State Screening Committee, it appeared to them that the manufacturer had indulged in the profiteering rather that the dealer, therefore, investigation needed to be conducted on part of the manufacturer i.e. M/s. Allergan Healthcare Pvt. Ltd. (Respondent No. 2).

g. In terms of Rule 129 (4) of the CGST Rules, 2017 the DGAP might also issue Notices to such other persons as deemed fit for a fair enquiry into the matter. Therefore, initially, the DGAP decided to proceed with the investigation against both the Respondent No. 1 & 2 and notice dated 21.10.2019 was issued to both. Thereafter, the contention of the DGAP was substantiated by the scrutiny of invoices issued by the Respondent No. 1 during the pre and post rate reduction periods, which indicated at

profiteering by the Respondent No. 1. Accordingly, the documents/data furnished by the Respondent No. 1 was also investigated.

h. 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.

i. From the invoices made available by the Respondent No. 1, the DGAP has observed that the Respondent No. 1 has 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 benefit of GST rate reduction was not passed on to the recipients by way of commensurate reduction in price. The methodology adopted for determining the amount of profiteering has been illustrated by the DGAP in respect of specific item i.e. "JUVEDERM VOLUMA WITH LIDOCAINE (2SYGX1ML) BOX" sold during the month of November, 2017 (pre-GST rate reduction). An average base price (after discount) 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 same item sold during post-GST rate reduction i.e. on or after 15.11.2017. The same has been illustrated by the DGAP 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 Description	A	JUVEDERM VOLUMA WITH LIDOCAINE (2SYGX1ML) BOX	
2.	Notification No.	B	41/2017-Central Tax (Rate) dated 14.11.2017	
4.	Total quantity of item sold	C	5	
5.	Total taxable value	D	133850	
6.	Average base price (without GST)	E=D/C	26770	
7.	GST Rate	F	28%	18%
8.	Commensurate Selling price (post Rate reduction-with GST)	G=E*1.18		31588.60
7.	Invoice No.	H		R/2115/17-18
8.	Invoice Date	I		23.11.2017
9.	Total Billed quantity (above invoice)	J		15
10.	Actual Base Price Charged in Invoice (per unit)	K		29039
11.	Actual Selling price per unit (post rate reduction-with GST)	L=K*1.18		34266.02
12.	Excess amount charged or profiteering	M=L-G	**2677.42**	
13	Total Profiteering	N= M*J	**40161.30**	

On the basis of the above Table, it was clear that the Respondent No. 1 did not reduce the selling price of the "JUVEDERM VOLUMA WITH LIDOCAINE (2SYGX1ML) BOX", 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. 40161.30/- on a particular Invoice No. R/2115/17-18 dated 23.11.2017 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. On the basis of aforesaid calculation as illustrated in table A above, the DGAP has determined 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.

j. 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 No. 1 for the state of Maharashtra , 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, came to **Rs. 61,54,833/-.** The amount of Rs. 61,54,833/- is inclusive of **Rs. 38,267/-** as profiteering amount collected by the Respondent No. 1 from the Applicant No. 1, vide invoice no. R/1782/18-19 dated 29.09.2018. The details of the computation have been provided by the DGAP in the Annex-24 of his report. The said profiteered amount had been arrived at by comparing the 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 , August, 2017 and so on up to July, 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.

k. The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. **61,54,833**/- has been furnished by the DGAP Table-B below:-

Table-B

S. No.	State Code	State	Profiteered Amount (Rs.)
1	04	Chandigarh	5355
2	08	Rajasthan	58903
3	27	Maharashtra	6090575
	Grand Total		**61,54,833**

l. Further, the subject application, the various replies of the Respondent No. 2 and the documents/evidence on record had been carefully examined by the DGAP and it appeared that the Respondent No. 2 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 benefit of GST rate reduction was not passed on to the recipients by way of commensurate reduction in price. The methodology adopted in respect of specific item i.e. "JUVEDERM ULTRA PLUS XC 1 mL" sold during the month of November, 2017 (pre-GST rate reduction has been illustrated by the DGAP. An average base price (after discount) 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 same item sold during post-GST rate reduction i.e. on or after 15.11.2017. The same has been illustrated by the DGAP in the Table-B below:-

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	JUVEDERM ULTRA PLUS XC 1 mL	
2.	Notification No.	B	41/2017-Central Tax (Rate) dated 14.11.2017	
4.	Total quantity of item sold	C	262	
5.	Total taxable value	D	3643706.80	
6.	Average base price (without GST)	E=D/C	13907.28	
7.	GST Rate	F	28%	18%

8.	Commensurate Selling price (post Rate reduction-with GST)	G=E*1.18		16410.59
7.	Invoice No.	H		MH0011000506
8.	Invoice Date	I		03.04.2018
9.	Total Billed quantity (above invoice)	J		10
10.	Actual Base Price Charged in Invoice	K		22448
11.	Actual Selling price per unit (post rate reduction-with GST)	L=K*1.18		26488.64
12.	Excess amount charged or profiteering	M=L-G	**10078.05**	
13	Total Profiteering	N= M*J	**100780.50**	

Upon perusal of the above Table-C, it is clear that the Respondent No. 2 did not reduce the selling price of the "JUVEDERM ULTRA PLUS XC 1 mL", 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. 100780/- on a particular Invoice No. MH0011000506 dated 03.04.2018 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. On the basis of aforesaid calculation as illustrated in Table-C above, profiteering has been arrived at 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 No. 2 during the period 15.11.2017 to 30.09.2019.

m. 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 No. 2 for the state of Maharashtra , 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 came to Rs. 28,50,72,358/-.** The details of the computation have been provided by the DGAP in the **Annex-25 of the report.** The said profiteered amount had been arrived at by comparing the average of the base prices of the impacted goods sold during the period 01.11.2017 to 14.11.2017 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.

n. The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. **28,50,72,358**/- has been furnished by the DGAP in Table-D below:-

Table-D

S. No.	State Code	State	Profiteered Amount (Rs.)
1	01	Jammu & Kashmir	25808.54
2	03	Punjab	2343330.77
3	04	Chandigarh	8272319.06
4	06	Haryana	3995036.53
5	07	Delhi	88044014.81
6	08	Rajasthan	3293020.40
7	09	Uttar Pradesh	1273733.15
8	10	Bihar	314179.91
9	14	Manipur	210893.93
10	18	Assam	3985319.38
11	19	West Bengal	9767889.93
12	21	Orissa	749348.28
13	22	Chhattisgarh	400467.13
14	23	Madhya Pradesh	1447987.59
15	24	Gujarat	11126725.94
16	27	Maharashtra	96436736.66
17	29	Karnataka	19117062.62
18	30	Goa	1576768.84
19	32	Kerala	3375798.78
20	33	Tamil Nadu	8880247.20
21	36	Telangana	20199944.37
22	37	Andhra Pradesh (New)	235724.04
	Grand Total		**28,50,72,358**

o. Thus, the DGAP has concluded that the allegation of the Applicant No. 1 that the base prices of the subject goods were increased while there was a reduction in the GST rate from 28% to 18% w.e.f. 15.11.2017 found to be correct and it was also observed that the benefit of such reduction in GST

rate was not passed on to the recipients by way of commensurate reduction in prices by the Respondent No. 1 & 2. Thus, the total amount of profiteering covering the period 15.11.2017 to 30.09.2019 in respect of the Respondent No. 1 had been worked out as Rs.61,54,833/- which included Rs. 38,267/- as profiteering amount collected by him from the Applicant No. 1 and the profiteering amount in respect of the Respondent No. 2 for the period from 15.11.2017 to 30.09.2019 was Rs. 28,50,72,358/-.

4. The above report of the DGAP dated 28.01.2021 was considered by this Authority in its sitting held on 29.01.2021 and it was decided to allow the Respondent No. 1 & 2 and the Applicant No. 1 to file their consolidated written submissions in respect of the above report of the DGAP by 15.02.2021. Notice dated 04.02.2021 was also issued to Respondent No. 1 & 2 directing them to explain why the above Report furnished by the DGAP should not be accepted and their liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed.

5. The Applicant No. 1 vide e-mail dated 18.02.2021 has filed her written submissions vide which she has stated that the price of the products remained unchanged and the Respondents have not reduced prices till date.

6. The Respondent No. 1 vide his written submissions dated 11.02.2021 and 18.03.2021 has made the following submissions and has stated that:-

   i. As per para 13 of the report of the DGAP, no proceedings could be maintained against him as per the following reasons:-

      a. He was the distributor of products manufactured by M/s. Allergan Healthcare India Pvt. Ltd. the Respondent No. 2.

      b. A Complaint was lodged by the Applicant No. 1 in respect of supply of goods namely Juvederm Voluma with Licodaine, Juvederm Ultra plus XC and Juvederm Ultra as a distributor of goods manufactured by Allergan Healthcare India Pvt Ltd.

   ii. In the present case, the Screening Committee and Standing Committee had recommended enquiry only against the Respondent No. 2 i.e. the manufacturer and did not recommend investigation against him. Despite clear reports and recommendations that no investigation needed to be taken up against him, the DGAP had proceeded to continue the investigation and issued his report recommending action against us which was in complete violation of the provisions of the CGST Act and the Rules.

iii. The DGAP did not have suo-moto powers to initiate any investigation. Rule 128 conferred powers on the Standing committee to examine the evidence provided to determine whether there was a prima facie case to support the claim of the applicant. There was a two level examination by the Standing Committee and the State Level Screening Committee and only based on a prima facie finding that the supplier had not passed on the benefit of reduction in rate of tax, the matter was referred to the DGAP for detailed investigation.

iv. The Respondent No. 1 has relied upon the decision of Hon'ble Supreme Court in the case of ***CIT VS Anjum. M.H Ghaswala (2002) I SCC 633, Competent Authority Vs Barangore Jute Factory (2005) 13 SCC 477 and The Privy Council in Nazir Ahmad Vs King Emperor AIR 1936 PC 253(2)*** in his support.

v. Rule 129(4) of the CGST Rules only provided for issue of notice to other parties with reference to an investigation initiated against a particular person. In other words, Rule 129(4) did not provide for a fresh enquiry against any person. Sub-rule (4) was only ancillary to sub-rule (1) and hence the DGAP was not empowered to make a fresh investigation against a person concerned. Therefore the notice issued to him was not maintainable and the report of the DGAP had to be disregarded in toto.

vi. In the instant case, the complaint was lodged on 7th December 2018 and the same was scrutinized by Standing Committee on 7th December 2018. The application was examined by State level Screening Committee and forwarded the recommendation to the Standing Committee. The recommendation was forwarded by the Standing Committee to the DGAP for further investigation on 09.10.2019. The DGAP has submitted his report on 28.01.2021 which was not as per the time limit specified under the law.

vii. The DGAP arbitrarily initiated investigation against him by referring to certain statutory provisions which have no relevance to the facts and circumstances of the case. Further, the investigation by the DGAP was in the nature of suo-moto investigation which was not permitted under law and the benefit of the Notification under Section 168A of the CGST Act could not be availed.

viii. He has relied upon the decision of Hon'ble Supreme Court in the case of Kuil Fire Works Industries Vs. CCE (1997) 95 ELT 3 and the decision of Hon'ble Gujarat High Court in the case of Gujarat Paraffins Pvt. Ltd. Vs. Union of India (2012) 282 ELT 33.

ix. There was no finding against him that he had continued to charge GST at the rate of 28% for the goods supplied after the date of reduction of tax rate.

x. He being a distributor was not authorized to alter the price of goods manufactured by the manufacturer.

xi. The product in question subject to fixation of MRP and he being a distributor was not entitled to alter the MRP and any attempt would result in violation of the provisions of Legal Metrology Act. In terms of Rule 18(5) of the Legal Metrology (Packaged Commodities) Rules, 2011 no wholesale dealer or retail dealer or other person should obliterate, smudge or alter the retail sale price indicated by the manufacturer or the packer or the importer as the case might be on the package or on the label affixed thereto.

xii. In the instant case, it was impossible to alter the MRP that was affixed by the manufacturer on the product and there was no special relaxation from the Ministry of Consumer Affairs at every point of time when there was a change in the rate of tax. It was a well-established principle that one could not be compelled to violate another law and the doctrine of impossibility would equally apply to the facts of the case.

xiii. When there was no procedure laid down for alteration of prices and no relaxation was given for alteration or modification of an MRP fixed by the manufacturer and when there were special orders passed permitting such modifications, insisting on reduction in price and alleging violation under Section 171 was legally not permissible.

xiv. The DGAP provided an arbitrary methodology to fix the price for the period prior to 15.11.2017 and for the period post 15.11.2017. The working provided in the table was not prescribed under the procedures and methodology issued under Rule 126. In fact, no methodology had been prescribed in Rule 126 covering specific situations.

xv. In the absence of machinery provisions and specific methodology for determining whether there was commensurate reduction in price or not on account of ITC availed or reduction in tax rates, the entire provision fails. The powers under Rule 126 had not been exercised and no methodology had been notified or prescribed and hence the determination of profiteered amount as per the report was violative of Section 171(2).

xvi. There was no notification published in the official gazette specifying any methodology or procedure industry wise or category wise. The website had a document titled as "Procedure &Methodology" said to be in exercise of powers under Rule 126 and was to come into force from the date of its Notification. However, the same was not in the nature of gazette notification and only finds place in the web site. The website document did not have any specific procedure or methodology for determining as to whether the reduction in tax rate or ITC availed had actually resulted in commensurate reduction in price.

xvii. He has also relied upon the decision of Hon'ble Supreme Court in the case of CIT Vs. B.C. Srinivasa Shetty (1981) 128 ITR 294, Seshadri Vs. District Magistrate (AIR 1954 SC 747) & Steel Authority of India Vs. State of Orissa (2000) 3 SCC 200 and the decision of Hon'ble Delhi High Court in the case of Suresh Kumar Bansal Vs. Union of India (2016) 43 STR 3.

7. Copy of the above submissions dated 18.03.2021 filed by the Respondent No. 1 were supplied to the DGAP for supplementary Report under Rule 133(2A) of the CGST Rules, 2017. The DGAP filed his clarifications on the Respondent No. 1's above submissions vide supplementary Report dated 08.04.2021 and has clarified that:-

i. In this sub-para (v), it had been clearly mentioned that while the clarification was being sought from the Standing Committee the invoices enclosed with application forwarded by the Standing Committee were scrutinized. On scrutiny it was observed that per unit price of impugned product charged by the Respondent No. 1 was increased in the invoice issued post-GST rate reduction period (after 14.11.2017) as compared to per unit price charged during pre-GST rate reduction period. Since it appeared that the benefit of reduction in tax rate was not passed on by the Respondent No. 1, and that Notice for Initiation of investigation was already issued to the Respondent No. 1 on 21.10.2019, investigation was preceded against the Respondent No. 1.

ii. The Standing Committee maintained his stand that as per the attached invoices and report of the State Screening Committee, it appeared to him that the manufacturer had indulged in profiteering rather than the dealer, and therefore investigation needed to be proceeded against the manufacturer. However, scrutiny of the impugned invoices of the Respondent during pre and post reduction period for the same product indicated that the Respondent No. 1had also indulged in profiteering. Therefore, investigation against the Respondent was carried out by the DGAP.

Further the DGAP was empowered under Rule 129(4) of the CGST Rules, 2017 to issue notices to such other persons as deemed fit for a fair inquiry into the matter. Therefore, initially it was decided to issue notice for Initiation of investigation to the Respondent No. 1 along-with the Respondent No. 2. Later, scrutiny of invoices issued by the Respondent No. 1 during pre and post rate reduction period indicated profiteering on part of the Respondent, as explained in para-13 (v) of the Report dated 28.01.2021.

iii. Initially the Standing Committee in his meeting held on 13.09.2019 decided to forward the complaint to the DGAP for detailed investigation as it had prima facie found evidence against the Respondent No. 1 i.e. M/s Rajkotia Medicare Pvt Ltd. Therefore, it was incorrect on part of the Respondent to state that the Standing Committee had not referred the matter to the DGAP for a detailed investigation under Rule 129(1) of the CGST Rules, 2017. No fresh investigation was initiated by the DGAP against the Respondent. Further, as per the provisions of Rule 129(4) Notice for initiation of investigation dated 21.10.2019 was issued to the Respondent No. 1. Although, the Standing Committee later maintained that investigation be carried out against the manufacturer, the DGAP through scrutiny of invoices issued by the Respondent No. 1 had doubt that the Respondent No. 1 had also indulged in profiteering. Accordingly, investigation was carried out against the Respondent No. 1 along-with the Respondent No. 2.

iv. The various notifications issued in view of prevalent pandemic of Covid-19 as detailed in para 4 of Report dated 28.01.2021 were very relevant to construe the last date to complete the investigation. In para 16-20 above, the recommendation of the Standing Committee and the reasons for investigating the case of the Respondent had been explained.

v. There were reasons to initiate investigation against the Respondent as explained in para 13 (v) of the Report dated 28.01.2021. Further, in para 16-20 above, it had been explained that the investigation carried out against the Respondent No. 1 had some basis and was not arbitrary. The case laws cited by the Respondent were not applicable as the notifications issued in view of the pandemic Covid-19 were directives of the Govt. so far as timelines were concerned. Also, there were foundations, as mentioned in para 16-20 above, to build up a case of profiteering against the Respondent No. 1.

vi. The question here was not of alteration of the price/MRP but of reducing the base price of the product when there was reduction in GST rate so that the commensurate benefit was passed on to the recipients.

vii. The Respondent did not reduce the selling price of the 'JUVEDERM VOLUMA WITH LIDOCAINE (2SYS X 1ML) BOX' when the rate of GST was reduced from 28% to 18% in the invoice no. R/2115/17-18 dated 23.11.2017. Hence, the question here was not of alteration of the price/MRP but of reducing the base price of the product when there was reduction in the rate of tax so the commensurate benefit was passed on to the recipients.

viii. The "Methodology and Procedure" has been notified by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the Rules and its main contours were enshrined in Section 171 (1) of the Act. The word "commensurate" mentioned in Section 171 gave the extent of benefit to be passed on by way of reduction in the prices which had to be computed in respect of each product based on the tax reduction as well as the existing base price of the product. The computation of commensurate reduction in the prices was purely a mathematical exercise based on certain parameters which would vary from product to product. Hence, no fix methodology can be prescribed to determine the amount of benefit required to be passed on to the recipients. Hence, a single formula, which fits all, could not be set.

ix. Profiteering was not a tax but it was a benefit which had accrued to the Respondent on account of reduction in tax rate which he needed to pass on to the eligible customers. The CGST Rules have provided an elaborate mechanism for determination of the benefits and hence, there was sufficient machinery to implement the anti-profiteering.

8. The Respondent No. 2 vide his submissions dated 16.03.2021 and 08.04.2021 has also filed his consolidated written submissions wherein he has stated that:-

a) No hearing had been provided by the DGAP even though the Respondent had specifically asked for the same, resulting in breach of principle of natural justice.

b) The statue prescribes no procedure and methodology, and thus, the complete exercise was left to the discretion of the DGAP, it was imperative that a personal hearing be granted at this stage in order to save the entire exercise getting vexed by arbitrariness. He has relied upon the decision of Hon'ble Supreme Court in Automotive Tyre Manufacturers Association (ATMA) vs Designated Authority and Ors. (2011) 2 SCC 258.

c) Any adverse report impacts the reputation and business of the entity. In this regard reference was made to the decision of the Hon'ble Supreme Court in the case of Rohtas Industries vs S.D. Agarwal and Anr AIR 1969 SC 707(1) and the decision of Hon'ble Delhi High Court in the case of Juggilal Kamlapat Cotton Spinning and Weaving Mills Co Ltd vs UOI ILR (1984) 2 783 (Delhi) relying on the Rohtas Industries (supra) and the decision of Hon'ble Bombay High Court in the case of Hardcastle Restaurants Private Limited vs Union of India W.P. (C) No 3492 of 2018.

d) As such, no opportunity of a personal hearing was granted to him to defend its position against the allegation being drawn up by the DGAP. In this regard, he has relied on the decision of various Hon'ble High Courts in various cases mentioned below:-

   i. The decision of Hon'ble Allahabad High Court in the case of Straw Board Manufacturing Co. Ltd. vs. Union of India [1995 (75) E.L.T 476 (All.)],
   ii. The decision of Hon'ble High Court of Ahmedabad in case of Harjit Singh Grewal Vs UOI 2018 (14) G.S.T.L. 22 (Guj.).
   iii. Uma Nath Pandey Vs. State of U.P. [2009 (237) E.L.T. 241 (S.C.)],

e) It was submitted that in view of the above, it was a duty on the part of the NAA to determine broad principles and guidelines on the basis of which profiteering could have been determined, especially when a person was

sought to be subjected to civil and penal consequences on failure to comply with the provisions of the law. Further, if it was the case of the DGAP, as it appeared from the Report dated 28.01.2021, that no uniform methodology or procedure could be prescribed for determination of the quantum of benefit to be passed on, would in itself show that the provisions as provided for in the law could not be implemented and the present proceedings are manifestly arbitrary and unreasonable.

f) The DGAP had arrived at the alleged profiteering amount by comparing the average Allergan Selling Price (ASP) for the period 01.11.2017 to 14.11.2017 with the actual selling price for the period under review. In his view, the same was arbitrary on account of the following:-

   i. For the period 01 November 2017 to 14 November 2017, he had effected sales to certain distributors at a reduced/special price in the normal course of trade and this had led to consideration of Average ASP that was significantly lower than the actual average;

   ii. Further the DGAP had failed to appreciate the nuances of his business to arrive at the profiteered amount Le trade reasons, profit margin should had remained intact pre and post GST rate change amongst others.

g) It was submitted that Rule 126 did not provide for a case to case determination but instead provides for a methodology to be given for determining whether reduction in the rate of tax or benefit of ITC had been passed on by the registered person to the recipients by way of commensurate reduction in price. Any exercise carried out without providing for a methodology/uniform guidelines inter alia with regard to meaning and scope of reduction in rate of tax", "benefit of ITC", "passed on", registered person 'recipients' 'commensurate and 'price' would not only lead to the entire proceedings being at the absolute discretion of the concerned authorities making it arbitrary, unreasonable and unfair but also render the very purpose of Rule 126 as futile. Hence, in the absence of the same the entire exercise would be in contradiction to Articles 14, 19(1)(g), 265 and 246A of the Constitution of India and the provisions of the Act and thereby liable to be quashed.

h) Section 171 of the CGST Act was in nature of anti-abuse provision and could not be construed in a manner that restricts the right of citizen to carry on

trade freely in terms of Article 19(1)(g). It was well settled that the right to reasonable profit was a part of right to trade and any methodology prescribed under Section 171 which was part of a taxing statute could not be de-hors a reasonable profit that might be earned by an enterprise. The very fact that the Impugned Report seeks to quantify an alleged amount of profiteering in instances where the Respondent No. 2 had suffered a loss was clearly demonstrative of the prejudicial and incorrect approach adopted by the DGAP.

i) The approach adopted by the DGAP restricts the right of the citizen to carry on trade freely and amounts to price fixation by the authorities, which was not the intent of the legislation. It was submitted that pricing of products was a complex exercise and products were not priced individually or in isolation at a unit level. The cost of taxes was only one of the elements that determined the final price. In a free market economy several considerations including forces of demand and competition, positioning in market determine the price of a product. Further, the statutory provisions only contemplate a broad co-relation between reduction of taxes and prices of products. It was submitted that the use of the term, commensurate' made it clear that the intent was to take overall facts and circumstances into consideration. The provision was in nature of anti-abuse provision for a business. A mere change in the rate of tax could not be considered as profit much less profiteering so as to lead to a reduction in price (without consideration of commensurate increase in cost and expenses including the purchase price of the product being sold) and the business of a registered dealer seen as a whole.

j) The sale price should vary depending upon the period considered as well as the composition of units sold during such period and accordingly there could not be a mean or average price derived for a 15 day period and applied as had been done in the present case. The correct approach might have been for the DGAP to consider the actual MRP and reduction required from a rate change perspective and towards this, adopt the last prevailing MRP (where several MRPs were available for the same product at a product level). In any view of the matter there was no rationale or sanctity to treat the discounted sale price of goods sold to special category of customers, between 1 November and 14 November as the bench mark for the average product price that ought to have been realized for the period 15 November to 30 September. Without prejudice, we further submit that, if the DGAP wished to embark on an average ideal sale price approach, they ought to have

compared the notional average price arrived at by them with the overall average sale price during the period of investigation as opposed to the present which defines logic, rationale or statutory backing. The entire approach of the DGAP in seeking to derive an "average" or "notional" sale price at a product category level for the period 1 November 2017 to 14 November 2017 and in seeking to apply the same to sales made during the period 15 November 2017 to 30 September 2019 was patently incorrect and liable to be quashed in toto.

k) The Impugned Order seeks to apply price reduction to stocks not covered by the rate reduction (i.e. pre GST stock and stock procured post GST rate change both of which should not be considered for any price change).

l) That assuming without accepting the allegation on profiteering, the Impugned Order ought to have considered only those goods that were imported at higher rate of tax as on the date of rate change and were sold by him subsequent to the event of change in GST rate. The directions forming a part of the order however made no such distinction and seem to cover pre-GST and stock procured post implementation of GST including stock currently bought and sold, the goods which had not witnessed the change in tax rate and had suffered only the revised lower rate of tax. Such application could potentially lead to a commercially inexpedient situation of the Respondent being forced to sell goods below their purchase price just to meet the requirements of the anti-profiteering provisions which were not formulated with the said intention in the first place. He was in the process of mapping the goods imported with the sale date to demonstrate the above explained incorrect method adopted to compute the profiteering amount.

m) He has issued credit notes amounting to Rs. 20,29,50,239/- to the distributors which in turn results in price reduction and the same had not been appreciated. The same should have been reduced from the alleged profiteered amount. The details of amount of credit notes issued by him for the period under review i.e. November 2017 to September 2019 has been furnished by him in the below mentioned table:-

S. No.	Particulars of goods	Amount of credit notes
1.	JUVEDERM ULTRA PLUS XC	5,76,42,251
2.	JUVEDERM VOLUMA XC	11,89,45,845
3.	JUVEDERM ULTRA XC	2,63,62,143
Total		20,29,50,239

n) On the basis of the above Table, the profiteered amount should have been reduced to the extent of such credit notes. Post giving effect to the same, the Respondent has tabulated the profiteering values in the Table mentioned below:-

Sl. No.	Particulars of goods	Alleged Profiteering amount	Amount of credit notes	Balance
1.	JUVEDERM ULTRA PLUS XC	5,81,88,648	5,76,42,251	5,46,398
2.	JUVEDERM VOLUMA XC	21,66,59,139	11,89,45,845	-1,61,37,573
3.	JUVEDERM ULTRA XC	1,02,24,570	2,63,62,143	9,77,13,294
TOTAL		**28,50,72,358**	**20,29,50,239**	**8,21,22,119**

o) The report/ quantification shared by the DGAP seems to focus only on positive instances of a difference between the so called and alleged Average Ideal Sale Price arrived at by the DGAP and the actual sale price. The proper approach for the DGAP would be to consider the overall reduction in price over cumulative instances of sales where both positive and negative values are equally considered. Those instances where he had sold products to its customers at a price lesser than the alleged ideal selling price (approved of by this Authority) should be considered while computing the total amount of the alleged profiteering. Accordingly it was submitted that insofar as the DGAP had not considered such instances, the Report was clearly erroneous and liable to be rejected.

p) The DGAP had issued a notice to him basis a specific compliant filed by an applicant with the product named "Juvederm Ultra Plus Xc" and "Juvederm Voluma". However, the DGAP had arrived at the profiteering amount by including an additional product i.e. Juvederm Ultra XC in addition to the aforementioned two products.

q) As per Section 171 and Rule 128, there was no mention of any power which allows the DGAP to take suo-moto cognizance of any alleged contravention of Section 171 in the absence of a compliant and to this extent and therefore expanded the scope of the investigation of the products to include such other products that did not form part of any complaint. The Respondent has relied upon the decision of Hon'ble Delhi High Court in the case of Reckitt Benckiser India Private Limited Vs Union of India. Computation of Profiteering to exclude transactions where the selling price had been decreased.

r) That there had been a reduction in the selling prices of all three products i.e. Juvederm Voluma, Juvederm Ultra Plus and Juvederm Ultra XC which were reviewed as part of the DGAP proceedings. In respect of two products Le Juvederm Ultra Plus and Juvederm Ultra XC, the prices had been reduced w.e.f. 15 January 2019 and the said reduction was lower than the average selling price as calculated by the DGAP. Thus on the said grounds this allegation needed to be set aside.

9. Copy of the above submissions dated 08.04.2021 filed by the Respondent No. 2 were supplied to the DGAP for Supplementary Report under Rule 133(2A) of the CGST Rules, 2017. The DGAP filed his clarifications on the Respondent's above submissions vide Supplementary Report dated 16.07.2021 and has clarified that:-

i. The Anti-profiteering law as provided under Section 171 of the CGST Act. 2017 and the Rules under Chapter XV of the CGST Rules, 2017 did not envisage any personal hearing by the DGAP. The mandate of the DGAP was to carry out a fair inquiry and investigation of any complaint/application referred by the Standing committee. The DGAP was not an adjudicating authority. After carrying out investigation, the DGAP submits its Report to the NAA who calls for further submissions from the Respondent and also gives personal hearing. Hence, there was no question of violation of principles of natural justice on part of the DGAP.

ii. The Report submitted by the DGAP was an internal document and not a public document. It was also not a final decision on the complaint made against the Respondent. The final decision on the matter was taken by the NAA by passing an order on the strength of the Report submitted by the DGAP and further submissions made by the Respondent before the Authority. In this case, the order which was a public document was yet to be passed. Therefore, it was not correct to assume that the investigation Report of the DGAP would have any civil consequences on him or affect his reputation.

iii. The "Methodology and Procedure" has been notified by this Authority vide its Notification dated 28.03.2018 under Rule 126 of the Rules and its main contours were enshrined in Section 171 (1) of the Act. The word "commensurate" mentioned in Section 171 gave the extent of benefit to be passed on by way of reduction in the prices which had to

be computed in respect of each product based on the tax reduction as well as the existing base price of the product. The computation of commensurate reduction in the prices was purely a mathematical exercise based on certain parameters which would vary from product to product. Hence, no fix methodology can be prescribed to determine the amount of benefit required to be passed on to the recipients. Hence, a single formula, which fits all, could not be set.

iv. Profiteering was not a tax but it was a benefit which had accrued to the Respondent on account of reduction in tax rate which he needed to pass on to the eligible customers. The CGST Rules have provided an elaborate mechanism for determination of the benefits and hence, there was sufficient machinery to implement the anti-profiteering.

v. Further, nowhere under the Anti-profiteering provisions has provided that the DGAP will provide any opportunity of hearing to the company investigated upon.

vi. The amount of profiteering had been arrived at by comparing the average base price during pre-rate reduction period with the actual base price during post-rate reduction period because the method of comparison of average price of pre-rate reduction with average price of post-rate reduction for computation of profiteering did not serve the purpose.

For Example-

In the pre rate reduction period a product 'X' might had been sold at a price of Rs.90/,92/95/98/- and 100/ in a day or during a month to different or same buyer falling under same category. The average price of all these sales would be Rs. 95/-. Now in post rate reduction era suppose the same product 'Z' was sold at Rs. 88/94/,95/- 97/and Rs. 101/- to different or same buyer then the following picture as shown in the below Table should emerge-

S. No	Pre-Rate reduction Price of Product 'X'			Post Rate Reduction Price of Product 'X'			Profiteering in case of **Average-to-Average** comparison	Profiteering in case of **Average-to-Actual** comparison
	Invoice No.	Base price declared on invoice	Average Base Price of product	Invoice No.	Base Price declared on Invoice	Average Base Price of product		
1	01	90	95	02	88	95	0	0
2	02	92		03	94			0
3	03	95		09	95			0
4	04	98		10	97			2
5	05	100		11	101			6

The comparison of average price of pre-rate reduction with average price of post-rate reduction, for computation of profiteering, would lead to a situation where a person/consumer who had paid Rs. 97/- or Rs. 101/- in post rate reduction would not be given any benefit of profiteering even though these recipients might have or might not have purchased goods in pre-rate reduction at a rate less than Rs. 95 even a new purchaser who purchased goods at Rs. 97/- in post-rate reduction would not get any benefit of profiteering.

From the above it was observed that the method of computation of profiteering on average-to-average price fails to serve the purpose of extending the benefit to each consumer on each transaction as enshrined under Section 171 of the CGST Act, 2017,

Thus, by taking Average to Actual method, it was ensured that:-

1. All transaction were covered for the purpose of calculation/computation.
2. Anyone who had actually suffered higher amount of money gets the benefit of rate reduction.
3. The intent and purpose of the Legislature for including a new Section 171 in the CGST Act, 2017 was fulfilled.

The instances where the invoice price in less than the average price, there was no profiteering and therefore such instances were not taken up while calculating profiteering.

vii. Section 171 of the CGST Act, 2017 simply mandates that the price had to be commensurately reduced by the supplier where there was reduction in rate of tax so that the actual benefit of reduction in rate of tax was passed on to the recipients. Therefore, there was no violation of the right of the Respondent enshrined under Article 14, 19(1)(9), 265 and Article 300A of the Constitution of India. Even in situations of loss, the Respondent had to pass on the benefit of reduction in rate of tax to the recipient Gain or loss accruing to the Respondent out of business was immaterial and could not absolve the Notices of passing on the due benefit to the recipient as no such exception had been provided under Section 171 of the CGST Act, 2017.

viii. Under the provisions of Section 171 of the CGST Act, 2017, no tax was being levied or collected from the Respondent. However, Section 171 of the CGST Act, 2017, mandates that any benefit of reduction in the rate of tax or the benefit of ITC which accrues to a supplier must be passed on to the consumers as both were concessions given by the Government and the suppliers were not entitled to appropriate such benefits by increasing their profit margin at the cost of the consumers. Such benefits must go to the consumers. Hence, Section 171 only requires the supplier to pass on the benefit of reduction in rate of tax or the benefit of ITC to his recipients by reducing the price commensurately and did not require him to seek any approval to conduct trade or fix prices of the products supplied by him.

Further, Section 171 of the CGST Act, 2017 requires the supplier of goods or services to pass on the benefit of reduction in tax rate or ITC to the recipients by way of commensurate reduction in price. If such benefit was not passed on by way of reduction in price and the benefit in appropriated by the supplier, it amounts to profiteering. The act of profiteering had got nothing to do with the profit making or the loss-making status of the supplier.

ix. As per practice, the period from 1.11.2017 to 14.11.2017 was taken for calculating average base price during pre-rate reduction period.

However, when a product was not found sold during the above period, the sale data in respect of that product was taken going backward viz. October 2017 through July, 2017.

x. The methodology adopted by the DGAP in such cases was uniform and in all such cases the pre-rate reduction average base price had been arrived at following the procedure described in sub-para above and the same was compared with the actual sale price during post-rate reduction period uniformly.

xi. The details of the credit notes issued to the distributors was not submitted by the Respondent. A credit note could be issued for multiple purposes. It could be accepted or considered while calculating profiteering only if there was specific mention in the credit notes that the same had been issued to pass on the benefit of reduction in tax rate in terms of Section 171 of the CGST Act, 2017. The case cited by the Respondent in respect of Maheshwari Infratech Pvt. Ltd. also mentions that the Authority had asked the DGAP to re-verify the credit notes issued to the extent that the same was towards passing on the benefit of the ITC.

xii. The negative values were not taken while arriving at profiteering. Only those instances are taken where the Respondent had collected more amount than required as per law and had not passed on the benefit in terms of Section 171 of the CGST Act, 2017. In the first place, he had not collected more amount wherever there are negative values Secondly, if the negative values are also taken, it would result in passing of incommensurate benefit of reduction in rate of tax to the recipients.

xiii. 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 Respondents contention that DGAP had exceeded its power by investigating products beyond contours of the complaint was incorrect and unacceptable.

xiv. The reduced selling price had been considered while calculating profiteering. In Annexure 25 of the Report, it could be seen that during January, 2019 and afterwards, in a number of cases where the actual selling price was below the average selling price, the profiteered amount was indicated as zero. However, during this period wherever the actual selling price was more than the average selling price, there was profiteering and the same had been indicated in the said Annexure.

10. The Respondent No. 1 has also filed his rejoinder dated 19.04.2022 on the clarifications dated 08.04.2021 submitted by the DGAP, vide which he has reiterated his submissions made earlier before this Authority and has interalia stated that:-

a. The methodology notified by this Authority is totally silent about the computational aspect as to how the authority will determine that the benefit of reduction in the rate of tax has been passed on or not.

b. The CGST Act has neither defined the term 'commensurate' or 'benefit of ITC' nor has prescribed any methodology to determine the commensurate reduction of benefit of ITC to be passed on to the recipients and again placed reliance of several case laws mentioned in their earlier submissions dated 18.03.2021.

c. As per Section 171, there has been no method provided for computation of profiteering.

11. The Respondent No. 2 has also filed his rejoinder dated 18.04.2022 on the clarifications dated 16.07.2021 vide which he has reiterated his submissions made earlier before this Authority and has inter-alia stated that:-

a. Since a proper hearing or an opportunity to present the facts of the case has not been provided, the DGAP has not been able to appreciate the nuances of the case in hand. This has led to DGAP putting up the report before the NAA based on its own assumptions and presumptions and a pre-determined mind-set causing grave injustice to the Respondent 2.

b. In case where the NAA confirms observations/findings made in the report of the DGAP then the same would cause grave civil consequences on him as any adverse report impacts the reputation and business of the entity. It is reiterated, that the Respondent 2 was never provided an opportunity to

explain various data/ information which was sought by the DGAP and was duly submitted by the Respondent 2 which has ultimately resulted in the DGAP arriving at the alleged profiteering amount basis it's whims and fancies.

c. The DGAP has failed to appreciate the fact that in a free market economy several considerations including forces of demand and supply, competition, positioning in market determine the price of a product. Further, the statutory provisions only contemplate a broad co-relation between reduction of taxes and prices of products. It is submitted that the use of the term, 'commensurate' makes it clear that the intent is to take overall facts and circumstances into consideration.

12. 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. The proceedings in the present case have been re-initiated. The Respondent No. 1 & 2 and the Applicant No. 1 were also granted hearing through video conferencing on 02.05.2022 and 06.06.2022. Ms. Meenakshi Agrawal, Applicant No. 1 appeared in person, Sh. Karan Rajkotia & Sh. Raghavendra CR (Advocate) appeared on behalf of the Respondent No. 1, Sh. Prashant Acharya, Sh. Anand Kamath, Sh. Ashish Maloo and Ms. Jayashree appeared on behalf of the Respondent No. 2 and Sh. Manoj Kumar, Assistant Commissioner appeared on behalf of the DGAP.

13. The Applicant No. 1 has filed her written submissions vide e-mail dated 26.03.2022 and has stated that she agreed with the Report of the DGAP and the Respondent No. 1 has not passed on the due benefit of reduction in the rate of tax to her till date.

14. The Respondent No. 1 has also filed his written submissions dated 15.06.2022 vide which he has reiterated his submissions made earlier before this Authority and has submitted the following details/documents:-

a. Price list of the impugned products w.e.f. 14.11.2017.
b. Price list of the impugned products w.e.f. 16.11.2017.
c. Details of the discount provided by him to his customers.
d. The alleged profiteered amount of Rs. 61,54,833/- in the hands of the Respondent No. 1 was clearly duplication in as much as the very same profiteering amount was already included in the hands of the Respondent No. 2.

e. Copies of the communication received from the Respondent No. 2 regarding the reduction of price to the end customers.

15. The Respondent No. 2 has also filed his written submissions dated 16.06.2022 vide which he has reiterated his submissions made earlier before this Authority and has submitted the following details/documents:-

a. Allergan Holding Inc. USA and Allergan Inc. USA are the holding company for Allergan Healthcare Pvt. Ltd.
b. He has submitted the transfer pricing reports for the FY 2016-17, 2017-18 and 2018-19 and the SVB Order.
c. The pricing of the Respondent No. 2's products were in lines with the Transfer pricing mechanism.
d. The Respondent No. 2 independently analyses the local markets and prices were set as per industry and competitive practices.
e. He is the sole importer and distributor of the impugned products.
f. He has obtained necessary permissions under the Drug License Authorities in India under Form 20B and Form 21B.
g. Allergan Group owns the formulation for the impugned products and the same being confidential data, he was following up with its global legal team to understand the ownership pattern and should be sharing the said information during the course of next personal hearing.
h. He imported the said products from the Allergan Pharmaceuticals International Ltd., Ireland and sold it to customer in India through chain of distributions.
i. He has not sent any communication regarding the price reduction to the distributors.
j. However, he has provided and indicated/suggested selling price to the distributors, however, distributors were free to determine their own resale price with applicable laws and regulations.
k. He has submitted the sample copies of the import invoices and Bill of Entries for the impugned products.
l. The credit notes issued by him to the distributors were accounted as net of sales i.e. the same were reduced from sales in the financial statements. Sample copies of credit notes were also submitted by him.

16. This Authority has carefully considered the Reports furnished by the DGAP, the submissions made by Respondent No. 1 & No. 2 and the Applicant No. 1 and the other material placed on record. On examining this various submissions, the Authority also finds that the following issues need to be addressed:-

a. Whether there was any violation of the provisions of Section 171 of the CGST Act, 2017 committed by Respondents?

b. Whether Respondents have passed on the commensurate benefit of reduction in the rate of tax to their customers and whether various issued raised by the Respondents like breach of principle of natural justice, absence of methodology etc. are tenable in the proceedings?

17. It is revealed from the records that the Respondent No. 1 is a distributor of the products manufactured by the Respondent No. 2. A complaint was filed by the Applicant No. 1 alleging profiteering by the Respondent No. 1 in respect of supply of three products namely "Juvederm Voluma with Licodaine, Juvederm Ultra Plus XC and Juvederm Ultra" and has alleged that increased the base prices of the subject goods in spite of GST rate reduction from 28% to 18 % vide Notification No. 41/2017 – Central Tax (Rate) dated 14.11.2017 w.e.f. 15.11.2017, indicating that the benefit of reduction in the GST rate from 28% to 18% was not passed on to the recipients. On scrutiny of the purchase invoices of the Respondent No. 1 issued by the Respondent No. 2 enclosed with the complaint, the DGAP has observed that the benefit of reduction in the rate of GST rate was not passed on to the recipients by way of commensurate reduction in the prices.

18. From the plain reading of Section 171 (1) of the CGST Act, 2017, it emerges that it deals with two situations:- one relating to the passing on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from record that there has been a reduction in the rate of tax from 28% to 18% w.e.f. 15.11.2017, on the above goods vide Notification No. 41/2017 – Central Tax (Rate) dated 14.11.2017. Therefore, the Respondent is liable to pass on the benefit of tax reduction to his customers in terms of Section 171 (1) of the above Act. It is also apparent that the present investigation has been carried out w.e.f. 15.11.2017 to 30.09.2019.

19. The Respondent No. 1 has vehemently argued that he was the distributor of the products manufactured by the Respondent No. 2 and thus, he is not liable to pass on the benefit of tax rate reduction to the recipients and the proceedings should not be maintained against him. With respect to the above contention, we find that the provisions of Section 171 of the CGST Act, 2017 itself provides that "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall*

be passed on to the recipient by way of commensurate reduction in prices." It is clear from the plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is ordered by the Central or the State Governments or a registered supplier avails benefit of additional ITC the same have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their tax revenue. In the present case, the Respondent No. 1, being a registered person under GST, is dealing with the products on which the tax rate has been reduced from 28% to 18% w.e.f. 15.11.2017 and thus, he is liable to pass on such benefit to his recipients/customers. Hence, the above contention made by him is incorrect and cannot be accepted.

20. The Respondent No. 1 has also argued that in the present case, the DGAP has not completed the investigation as per the provisions of CGST Act and CGST Rules. In this regard, we find that 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, has been specified in, or prescribed or notified under the CGST Act, 2017 which falls during the period from the 20th day of March, 2020 to the 29th day of June, 2020, and where completion or compliance of such action has not been made within such time, then, the time limit for completion or compliance of such action, shall be extended up to 30.06.2020. Vide Notification 55/2020-Central Tax dated 27.06.2020 and Notification No. 65/2020 dated 01.09.2020 and Notification No. 91/2020 dated 14.12.2020, it was further extended up to 31.03.2021. Hence, the DGAP has submitted his report within the specified time limit and as per the provisions of CGST Act and CGST Rules. Therefore, the contention of the Respondent No. 1 is not maintainable and cannot be accepted.

21. It has also been contended by the Respondent No. 1 that the Standing Committee on Anti-profiteering has recommended enquiry only against the Respondent No. 2 i.e. the manufacturer/importer and not against him. However, the DGAP has suo-moto initiated investigation against him. He has relied upon the decision of Hon'ble Supreme Court in the case of ***CIT VS Anjum. M.H Ghaswala (2002) I SCC 633, Competent Authority Vs Barangore Jute Factory (2005) 13 SCC 477 and The Privy Council in Nazir Ahmad Vs King Emperor AIR 1936 PC 253(2)*** in his support. In this regard, we find that the DGAP while scrutinizing the invoices bearing Invoice no. R/1140/17-18 dated 21.07.2017 consigned to Dr. Rashmi Shetty for the product " Juvederm Voluma with Lidocaine (2x1 ml) and Invoice no.

R/1782/18-19 dated 29.09.2018 consigned to the Applicant No. 1 issued by the Respondent No. 1, it was observed that the base price of the impugned product/products charged by the Respondent No. 1 to his customers was increased. Hence, it was clear that the benefit of reduction in the rate of tax has not been passed on by the Respondent No. 1 to his customers, which was a clear violation of the provisions of Section 171 of the CGST Act, 2017. Further, the original complaint filed by the Applicant No. 1 was against the Respondent No. 1. Hence, the above contention made by the Respondent No. 1 is not correct and is not liable to be accepted. Therefore, the above cases relied upon by the Respondent No. 1 are of no help to him as he was in clear violation of the provisions of Section 171 of the CGST Act, 2017.

22. The Respondent No. 1 has further argued that he being a distributor was not authorized to alter the Maximum Retail Price (MRP) of impugned products manufactured by the Respondent No. 2 i.e. the manufacturer and any attempt would result in violation of provisions of Legal Metrology Act. With respect to the above contention, we find that Maximum Retail Price ("MRP") is the maximum price at which goods can be sold in retail. The value of transaction between the manufacturer and the whole seller or the whole seller and the retailer is invariably less than the MRP. Therefore, regardless of whether MRP is required to be marked on the product or not, the pre and post-tax rate reduction transaction values are compared to determine profiteering. In case of closing stock carrying higher MRP, while the manufacturer is under statutory obligation to reaffix the revised MRP, everybody in the supply chain is also legally required to pass on the benefit of tax rate reduction by maintaining the base price and charging GST at the reduced rate on such base price. Further, the question of alteration of MRP did not arise here. The Respondent No. 1 was only required to charge the reduced rate of GST on the base price which he was charging earlier in the pre-GST rate reduction regime. Instead, the Respondent No. 1 has charged the reduced rate of GST on the increased base price of the impugned products which in turn resulted in non-passing on of the benefit of reduction in the rate of tax to his customers. Hence, the above contention of the Respondent being incorrect cannot be accepted.

23. The Respondent No. 1 & No. 2 have also contended this Authority was required to determine the *'methodology'* and *'procedure'* but the Respondent was unaware about framing of methodology nor he has been provided any computation methodology till date. Further, neither Section 171 of the CGST Act, 2017 nor did Rule 126 of the CGST Rules, 2017 provide specific methodology for determining the profiteering. Hence, in the absence of the same the entire exercise would be in

contradiction to Articles 14, 19(1)(g), 265 and 246A of the Constitution of India. They have also relied upon the decision of Hon'ble Supreme Court in the case of CIT Vs. B.C. Srinivasa Shetty (1981) 128 ITR 294, Seshadri Vs. District Magistrate (AIR 1954 SC 747) & Steel Authority of India Vs. State of Orissa (2000) 3 SCC 200 and the decision of Hon'ble Delhi High Court in the case of Suresh Kumar Bansal Vs. Union of India (2016) 43 STR 3. The above contention of the Respondents is without substance as the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC or for computation of the profiteered amount has been outlined in Section 171 (1) of the CGST Act, 2017 itself which provides that *"any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."* The Authority finds that, it is clear from the plain reading of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that if any reduction in the rate of tax is ordered by the Central and the State Governments or a registered supplier avails benefit of additional ITC post GST implementation, the same have to be passed on by him to his recipients since both the above benefits are being given by the above Governments out of their scarce and precious tax revenue. It also provides that the above benefits are to be passed on any supply i.e. on each product or unit of construction or service to every buyer and in case they are not passed on, the quantum of denial of these benefits or the profiteered amount has to be computed for which investigation has to be conducted in respect of all such products/units/services by the DGAP.

24. the 'profiteered amount' has been clearly defined in the explanation attached to Section 171. These benefits can also not be passed on at the entity / organisation / branch/ invoice/ business vertical level as they have to be passed on to each and every buyer at each product/unit/service level by treating them equally. The above provision also mentions "any supply" which connotes each taxable supply made to each recipient thereby making it evident that a supplier cannot claim that he has passed on more benefit to one customer on a particular product therefore he would pass less benefit or no benefit to another customer than what is actually due to that customer, on another product. Each customer is entitled to receive the benefit of tax reduction or ITC on each product or unit or service purchased by him subject to his eligibility.

25. The term "commensurate" mentioned in the above Sub-Section provides the extent of benefit to be passed on by way of reduction in the price which has to be computed in respect of each product or unit or service based on the price and the rate of tax reduction or the additional ITC which has become available to a registered person. The legislature has deliberately not used the word 'equal' or 'equivalent' in this Section and used the word 'Commensurate'. The benefit of additional ITC would

depend on the comparison of the ITC/CENVAT credit which was available to a supplier in the pre-GST period with the ITC available to him in the post GST period w.e.f. 01.07.2017. Similarly, the benefit of tax reduction would depend upon the pre rate reduction price of the product and quantum of reduction in the rate of tax from the date of its notification. Computation of commensurate reduction in prices is a mathematical exercise which is based upon the above parameters and hence it would vary from product to product or unit to unit or service to service and hence no fixed mathematical methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a buyer. Similarly, computation of the profiteered amount is also a mathematical exercise which can be done by any person who has elementary knowledge of accounts and mathematics as per the Explanation attached to Section 171.

26. This Authority has been authorised to determine the 'Procedure and Methodology', which has been done by it vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed mathematical formula, in respect of all the Sectors or the products or the services, can be set for passing on the above benefits or for computation of the profiteered amount, as the facts of each case are different. The facts of the cases relating to the sectors of Fast Moving Consumer Goods (FMCG), restaurant service, construction service and cinema service are completely different from each other and therefore, the mathematical methodology adopted in the case of one sector cannot be applied to the other sector.

27. The benefits are being given by the Central as well as the State Governments as a special concession out of their tax revenue in the public interest and hence the suppliers are not required to pay even a single penny from their own pocket and therefore, they are bound to pass on the above benefits as per the provisions of Section 171 (1) which are abundantly clear, unambiguous, mandatory and legally enforceable. The above provisions also reflect that the true intent behind the above provisions, made by the Central and the State legislatures in their respective GST Acts, is to pass on the above benefits to the common buyers who bear the burden of tax and who are unorganised, voiceless and vulnerable. It is abundantly clear from the above narration of the facts and the law that no elaborate mathematical calculations are required to be prescribed separately for passing on the benefit of tax reduction and computation of the profiteered amount. This Authority was under no obligation to provide the same to the Respondents. The Respondents cannot deny the benefit of tax reduction to his customers on the above ground and enrich himself at the expense of his buyers as Section 171 provides clear cut methodology and procedure to compute the benefit of tax reduction and the profiteered amount. Therefore, the Authority finds that the above plea of the Respondent cannot be accepted. Further, with respect to the cases relied upon by the Respondents, it is

mentioned that under Section 171 (1) no tax has been imposed and hence no computation provisions mentioned in the above case are required to be made. The Respondent cannot claim protection under Articles 14, 19(1)(g), 265 and 246A of the Constitution when he has violated the above Article himself by denying benefit of tax reduction to his various customers Hence, the law settled in the cases relied upon by the Respondents is not applicable in the present case.

28. The Respondent No. 2 has further contended that the DGAP has not provided any hearing to him during the course of investigation to defend his position against the allegation levelled on him and any adverse report impacts the reputation and business of the entity. He has also made reference to the decision of the Hon'ble Supreme Court in the case of **Rohtas Industries vs S.D. Agarwal and Anr AIR 1969 SC 707(1)** and the decision of Hon'ble Delhi High Court in the case of **Juggilal Kamlapat Cotton Spinning and Weaving Mills Co Ltd vs UOI ILR (1984) 2 783 (Delhi) relying on the Rohtas Industries** (supra) and the decision of Hon'ble Bombay High Court in the case of **Hardcastle Restaurants Private Limited vs Union of India W.P. (C) No 3492 of 2018** in support of his claim. In this regard it is mentioned that the DGAP being an investigating agency has no power to grant opportunity of hearing to the Respondent. However, it is apparent from the Report dated 28.01.2021 of the DGAP that the Respondent was duly issued notice dated 21.10.2019 under Rule 129 (3) by the DGAP putting him on notice that he would be investigated for not passing on the benefit of tax reduction. The Respondent has been granted sufficient opportunity by this Authority to counter the findings of the DGAP during the course of the present proceedings and hence he should have no grievance on this account. Therefore, the above cases relied upon by him are of no assistance to him as he has been given due notice by the DGAP.

29. It has also been contended by the Respondent No. 2 that comparing the pre-rate reduction average base prices with the post rate reduction actual base prices of the impugned products was arbitrary and for the period from 01.11.2017 to 14.11.2017, he has effected sales to certain distributors at a reduced/special prices in the normal course of trade and this had led to lower average prices than the actual average prices. In this regard, we observe that the methodology adopted by the DGAP for computation of the profiteered amount by comparing the average base prices of the products in respect of which the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017 with the actual post rate reduction base prices of these products appears to be correct, reasonable, justifiable and in consonance with the provisions of Section 171 of the CGST Act, 2017 as it was not possible to compare the actual base prices prevalent during the pre and the post GST rate reduction periods due to the reasons

that the Respondent was (i) selling his products at different rates to different customers based on the various factors (ii) the same customer may not have purchased the same product during the pre and the post rate reduction periods and (iii) the average base prices computed for a period of 14 days w.e.f. 01.11.2017 to 14.11.2017 or for the previous months provide highly representative and justifiable comparable average base prices. On the basis of the average pre rate reduction base prices the commensurate base prices have been computed and compared with the invoice wise actual base prices of the products as is evident from Table-A & C supra. However, the average pre rate reduction base prices were required to be compared with the actual post rate reduction base prices as the benefit is required to be passed on each product to each customer. In case average to average base prices are compared for both the periods, the customers who have purchased the products on the base prices which were more than the commensurate base prices would not get the benefit of tax reduction. Such a comparison would be against the provisions of Section 171 as well as Article 14 of the Constitution which require that each customer has to be passed on the benefit of tax reduction on each purchase made by him.

Further, the average base prices of the products have been arrived at by dividing the total quantity supplied with the total taxable value charged post discount. Therefore, the computation done by the DGAP is based on the transaction value as per the provisions of Section 15 of the CGST Act, 2017 which reads as under:-

> *"The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."*

Further, Section 15 (3) (a) of the above Act also provides that the value of the supply shall not include any discount which was given before or at the time of the supply if such discount had been duly recorded in the invoice issued in respect of such supply and thus, the GST was chargeable on the actual transaction value after excluding any discount (conditional as well as unconditional) and therefore, actual transaction value has been rightly considered by the DGAP for computation of profiteering. Discounted sales have no effect on the average base prices as has been claimed by the Respondent as discounts do not form part of the transaction value which has been compared with the post rate reduction transaction value for arriving at the profiteered amount. The benefit of tax reduction can also not be passed

though discounts as it can be passed only by way of commensurate reduction in the prices. The Respondent has himself submitted that the discounts offered by him were given due to various factors following the general market practices in the course of his business, which every other supplier may also give, if necessary, to promote his sales and hence, they cannot be considered while computing the average or the actual base prices. Therefore, the average base prices have been correctly calculated by the DGAP and all the claims made by the Respondent in this regard are not legally tenable.

30. The Respondent No. 2 has also argued that Section 171 violates the right to trade guaranteed under Article 19 (1) (g) of the Constitution of India and the right to trade included the right to reasonable profits which could not be taken away without any explicit authority under the law. Therefore, this form of price control was a violation of Article 19 (1) (g) of the Constitution of India. In this connection it would be relevant to mention that the Respondent has full right to fix his prices under Article 19 (1) (g) of the Constitution but he has no right to appropriate the benefit of tax reduction under the garb of the above right. Neither this Authority not the DGAP has acted in any way as a price controlling authority as he does not have the mandate to do so. Under Section 171 read with Rule 129 of the above Rules the DGAP has only been mandated to investigate whether both the benefits of tax reduction and ITC which are the sacrifices of precious tax revenue made from the kitty of the Central and the State Governments have been passed on to the end consumers who bear the burden of the tax. The intent of this provision is the welfare of the consumers who are voiceless, unorganized and vulnerable. The DGAP has nowhere interfered with the pricing decisions of the Respondent and therefore, there is no violation of Article 19 (1) (g) of the Constitution.

31. It has also been contended by the Respondent No. 2 that he has passed on the benefit of reduction in the rate of tax to his distributors by issuing credit notes amounting to Rs. 20,29,50,239/- and thus, the same amount be reduced from the alleged profiteered amount. This Authority has observed that the above claim of the Respondent is not substantiated by any verifiable record so as to determine the veracity of such claim. Hence, such claim of the Respondent needs proper verifiable documentary evidence from each and every distributor that they have received the benefit of rate reduction from the Respondent in the form of credit notes and verification of the authenticity of such documents. Hence, in the absence of authentic acknowledgment receipts/ verifiable evidence/ documents from the distributors/customers, the Authority finds that it cannot be accepted that the

Respondent No. 2 has passed on the benefit of GST rate reduction to his distributors/customers.

32. The Respondent No. 2 has further contended that the DGAP has ignored the negative values and resorted to 'zeroing' to compute higher profiteering. If these negative values be considered, the total profiteered amount would be reduced by Rs. 12,80,368/- The above contention of the Respondent is not correct as no netting off can be applied in the cases of profiteering as the benefit has to be passed on to each customer which has to be computed on each Stock Keeping Unit SKU. Netting off implies that the amount of benefit not passed on certain SKUs will be subtracted from the amount of benefit passed on other SKUs and the resultant amount shall be determined as the profiteered amount. If this methodology is applied the Respondent shall be entitled to subtract the amount of benefit which he has not passed on from the amount of benefit which he has claimed to have passed, which will result in complete denial of benefit to the customers who were entitled to receive it. Every recipient of goods or services is entitled to the benefit of tax rate reduction by way of reduced prices and Section 171 does not offer the Respondent to suo-moto decide on any other modality to pass on the benefit of reduction in the rate of tax to his recipients. Therefore, any benefit of tax rate reduction passed on to a particular recipient or customer cannot be appropriated or adjusted against the benefit of tax rate reduction due to another recipient or customer. Hence, this methodology of 'netting off' cannot be applied in the present case as the customers have to be considered as individual beneficiaries and they cannot be compared with netted off. This Authority has also clarified in its various orders that the benefit cannot be computed at the product, service or the entity level as the benefit has to be passed on each supply of goods and services. Hence, the above contentions of the Respondent are not correct as the Respondent cannot apply the above methodology of netting off as it would result in denial of benefit to the customers which would resulted in violation of the provisions of Section 171 of the above Act as well as Article 14 of the Constitution. Accordingly, the profiteered amount cannot be reduced by Rs. 12,80,368/-.

33. The Respondent has also argued that the complaint filed by the Applicant No. 1 was with respect to the products namely "Juvederm Ultra Plus Xc" and "Juvederm Voluma". However, the DGAP had arrived at the profiteering amount by including an additional product i.e. Juvederm Ultra XC in addition to the aforementioned two products. As per Section 171 and Rule 128, there was no mention of any power which allows the DGAP to take suo-moto cognizance of any alleged contravention of Section 171 in the absence of a compliant and to this extent and therefore expanded

the scope of the investigation of the products to include such other products that did not form part of any complaint. In this connection this Authority finds that under the provisions of Section 171 (2), the DGAP as investigating arm of this Authority has mandate to investigate all infringements of the above Section as per the provisions of Rule 129. Therefore, the DGAP is bound to investigate all the products on which the rate of tax has been reduced and therefore, there is no question of his expanding the investigation suo-moto. Hence, the above argument of the Respondent is not tenable.

34. The Respondent No. 2 has alleged that in respect of two products Juvederm Ultra Plus and Juvederm Ultra XC, the prices had been reduced w.e.f. 15 January 2019 and the said reduction was lower than the average selling price as calculated by the DGAP. Hence, the allegations should be set aside on the above ground. In this regard, we observe that while calculating the profiteered amount, the DGAP has considered only the reduced selling price wherever reduced. As per the Annexure-25 of the report of the DGAP, it is seen that during January, 2019 and afterwards, the cases where the post-tax rate reduction actual selling price was below the pre-tax rate reduction average selling price, the profiteered amount was indicated as zero. Hence, profiteering has not been calculated in the cases where the Respondent has charged post tax rate reduction price below the average pre tax rate reduction selling price of the products to his customers. Hence, the above allegation made by the Respondent cannot be accepted.

35. This Authority determines that the amount profiteered by the Respondent No. 1 and No. 2 is Rs. **61,54,833**/- and Rs. **28,50,72,358**/- respectively. The amount profiteered by the Respondent No. 2 is inclusive of the amount profiteered by the Respondent No. 1. Hence, the Respondent No. 2 is liable to pass on the profiteered amount of Rs. **61,54,833**/- to the Respondent No. 1 and thus, the Respondent No. 1 is liable to pass on this benefit of rate reduction due to the Applicant No. 1 and the remaining amount in the Central and concerned State Consumer Welfare Fund.

36. Based on the above facts the profiteered amount in the case of the Respondent No. 1 is determined as Rs. **61,54,833**/- which includes Rs. **38,267**/- as profiteered amount collected by him from the Applicant No. 1 for the period from 15.11.2017 to 30.09.2019. The Applicant No. 1 is resident of State of Maharashtra, as such the said amount of Rs. 38,267/- would be subtracted from allocation of State of Maharashtra. The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. **61,16,566**/- is mentioned in the below Table:-

S. No.	State Code	State	Profiteered Amount (Rs.)
1	04	Chandigarh	5355
2	08	Rajasthan	58903
3	27	Maharashtra	6090575 (-) 38267= 6052308
	Grand Total		**61,16,566/-**

37. Accordingly, the Respondent No. 1 is directed to pass on Rs. 38,267/- to the Applicant No. 1 as the benefit of rate reduction alongwith applicable interest to be calculated from the dates on which the above amount was realized by the Respondent from the Applicant No. 1 till the date of its return/refund. He is further directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. Further, since the other recipients of the benefit, as determined, are not identifiable, the Respondent No. 1 is directed to deposit the balance amount of Rs. **61,16,566**/- in two equal parts in the Central Consumer Welfare Fund and the concerned State Consumer Welfare Fund as per the provisions of Rule 133 (3) (c) of the CGST Rules 2017, along with interest payable @ 18% to be calculated from the dates on which the profiteered amount was realized by the Respondent No. 1 from his recipients till the date of its deposit in the particular Consumer Welfare Fund as prescribed and in accordance with the provisions of Rule 133 (3)(b) of the CGST Rules, 2017. The above amount of Rs. **61,54,833**/- shall be deposited/returned/refunded, as specified above, within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned CGST/SGST Commissioners.

38. The profiteered amount in the case of the Respondent No. 2 is determined as Rs. **28,50,72,358**/- for the period from 15.11.2017 to 30.09.2019. Accordingly, the Respondent No. 2 is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules.

39. The above amount profiteered by the Respondent No. 2 is inclusive of Rs. **61,54,833/-**, the amount profiteered by the Respondent No. 1. Since the Respondent No. 1 is identifiable, the Respondent No. 2 is directed to pass on the above benefit of rate reduction to the Respondent No. 1 as per the provisions of Rule 133 (3) (c) of the CGST Rules 2017, along with interest payable @ 18% to be calculated from the dates on which the profiteered amount was realized by the Respondent No. 2 from the Respondent No. 1 till the date of its refund/return as prescribed and in accordance with the provisions of Rule 133 (3)(b) of the CGST Rules, 2017. The above amount of Rs. 61,54,833/- shall be refunded/returned, as

specified above, within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned CGST/SGST Commissioners

40. Further, since the recipients (other than the Respondent No. 1) of the benefit of rate reduction are not identifiable, the Respondent No. 2 is directed to deposit the remaining profiteered amount of Rs. **27,89,17,525**/- in two equal parts in the Central Consumer Welfare Fund and the concerned State Consumer Welfare Fund as per the provisions of Rule 133 (3) (c) of the CGST Rules 2017, along with interest payable @ 18% to be calculated from the dates on which the above amount was realized by the Respondent No. 2 from his recipients till the date of its deposit as prescribed and in accordance with the provisions of Rule 133 (3)(b) of the CGST Rules, 2017. The above amount of Rs. **27,89,17,525**/- shall be deposited, as specified above, within a period of 3 months from the date of passing of this order failing which it shall be recovered by the concerned CGST/SGST Commissioners.

41. The place (State or Union Territory) of supply-wise break-up of the total profiteered amount of Rs. **27,89,17,525**/- in respect of the Respondent No. 2 is mentioned in the below Table:-

S. No.	State Code	State	Profiteered Amount (Rs.)
1	01	Jammu & Kashmir	25809
2	03	Punjab	2343331
3	04	Chandigarh	8272319 (-) 5355= 8266964*
4	06	Haryana	3995037
5	07	Delhi	88044015
6	08	Rajasthan	3293020 (-) 58903= 3234117**
7	09	Uttar Pradesh	1273733
8	10	Bihar	314180
9	14	Manipur	210894
10	18	Assam	3985319
11	19	West Bengal	9767890
12	21	Orissa	749348
13	22	Chhattisgarh	400467
14	23	Madhya Pradesh	1447988

15	24	Gujarat	11126726
16	27	Maharashtra	96436737 (-) 60,90,575= 90346162***
17	29	Karnataka	19117063
18	30	Goa	1576769
19	32	Kerala	3375799
20	33	Tamil Nadu	8880247
21	36	Telangana	20199944
22	37	Andhra Pradesh (New)	235724
	Grand Total		**27,89,17,525/-**

(*, **, ***):- These amounts have been arrived at by subtracting the state-wise profiteered amount determined in the case of the Respondent No. 1 from the state-wise profiteered amount in the case of the Respondent No. 2.

42. It is evident from the above narration of facts that the Respondents have denied the benefit of tax reduction to the customers in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus resorted to profiteering. Hence, they have, committed an offence under section 171 (3A) of the CGST Act, 2017 and therefore, they are liable to penal action under the provisions of the above Section. However, since the provisions of Section 171 (3A) come have come into force w.e.f. 01.01.2020, whereas, the period during which violation has occurred is w.e.f 01.07.2017 to 30.09.2019, hence the penalty prescribed under the above Section cannot be imposed on the Respondents retrospectively.

43. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the concerned Commissioners of CGST/SGST to monitor this order by ensuring that the amount profiteered by the Respondent No. 1 & 2 as ordered by this Authority is deposited in the CWFs of the Central and the concerned State Government as per the details given above. A report in compliance of this order shall be submitted to this Authority by the concerned Commissioner within a period of 4 months from the date of receipt of this order.

44. This Authority has also observed that the Respondent No. 1 and No. 2 has not passed on the benefit of rate reduction to their customers when the rate of GST was reduced from 28% to 18% w.e.f. 15.11.2017 and has not reduced the prices of the products manufactured/sold by them till date. Hence, this Authority, in terms of Rule 133(5) of the CGST Rules, 2017 read with Section 171(2) of the CGST Act, 2017

directs the DGAP to investigate profiteering in relation to all the products inclusive of the impugned products manufactured/sold by the Respondent No. 1 & No. 2 where the rate of GST has been reduced till the period when the prices of the products have been reduced by both the Respondents.

45. Further, the Hon'ble Supreme Court, vide its Order dated 23.03.2020 in Suo Moto Writ Petition (C) no. 3/2020, while taking *suo-moto* cognizance of the situation arising on account of Covid-19 pandemic, has extended the period of limitation prescribed under general law of limitation or any other special laws (both Central and State) including those prescribed under Rule 133(1) of the CGST Rules, 2017, as is clear from the said Order which states as follows:-

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

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

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

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

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

Sd/-
(Amand Shah)
Technical Member &
Chairman

Sd/-
(Pramod Kumar Singh)
Technical Member

Sd/-
(Hitesh Shah)
Technical Member

Certified Copy

(Dinesh Meena)
Secretary, NAA

File No. 22011/NAA/15/Allergan/2021 Date:- 31.08.2022

Copy To:-

1. M/s Rajkotia Medicare Pvt. Ltd., 19/19A, Nand Deep Industrial Estate, Kondivita Lane Andheri Kurla Road, Andheri (E), Mumbai-400059.
2. M/s Allergan Healthcare India Pvt. Ltd., Lever 6&7, Prestige Obelisk, No. 3, Kasturba Road, Ambedkar Veedhi, Bengaluru, Karnataka-560001.
3. Dr. Meenakshi Agarwal, 168, Vidhya Apartments, near Hinduja Hospital, Veer SavarkarMarg, Mahim West, Mumbai-400016.
4. Directorate General of Anti-Profiteering, 2nd Floor, BhaiVir Singh SahityaSadan, BhaiVir Singh Marg, New Delhi-110001.
5. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010
6. Chief Commissioner of Central Goods & Services Tax, Mumbai Zone GST Building, 115 M.K. Road, Opp. Churchagate Station, Mumbai-400020
7. Commissioner of Commercial Taxes, Vanijya Therige Karyalaya, 1st Main Road, Gandhinagar, Bangalore- 560 009.
8. Principle Chief Commissioner of CGST, C.R. Building, Queen's Road, Bengaluru-560001.
9. Commissioner of Commercial Taxes, Office of the Chief Commissioner of State Tax, Eedupugallu, Krishna District, Andhra Pradesh.
10. Commissioner of Commercial Taxes, Office of The Commissioner of Taxes, Government of Assam, Kar Bhawan, Ganeshpuri, Dispur, Guwahati - 781 006.
11. Commissioner of Commercial Taxes, Additional Commissioner (GST), Commercial Tax Department, Ground Floor, Vikas Bhawan, Baily Road, Patna – 800 001
12. Commissioner of Commercial Taxes, Commercial Tax, SGST Department, Behind Raj Bhawan, Civil Lines, Raipur - 492 001
13. Commissioner of Commercial Taxes, Office of Commissioner of Commercial Tax, Vikrikar Bhavan, Old High Court Building, Panji, Goa- 403 001
14. Commissioner of Commercial Taxes, C-5, Rajya Kar Bhavan, Near Times of India, Ashram Road, Ahmedabad.
15. Commissioner Of Commercial Taxes, Vanijya Bhavan, Plot No. 1-3, Sector-5, Panchkula- 134 151.
16. Commissioner of Commercial Taxes, Excise & Taxation Complex, Rail Head Jammu.

17. Commissioner of Commercial Taxes, Government Secretariat, Thiruvananthapuram -695001.
18. Commissioner of Commercial Taxes, Department of Taxes, Old Guwahati High Court Complex, North Aoc, Imphal West, Manipur - 795 001.
19. Commissioner of Commercial Taxes, Office of The Commissioner of State Tax, Banijyakar Bhawan, Old Secretariat Compound, Cuttack - 753 001.
20. Commissioner of Commercial Taxes, Office Of Excise And Taxation Commissioner, Bhupindra Road, Patiala- 147 001
21. Commissioner of Commercial Taxes, Kar Bhavan, Ambedkar Circle, Jaipur, Rajasthan - 302 005.
22. Commissioner of Commercial Taxes, Papjm Building, Greams Road, Chennai – 600 006.
23. Commissioner of Commercial Taxes, O/O The Commissioner of State Tax, Ct Complex, Nampally Station Road, Hyderabad - 500 001.
24. Commissioner of Commercial Taxes, Office Of The Commissioner, Commercial Tax, U.P. Commercial Tax Head Office Vibhuti Khand, Gomti Nagar, Lucknow (U.P)
25. Commissioner of Commercial Taxes, 14, Beliaghata Road, Kolkata - 700 015.
26. Commissioner of Commercial Taxes, Deptt Of Trade & Taxes, Vyapar Bhavan, IP Estate, New Delhi-2 Pin: 110 002
27. Chief Commissioner of Central Goods & Services Tax, Bhopal Zone 48, Administrative Area, Arera Hills, Hoshangabad Road, Bhopal M.P. 462 011
28. Chief Commissioner of Central Goods & Service Tax C.R. Building Rajaswa Vihar, Bhubaneswar-751007
29. Chief Commissioner of Central Goods & Service Tax Chandigarh Zone C.R. Building, Plot No.19a, Sector17c, Chandigarh-160017
30. Chief Commissioner Central Goods & Service Tax , Cochin Zone C.R.Building, I.S. Press Road, Ernakulum Cochin-682018
31. Chief Commissioner of Central Goods & Services Tax Delhi Zone C.R. Building, I.P. Estate, New Delhi-110 109
32. Chief Commissioner of Central Goods & Service Tax, Hyderabad Zone GST Bhavan, I.B. Stadium Road, Basheer Bagh, Hyderabad 500 004.
33. Chief Commissioner of Central Goods & Services Tax Jaipur Zone, New Central Revenue Building, Statue Circle, Jaipur 302 005
34. Chief Commissioner of Central Goods & Services Tax, Meerut Zone Opp. Ccs University,Mangal Pandey Nagar, Meerut-250 004.
35. Chief Commissioner of Central Goods & Services Tax, Telangkhedi Road, Civil Lines, Nagpur 440001.
36. Chief Commissioner of Central Goods & Services Tax Panchkula Sco 407408, Sector-8, Panchkula.
37. Chief Commissioner of Central Goods & Services Tax, Pune Zone GST Bhawan Ice House, 41a, Sasoon Road, Opp. Wadia College, Pune-411001.
38. Chief Commissioner Of Central Goods & Services Tax, (Ranchi Zone) 1st Floor, C.R. Building, (Annex) Veer Chand Patel Path Patna, 800001.
39. Chief Commissioner Of Central Goods & Services Tax, Shillong Zone North Eastern, 3rtd Floor, Crescens Building, MG Road, Shillong-793 001.
40. Chief Commissioner of Central Goods & Services Tax, Vadodara Zone 2nd Floor, Central Excise Building, Race Course Circle, Vadodara 390007.
41. Chief Commissioner of Central Goods & Services Tax Visakhapatnam Zone GST Bhavan, Port Area, Visakhapatnam-530 035.
42. NAA website/Guard file.