BEFORE THE COMPETITION COMMISSION OF INDIA

(AUTHORITY UNDER SECTION 171 OF THE CENTRAL GOODS & SERVICES TAX ACT, 2017)

Case No.	:	24/2023
Date of Institution	:	01.02.2021
Date of Order	:	30.11.2023

In the matter of:

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.

Applicant

Versus

M/s Smookey Kitchen Foods OPC Pvt. Ltd., (Franchisee of M/s Subway Systems India Pvt. Ltd.), G07 & G08, Ground Floor, Newtech LaGracia, Crossing Republik, Ghaziabad, Uttar Pradesh-201016.

Respondent

Coram:-

1. Smt. Ravneet Kaur, Chairperson
2. Sh. Anil Agarwal, Member
3. Sh. Deepak Anurag, Member
4. Ms. Sweta Kakkad, Member

Present:-

1. None for the Respondent.

ORDER

1. The National Anti-Profiteering Authority (**NAA**) vide Interim Order No. 23/2020 dated 13.10.2020 in this matter had passed the following order:-

   i. *"However, we observe that the DGAP, vide his clarificatory report dated 24.06.2020, had reported that while computing the quantum of profiteering, the sales data of the World Sandwich Day (WSD) on 03.11.2017 had been excluded while working out the product-wise base prices for the pre-tax rate reduction period, i.e., from 01.11.2017 to 14.11.2017. We find that under this offer, the Respondent was offering one similar product free for every product purchased by a customer on 03.11.2017. We also observed that the DGAP had reported that the sales data of the World Sandwich Day (WSD) was an outlier and hence an exception. We find this exclusion improper because in several similar cases pertaining to other franchisees of M/s Subway India, the sales data of WSD or sales data related to a similar "Buy One Get One" scheme, was not excluded by the DGAP while computing profiteering in similar cases of franchisees of M/s Subway India. It was apparent that the exclusion of the sales data of 03.11.2017 makes the computation of profiteering in this case different from the computation made in the case of Order Nos. 14/2020, 17/2020, 18/2020, and 36/2020 wherein the DGAP had not excluded the sales data of Buy One Get One (BOGO) offer or the WSD offer offered by those Respondents while working out the product-wise base prices for the period from 01.11.2017 to 14.11.2017. Hence the method used for computation of profiteering, in this case, becomes an aberration and thus unacceptable".*

ii. *"In terms of the above observation and without dwelling upon any other aspect of the case and without going into any other contentions of the Respondent, this Authority, under the powers conferred on it under Rule 133(4) of the CGST Rules read with Section 171 of the CGST Act 2017, directs the DGAP to reinvestigate this case and re-compute the quantum of profiteering by duly incorporating the sales data of the World Sandwich Day as on 03.11.2017 in the calculation of the pre-tax rate reduction prices. While reinvestigating the matter on the above lines, all other contentions made by Respondent before this Authority during the course of the hearings might also be considered and also directed to reinvestigate the matter and submitted the Report keeping in view the aforesaid issues".*

2. The brief facts of the case had been mentioned in the NAA's I.O. No. 23/2020 dated 13.10.2020 and the same are reproduced below:

(a) A reference was received from Standing Committee on Anti-profiteering, under Rule 128 of the CGST Rules, 2017, on 01.07.2019 to conduct a detailed investigation alleging that the Respondent had not passed on the benefit of reduction in the GST rate from 18% to 5% w.e.f 15.11.2017 vide Notification dated 46/2017-Central Tax (Rate) dated 14.11.2017 by way of commensurate reduction in price, in terms of Section 171 of the CGST Act, 2017.

(b) The DGAP had examined the above reference from the Standing Committee on Anti-profiteering on 01.07.2019 and a Notice under Rule129(3) of the CGST Rules, 2017, was issued by the DGAP to the Respondent on 09.07.2019 to reply whether

he admitted that the benefit of reduction in GST rate w.e.f 15.11.2017, had not been passed on to the recipients by way of commensurate reduction in prices and if so, to suo moto determine the quantum thereof and indicate the same in reply to the Notice as well as furnish all supporting documents to evidence the same. The rate of GST on service supplied by the Respondent was reduced from 18% to 5% and if so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

(c) The Period covered by the current investigation was from 15.11.2017 to 30.06.2019.

(d) The Respondent had submitted to the DGAP that the ITC amounting to Rs. 99,582/- was available to the Respondent during the period July, 2017 to October, 2017, which was 6.03% of the net taxable turnover of the restaurant service amounting to Rs. 16,50,592/- supplied during the same period. Further, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent. A summary of the computation of ration of ITC to the taxable turnover of the Respondent had been furnished in Table-A below: -

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

Particulars	Jul-2017	Aug-2017	Sept.-2017	Oct.- 2017	Total
Total Outward Taxable Turnover as per GSTR-3B(A)	4,84,207	4,11,860	3,75,948	3,78,577	16,50,592
ITC Availed as per GSTR-3B (B)	24,294	26,549	19,937	28,802	99,582
Ratio of ITC to Net Outward Taxable Turnover (C) =B/A*100					6.03%

(e) The Analysis of the details of item-wise outward taxable supplies during the period 15.11.2017 to 30.06.2019, reveals that the Respondent had increased the base prices of different items supplied as part of restaurant service to make up for the denial of ITC post-GST reduction. To ascertain the profiteering on the basis of the aforesaid pre and the post GST rates, the DGAP had explained the methodology with the help of one illustration viz. of a particular item "6" 'Paneer Tikka' for which the average base price had been calculated during the pre-GST reduction period of 1st November, 2017 to 14 November, 2017 and then profiteering had been calculated for post GST rate reduction invoice no. 1/A-9907 dated 15.11.2017 as tabulated below in "Table B": -

"Table- B" **(Amount in Rs.)**

Name of the Product (A)	"6" Paneer Tikka"
Total Quantity sold from 01.11.2017 to 14.11.2017 (B)	74
Sum of Taxable Value during 01.11.2017 to 14.11.2017	9086*
Average base price from 01.11.2017 to 14.011.2017 D=C/B	122.79
Base price with denial of ITC @ 6.03% (E=D+D*6.03%)	130.19
GST @ 5% (F=E*5%)	6.51
Total price to be charged (G=E+F)	136.70
Selling price per unit as per invoice no. 1/A-9907 dated 15.11.2017 (H)	165
Total Profiteering (I=H-G)	28.30 165-136.70)

(*This table has been taken from DGAP Report dated 28.01.2020 However, figure in Row 'c' should be read as 9086 instead of 9806.)

(f) From the above table, it would emerge that the Respondent did not reduce the selling price commensurately of "6" Paneer Tikka" when the GST rate was reduced from 18% to 5% w.e.f 15.11.2017 and hence profiteered an amount of Rs. 28.30/- on a particular invoice 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.

(g) On the basis of the above calculation as illustrated in table 'B' above, profiteering in the case of all impacted goods of the Respondent supplied had also arrived Rs. 6,49,397/- in similar way.

3. The Respondent, vide his written submissions dated 03.03.2020, has made the following contentions against the DGAP's report: -

(a) That the DGAP has compared the discounted average prices of the pre-tax reduction period from 01.11.2017 to 14.11.2017 with the actual prices post GST rate reduction for the subsequent period for computing the quantum of profiteering; that this approach adopted by the DGAP was arbitrary and there was no uniformity in the mechanism adopted by the DGAP.

(b) That the special 50% discount he had offered to his customers on the occasion of World Sandwich Day on 3rd November 2017, which is celebrated by all Subway franchisees every year as a means of business promotion has not been excluded from the calculation of the pre rate reduction average prices by the DGAP, whereas it ought to have been excluded as an exception

or an outlier; that due to this inclusion of the discounted prices on 03.10.2017, for calculation of the average price pre-GST rate reduction, the computation has become flawed and has resulted in an inflated quantification of the profiteered amount; that in other words, it was very common in the restaurant business to offer discretionary discounts to customers based on the business and market practices such as sales, inventory position, competition, competitor strategy, market penetration, customer loyalty, and other similar factors; that as the supplier, he was not only offering these discounts but also had the right to withdraw the discounts and promotional offers anytime and that there was no rule governing that any deal or discount could not be withdrawn until the expiry of a specified period;

(c) That the DGAP has erred by computing the average pre rate reduction prices based on the total sales, by including the discounted as well as normal sales, during the period 01.11.2017 to 14.11.2017; that if the discounted prices of the World Sandwich Day had been excluded the profiteered amount would stand reduced by Rs. 88,270/-.

(d) That DGAP ought to have taken the pre-tax rate reduction average prices (without considering discounted sales) and compared the same with the post-tax rate reduction average prices so that the basis of comparison was the same; further that for a few items which had not been supplied by him in the period from 01.11.2017 to 14.11.2017, the DGAP has inexplicably relied on the prices of supplies effected during the

months of September 2017 & October 2017, which was improper; that the DGAP ought to have taken a uniform pre-tax rate reduction period for all items supplied by him.

(e) That the quantum of profiteering should have been calculated by the DGAP only up to the date of the next price revision affected by him (the Respondent) as any such price revision was on account of business reasons only; that while the tax rate has been reduced on restaurant service from 18% to 5% without the benefit of Input tax credit effective from 15.11.2017, the DGAP has calculated the profiteered amount of Rs. 6,49,397/- from 15.11.2017 till 30.06.2019, i.e. for a period of approximately 20 months which was improper as all the price revisions effected by him in this period of 20 months have been incorporated in the computation, ignoring the fact that he, as the supplier, had the right to increase his prices on account of various reasons other than tax; that on this account, the profiteered amount was incorrectly inflated as it has been computed taking into account the higher product prices since the prices had been increased by him in February 2019 on account of general inflation and other expenses; that consequentially, the average alleged quantum of profiteering which was 8.22% of the monthly turnover for the period before February 2019, increased to 11.60% of the turnover in the period after February 2019, i.e. a jump of almost 3.50% :

(f) That the right to trade is a fundamental right guaranteed under Article 19(1) (g) of the Constitution of India and the right to trade

includes the right to determine prices and such right which has been granted by the Constitution of India can't be taken away without any explicit authority under the Law. Therefore, the way in which profiteering has been calculated by the DGAP for the entire period up to June 2019 is a violation of Article 19(1)(g) of the Constitution of India; that, in other words, though the tax rate reduction from 18% to 5% became effective from 15.11.2017 and thereafter there was no change in the tax for restaurant service, the DGAP has calculated the quantum of profiteering for the entire period till June 2019, ignoring the fact that the Respondent had the fundamental right to increase the prices of his products, which he has exercised only after 15 months (approx.) from the of tax rate reduction and thus the DGAP has worked like a price controlling authority improperly; that there were no guidelines in the statute itself that prescribed the mechanism to be followed by the Respondent for revision of price and up to what period, the prices of products should not be increased; that thus the profiteered amount ought not be calculated on the increased price of the products in his case.

(g) That the DGAP has erred in including the 5% GST paid by him in the profiteered amount because the GST has been paid to the government was based on the base price charged to the customers. Since, according to the DGAP's report, the base price should have been reduced and accordingly, the GST amount payable should also be less than as compared to the actual GST amount collected from the customers. However, the

collection of the GST amount on the increased base price from the customers has been already deposited with the Government of India along with monthly tax liability. Therefore, the addition of a 5% GST amount needed to be removed, and the profiteered amount should be recovered from the Governments, and therefore, the calculated profiteered amount should be reduced further by Rs. 30,923/-.

(h) That the increase in royalty expenses paid to M/s Subway India Private Limited @1.769% should be considered in the calculation of base prices after rate reduction; that as per franchise agreement, the Respondent was under a legal obligation to pay 8% on net sales towards royalty and 4.5% towards advertisement charges to M/s Subway Systems India Private Limited; that the invoices relating to royalty and tax had been issued by M/s Subway India Private Limited after charging GST@12% on the royalty amount & 18% on advertisement expenses; that the calculation of royalty and advertisement charges was based on net taxable sales; that post 14.11.2017, the cost of royalty and advertisement charges, taken together, had increased by 1.769%, which has not been considered by the DGAP.

(i) That the DGAP, while calculating the profiteering amount, ought to have considered the increase in the royalty and advertisement expenses, as detailed in the month-wise calculation given below, which would have resulted in the reduction of the profiteered amount by Rs. 68,721/-.

(j) That he places reliance on the decision of NAA's given in the case of Kumar Gandhrav v. KRBL Limited (Case Number 03/2018 dated 04.05.2018) wherein an increase in the purchase price/cost of goods has been accepted by this Authority while determining the profiteered amount; that he invites attention to Para 7 of the above-said Order, which is as below: -

"*It is also revealed from the perusal of the tax Invoices submitted by the Respondent that there was an increase in the purchase price of paddy in the year 2017 as compared to its price during the year 2016 which constitutes major part of the cost of the above product*" .....

Therefore, due to the imposition of the GST on the above products as well as the increase in the purchase price of the paddy there does not appear to be denial of benefit of ITC as has been alleged by the applicant as there has been no net benefit of ITC available to the Respondent which could be passed on the consumers."

(k) That increase in the delivery expenses paid to online E-Commerce platforms and online food delivery providers ought to have been considered by the DGAP while calculating the base prices after rate reduction; that online food delivery has emerged as one of the most fast-paced developments in the e-commerce space; that this sector has revolutionized the entire outlook towards the food industry as consumers now have the privilege to choose from a wide variety of cuisines, anywhere, anytime from a range of restaurants listed online; that this has happened

due to the emergence of the concept of 'aggregator business model', wherein the business players provide a single online window to customers for ordering food online from a wide variety of restaurants registered on the portal. The aggregators were collecting a fixed margin of the order amount received by the restaurant from the customer as service charge and in turn, handled the actual delivery of food itself; that he had started working with aggregators like Swiggy, Zomato, Uber Eats, etc. from April 2018 onwards, which charge 12-15% service fee for delivery of products; that his online sales amounted to around 45% of his total sales and that he accordingly paid them Rs. 9,18,627/- on account of the delivery fee, inclusive of GST amounting to Rs. 1,40,129.59/-, which was not considered by the DGAP.

(l) That the DGAP, while calculating the profiteering, had only considered those products/ SKUs where the base prices had increased and had ignored those products/ SKUs where more than commensurate benefit had been passed on; that the said method of calculation was against the stand taken by the Government of India at the World Trade Organisation (WTO) against a similar methodology of calculation of dumping under the Anti-dumping laws; that the argument taken by India in that forum was that while determining the dumping margin, all SKUs should be taken into consideration rather than only those which showed positive dumping; that the stand taken by Govt. of India

was later upheld by the WTO Appellate Body; hence in the present case, the excess benefit passed on by him (Respondent) through a greater-than-commensurate reduction in the basic prices of some of his products ought to have been appropriately considered as negative values, rather than zero, by the DGAP while calculating the aggregate profiteered amount, which has not been done; that accordingly, the column "Difference in Value %" in Annexure 14 of the DGAP's Report merited to be modified and an amount of Rs. 2,16,411/-; which was the aggregate of such negative values, ought to be reduced from the profiteered amount as given in Table –C below.

"Table- C"

Impact on Profiteered amount due to reduction in prices **(Amount in Rs.)**

Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per his Calculation	Difference	Month	Total Profiteering Amount as per DGAP	Total Profiteering Amount as per his Calculation	Difference	Total Impact
Nov'17	-	(334.86)	(334.86)	Sept'18	-	(19,145.91)	(19,145.91)	(19,480.77)
Dec'17	-	(2,466.70)	(2,466.70)	Oct'18	-	(10,484.58)	(10,484.58)	(12,951.28)
Jan'18	-	(2,917.82)	(2,917.82)	Nov'18	-	(16,140.34)	(16,140.34)	(19,058.16)
Feb'18	-	(6,373.93)	(6,373.93)	Dec'18	-	(7,260.62)	(7,260.62)	(13,634.54)
Mar'18	-	(24,120.23)	(24,120.23)	Jan'19	-	(6,774.62)	(6,774.62)	(30,894.85)
Apr'18	-	(19,916.16)	(19,916.16)	Feb'19	-	(4,233.88)	(4,233.88)	(24,150.04)
May'18	-	(24,415.28)	(24,415.28)	Mar'19	-	(2,427.42)	(2,427.42)	(26,842.70)
June'18	-	(15,442.96)	(15,442.96)	Apr'19	-	(3,597.65)	(3,597.65)	(19,040.61)
July'18	-	(15,358.48)	(15,358.48)	May'19	-	(4,213.05)	(4,213.05)	(19,571.53)
Aug'18	-	(26,450.92)	(26,450.92)	Jun'19	-	(4,336.00)	(4,336.00)	(30,786.92)
Total	-	(137,797.33)	(137,797.33)		-	(78,614.07)	(78,614.07)	(216,411.40)

(m) That he had also been supplying a few MRP based products like soft drinks that attracted GST @28% plus 12% Cess; that in the post-rate reduction period, his costs had increased because the ITC on 28% GST and 12% Cess was not available to him anymore; that in such cases of supply of MRP based products where the tax incidence on him had increased due to denial of ITC, needed to be excluded from the profiteered amount.

(n) That the calculation of the profiteered amount should only have been up to 31.03.2018 and not up to June 2019 as was done by the DGAP; that neither the provisions of Section 171 of the CGST Act 2017 and the relevant CGST Rules 2017, nor the notified methodology and procedure, prescribed any period up to which a registered person has to keep the base prices unchanged; that since he was operating restaurant service and was not holding inventory for more than one week due to perishable nature of the items and in view of the daily price variations of the cost of his raw materials, especially vegetables, the period of investigation ought to have been limited and not 20 months; that the period of investigation ought to be limited also because pricing of products in his business was a complex exercise, being dependent on various factors such as competition pricing, long term strategies for market penetration, profit margin for sustaining in the market, life cycle of the product, economic and social conditions, cost of the products and capital expenditure, inflation in man power cost, general year on year inflation etc; that the GST law was a new law and

and it did not prescribe any method of computation or the period of investigation; that while everyone was trying to understand the implications of the new law, the taxation provisions applicable to restaurant service had been again changed within a short period of time of four months of the roll out of GST; that thus the impact of changes effected with effect from 15.11.2017 should be considered only for a certain period; that in his case, considering the nature of his business, the period for the calculation of profiteering should be limited to 4 months i.e. up to the period of March 2018 from the date of tax rate reduction, i.e. 15.11.2017; that in the absence of a computation methodology and a prescribed period of anti-profiteering investigation in the statute, the 20 month long period of investigation adopted by the DGAP, i.e. from 15.11.2017 to 30.06.2019 was arbitrary and improper and needed to be curtailed only up to 31.03.2018.

(o) That a considerate approach should be adopted in his case and the current proceedings ought to be dropped since he was in deep loss ever since he started his restaurant service as a franchisee in 2017; that in the year ending March 2018, he had incurred losses @36.27% and in the year ending March 2019, his losses had increased to 43.89%; that as a result of the losses, he had received instructions from his franchisor, M/s Subway India, either to relocate his store or to close down; that the profiteered amount should be calculated at the entity level based on his Profit & Loss (P&L) account and not item (SKU) wise; that accordingly, he has placed on record a chart of his

Profit & Loss Account as a percentage of his Turnover, which is as below :-

Sl. No.	Total Turnover	Total Expenses	Net Profit	% of Turnover
Year Ended March 2018	Rs.42,23,300	Rs.57,55,216	Rs (15,31,916)	(36.27%)
Year Ended March 2019	Rs.42,54,848	Rs.55,64,855	Rs (18,67,577)	(43.89%)

(p) That as per the DGAP Report, the percentage of the profiteered amount to his net sales turnover was 9.91%; that this calculation has been worked out based on only those products/ SKUs where the commensurate benefit was not passed on without adjusting those cases where a higher than commensurate benefit was passed on to the customers; that discounts offered by him to his customers were ignored in the computation; that the computation by the DGAP has not taken into consideration the increase in his royalty and advertising expenses as also the expenses incurred on capital goods purchased by him; that for the period from February 2019 to June 2019, the profiteered amount calculated by the DGAP was on the higher side of net sales turnover as compared to the overall Average percentage calculated by the DGAP which was because he had increased prices in the month of February 2019 to account for several other business factors. The DGAP has incorrectly calculated the quantum of profiteering on the higher prices after he had increased his product prices in Feb 2019.

(q) That due to competition with other identical franchisees in his vicinity he had no option but to maintain pricing similar to the other Subway franchisees; that however, he had kept customers' interest in mind while arriving at his selling price and that the pricing data submitted by him in respect some of his main products before and after the tax rate reduction showed that the final impact on the customers was very minimal and, in some cases, even negative and that his pricing decisions were based on various business factors and his costs.

(r) That several writ petitions have been filed in various High Courts challenging the constitutional validity of anti-profiteering provisions under the CGST Act 2017; that in some of these writ petitions, the computation method/procedures adopted by this Authority for calculating profiteering amount has also been challenged; that these writ petitions included WP (C) 378 of 2019 (Hindustan Unilever Ltd. v. Union of India), WP (C) 2347 of 2019 (Jubilant Food works Ltd. v. Union of India) and WP (C) 4213/2019 (Abbott Healthcare v. Union of India); that the proceeding in his case should be deferred till the above issues relating to the constitutional validity and the computation methodology are settled by the courts.

(s) That he was an extremely small taxpayer having a turnover less than Rs. 50 Lakh and had been merely following the market trend and industry practices while making his pricing decisions; that he had no control over the market and hence he followed

the pricing decisions taken by the bigger market players in this business.

4. The Respondent submitted additional submissions vide his e-mail dated 17.05.2020 whereby he reiterated his earlier submissions and also contended that the subject proceedings were without jurisdiction and barred by limitation. He substantiated his above claim stating that as per Rule 128 (2) of CGST Rules, 2017, all applications from interested parties, on issues of local nature or those forwarded by the Standing Committee, were required to be first examined by the State Level Committee and then the Screening Committee should, within two months from the date of receipt of the written application or within such extended period not exceeding a further period of one month, for reasons to be recorded in writing, as might be allowed by this Authority, upon being satisfied that the supplier had contravened the provisions of Section 171, forward the Application with its recommendations to Standing committee for further action; that in the DGAP Report, nothing was mentioned either about the complaint or the examination of the Application by the State Level Screening Committee and as to when the complaint was forwarded by the State Level Screening Committee to the Standing Committee recommending further investigation; that therefore it was not clear to him whether the Standing Committee had considered the written complaint within the period of limitation prescribed under Rule 128 (1) of the CGST Rules, 2017 and as to whether the State Level Screening Committee had completed its preliminary scrutiny within the prescribed period; that the Standing Committee could not have started its scrutiny in line with Rule 129 of CGST Rules 2017 beyond the prescribed period of limitation.

5. Supplementary Reports were sought from the DGAP on the submissions of the Respondent. In response, the DGAP vide his Reports dated 18.03.2020 and 24.06.2020 has furnished his clarificatory reports rebutting the various contentions raised by the Respondent. In respect of one of these contentions of the Respondent, the DGAP has inter-alia, reported that in the present case, for the calculation of the quantum of profiteering, the average prices of different products supplied by the Respondent during the pre-tax rate reduction period from 01.11.2017 to 14.11.2017 were taken as the base prices and that for calculation of the product-wise (SKU wise) base prices, the sales data pertaining to World Sandwich Day (WSD), i.e. 03.11.2017, was excluded since the transaction prices pertaining to that day were an exception. While the DGAP has submitted clarifications on several other issues, however, the NAA after considering the various submissions made by the Respondent & the DGAP report, vide its Interim Order No. 23/2020 dated 13.10.2020, referred the matter back to the DGAP to reinvestigate this case and recomputed the quantum of profiteering by duly incorporating the sales data of the World Sandwich Day as on 03.11.2017 in the calculation of the pre-tax rate reduction prices. It was also directed while reinvestigating the matter on the above lines, all other contentions made by the Respondent before the NAA during the course of the hearings might also be considered.

6. Accordingly, the DGAP had carried out necessary re-investigation and on conclusion of the same, a report dated 29.01.2021 (received in the DGAP on 01.02.2021) was sent to the Authority under Rule 133 (4) of the CGST Rules, 2017 which inter-alia stated: -

i. That after receiving reference from the Authority, the case was re-investigated as directed vide Interim Order No. 23/2020 dated 13.10.2020.

ii. For the contention raised by the Respondent regarding sales data of World Sandwich Day had been excluded from the profiteering calculation. The same might be included for calculation of profiteering as had been done in other cases Reported by DGAP, the DGAP had clarified that on re-verification of all the documents/ reply submitted by the Respondent, it was observed the Respondent had extended the benefit of World Sandwich Day (hereinafter referred to as WSD) on 02.11.2018 and in 6 invoices on 03.11.2018. The Respondent also enclosed sample copies of the invoices reflecting the special offer (BOGO). From the perusal of these invoices and invoices of 03.11.2017, it was observed that these invoices contained special offer of WSD. For example:

"Table- D" **(Amount in Rs.)**

Invoice No. 1/A-9172 dated 03.11.2017			Invoice No. 1/A-26991 dated 02.11.2018	
Item	Price (Rs.)	Qty	Item	Price (Rs.)
(IN) WSD BTPH 6inch Sub	0.00	2	12" Hara Bhara Kabab Sub	600
6" – Paneer Tikka Sub	70.00	2	(IN) WSD BOGO Any Ft	0.00
6" – Chicken Seekh Sub	77.50	2	12" -Hara Bhara Kabab Sub	0.00

From the perusal of above table, it was observed that the transaction value was reflected in main course items only and the prices of other items were Zero (Nil). Thus, the Respondent's contention that special treatment at WSD had been found to be correct and had been treated as a special category. The transaction value of same item of 03.11.2017 had been compared with same item of 02.11.2018 and 03.11.2018 (for 6 invoices) to compute profiteering. Accordingly, two separate profiteering computation sheets had been prepared:

i. For invoices of WSD

ii. For all other invoices excluding WSD.

The profiteering for World Sandwich Day was Rs. 7,835/- and the detailed working for the same was enclosed as Annex-1 of the DGAP's Report dated 01.02.2021. For calculation of profiteering for sale of products of all other days, average transaction price for the period 1st Nov to 14th Nov, 2017 (except 03.11.2017) had been considered. Further, in some cases, sales of certain items were not found during the period 01st Nov to 14th Nov, 2017. For such items, the average transaction price was calculated by going through the sales for the month of October, 2017 and if not available in October, then in September, 2017 and accordingly, till the month of July, 2017. For the products sold for the rest of the period, the profiteering was Rs.6,50,688/- The total profiteering comes to Rs. 6,58,523/- (Rs. 6,50,688 (+) Rs. 7,835).

iii. In the matter of all other contentions made by the Respondent before the Authority during the course of hearings might also be

considered, the DGAP replied that the detailed reply on the Respondent's submissions had already been submitted vide the DGAP letters dated 18.03.2020 and 24.06.2020. However, point-wise reply with respect to submissions made by the Respondent, before the Authority, was as under:

A. That for the contentions raised by the Respondent on Discounted Average Base Rate be taken in DGAP Report, it would appropriate to mention that transaction price had been considered, both for determination of base price and calculation of profiteering. DGAP in his Investigation Report had considered transaction price (as per Section 15 of the CGST Act, 2017) and this had already factored in all discounts in both the period (pre-rate reduction & post rate-reduction).

B. Regarding uniformity in the mechanism, it was to state that, the extent of profiteering was arrived at, on case to case basis, by adopting suitable method based on the facts and circumstances of each case as well as the nature of the goods or services supplied. There could not be any fixed methodology for determination of the quantum of benefit to be passed on.

C. That for the contentions raised by the Respondent on Profiteering amount should be calculated up to the next price revision after post GST rate reduction, considering that after GST rate reduction any change of price was due

to the business reasons only, the DGAP had clarified that the period of investigation was not prescribed under the GST Act or Rules. The DGAP follows the practice of taking the period of investigation from the date of rate reduction till the previous month of the date on which notice of investigation was issued. Section 171(1) of the CGST Act, 2017 was very clear which states that any reduction in the rate of tax or the benefit of ITC had to be passed on to the recipient by way of commensurate reduction in price. Therefore, Section 171 of the CGST Act, 2017, was neither violative of Article 19(1)(g) of the Constitution of India nor does it interfere with the right to trade, as Section 171 of the CGST Act, 2017 nowhere seeks to fix the prices at which the goods and services ought to had been supplied. The said Section 171 only requires the supplier to pass on the benefit of reduction in rate of tax or the benefit of ITC to the recipients by reducing the price commensurately and does not require the supplier to seek any approval to conduct trade or fix prices of the products supplied by him. Therefore, there was no violation of the right of the Respondent enshrined under Article 19(1)(g) of the Constitution of India.

D. That for the contentions raised by the Respondent on 5% additional GST amount added on profiteered amount should be removed, it was to mention that on account of increase in base price more than the commensurate denial

of input tax credit, the customer had to bear not only the increased base price but also the excess GST levied on it. Hence, the same was incorporated by this Directorate for the purpose of calculation of profiteering amount. This methodology adopted by DGAP is consistent & uniform in all his reports involving allegation of profiteering in similar cases and had been upheld by the NAA.

E. The Respondent had collected profiteered amount in the form of excess price and GST on it. As the 5% additional GST amount was a part of profiteered amount, it could not be removed. Therefore, the contention of the Respondent that the profiteered amount should not be increased additionally by 5% on account of GST, was incorrect.

F. That for the contention raised by the Respondent that increases in royalty expense paid to Subway India Private Limited @1.769% should be considered in calculation of base price after rate reduction. In this regard, it would be appropriate to mention that methodology of DGAP had been consistent & uniform in all his reports involving allegation of profiteering in similar cases. During the course of investigation if it was noted that, the increase in base price was more than what was required to offset the impact of denial of input tax credit, such additional quantum along with applicable GST was recommended as profiteering in his report. This had been accepted and settled before Authority in all such cases of profiteering in case of supply

of Restaurant Service. The DGAP had compared the transaction value (exclusive of tax) post rate reduction with the commensurate base price arrived at by adding the denial of ITC on pre rate reduction transaction value (exclusive of tax). The DGAP does not go into the increased cost incurred by the Respondent and does not go into the costing of the product. As regards the additional cost of GST paid under Reverse Charge by the Respondent to Subway India Private Limited on the increased amount of Royalty and Advertisement Expenses, it was stated that these was the part of the business process and hence was inbuilt in the basic cost of the product/item. Any increase on this account can't be passed on to consumer by cutting into the tax relief provided by the Government. Therefore, in all circumstances, reduced tax benefit had to be passed on to the consumer. Further, the case cited by the respondent was different from the instant case as in the case of M/s KRBL, the pre-GST rate was nil and for the first time a tax of 5% was imposed on the impugned product.

G. That for the contention raised by the Respondent that increases in delivery expense paid to Online E-Commerce Platforms should be considered in calculation of base price after rate reduction; it was to mention that DGAP does not look into aspect of costing in course of this investigation of profiteering. As per the Section 171 of the CGST Act, 2017

any benefit of rate reduction shall have to be passed on to the buyer.

H. That for the contention raised by the Respondent impact on the Profiteered amount due to reduction in base price of the products post GST rate should be considered; it would be appropriate to mention that benefits passed on by the Respondent in some instances where the prices charged were lower than the price arrived at after incorporating the impact of denial of ITC was to a different set of consumers. The sum of total amount of such additional benefit passed could not be claimed to offset against the increased prices charged from other set of customers.

I. That for the contention raised by the Respondent MRP based product where denial of ITC was much higher in comparison with average ITC; it would be appropriate to mention that the total impact of ITC denial which included the ITC in respect of MRP goods had been duly considered and accordingly ratio of ITC to Net Outward Taxable Turnover was calculated for the pre rate reduction period. Thus, this claim of the Respondent had no significance at this point of the time.

J. That for the contention raised by the Respondent calculation of profiteered amount should be up to March 31st 2018, the DGAP replied that DGAP follows the

practice of investigation period upto previous month of the issuance of Notice of Investigation.

K. That for the contention raised by the Respondent considered approach should be adopted and request to drop the proceedings, the DGAP explained that the jurisdiction of adjudication lies with NAA.

L. That for the contention raised by the Respondent proceedings were without jurisdiction and barred by Limitation, it would be appropriate to mention that a reference was received from the Standing Committee on Anti-profiteering on 01.07.2019 to conduct a detailed investigation in respect of the Respondent alleging profiteering despite reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017. It had been alleged that the Respondent increased the base prices of his products and had not pass on the benefit of reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 by way of commensurate reduction in price, in terms of Section 171 of the CGST Act, 2017. On receipt of the aforesaid reference from the Standing Committee on Anti-profiteering on 01.07.2019, a Notice under Rule 129 of the CGST Rules, 2017 was issued by the Director General of Anti-profiteering on 09.07.2019, calling upon the Respondent to reply as to whether he admitted that the benefit of reduction in GST rate w.e.f. 15.11.2017, had not been passed on to

his recipients by way of commensurate reduction in price and if so, to suo moto determine the quantum thereof and indicate the same in his reply to the Notice as well as furnish all documents in support of his reply. The procedure followed by the Standing Committee and Screening Committee might be obtained from him directly.

7. The above report was carefully considered by NAA and a copy of the investigation report dated 01.02.2021 was provided to the Respondent as per the Minutes of the meeting of Authority held on 03.02.2021 to file his consolidated written submissions in respect of the above report of the DGAP. The Respondent vide letter dated 22.03.2021 (confidential) filed his written submissions.

8. Copy of the above submissions dated 22.03.2021 filed by the Respondent was supplied to the DGAP for supplementary Report under Rule 133(2A) of the CGST Rules, 2017. The DGAP filed his clarifications dated 31.05.2021 on the Respondent's submissions and, inter-alia clarified that all the contentions raised by the Respondent in his submissions, were already addressed in the Investigation Report dated 29.01.2021. Further the Respondent vide e-mail dated 09.05.2022 had submitted that he did not have additional information to submit.

9. The Respondent was directed by the Commission to appear before it on 10.08.2023, 26.10.2023 and 16.11. 2023. The Commission has carefully considered the Reports of the DGAP, submissions made by the Respondent and the case records. It was observed that this case pertains to a franchisee namely M/s. Smookey Kitchen Foods OPC Pvt. Ltd. of M/s. Subway India Private Limited in Gaziabad (Uttar Pradesh) who is

supplying various food products to his recipients/customers. It is also revealed from the plain reading of Section 171 (1) of the CGST Act, 2017 that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the record that there has been a reduction in the rate of tax from 18% to 5% w.e.f. 15.11.2017, on the restaurant service being supplied by Respondent No. 1, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 without the benefit of ITC. Therefore, 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 DGAP has carried out the present investigation w.e.f. 15.11.2017 to 30.06.2019.

10. It is also evident that Respondent has been supplying different items during the period from 15.11.2017 to 31.06.2019 to his customers. It has been found by DGAP that the GST rate of 5% has been charged by Respondent w.e.f. 15.11.2017, however, the base prices of some of the products have been increased more than their commensurate prices w.e.f. 15.11.2017 which established that because of the increase in the base prices the cum-tax price paid by the consumers was not reduced commensurately, in spite of the reduction in the GST rate.

11. It is further revealed from the analysis of the details of item-wise outward taxable supplies made during the period from 15.11.2017 to 30.06.2019 that Respondent had increased the base prices of his products/items supplied as a part of restaurant service to make up for the denial of ITC post GST rate reduction. The pre and post GST rate reduction prices of the items sold during the period from 01.07.2017 to 14.11.2017 (Pre-GST

rate reduction) and 15.11.2017 to 30.06.2019 (Post-GST rate reduction) have been compared and it has been found that Respondent has increased the base prices by more than 6.03% i.e. by more than what was required to offset the impact of denial of ITC in respect of the products/items sold during the above period. Thus, it is apparent that Respondent has resorted to profiteering as the commensurate benefit of reduction in the rate of tax from 18% to 5% has not been passed on by him.

12. In the matter of contention raised by Respondent that the DGAP, for computation of the profiteered amount, has compared the discounted average base prices of the products which were being charged by the Respondent during the pre-tax rate reduction period with the actual post-tax rate reduction base prices of these products. Further, as regards exclusion of any type of discretionary discount both prior to GST rate-reduction & post rate-reduction, DGAP has clarified that transaction price (as per Section 15 of CGST Act, 2017) has been considered, both for determination of base price and calculation of profiteering. Based on the average pre-tax rate reduction base price the commensurate base price has been computed by adding denial of ITC of 6.03% and compared with the actual base price of the product. The above methodology employed by the DGAP for computing the profiteered amount appears to be correct, reasonable, justifiable and in consonance with the provisions of Section 171 of the CGST Act, 2017 and has been successively approved by the erstwhile Authority in the cases of tax reduction and hence the same can be relied upon.

13. The Respondent has also contended that Profiteering amount should be calculated up to the next price revision after post-GST rate reduction, considering that after GST rate reduction any change of price is due to the business reasons only. In this regard, the Commission finds that the period of investigation is not prescribed under CGST Act, 2017. The DGAP follows the practice of taking the period of investigation from the date of rate reduction till the previous month of the date on which notice of investigation is issued. Section 171(1) of the CGST Act, 2017 was very clear which states that any reduction in the rate of tax or the benefit of ITC had to be passed on to the recipient by way of commensurate reduction in price. Therefore, Section 171 of the CGST Act, 2017, was neither violative of Article 19(1)(g) of the Constitution of India nor does it interfere with the right to trade, as Section 171 of the CGST Act, 2017 nowhere seeks to fix the prices at which the goods and services ought to have been supplied. The said Section 171 only requires the supplier to pass on the benefit of reduction in rate of tax or the benefit of ITC to the recipients by reducing the price commensurately and does not require the supplier to seek any approval to conduct trade or fix prices of the products supplied by him. Therefore, there was no violation of the right of the Respondent enshrined under Article 19(1)(g) of the Constitution of India.

14. The Respondent has also contended that 5% additional GST amount added on profiteered amount should be reduced. In this regard, the Commission finds that on account of increase in base price more than the commensurate denial of ITC, the customer had to bear not only the increased base price but also the excess GST levied on it. Hence, the

same was incorporated by the DGAP for the purpose of calculation of profiteered amount. The Commission also finds that the Respondent has collected profiteered amount in the form of excess price and GST on it and as the 5% additional GST amount was part of profiteered amount, it could not be reduced. Therefore, the above contention of Respondent is not maintainable. However, the Respondent is at liberty to claim excess amount of tax paid by him to the concerned Jurisdictional Commissionerate.

15. The Respondent has also contended that increase in royalty expense paid to Subway India Private Limited @1.769% should be considered in calculation of base price after rate reduction. As regards the additional cost of GST paid under Reverse Charge by the Respondent to Subway India Private Limited on the increased amount of Royalty and Advertisement Expenses, the Commission finds that these were the part of the business process and hence were inbuilt in the basic cost of the product/item. Any increase on this account can't be passed on to consumer by cutting into the tax relief provided by the Government. Therefore, in all circumstances, reduced tax benefit has to be passed on to the consumer. Further, the case of M/s KRBL cited by the Respondent is different from the instant case as in the earlier case, the pre-GST rate was nil and for the first time a tax of 5% was imposed on the impugned product after implementation of GST w.e.f. 01.07.2017. Therefore, the above contention of Respondent is not tenable and hence the provisions of Section 171 were not attracted.

16. The Respondent has also contended that increase in delivery expenses paid to Online E-Commerce Platforms should be considered in calculation

of base price after rate reduction. In this regard, the Commission finds that the Respondent has not produced any evidence to establish that he was not selling through E-commerce Platforms during the pre-rate reduction period w.e.f. 01.07.2017 to 14.11.2017 for which ratio of denial of ITC has been computed. Therefore, his contention that he has started selling through online platforms only after rate reduction is not corroborated. Moreover, this aspect of cost for determination of profiteered amount is outside the purview of Section 171 of the CGST Act, 2017.

17. The Respondent has also contended that impact on the profiteered amount due to reduction in base prices of the products post GST rate should be considered. In this regard, the Commission finds that benefit passed on by the Respondent on some products where the prices charged were lower than the price arrived at after incorporating the impact of denial of ITC cannot be considered as the lower prices were charged to different set of consumers. The amount of such additional benefit passed on to one set of customers can't be offset against the increased prices charged from other set of customers as each customer is eligible to get full benefit of tax reduction on the supplies received by him. Therefore, the above claim of the Respondent is incorrect.

18. In the matter of contention raised by the Respondent that "MRP based product where denial of ITC is much higher in comparison with average ITC" the Commission finds that the ITC accrues on the basis of the material purchased for preparing a product and is not dependent on its MRP. The impact of denial of ITC in respect of MRP goods has been duly considered and accordingly ratio of input tax credit to Net Outward

Taxable Turnover has been calculated for the pre-rate reduction period. Thus, the claim of the Respondent is not maintainable.

19. Based on the above facts the profiteered amount is determined as Rs. 6,58,523/- as has been computed in Annexure-1 & 2 of the DGAP's Report dated 29.01.2021. Accordingly, we direct the Respondent to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. Further, since the recipients of the benefit, as determined above are not identifiable, Respondent is directed to deposit an amount of Rs. 6,58,523/- in two equal parts of Rs. 3,29,261.50/- each in the Central Consumer Welfare Fund and the Uttar Pradesh State Consumer Welfare Fund as per the provisions of Section 171 read with 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 from his recipients till the date of its deposit. The above amount of Rs. 6,58,523/- 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 Commissioner.

20. It is evident from the above narration of facts that Respondent has 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 committed an offense under Section 171 (3A) of the above Act and therefore, he is liable for imposition of penalty under the provisions of the above Section. However, since the provisions of Section 171 (3A) have come into force w.e.f. 01.01.2020 whereas the period during which the violation occurred is w.e.f. 01.07.2017 to 30.06.2019, hence the penalty prescribed under the above Section cannot be imposed on Respondent

No. 1 retrospectively. Accordingly, Show Cause Notice directing him to explain why the penalty prescribed under Section 171 (3A) of the above Act read with Rule 133 (3) (d) of the CGST Rules, 2017 should not be imposed on him is not required to be issued.

21. Further, this Commission as per Rule 136 of the CGST Rules 2017 directs the Commissioners of CGST/SGST to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by Respondent as ordered by this Commission is deposited in the CWFs of the Central and the State Governments as per the details given above. A report in compliance of this order shall be submitted to this Commission by the concerned Commissioner within a period of 4 months from the date of receipt of this order.

22. A copy each of these orders be supplied to the Respondent and to the concerned Commissioners CGST /SGST for necessary action. The file be consigned after completion.

S/d.
Deepak Anurag
(Member)

S/d.
Sweta Kakkad
(Member)

S/d.
Anil Agarwal
(Member)

S/d.
Ravneet Kaur
(Chairperson)

Certified Copy

(Anupama Anand)
Secretary

F.No. 22011/NAA/126/SmookeyKitchen2021/1237–1241 Dated: 01.12.2023

Copy To:

1. M/s Smookey Kitchen Foods OPC Pvt. Ltd., Franchisee of M/s. Subway System India Pvt. Ltd. G07 & G08, Ground Floor, Newtech Lagracia, Crossing Republik, Ghaziabad, Uttar Pradesh-201016

2. Directorate General of Anti-Profiteering, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, New Delhi-110001.
3. Commissioner of Commercial Taxes, Office Of The Commissioner, Commercial Tax, U.P. Commercial Tax Head Office Vibhuti Khand, Gomti Nagar, Lucknow (U.P) (E-mail:- ctcomhqlu-up@nic.in).
4. Chief Commissioner of CGST, Meerut Zone, Mangal Pandey Nagar, Meerut-250004 (E-mail:- ccu-cexmeerut@nic.in).
5. Guard File