

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

I.O. No. : 12/2022
Date of Institution : 06.07.2020
Date of Order : 05.08.2022

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 Theco India Pvt. Ltd., Office No. D, Shroff Orchards, Old No. 78, New No. 44, New Avadi Road, Kilpauk, Chennai-600010.

Respondent

Quorum:-

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

Present: -

1. None for the DGAP.
2. Sh. S. Durairaj, Advocate and Sh. George Abraham, Director, for the Respondent.

ORDER

1. The present Report dated 01.07.2020 has been received from the Applicant No. 1 i.e. the Director General of Anti-Profiteering (**DGAP**) after detailed investigation under Rule 129(6) of the Central Goods & Service Tax (**CGST**) Rules, 2017. The brief facts of the present case are that vide Order No. 15/2018 dated 28.11.2018, the Authority has confirmed the profited amount of Rs. 4,78,085/- against the Respondent for two products i.e. LAVA Mill CNC 240 and Sintering Furnace D664 as he has not passed on the additional benefit of ITC in post GST and the Authority also directed the DGAP to conduct a fresh


investigation covering all other products supplied by the Respondent in respect of which either the rate of tax was reduced or benefit of additional input tax credit (ITC) was made available as per the provisions of Section 171 (1) of the CGST Act, 2017 and quantify the benefit, if any, that the Respondent has failed to pass on to his customers and submit the Report under Rule 129 (6) of the CGST Rules, 2017 covering all the goods and services supplied by the Respondent. Further, the Authority vide I.O. No. 09/2019 dated 01.08.2019 has confirmed the direction given in the para 20 of the Order dated 28.11.2018. Accordingly, the DGAP has submitted the present Report dated 01.07.2020.

2. The DGAP in its Report dated 01.07.2020, inter-alia stated that:-

- i. On receipt of the reference from this Authority, a notice was issued by the DGAP on 19.09.2019, calling upon the Respondent to reply as to whether he admit that the benefit of reduction in tax rate 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 supporting documents.
- ii. The period covered by the current investigation was from 01.07.2017 to 30.08.2019.
- iii. The time limit to complete the investigation was extended upto 04.05.2020 by this Authority, vide letter F.No. 22011/NAA/19/2018/803 dated 07.02.2020, in terms of Rule 129(6) of the Rules. Further, vide Notification 35/2020-Central Tax dated 03.04.2020 where, any time limit for

completion/furnishing of any report, been specified in, or prescribed or notified under the CGST Act, 2017 which fell during the period from the 20th day of March, 2020 to the 29th day of June, 2020, and where completion or compliance of such action not been made within such time, then, the time limit for completion or compliance of such action, should be extended upto the 30.06.2020. Accordingly, time limit to complete the investigation was extended.

iv. In response to the notice dated 19.09.2019, the Respondent submitted his reply vide letters and e-mails dated 03.10.2019, 24.12.2019, 21.01.2020, 23.01.2020, 07.02.2020, 09.03.2020, 08.06.2020 and 19.06.2020. The Respondent vide the above replies, inter-alia, stated as under: -

a. He was very small Pvt. ltd. company with a petty sales turnover of about Rs 9.32 crores, 7.83 crores & 5.65 crores respectively during the last 3 financial years 2016-2017, 2017-2018 & 2018-19. 


b. No quotations were issued during the Pre-GST period (before 01.07.2017) where supply took place post-GST period.

c. He had very small firm with a few people, most of functions like accounting, payroll, tax filling etc was outsourced since he did not make enough profit to afford such full time services and qualified employees.

d. All the works related to the office like emails, replies, filing of paperwork etc were done by the Respondent itself.

- e. Variation of selling prices occurred due to the different type of products that the customer made from the product that was provided to him as raw material for manufacture of Zirconia Crown. For example, the product “68591 Lava Frame Multi” was actually a raw material that got converted into finished products by the Respondent’s customers (viz. Dental Labs similar to crown express Ranchi). Post conversion, a unique non-transferable product was made and supplied to the dentist which was further sold to patient. Since material was made with his product, he extended a warranty claim to the patient/dentist in case of material damage or breakage. If a crown was made at the higher warranty of 10 years then the rate was higher and if crown was made with a warranty of 5 years then the rate was lesser. The variations in the price were due to variation in the warranty period.
- f. He neither had any pricing agreement with the customers nor he had a constant order pipeline from the lab customers. The lower prices and product warranty coverage was given to help the Respondent in generating sales orders.
- v. Vide the aforementioned letters/e-mails; the Respondent submitted the following documents/information:
- a. Copies of GSTR-1 returns for the period July, 2017 to August, 2019.
- b. Copies of GSTR-3B returns for the period July, 2017 to August, 2019.

- c. Copy of Tran-1.
 - d. Electronic Credit Ledger for the period July, 2017 to August, 2019.
 - e. Copies of VAT returns for the period April, 2016 to June, 2017.
 - f. Invoice wise details of outward supplies made during April, 2016 to August, 2019.
 - g. Invoice wise details of purchase made during April, 2016 to August, 2019.
- vi. The subject application, various replies of the Respondent and the documents/evidences on record had been carefully examined. The main issues for determination are: -
- a. Whether there was benefit of reduction in rate of tax or any supply of goods or services or benefit of ITC by the Respondent after implementation of GST w.e.f. 01.07.2017 and if so,
 - b. Whether the Respondent passed on such benefit to the recipients by way of commensurate reduction in price, in terms of Section 171 of the CGST Act, 2017.
- vii. On the basis of the inward and outward supplies of the Respondent, it has been observed that the Respondent was primarily a dealer engaged in the supply of dental equipment and accessories. In pre-GST era, the Respondent was not eligible to avail the any ITC/credit on the inter-state purchases. However, with the introduction of GST, all the State as well as Central Taxes were subsumed in GST and ITC of IGST (inter-state GST

on the purchases) was made available to the Respondent in respect of all goods and services unless specifically denied. Thus, the additional benefit of ITC in the GST regime would be limited to those input taxes, the credit of which was not allowed in the pre-GST regime to the Respondent. This additional benefit of ITC in the GST regime was required to be passed on by the Respondent to the recipients by way of commensurate reduction in price, in terms of Section 171 of the CGST Act, 2017. This additional benefit of ITC would be applicable to only those products which were sold in both pre-GST regime and post-GST regime. In the present case, it was observed that there were 85 such products sold and hence, the investigation for the purpose of determination of profiteering was limited to these 85 products. 

- viii. Further, vide e-mail dated 15.06.2020, the Respondent was asked to submit the details of tax structure of the purchases made by him in the pre-GST period on which the ITC was not available, so that the DGAP could work out the exact quantum of the benefit of ITC that needed to be passed on by the Respondent to the recipients after implementation of GST w.e.f. 01.07.2017. The Respondent replied vide e-mail dated 19.06.2020 but did not submit the tax components like Central Excise Duty, CVD etc., on which the ITC was not available in the pre GST period. The Respondent was based in Tamil Nadu and most of the purchases or the products to which the profiteering was limited to be 2% CST. Further, as per the provisions of the Section 19 of the Tamil Nadu VAT Act, 2006 which stated the conditions wherein a dealer was eligible to

take credit on purchases, tax paid on inputs in other states was not given as ITC and the same was reflected in the monthly VAT and CST Returns of the Respondent. As per the VAT/CST Return, the Respondent was not eligible to take credit on inter-state purchases on which CST was paid. It could be seen from VAT and CST Return for the month of April, 2017 that the turnover of inter-state purchases was Rs. 46 lakhs (approximately) and the tax paid as CST on this purchases was Rs. 93000 (approx.). However, the same was not taken as input credit by the Respondent as he was not eligible to take credit. Therefore, when input taxes applicable in pre-GST regime were subsumed in GST, the Respondent was enjoying the benefit of ITC on the same. In absence of the said details, the methodology adopted by the DGAP was that the average base price of the purchase made by the Respondent in the post-GST period per unit of each product was calculated. Then the average GST paid per unit product was found & it was deducted from pre-GST base price to arrive at the commensurate sale price in GST period. To arrive at the benefit of the ITC that needed to be passed on by the Respondent, the actual sale price of the 85 products which were sold in post GST period was compared with the commensurate base sale price and the difference in both prices amounts to total amount of profiteering made by the Respondent on account of ITC available to the Respondent in post-GST period.

- ix. The above said methodology for the profiteering in the subject case was applied for the 85 products which were sold in both pre and post GST period and the illustration for the particular product was given below.


TABLE - A

S. No	Description	Factor	Pre-GST	Post-GST
1.	Product Name	A	12216 CLINPRO Tooth Creme 113G	
2.	Sold Quantity in Pre-GST period	B	26	
3.	Total Taxable Amount (in Rs.)	C	16209.34	
4.	Average/Base Price of Sale in pre-GST Period (in Rs.)	D=C/B	623.44	
5.	Purchased Quantity in post GST period	E		459
6.	Total Taxable Amount of purchase (in Rs.)	F		261338.05
7.	Average Purchase Base Price in post GST period (in Rs.)	G=F/E		569.36
8.	Input GST Rate on above mentioned product	H		28%
9.	Amount of ITC availed on average purchase base price (in Rs.)	I=G*H%		159.41
10.	Commensurate Sale Price in GST period (after deducting the ITC benefit) (in Rs.)	J=D-I		464.01
11.	Invoice No & dated	K		1955 & 09.08.2017
12.	Quantity	L		20
13.	Total Taxable Amount (in Rs.)	M		9687.40
14.	Actual base sale price in GST period (in Rs.)	N=M/L		484.37
15.	Profiteering Per unit (in Rs.)	O=J-N		20.36
16.	GST amount on profiteering (in Rs.) per unit	P=O*H%		5.70

17.	Final Profiteering (in Rs.)	$Q=(O+P)$ $*L$		521.11
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- x. From the above table, it was clear that the average purchase price of the product “12216 CLINPRO Tooth Creme 113G” was Rs. 569.36/- in the post GST period and the ITC availed on the said product @ 28 % IGST was Rs. 159.41/- which was not available in the pre-GST period to the Respondent. Thus this benefit of ITC needed to be passed on by the Respondent to the recipients. However, the Respondent did not pass on the benefit of ITC by the way of commensurate reduction in the base price of the said product on after GST came into existence. The Respondent actually sold the said product at the base sale price of Rs. 484.37/- whereas the Respondent to reduce the base sale price of the said product to Rs. 464.01/- (623.44-159.41) after deducting the benefit of ITC of Rs. 159.41 from the average base sale price of the said product in the pre-GST period i.e. Rs. 623.44/-. This results into the profiteered of an amount of Rs.521.11/- on a particular product. Further, it appears that benefit of ITC 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. Therefore, on the basis of above calculation as illustrated in table A above, profiteering in case of all impacted products of the Respondent which were sold in both pre and post GST also been arrived in similar way. However, the average sale base price and also the additional ITC benefit for other products would be

different from the product mentioned in 'TABLE-A' as the products were purchased and sold at different tax rates of 12%,18% and 28% in the GST period and accordingly, profiteering been calculated product-wise.

xi. As regards the total amount of profiteering, on perusal of the purchase and outward sale details made available by the Respondent indicates that the Respondent had not passed on the benefit of ITC by way of commensurate reduction in prices of the goods/products after implementation of GST w.e.f 01.07.2017. The total profited amount for the 85 products that were sold in both pre and post GST period, comes to Rs. 1,29,39,594/- (including GST). The details of the computation has been given in the Annexure-11 of the Report dated 01.07.2020. The said  profited amount has been arrived at by comparing the actual base sale price of the products sold during the period 01.07.2017 to 30.08.2019 i.e. in the post-GST period with the commensurate base sale price which was arrived by deducting the benefit of ITC availed on the average price of post GST purchased from the average base sale price in pre GST i.e. during the period 01.04.2016 to 30.06.2017. The excess GST so collected from the recipients, was also included in the aforesaid profited amount as the excess price collected from the recipients also included the GST charged on the increased sale price.

xii. The place (State or Union Territory) of supply-wise break up of total profiteering amount of Rs. 1,29,39,594/- in Table-B has been given below: -

Table-B

Sr. No	State Name	State Code	Amount of Profiteering (in Rs.)
1	Andhra Pradesh	37	388345
2	Bihar	10	323523
3	Chhattisgarh	22	2368
4	Delhi	7	1541530
5	Goa	30	12874
6	Gujarat	24	373060
7	Haryana	6	4294
8	Himachal Pradesh	2	900
9	Jammu & Kashmir	1	80066
10	Jharkhand	20	52120
11	Karnataka	29	1625630
12	Kerala	32	3588569
13	Madhya Pradesh	23	7562
14	Maharashtra	27	2739697
15	Odisha	21	102014
16	Punjab	3	503921
17	Rajasthan	8	1800
18	Tamilnadu	33	393518
19	Telangana	36	665
20	Uttar Pradesh	9	383920
21	West Bengal	19	813216
Total			1,29,39,594

- xiii. From the above discussion, the allegation of profiteering that the Respondent did not pass on the benefit of ITC to the recipients by way of commensurate reduction in the base sale price of the products after implementation of GST w.e.f. 01.01.2017 appeared to be correct. The total amount of profiteering covering the period

of 01.07.2017 to 30.08.2019, was Rs. 1,29,39,594/- (Rupees One Crore Twenty Nine Lakh Thirty Nine Thousand Five Hundred and Ninety Four only).

3. The above Report was carefully considered by this Authority and it was decided to allow the Respondent to file his consolidated written submissions by 21.07.2020. A notice dated 10.07.2020 was issued to the Respondent to explain why the Report dated 01.07.2020 furnished by the DGAP should not be accepted and his liability for profiteering in violation of the provisions of Section 171 should not be fixed.
4. The Respondent has submitted that he had filed the Writ Petition No. 15527/2020 in the Hon'ble Madras High Court against the notice dated 10.07.2020 seeking quashing of expansion of the investigation. The High Court vide order dated 27.10.2021 decided the matter with the following direction:-

"45. Barring the aspect of exemption of jurisdiction that has been held adverse to the petitioner, both parties are at liberty to pursue all lines of argument as they believe are available to them and nothing contained in this order shall stand in the way of a denovo hearing on the merits of the matter, with all issues left open, for decision afresh."

5. The Respondent vide letter dated 07.04.2020 has filed his written submissions against the DGAP's Report dated 01.07.2020 in which he has, inter-alia, submitted that:-
 - i. In para 10 of the Report, the DGAP alleged that the Respondent has not submitted the tax structure [Central Excise Duty, Countervailing Duty etc.) on which ITC was not available in the Pre-GST period, which was sought for through e-mail dated

15.06.2020. The allegation was not sustainable because, the Respondent was not equipped with the required infrastructure/resources to furnish such details since he was only a trader and not a manufacturer/importer. The said product was imported by his supplier viz 3M India Limited, who also was only an importer and not a manufacturer, hence in the Pre-GST purchase invoices, the tax structure was not mentioned by the supplier as supplies were at 2% CST; sample copy of purchase invoice BO 00018925 dated 14.10.2016 was enclosed herewith. Further due to COVID-19, the Respondent was also unable to collect the tax structure from other sources; however, now the Respondent was able to collect the details for the product 12216 CLINPRO TOOTH CREME (per Table-A) as mentioned below for the pre-GST period.

1.	HSN- Customs Tariff Code	33061020
2.	Excise Duty (Section 3 of Central Excise Act, 1944)/ Counter Vailing Duty equivalent to Excise Duty (Sub section 1 of Section 3 of Customs Tariff Act, 1975)	12.5%
3.	Special Additional Customs duty (Counter balance the sales tax) {Sub section 5 of Section 3 of Customs Tariff Act, 1975}	4%

- ii. The above taxes were subsumed in GST and the rate of tax was 28% for the period from 1.07.2017 to 14.11.2017 [Sl. No:28 of Schedule IV of notification 1/2017-IT (Rate) dated 28.6.2017. Subsequently, the rate of tax was reduced to 18% with effect from

15.11.2017 onward [Sl. No:60 of Schedule III of notification 1/2017-IT (Rate) dated 28.6.2017 as amended by notification 43/2017-ITC(Rate) dated 14.11.2017]. Hence averaging out the tax and ITC across this product for a period of 1.07.2017 to 30.08.2019 would be incorrect.

iii. In para 10 of the Report, the DGAP alleged that since the tax structure was not furnished, he was adopting the methodology to quantify the amount of profiteering for the period 1.07.2017 to 30.08.2019 as explained in paras 11 and 12 of the Report.

iv. The rate of GST was adopted as 28% for the entire period; but, 28% was applicable for a short period from 1.07.2017 to 14.11.2017 and for the period from 15.11.2017 to 30.08.2019, the rate of GST was only 18%. If 18% was applied, there would not be any profiteering. Therefore, the method at rows 7, 8, 9 of Table-A of the Report was not correct. If 18% was applied in row 8, the figure in row 9 would become 102.48; the figure in row 10 would become 520.96 and the figure in row 15 would become - 36.59.

v. That the said product along with 90% of all other products in the 85 products being reviewed was imported by his supplier viz 3M India Limited, who also was only an importer and not a manufacturer. At the time of imports, the said supplier discharged the import duty liabilities on the value [Section 14 of the Customs Act, 1962] declared by him in the Bill Of Entry (BOE). The importer could pass on the Counter Veiling Duty (sub section 1 of Section 3 of Customs Tariff Act) and the Special Additional

Customs Duty (sub section 5 of Section 3 of the Customs Tariff Act, 1985] to others in terms of Rule 9 of Cenvat Credit Rules, 2004 and this could be taken as credit by a manufacturer or a service provider in terms of Rule 3(vii) and (via) of Cenvat Credit Rules, 2004. The Respondent had not availed such benefits during pre-GST period.

- vi. The duty that was paid by the importer (his supplier viz 3M India Limited) at the time of imports was the actual ITC during the pre-GST period; therefore, the method adopted by the DGAP as per rows 7, 8, 9, and 10 of Table-A of the Report was not correct because, the purchase cost of Rs. 556/- is the price from his supplier to the Respondent; and thereby could not be used as the basic import value. The correct method would be to evaluate the Basic Import Value as per the Bill Of Entry (BOE) of the product. In the above purchase cost, 50% could be assumed as import duties, over heads and the profit of the supplier and so the import value could be assumed as Rs. 278/-; the ITC incidence during the Pre-GST period would be Rs. 45.87/-. Therefore, the figure in row 9 would become Rs. 45.87; the figure in row 10 would become 577.57 and the figure in row 15 would become -93.2.
- vii. After the introduction of GST on 01.07.2017, he had not taken any ITC on the stock of goods as on 30.06.2017 through TRAN-1 in terms of Section 140 of the CGST Act, 2017; further whatever the ITC that was taken after 01.07.2017 was not loaded in the base price of the products and such benefit was duly passed on to the customers.

6. Copy of the above submissions dated 07.04.2022 filed by the Respondent was supplied to the DGAP for clarifications under Rule 133(2A) of the CGST Rules, 2017. The DGAP filed his clarifications dated 04.05.2022 vide which the DGAP has clarified that:-

- i. The investigation Report dated 01.07.2020 was prepared on the strength of data furnished by Respondent during the course of Investigation. As stated in the said Report, the Respondent had not provided details of tax structure of the purchases made by him in the pre-GST period on which the ITC was not available. Now the Respondent furnished data in respect of item 12216 Clinpro Tooth that during the pre-GST regime the applicable tax rates were 12.5% (Excise Duty-Section 3 of Central Excise Act, 1944/Counter Vailing Duty equivalent to Excise Duty [Sub section 1 of Section 3 of Customs tariff Act, 1975]) and 4% (Special Additional Customs Duty – Counter balance of the sales tax [Sub section 5 of Section 3 of Customs Tariff Act, 1975]). The Respondent has also furnished that on the item 12216 Clinpro Tooth Creme, the tax rate was Respondent also furnished now that on the item 12216 Clinpro Tooth Creme, the tax rate was 28% during the period from 01.07.2017 to 14.11.2017 and thereafter from 15.11.2017 to 30.08.2019 the tax rate was 18% on this item. However, the Respondent has not provided the tax rate in respect of other 84 items. Therefore, in order to check the veracity of the claim of the Respondent, the entire data regarding details tax structure of all the 85 items including ITC availability for pre as

well as post-GST period was required. In absence of the requisite data, the contention of the Respondent could not be examined.

7. Further, the DGAP's clarification dated 04.05.2022 was supplied to the Respondent to file their rejoinder. Personal hearing in the matter was held on 13.05.2022 at 12:00 P.M. Same was attended by Sh. S. Durairaj, Advocate and Sh. George Abraham, Director, for the Respondent. During the personal hearing the Respondent reiterated his arguments based on his written submissions dated 07.04.2022 and 13.05.2022. The Respondent has also requested to file additional submissions and the same was allowed by the Authority. The Respondent vide letter dated 12.05.2022 has filed his written submissions on 13.05.2022 in which he has submitted that:-

- i. **PRE GST PERIOD:** The pre GST Tax structure was furnished in Annexure I of this submission. As per Rule 3 of CENVAT Credit Rules, 2004, only the manufacturer and service providers were eligible to take Cenvat credit. The Respondent was only a dealer [Trader] and so, he could not take Cenvat credit. However, if he was registered as first stage dealer or second stage dealer as per Rule 9 of Central Excise Rules, 2002, he could take credit and pass on the credit to others by issuing invoices as required under Rule 11 of the Central Excise Rules, 2002. For this purpose, he could take credit only on the basis of an invoice issued by the importer/supplier as per Rule 9 of the Cenvat Credit Rules, 2004. In the instant case, the Respondent neither registered as a dealer nor he received the goods under the cover of specified invoices for taking credit from his suppliers. Therefore, the Respondent was

not eligible to take Cenvat Credit during the pre GST period. Further, most of his consumers were either service providers [clinical establishments providing health care services], who were exempted from payment of service tax under notification 25/2012-ST [Sl.No:2(i)] or small scale manufacturers, who were enjoying the exemption under notification 8/2003-CE. By virtue of these exemptions, the consumers were also not entitled for Cenvat credit. Further, purchases were inter-state @ 2% Central Sales Tax and it was also not eligible for input tax credit. Under such circumstances, the Respondent added these duties in the cost of the products.

- ii. **TRANSITIONAL PERIOD:** At the time of transition into GST, closing credit as per the last VAT/Excise Returns could be carried forward and also the duties paid on the closing stock as on 30.06.2017 by virtue of Section 140 of the CGST Act, 2017 read with Rule 117 of the CGST Rules, 2017. However, the Respondent has not taken any such credit under this provision. Therefore, the question of passing the ITC benefit by way of reduced prices did not arise in terms of proviso to sub section 3 of Section 140 of the CGST Act, 2017. The relevant provision is appended below.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012-Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect

of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to the following conditions, namely:—

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

- iii. **POST GST PERIOD:** The post GST Tax structure was furnished in Annexure-II of this submission. After 01.07.2017, the Respondent purchased the goods on payment GST and took input tax credit. Such input tax credit was neither accounted as expenditure nor loaded in the cost of the product. The Respondent sold the goods by charging the applicable GST on the value, which was the base purchase price excluding GST +overheads+profit.

- iv. **ANTI PROFITEERING MEASURE:** Section 171(2) of the CGST Act, 2017, which is appended below, is in consonance with the proviso to Section 143(3).

*(2) The Central Government may, on recommendations of the Council, by notification, constitute an Authority, or empower an existing Authority constituted under any law for the time being in force, to examine whether input tax credits **availed** by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.*

On a combined reading of the above provisions, the law that emerged that, provisions of Section 171 would attract only when ITC was taken on the stock of goods as on 30.06.2017 but the prices were not reduced. In the instant case, ITC was not taken and therefore there was no necessity to reduce the prices even if such goods were sold after GST during the period 01.07.2017 to 30.08.2019. So, provisions of Section 171 were not applicable. It was also pertinent to mention here that for the reasons mentioned in para 7 (iii) above, Section 171 was not applicable for the goods purchased and sold after 01.07.2017 to 30.08.2019 because that the ITC availed was duly passed on to the buyers.

- v. Without prejudice to the above submissions, the amount of profiteering was shown as Rs.1,29,39,594/- on account of not passing on the ITC and GST on the profiteered amount. If such amount was collected from him, he was eligible for the ITC in terms of proviso to Section 140(3). GST was already paid to the Government and if it is collected again from him, he was eligible for the refund under Section 54 of the CGST Act, 2017.

- vi. The method in Table-A of the Report dated 01.07.2020 was contrary to the method adopted in Table-A of this Authority's Order 15/2018 dated 28.11.2018. In Order 15/2018 dated 28.11.2018, pre GST ITC benefit was calculated @ the applicable rate of CVD on the import value, whereas in Table-A of the Report, it was calculated @ GST rate on the average base purchase in post GST period. The import value in Table-A of the Order dated 28.11.2018 is 48% of the sale value and CVD is 12.5%, which is the applicable rate of CVD. If the same ratio is applied for the products in Annexure-11 of the Report, most of the products would be eliminated from the Annexure-11 of the Report.
8. Copy of the above submissions dated 12.05.2022 filed by the Respondent on 13.05.2022 was supplied to the DGAP for clarifications under Rule 133(2A) of the CGST Rules, 2017. The DGAP filed his clarifications dated 14.06.2022 vide which the DGAP has clarified that:-
- i. The submissions dated 13.05.2022 of the Respondent were examined vis-à-vis the investigation Report dated 01.07.2020, the Respondent has submitted that in the pre-GST regime he was unregistered dealer and therefore not entitled for any input credit. Further, he has not taken any transitional credit on the stock lying with them as on 30.06 2017, he was also not entitled for 2% Central Sales Tax on inter-state purchases and hence he was not entitled for any credit on inputs or inputs services in the pre-GST regime he has argued that as no ITC was taken prior to

01.07.2017, there was no necessity to reduce the prices even if such goods are sold after 01.07.2017, and therefore the provisions of Section 171 of CGST Act, 2017 were not applicable. The contention of the Respondent was not acceptable. The Respondent has accrued benefit of ITC in the GST regime. Therefore, Section 171 of CGST Act, 2017 was applicable to him and he was required to pass on the benefit of ITC to their recipients whatever credit the Respondent has availed in the post-GST period is the benefit of ITC to them. The investigation Report dated 01.07.2020 has been prepared on the same premise. During the course of investigation, the Respondent did not provide the details of tax structure of the purchase made in the pre-GST period viz. C. Ex duty, CVD on which ITC was not available. Now he has furnished pre & post-GST tax structure in respect of various products. However, this data regarding the tax structure was immaterial in the quantification of profiteering amount worked out in Report dated 01.07.2020 as the quantification was done on the basis of accrual of ITC to the Respondent which was not available to him in pre GST regime. Accordingly, it is submitted that the investigation Report dated 01.07.2020 might be accepted as correct.

9. The Respondent vide letter dated 07.06.2022 has filed his consolidated submissions vide which he has interalia stated that:-


- i. During the pre GST period, Applicant was not a registered person under Central Excise Rules, 2002/Finance Act, 1994 and so not eligible to take Cenvat credit under CCR, 2004. Further, all the

purchases were interstate; the Respondent was not eligible to take credit of CST. However, during the transitional period into GST, on the stock of goods, he was eligible to take credit in terms of Section 140(3) read with Rule 117(4). Proviso to Section 140(3) states that when ITC is availed to that extent price must be reduced. Section 171(2) also states that price reduction is required only when ITC is availed. In the instant case, no ITC was availed. Therefore, there was no jurisdiction under Section 171. Such ITC benefit was available only for the stock of goods as on 30.06.2017 and for the period from 01.07.2017 to 31.12.2017 [six tax periods] in terms of Rule 117(4)(a)(iii).

- ii. The benefit of ITC must be calculated as per Rule 117(4) i.e. eligible ITC was 30% of the IGST paid, for the products, when the rate of IGST was 18% and more; and, eligible ITC was 20% of the IGST paid, for the products, when the rate of IGST was less than 18%. The eligible ITC as per Rule 117(4) was already furnished vide reply dated 13.05.2022 and it was Rs.9,77,343/. If such credit was availed by filing TRAN-1 and TRAN-2, the said amount would be credited in electronic credit ledger [auto credited]. In the present case, no such credit was availed. Therefore, there was no obligation to reduce the prices to the extent of Rs. 9,77,343/ in terms of proviso to Sections 140(3) and 171(2).
- iii. Further, post GST purchases were made on payment of GST @ applicable rates of 12% or 18% or 28%. The details were available in GSTR-2A. During the years, 2017-18, 2018-19 and

2019-20, the ITC availed on inward supply of Goods as per GSTR-2A has been furnished below:-

YEAR	GSTR 2A [ITC ON INWARD SUPPLIES OF GOODS]	Total Taxes paid as per GSTR 3B in Cash
2017-2018 [01.07.2017 to 31.03.2018]	56,99,776/-	41,87,970/-
2018-2019 [01.04.2018 to 31.03.2019]	66,36,346/-	20,63,183/
2019-2020 [01.04.2019 to 31.08.2019]	23,44,955/	5,09,037/

The above taxes have been paid after adjusting the GST Input tax credit against the actual taxes payable. This clearly explained that he had not included Input tax credit in his cost of goods sold and he has passed on the ITC benefit to the customers. 

- iv. The taxable value, ITC and gross value were available in the GSTR-2A. In the profit and loss account, the cost of goods was shown as expense. From this, it was evident to prove whether ITC was passed on to the consumers or not. When the gross value (taxable value + ITC) was shown as cost, it is imperative that the ITC benefit was not passed on. If the taxable value [basic value excluding taxes] alone is shown as cost, it was imperative that ITC benefit was passed on. In the present case, the following data would prove that ITC was not included in the cost and so it was established that the ITC benefit was passed on. Therefore, it was proved beyond doubt that ITC benefit was passed on to the consumers and there was no violation of Section 171(2).

S.No.	Details	2017-18	2018-19	2019-20
1.	Taxable value as per GSTR -2A	3,09,74,604	4,08,07,482	2,51,43,281
2.	ITC as per GSTR -2A	56,99,776	66,36,346	44,24,863
3.	Gross value as per GSTR -2A	3,66,74,381	4,74,43,829	2,95,68,144
4.	Cost of goods as shown as expenses in the profit and loss account [Only GST ITC Purchases]	3,09,74,604	4,05,91,706	2,47 90,092

- v. The DGAP in his Report dated 01.07.2020 has stated that since the pre GST tax structure was not furnished by the Respondent, he had adopted the method as per Table A in paragraph 11 of the Report. The Respondent furnished the details on 13.05.2022. Further, the method was contrary to the provisions of proviso to Section 140(3), Section 171(2) and Rule 117(4). Any method must ensure that ITC was availed and not on the basis that ITC was available. Further, the ITC as quantified in column T of Annexure 11 of the Report was not added to the cost of the product as explained above and it was passed on to the consumers.
- vi. Further, the DGAP has adopted a method in his Report dated 01.07.2020 [Table-A - Para 11] to determine the profiteering amount for the reasons that the Respondent has not furnished the tax structure. Now, the Respondent has furnished the details on 20.04.2022 and structure on 13.05.2022. The Respondent had fulfilled the requirement of the DGAP in his letter dated 04.05.2022. Now, the DGAP has to furnish his Report on the

method of working. Further, the total ITC taken & taxes paid through cash during 3 years from 01.07.2017 to 31.08.2019 is Rs. 1,46,81,077/ & Rs 67,60,190/ respectively, wherein the amount demanded by the DGAP was Rs. 1,29,39,594/-. This proved that the logic of the DGAP by adopting such method was contrary to the intention of avoiding cascading effect in GST supply chain.

vii. As per the work sheet Annexure-I with this submission, it was evident that there is no profiteering for all the products. The workings were made on the basis of the following factors:

a. During the period 01.07.2017 to 30.08.2019, whatever the ITC that was availed was passed on to the consumers. So, the ITC benefit in post GST was only to the extent of 30% of the tax payable, when the tax rate was 18% or more; and it was 20% of the tax payable, when the tax rate was 12% or below as per Rule 117(4) of CGST Rules, 2017. As per Rule 117(4), the above benefit must be worked out on the base selling price based on the post GST invoices. The above benefit must be reduced from the pre GST average base sale price to arrive at the commensurate sale price in post GST.

b. The base selling price post GST as on 01.07.2017 for the purpose of working out the profiteering was to be arrived because the invoice based post GST base selling price was calculated for the period from 01.07.2017 to 30.08.2019, this was quite a long period and during this period there have been lot of factors for the increase in price such as

increase in overheads; amortizing the cost of free warranty replacements, increase in transportation cost and increase in price by the suppliers. Such factors would be in the ratio of 30% for most of the products. Only a few products, it was 36% - 45% because of various other factors. Therefore, the base selling price based on post GST invoices was reduced by 30% for most of the products and 3 to 4 for some of the products to arrive at the base selling price as on 01.07.2017. The base selling price (Post GST) as on 01.07.2017 was always lesser than the commensurate sale price of the item.

10. This Authority has carefully considered the Report and clarifications furnished by the DGAP, the submissions made by the Respondent and the other material placed on record. On examining the various submissions, the observations of this Authority are as follows:-

- i. Vide Order No. 15/2018 dated 28.11.2018, the Authority has confirmed the profiteered amount of Rs. 4,78,085/- against the Respondent for two products/machines i.e. LAVA Mill CNC 240 and Sintering Furnace D664 as he has not passed on the additional benefit of ITC in post GST. On perusal of the Order dated 28.11.2018, it is observed that both of the products/machines i.e. LAVA Mill CNC 240 and Sintering Furnace D664 were imported by the Respondent. However, the products against which the present Report was submitted by the DGAP were purchased by the Respondent from the importer and then, sold to the customers.

- ii. The Respondent claimed to be Trader and has been selling the product imported by other parties (M/s 3M India Private Ltd). The Respondent has also claimed to have not registered with the Service Tax Department before 1.7.2017 and contended that he has not availed any credit of CVD and the Special Additional Customs Duty during pre-GST period.
- iii. The Respondent also refers to para 10 of the Report, wherein the DGAP has alleged that the Respondent has not submitted the tax structure on which the ITC was not available in the pre-GST period.
- iv. It is claimed by the Respondent that the said products were imported by his supplier and the tax structure was not mentioned by the supplier as supplies were at 2% CST. The Respondent has also submitted the sample copy of purchase invoice BO 00018925 dated 14.10.2016 with his submissions dated 07.04.2022. On perusal of the above submissions and the invoice submitted by the Respondent, this Authority observes that the said document only mention 2% CST and no breakup of import duty structures like basic customs duty, countervailing duty, special additional duty, etc have been mentioned. Such details of payment of duty may be available on the Bills of Entry filed by the supplier/importer (M/s 3M India Private Ltd).
- v. The Respondent has also contended that the rate of GST adopted by the DGAP was 28% for the entire period for the product 12216 CLINPRO Tooth Crème 113G as illustrated in Table-A of the

Report, whereas the said rate of duty was reduced from 15.11.2017. Though the Respondent has raised this issue in the submission dated 7.4.2022, but the DGAP has not clarified on the above contention.

- vi. The Respondent vide his submissions dated 12.05.2022 has submitted the pre-GST and post-GST tax structure, which was not available with the DGAP during the earlier round of investigation.
- vii. The Respondent vide his extensive and elaborate submissions dated 07.06.2022 has raised several other issues including his own calculation of the amount of profiteering based on his own understanding and some of these issues have not been addressed by the DGAP in its earlier report or clarifications given thereof.

11. In view of observation as mentioned in the earlier paragraphs, the Authority is of the view that correct amount of profiteering cannot be worked out until the information relating to the payment of various taxes by the importer/supplier is collected and analysed to work out the amount of credit, if any, which may be available to the Respondent before the implementation of GST. It is necessary for the DGAP to work out the amount of additional ITC, which if at all would be available to the Respondent after the implementation of GST. During this process, it may be possible to examine as to whether the supplier/importer is passing on the benefit of ITC to the Respondent, who in turn would pass on to its consumers/buyers. Only in such case, where any additional ITC has actually been made available to the Respondent in the GST regime as compared to the pre GST regime,

can any profiteering be alleged against the Respondent or any profited amount can be determined. Otherwise, the provisions of Section 171 of the CGST cannot apply to the Respondent who is not an importer himself, but, buys such goods from the importer. However, such facts are subject to ascertainment and verification by the DGAP.

12. For the reasons mentioned and discussed herein above and in the given circumstances, the Authority without going into the merits of the other submissions filed by the Applicant and the Respondent at this stage, find that this is a fit case for further investigation as per the provisions of Rule 133(4) of the CGST Rules 2017 as per the findings and directions contained herein above. Accordingly, this Authority directs the DGAP to reinvestigate the matter on all the above issues and furnish his Report under Rule 129 (6) of the CGST Rules, 2017. The DGAP may also collect relevant documents/evidences from the supplier/importer and investigate them also under Rule 133 (5). On his part, the Respondent is directed to fully cooperate with the DGAP in the process of reinvestigation which includes submission of the requisite documents/details/information pertaining to his supplies.

13. 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 or 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.

14. A copy each of this Order be supplied to the DGAP and the Respondent free of cost. File be consigned after completion.


Sd/-
(Amand Shah)
Technical Member &
Chairman

Sd/-
(Pramod Kumar Singh)
Technical Member



(Hitesh Shah)
Technical Member

Certified Copy


(Dinesh Meena)
Secretary, NAA

F. No. 22011/NAA/170/Theco/2020 | 8095 — 8097 Dated: 05.08.2022

Copy To:-

1. M/s. Theco India Pvt. Ltd., Shroff Orchads, No. D, Old No. 78, New No. 44, New Avadi Road, Kilpauk, Chennai- 600010
2. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, BhaiVir Singh Sahitya Sadan, BhaiVir Singh Marg, Gole Market, New Delhi-110001.
3. Guard File.