BEFORE THE NATIONAL ANTI-PROFITEERING AUTHORITY

UNDER THE CENTRAL GOODS & SERVICES TAX ACT, 2017

Case No.	18/2020
Date of Institution	16.09.2019
Date of Order	13.03.2020

In the matter of:

1. State Tax Officer, C-602, Cabin No. 437A, Vikrikar Bhavan, 4th Floor, Airport Road, Yervada, Pune-411006.
2. Director General of Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.

Applicants

Versus

M/s Cilantro Diners Pvt. Ltd., Shop No. 9, Riddhi Siddhi Heights, Chatrapati Chowk Road, Yervada, Pune-411057.

Respondent

Quorum:-

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

Present:-

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

ORDER

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

commensurate benefit since he has increased the base prices of his products. Record shows that the worksheet indicating the extent of profiteering sent by the Screening Committee was also received by the DGAP along with the above recommendation of the Standing Committee on 27.03.2017.

2. The DGAP in his report has stated that on receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 (3) was issued on 08.04.2019 (Annex-2), 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 prices and if so, to suo-moto determine the quantum thereof and indicate the same in his reply to the notice as well as furnish all supporting documents. The Respondent was also allowed to inspect the relied upon non-confidential evidence/information or any data supplied by the Applicant No. 1 between 15.04.2019 and 17.04.2019, which was however not availed of by the Respondent.

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

4. The DGAP has also reported that in response to the notice dated 09.04.2019 and subsequent reminders, the Respondent has submitted his replies vide his letters/e-mails dated 19.04.2019 (Annex-4), 12.06.2019 (Annex-5), 19.06.2019 (Annex-6), 17.07.2019 (Annex-7), 24.08.2019 (Annex-8) and 05.09.2019 (Annex-9), whereby the Respondent has submitted that he had availed Input Tax Credit (ITC) during the period from July 2017 till 14.11.2017 but thereafter he had not availed any ITC. Vide the aforementioned e-mails/letters, the Respondent submitted the following documents/information:-

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

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

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

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

(e) Price lists of the products, separately, for two stores registered under the same GST registration number.

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

(g) Details of ITC availed and utilised for the period July 2017 to 14th November 2017 by the Respondent.

5. The DGAP has also reported that in terms of Rule 130 of the CGST Rules 2017, the Respondent had also been informed by the DGAP vide notice dated 08.04.2019 that if any information/documents provided by him were confidential, a non-confidential summary of such information/documents could be furnished by him. However, the Respondent did not classify any of the information/documents provided by him as confidential, in terms of Rule 130 of the Rules, ibid.

6. The DGAP has also reported that based on a careful examination of the case records, including the reference from the Standing Committee on Anti-Profiteering, various replies of the Respondent and documents/evidence placed on record, it emerged that the main issues for determination were whether the rate of GST on the service supplied by the Respondent was reduced from 18% to 5% w.e.f. 15.11.2017 and if so, whether the benefit of such reduction in the rate of GST had been passed on by the Respondent to his recipients, in terms of Section 171 of the CGST Act, 2017.

7. The DGAP has further reported that the GST rate on the restaurant service had been reduced from 18% to 5% w.e.f. 15.11.2017 along with the condition that no ITC on the goods and services used in supplying the service would be available to the Respondent vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017. Since it was a case of reduction in the rate of tax, it was important to examine the provisions of Section 171 of

the CGST Act, 2017 to ascertain whether the present case was a case of profiteering or not. Section 171(1) reads as follows:-

"*Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement of the above provision was abundantly clear that in the event of a benefit of ITC or reduction in the rate of tax, there must follow a commensurate reduction in the prices of the goods or services being supplied by a registered person and that the final price being changed on each supply had to be reduced commensurately with the extent of benefit and that there was no other legally tenable mode of passing on such benefit of ITC to the recipients/consumers.

8. Further, the DGAP has intimated that the assessment of the impact of denial of ITC, which was an uncontested fact, required determination of the ITC in respect of "restaurant service", as a percentage of the taxable turnover from the outward supply of "products", during the pre-rate reduction period. For instance, if the ITC in respect of restaurant service was 10% of the taxable turnover of a registrant till 14.11.2017 (which became unavailable to him w.e.f. 15.11.2017) and if the increase in the base prices w.e.f. 15.11.2017 was less than 10%, then this would not be a case of profiteering. However, if in the same example, the increase in the base prices w.e.f. 15.11.2017, was by a margin of 14%, the extent of profiteering would be 14% -

10% = 4% of the turnover. In the instant case, profiteering was computed in the same manner as the above example for the period from 01.07.2017 to 14.11.2017. During the investigation, however, it was observed that certain invoices furnished by the Respondent for the period 01.11.2017 to 14.11.2017 actually pertained to the entire month of November 2017 and that no reversal of ITC was seen reflected in respect of such invoices (for the period from 15.11.2017 to 30.11.2017) in the GSTR-3B Returns of November 2017. Therefore, for the current investigation, the taxable turnover and ITC for the period 01.11.2017 to 14.11.2017 was excluded and not taken into account for the calculation of the percentage of ITC available to the Respondent.

9. The DGAP in his report has further intimated that the ratio of ITC to the Net Taxable Turnover has been taken as the basis for determining the impact of denial of ITC that was available till 31.10.2017. The monthly GST Returns of the Respondent show that the ITC amounting to Rs. 3,03,347/- was available during the period from July 2017 to October 2017 which worked out to be 9.05% of his Net Taxable Turnover from the restaurant service supplies amounting to Rs. 33,52,358/- during the same period. Further, with effect from 15.11.2017, the rate of tax on restaurant service was reduced from 18% to 5% and no ITC was available to the Respondent. A summary of the computation of

the ratio of ITC to the taxable turnover as furnished by the DGAP is at Table-A below:-

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

Particulars	Jul 17	Aug 17	Sept 2017	Oct 2017	Total
Total Outward Taxable Turnover as per GSTR-3B (A)	8,76,260	8,64,783	7,96,749	8,14,566	33,52,358
ITC Availed as per GSTR-3B (B)	63,369	84,567	72,859	82,552	3,03,347
The ratio of ITC to Net Outward Taxable Turnover (C)= (A/B*100)					**9.05 %**

10. The DGAP has also submitted that the analysis of the details of item-wise outward taxable supplies made during the post-rate reduction period (from 15.11.2017 to 31.03.2019) revealed that the base prices of the different items supplied by the Respondent had been increased by the Respondent, presumably, to offset denial of ITC. The pre and post rate reduction prices of the items sold by the Respondent during the period from 01.07.2017 to 14.11.2017 (Pre-GST rate reduction) and from 15.11.2017 to 31.03.2019 (Post-GST rate reduction) were compared and it was found that the Respondent had increased the base prices of the products supplied by him by more than what was required to offset the impact of denial of ITC in respect of items sold during the same period and hence, the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on.

11. The DGAP has further stated that the next step was to compute the amount of profiteering in this case. It was pertinent that as a

principle, only those items, where the increase in base prices was more than what was required to offset the impact of denial of ITC, were considered and the calculation was carried out following the above principle. For example, in the case for item "6" Hara Bhara Kabab Sub" the extent of profiteering was worked out as per the procedure mentioned in Table-B below:-

Table–B **(Amount in Rs.)**

(Store No. 55117) Name of the product (A)	6" Hara Bhara Kabab Sub
Total Quantity sold during 01.11.2017 to 14.11.2017 (B)	55
Sum of taxable Value during 01.11.2017 to 14.11.2017 (C)	5454
Average base price during 01.11.2017 to 14.11.2017 (D=C/B)	99.16
Base price with denial of input tax credit @ 9.05% (E=D+D *9.05%)	108.14
GST @ 5% (F=E*5%)	5.41
Total price to be charged(G=E+F)	113.54
Selling price per unit as per invoice no. 1/A-10509 dated 15.11.2017 (H)	140
Total profiteering (I=H-G)	26.46 (140-113.54)

12. The DGAP has also claimed that based on the aforesaid pre and post rates reduction prices of the products; the impact of denial of ITC; and the details of outward supplies (other than zero-rated, nil rated and exempted supplies) during the period 15.11.2017 to 31.03.2019 (as per the product-wise sales registers reconciled with the GSTR-1 and GSTR-3B Returns) the amount of net higher sale realization due to increase in the base prices of the service supplied after netting off the impact of denial of ITC or in other words, the profiteered amount worked out Rs. 20,80,087/- (including GST on the base profiteered amount) for the period of investigation, which is detailed in Annexure-11 of

his report. It was also stated that the service had been supplied by the Respondent in the State of Maharashtra only.

13. The DGAP has concluded that the allegation of profiteering by way of either increasing the base prices of the products while maintaining the same selling prices or by way of not reducing the selling prices of the products commensurately, despite the reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent and that the extent of profiteering was Rs. 20,80,087/- (inclusive of GST). Thus the provisions of Section 171 (1) of the CGST Act, 2017 had been contravened by the Respondent in the present case.

14. The above Report of the DGAP was considered by this Authority on 17.09.2019 and it was decided to hear the Respondent on 03.10.2019. Sh. Neeraj Rai, Director represented in person.

15. The Respondent vide his written submissions dated 18.10.2019 made the following submissions:-

    a. The Respondent stated that in DGAP's report dated 13.09.2019, the method applied to arrive at profiteering was incorrect as the data was not a comparable data since average base prices in the pre-GST periods were used and compared with the item-wise prices in the post-rate reduction period i.e. after 14.11.2017. Further, for the pre-rate reduction period itself, two sets of dates have been used, first from 01.11.2017 to 14.11.2017 and the second

from 01.07.2017 to 31.10.2017. He stated that the above method was untenable since for calculating the average base prices for the period 01.11.2017 to 14.11.2017, the DGAP has calculated the price after factoring the discount although the actual base prices in the menu were much higher. He further stated that offering discounts was a norm in this competitive world and depended on various factors and that it was the call of the business to decide upon the period and quantum of discount that were needed to be given to sustain in business and to attract more customers. He contended that this Authority ought to factor in the average base prices (excluding discount) for the period from 01.11.2017 to 14.11.2017 for his outlets, i.e. Store No. 55117 and No. 57692, and that the correct average base prices were being submitted before the Authority.

b. The Respondent submitted that in all Subway outlets, Sub of the Day (SOTD) was highly popular and was priced at Rs. 130/- inclusive of taxes (Rs. 110/- being the base price) across all outlets before 15.11.2017. However, this base price of Rs. 110/- was incorrectly mapped as Rs. 105/- in several invoices issued during the period from July-2017 to October 2017. This mistake needed to be corrected and the base price of SOTD should be taken as Rs. 110/-.

c. The Respondent further stated that all over the country M/s Subway Systems India Pvt. Ltd. (the franchisor) charged 8% of the Turnover (taxable sales) as Royalty and Advertisement Charges @ 4.5% of the turnover on weekly basis. Further, during the period when the GST rate was 18%, he had paid royalty and Advertisement charges on the weekly total sales excluding 18% GST, which later increased to the weekly total sales excluding 5% GST on account of the GST rate reduction since he opted for the composition scheme. Hence, when he had moved to the Composition Scheme he had started paying higher Royalty and Advertisement charges and as such his royalty cost had increased by 1.77%, as has been illustrated in the Table below:-

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

d. The Respondent further submitted that after moving to the composition scheme w.e.f. 15.11.2017, he was disallowed ITC on Capital Goods, which needed to be treated as a loss of ITC from Capital Goods in the computation of profiteering by the DGAP. The same is illustrated below:-

Non Availability of ITC of Capital Goods			(Amount in Rs.)	
Party Name	Invoice Number	Date of purchase	Basic Amount	GST Paid
Stellar Gastronom Pvt. Ltd.	TC/T/18-19/104	27.04.2018	71045	12788.1
Nirmal Sales Agencies	163	23.04.2018	16299	2933.84
Stellar Gastronom Pvt. Ltd.	TC/T/18-19/147	04.05.2018	41640	7495.2
Stellar Gastronom Pvt. Ltd.	TC/T/18-19/1193	11.05.2018	5280	950.2
Stellar Gastronom Pvt. Ltd.	TC/T/18-19/235	11.05.2018	1750	210
Stellar Gastronom Pvt. Ltd.	TC/T/18-19/2236	22.05.2018	249409	44893.62
Stellar Gastronom Pvt. Ltd.	TC/T/18-19/317	14.06.2018	78200	14076
Rajseva Enterprises Pvt. Ltd	12019	23.06.2018	12203.42	2196.62
Power Solutions	RSP/249/18-19	16.07.2018	70000	12600
Stellar Gastronom Pvt. Ltd.	TC/T/18-19/104	14.08.2018	62139	11185.02
Total			607965.42	109328.8
Turnover of 2018-19 (Rs.)		10179424.6		
% loss of GST on Capital Goods		1.074%		

e. The Respondent further submitted that in the restaurant business, he has to extend several promotional offers and discounts/deals to attract more customers and hence, he ran the Buy One Get One (BOGO) offer regularly in the

case of Store No. 57692 under which one Sub was offered free for every single Sub purchased. He submitted that the DGAP in his report has calculated profiteering on the second Sub also despite it having been given free of cost to customers and therefore, the profiteering calculated on the same should be completely removed from the sales made on the below-mentioned dates. He further stated that he ran the BOGO offer in respect of both his stores and had this contention been accepted by the DGAP there would have been no profiteering for the sales effected on the following dates as has been given in the Table below:-

Table

S. No	BOGO Offer in Store No. 57692	BOGO Offer in Store No. 55117
1	13th December 2017	2nd Nov 2018
2	10th Jan 2018	
3	24th Jan 2018	
4	28th Feb 2018	
5	21st March 2018	
6	11th April 2018	
7	25th April 2018	
8	9th May 2018	
9	30th May 2018	
10	25th July 2018	
11	8th August 2018	
12	29th August 2018	
13	12th September 2018	
14	26th September 2018	
15	10th October 2018	
16	24th October 2018	
17	2nd Nov 2018	
18	14th Nov 2018	
19	28th Nov 2018	
20	12th Dec 2018	
21	9th Jan 2019	
22	23rd Jan 2019	
23	13th Feb 2019	
24	27th Feb 2019	
25	13th March 2019	
26	27th March 2019	

f. The Respondent further submitted that the rate of inflation was almost 6% which implied that the profiteering should have been calculated till 31.03.2018 rather than 31.03.2019.

g. The Respondent also submitted that due to the above stated reasons, the profiteering amount of Rs. 20,80,087/- was incorrect and due weightage should be given to the above-mentioned points in the final calculation.

He further mentioned that as per Annexure 6 of the DGAP Report, the profiteering worked out to be 12% at the Cilantro level and 16% for the store No. 55117. The profiteering percentage was over and above 9.05% ITC and 5% GST which he was paying under the composition scheme.

Other Submissions:-

h. The Respondent also stated that as per his calculations after factoring in the above points, related to considering correct Average Base Prices of all the items, Royalty and Advertisement Charges impact on his costing, loss of ITC in Capital Goods, excluding Profiteering on the BOGO Sales (Free SUBs), factoring general inflation and limiting the scope of arriving at profiteering till 31.03.2018, the profiteering worked out to be merely Rs. 22,101/- as per

Annexure-5, which was less than 1% of the Taxable Sales for the period 15.11.2017 to 31.03.2018.

16. A supplementary report was sought from the DGAP on the various submissions made by the Respondent. In response, the DGAP, after considering the above submissions made by the Respondent, has furnished his issue-wise report, which is as below:-

a. In terms of CGST Act, 2017 and Rules made thereunder, the effective price on which tax was levied was the discounted price. Hence, the discounted price has been taken for both, i.e. the pre and post rate reduction periods. Explaining the same, it has been reported that in the computation contained in the DGAP's report dated 13.09.2019, the reference base prices of the products have been arrived at by dividing the total quantity supplied to the total taxable value charged (after discount) for the products during the period from 01.11.2017 to 14.11.2017. The reference base prices of the products, which were not supplied during the period from 01.11.2017 to 14.11.2017, were taken from the sales data for the period from July 2017 to October 2017.

b. In the DGAP's Report dated 13.09.2019, the reference base price for SOTD was taken as Rs. 110/-. However, the reference base price of SOTD products which were

not supplied during the period from 01.11.2017 to 14.11.2017, was taken from the sales data for the period July 2017 to October 2017, which was Rs. 105/-.

c. The payment of royalty and advertisement charges was a purely internal agreement between the Respondent and M/s Subway Systems India Pvt. Ltd., i.e. the franchisee and the franchisor. Therefore, there were no comments to offer in this regard.

d. This concern of the Respondent that post rate reduction he was not allowed to avail ITC of capital goods has already been addressed in para 13 to 15 of the DGAP's report dated 13.09.2019, wherein the base prices of the products has been increased by 9.05%, to factor in the denial of the ITC.

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

products during the period from 15.11.2017 to 31.03.2019 were more than the commensurate base prices of the impugned products. The invoices where the transaction prices were less than the commensurate base prices of the impugned products have not been considered.

17. The Respondent, vide his submissions dated 11.11.2019, filed his contentions against the above supplementary report of the DGAP, which are as below:-

a. That he did not agree with the findings of the DGAP because it was common in the restaurant business to offer discretionary discounts to customers and these discounts largely depended on market practices and factors such as sales, inventory position, competitor strategy, market penetration, customers' loyalty etc. He cited the decision of this Authority given in the case of M/s Flipkart (Case No. 5/2018 dated July 18, 2018) wherein it was held that withdrawal of discount was a prerogative of the supplier and did not amount to profiteering. He also stated that he has the right to withdraw discounts and other promotional offers anytime and no rule implied that a discount could not be withdrawn until the expiry of a specified period and that the DGAP had completely ignored this fact in as much as the average base prices had been calculated based on

discounted and normal sales during the period from 01.11.2017 to 14.11.2017, whereas they ought to have been calculated only based on normal sales made during that period.

b. That for Store No. 55117, the calculation of profiteering was flawed as it could not be 16% despite the denial of ITC benefit which was 9.05%. Maximum profiteering due to changes in GST rate could be 3.95% based on the simple calculation, i.e. 18% (GST rate) - 9.05% (ITC Loss) - 5%(GST Output Rate). He has also done the profiteering analysis which is mentioned below:-

(Amount in Rs.)

Month	Taxable Sales	Profiteering As per DGAP	Profiteering %
Nov 17	263607	29079	11%
Dec 17	551933	60782	11%
Jan 18	482484	49229	10%
Feb 18	451899	43599	10%
Mar 18	525335	53327	10%
Apr 18	674090	85430	13%
May 18	657331	97311	15%
Jun 18	692680	112748	16%
Jul 18	890558	150324	17%
Aug 18	787465	128004	16%
Sep 18	857866	149726	17%
Oct-18	1022312	183539	18%
Nov-18	899543	155277	17%
Dec-18	802117	130948	16%
Jan-19	733092	119556	16%
Feb-19	759524	147967	19%
Mar-19	914793	169336	19%
Grand Total	11966630	1866182	16%

c. That the DGAP's calculation of profiteering was flawed as he ought to have considered the fact that giving discounts was a general business practice. The DGAP should have

worked out the calculation based on the non-discounted base prices for non discounted sales and the discounted prices for discounted sales, for the two periods, separately, which would have resulted in a drastically reduced figure of profiteering, i.e. Rs. 13,79,025/-. He has also claimed that the correct calculation should be as below:-

(Amount in Rs.)

Profiteering Calculation based on average base price calculated separately for normal sales & discounted sales							
Month	Normal Sales Impact			Discounted sales Impact			Total Difference
	Profiteering as per DGAP Report	Profiteering as per our Calculation	Difference	Profiteering as per DGAP Report	Profiteering as per our Calculation	Difference	
5.Nov'17	32,756.33	7,289.35	25,466.97	207.37	263.20	(55.83)	25,411.14
6.Dec'17	66,381.95	13,801.65	52,580.30	437.79	817.51	(379.71)	52,200.59
7.Jan'18	55,554.08	12,523.98	43,030.10	713.47	1,469.05	(755.58)	42,274.52
8.Feb'18	50,105.99	12,851.22	37,254.77	273.76	340.23	(66.47)	37,188.30
9.Mar'18	60,322.60	16,338.83	43,983.77	597.65	2,333.47	(1,735.83)	42,247.95
1.Apr'18	86,410.52	28,874.89	57,535.63	15,939.96	41,960.89	(26,020.93)	31,514.71
2.May'18	96,046.95	29,137.77	66,909.18	17,462.94	43,462.86	(25,999.92)	40,909.26
3.Jun'18	111,075.31	27,531.27	83,544.04	13,069.86	28,464.59	(15,394.73)	68,149.31
4.Jul'18	162,881.47	36,665.04	126,216.43	59.39	-	59.39	126,275.82
5.Aug'18	144,198.09	36,437.95	107,760.15	162.67	-	162.67	107,922.82
6.Sept'18	163,382.80	37,887.39	125,495.41	-	-	-	125,495.41
7.Oct'18	198,264.08	45,672.94	152,591.15	2,336.88	6120.69032	(3,783.81)	148,807.34
8.Nov'18	170,562.07	42,227.26	128,334.82	2,263.39	5,094.83	(2,831.44)	125,503.37
9.Dec'18	142,026.94	31,741.00	110,285.94	-	-	-	110,285.94
10.Jan'19	136,462.02	36,261.25	100,200.76	-	-	-	100,200.76
11.Feb'19	161,936.78	61,389.44	100,547.34	2,070.80	4,216.03	(2,145.23)	98,402.11
12.Mar'19	174,512.13	66,543.80	107,968.32	11,610.85	23,342.75	(11,731.90)	96,236.42
	2,012,880.1	**543,175.02**	**1,469,705.09**	**67,206.78**	**157,886.10**	**(90,679.31)**	**1,379,025.78**

d. That the DGAP should have completely excluded all those items from the scope of calculation of profiteering which were not at all sold during the period 1.11.2017 to

14.11.2017; in other words, all the items for which comparison has been done based on the base period from July 2017 to October 2017, should be removed from the scope of calculation of Profiteering. The impact thereof on Store No. 55117 would be Rs. 46,742/- and on Store No 57692, it would be Rs. 13,432/-, and thus the total amount of profiteering would reduce accordingly by Rs. 60174/-.

e. That the profiteered percentage could not exceed the net reduction in the rate of tax. The profiteering should be calculated based on the actual impact due to net reduction in the rate of tax. Under the GST law, no precise computation methodology or principles have been prescribed for computing the profiteered amount. While the DGAP has considered the changes in base prices post 15.11.2017 as compared to the pre rate reduction period, he has failed to appreciate that prices of the products could depend on many other factors. His own calculation of the impact of tax rate reduction based on the assumption that the rate reduction Notification gave 2 options, first to opt for 18% GST with ITC benefit or opt for 5% GST without the benefit of ITC, the maximum impact could work out to Rs. 4,82,858/- (without considering the impact of other factors) whereas the DGAP had calculated profiteered amount of Rs. 20,80,087/-, which was 430% higher when compared to the actual benefit received due to reduction in the tax

rate. The Respondent also submitted his calculation to buttress his above claim.

f. That he did not agree with the finding of the DGAP that all those products in respect of which menu prices were not found in the database of the period from 01.11.2017 to 14.11.2017, base prices have been taken for such items from the period July 17 to October 2017. One such example was the case of SOTD under which the Respondent was selling SOTD at a fixed price of Rs. 110/- till 14.11.2017 (i.e. before the change in GST rate from 18% to 5%); although the sandwich being supplied as SOTD kept changing on a daily basis; that in the case of Store No. 55117, SOTD base price of Rs. 105/- was increased on 18.08.2017 to Rs. 110/- and it remained unchanged till 14.11.2017; that for Store No. 57692, the said base price of SOTD was increased from Rs. 105/- to Rs. 110/- on 23.08.2017; that he was submitting sample bills to evidence his above claim in respect of both his stores; that after taking the correct SOTD base price of Rs. 110/-, the amount of profiteering would stand reduced by Rs. 13,263/-.

g. The Respondent submitted that the finding of the DGAP relating to Royalty and Advertisement Charges expenses paid to M/s Subway Systems India Private Limited, the franchisor, was flawed, though it was indeed an internal

agreement between him and the franchisor however, post 15.11.2017, his royalty cost increased by 1.77% and he had to increase the base prices of his products to compensate for the loss that arose due to his migration to the GST scheme from 18% to 5% rate; that the DGAP should have considered this 1.77% increase in royalty while calculating the Profiteering amount as it increased his costs as detailed in Annexure 2 below:-

Annexure-2

Calculation of GST impact on Royalty and Advertisement Expenses

(Amount in Rs.)

Particular	Before 15/11/2017	After 15/11/2017	Incremental cost. %
Sales price including GST	118	118	
Basic price	100	112.38	
GST	18%	5%	
GST Amount	18	5.62	
Total	118	118	
Royalty Expenses	8% of basic price	8% of basic price	
Royalty Amount	8	8.99	
GST on Royalty	12%	12%	
GST Amount	0.96	1.079	
Total Amount	8.96	10.07	1.11
Advertisement Expenses	4.5% of basic price	4.5% of basic price	
Advertisement Amount	4.5	5.06	
GST on advertisement	18%	18%	
GST Amount	0.81	0.910	
Total Amount	5.31	5.97	0.66
Total	14.27	16.037	1.77

Impact of increase in Royalty:-

Month	Royalty Impact (Amount in Rs.)		
	Profiteering as per DGAP Report	Profiteering as per our Calculation after royalty adjustment	Difference
5.Nov'17	32,963.70	28,813.46	4,150.24
6.Dec'17	66,819.74	58,760.79	8,058.96
7.Jan'18	56,267.54	48,888.43	7,379.12
8.Feb'18	50,379.75	45,120.55	5,259.21
9.Mar'18	60,920.25	55,660.77	5,259.48
1.Apr'18	102,350.48	91,616.43	10,734.05
2.May'18	113,509.89	102,320.50	11,189.39
3.Jun'18	124,145.17	113,877.76	10,267.41
4.Jul'18	162,940.86	150,428.85	12,512.01
5.Aug'18	144,360.77	132,167.57	12,193.20
6.Sept'18	163,382.80	150,353.38	13,029.42
7.Oct'18	200,600.97	185,048.75	15,552.22
8.Nov'18	172,825.46	158,997.70	13,827.76
9.Dec'18	142,026.94	131,742.38	10,284.57
10.Jan'19	136,462.02	125,378.43	11,083.59
11.Feb'19	164,007.58	153,083.85	10,923.72
12.Mar'19	186,122.97	173,602.98	12,519.99
	2,080,086.90	**1,905,862.58**	**174,224.32**

h. That the finding of the DGAP relating to his Buy One Get One Free Offer (BOGO) were also untenable since only those invoices had been taken into account for computing profiteering wherein the transaction prices of the products during the period 15.11.2017 to 31.3.2019 were more than the commensurate base prices and that the invoices where the transactions prices were less than the commensurate base prices, were not considered: that under this offer, he was offering one Sub Free to his customers under the cover of single invoice on the purchase of a Sub at normal price.; that though the customer and the invoice were

same, as per the logic used by the DGAP, the free Sub was excluded from Profiteering calculation; that this offer was a common form of sales promotion whereby the price took into account the fact that two items were being sold at approximately the price of one: that under BOGO, he has passed on the benefit to the customers through the same Invoice and therefore all the sales on BOGO dates should be excluded from the scope of calculating profiteering; that he was enclosing sample invoice of BOGO and the dates of BOGO for both his stores, as is given below:-

For Store No 57692

(a) Inv. No. 25010 dated 9/5/18 Amount Rs 185/-.

(b) Inv. No. 33039 dated 12/9/18 Amount Rs 255/-.

(c) Inv. No. 39816 dated 9/1/19 Amount Rs 220/-.

For Store No 55117

(a) Inv. No. 42413 dated 2/11/18 Amount Rs 220/-.

(b) Inv. No. 42423 dated 2/11/18 Amount Rs 220/-.

(c) Inv. No. 42450 dated 2/11/18 Amount Rs 220/-.

S. No	BOGO Offer in Store No. 57692	BOGO Offer in Store No. 55117
1	13th December 2017	2nd Nov 2018
2	10th Jan 2018	
3	24th Jan 2018	
4	28th Feb 2018	
5	21st March 2018	
6	11th April 2018	
7	25th April 2018	

8	9th May 2018	
9	30th May 2018	
10	25th July 2018	
11	8th August 2018	
12	29th August 2018	
13	12th September 2018	
14	26th September 2018	
15	10th October 2018	
16	24th October 2018	
17	2nd Nov 2018	
18	14th Nov 2018	
19	28th Nov 2018	
20	12th Dec 2018	
21	9th Jan 2019	
22	23rd Jan 2019	
23	13th Feb 2019	
24	27th Feb 2019	
25	13th March 2019	
26	27th March 2019	

That using his above understanding, he had further calculated that the impact of profiteering on Store No. 57692 was Rs. 58,220/- and For Store No. 55117, it was Rs. 14,085/-, both totalling to Rs. 72,305/-.

i. That on point No. 6 of his previous submissions dated 18.10.2019 which related to inflation, the DGAP has not given any comment; that he wishes to submit that he was not holding inventory more than one week due to the perishable nature of his items; that one of his main raw materials was vegetables prices of which kept changing on day to day basis; that various factors like 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 and general year on year inflation, etc. played an important part at the time of fixing the prices of the products; that the computation of profiteering ought to factor the same; that no specific period has been prescribed for investigation under Section 171 of the CGST Act 2017 and the CGST Rules to keep the base prices same; that , the DGAP, while calculating profiteered amount, has considered sales up to the period from November 2017 to March 2019, i.e. a period of almost 16 months for his investigation which was unacceptable; that the tax rate was reduced from 18% to 5% with effect from 15.11.2017 and he had increased the base sale prices of his products on different dates after 15.11.2017 as part of his normal business practice and to offset inflation which has not been considered by the DGAP; that the profiteered amount should be calculated on the basis of the difference in base prices which existed just before reduction in rate and immediately after that; that the profiteered amount should be calculated up to 31.03.2018 and beyond that period any increase in prices should be purely considered as business decision and should not be part of profiteered amount.

j. That as per Article 19 (1) (g) of the Constitution of India, he enjoyed the right to trade, which included the right to determine prices and such right which has been granted by the Constitution of India, could not be taken away without any

explicit authority under the law; that therefore, this form of price control was a violation of Article 19(1) (g) of the Constitution of India.

k. That in case of a few products, on which he had not only passed the benefit of the reduction in tax rate but had reduced the basic prices further, and incurred substantial losses, have not been considered by the DGAP; that the DGAP, while calculating the profiteered amount, had not considered the prices of products which had been reduced by him and that as such the DGAP has considered such impact as zero, ignoring the negative values.

l. That the DGAP, while calculating the profiteered amount, has wrongly added 5% GST to the amount profiteered, apparently on account of GST, which was collected from customers and deposited with government and hence could not be considered profiteering. On this account, the profiteered amount should stand reduced by Rs. 99,052/-.

18. We have carefully considered the Report of the DGAP, the submissions made by the Respondent and the Applicant and the other material placed on record. On examining the various submissions we find that the following issues need to be addressed:-

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

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

19. Section 171 of the CGST Act provides as under:-

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

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

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

(3A) Where the Authority referred to in sub-section (2) after holding examination as required under the said sub-section comes to the conclusion that any registered person has

profiteered under sub-section (1), such person shall be liable to pay penalty equivalent to ten percent of the amount so profiteered:

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

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

20. In the context of deciding the present case, we observe that Section 171 of the CGST Act 2017 itself defines the term "profiteered" which means the amount determined on account of not passing on the benefit of reduction in the rate of tax on supply of goods and services or both or the benefit of Input Tax Credit to the recipient by way of commensurate reduction in the prices of the goods or services or both. We find it pertinent that Section 171 of the CGST Act 2017 provides that the "profiteered amount" is to be computed in respect of each supply made by a registered person. As per the above-said provisions, there is no connection between the term "profiteered" and "Profit". The scope of profiteering is confined to the question of whether the

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benefit accruing on account of reduction in the tax rate or the benefit of ITC as the case may be, has been passed on to the recipient/consumer or not. In the context of the same, some of the submissions made by the Respondent, i.e. those relating to increase in cost on account of royalty, advertising charges and inflation has increased due to the cost of raw materials do not have any ramification on the computation of the amount of profiteering. Further, it is pertinent to mention that Section 171 of the Act, ibid, mandates that profiteering has to be calculated on each supply/transaction and therefore it has to be calculated on each actual invoice/actual supply in the relevant period, comparing the prices mentioned therein with the prevailing base prices before the reduction in the tax rate in the availability of ITC. It is also pertinent that for the computation of profiteering, the actual transaction value of a product in the pre and post-tax rate reduction periods is compared. Hence, the pricing and the amount of profit/loss at the end of the supplier becomes irrelevant for the computation of profiteering. We also find it pertinent to mention that this Authority has no legislative mandate to fix the prices or the profit margins in respect of any supply (which are the rights of the supplier) and it is obligated by Section 171 of the CGST Act, 2017 to ensure that the benefit of the reduction in the rate of tax and/ or benefit of ITC (which is a sacrifice of revenue from the kitty of Central and State Governments in a welfare state) is passed on to the recipients,

and, if tracked down the entire value chain, to the end consumers. The welfare of the consumers who are voiceless, unorganized and scattered is the soul of this provision. This Authority has been working in the interest of consumers as the trade is bound to pass on the benefit of tax reduction and ITC which become available to it due to revenue sacrificed by the Government. This Authority does not, in any manner, interfere in the business decisions of the Respondent and hence the functioning of this Authority and the anti-profiteering machinery is within the confines of the four walls of the provisions of Section 171 of the CGST Act 2017 and in no way violates the tenets of Article 19 (1) (g) of the Constitution. Keeping the above observations in mind, we proceed to address the specific issues raised by the Applicants and the Respondent in the present case.

21. It is clear from the plain reading of Section 171(1) mentioned above that it deals with two situations one relating to the passing on the benefit of reduction in the rate of tax and the second about the passing on the benefit of the ITC. On the issue of reduction in the tax rate, it is apparent from the DGAP's Report that there has been a reduction in the rate of tax from 18% to 5% w.e.f. 15.11.2017, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 in the post GST period. It has been revealed from the DGAP's Report that the ITC which was available to the Respondent during the period July 2017 to

October 2017 was 9.05% of the net taxable turnover of restaurant services supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the ITC was not available to the Respondent. The DGAP in his Report has stated that the Respondent had increased the base prices of different items by more than 9.05% i.e. by more than what was required to offset the impact of denial of ITC, supplied as a part of restaurant service to make up for the denial of ITC post-GST rate reduction.

22. One of the contention made by the Respondent is that the methodology applied by the DGAP to arrive at profiteering was incorrect as the data was not comparable, as two sets of average base prices have been used to compare the item-wise transactions post 14.11.2017, first during the period from 01.11.2017 to 14.11.2017 and second from 01.07.2017 to 31.10.2017. He has stated that the above method was completely incomparable. The above contention of the Respondent is not correct. It is evident from the DGAP's Report that the reference base prices of the items have been arrived at by dividing the total quantity supplied to the total taxable value charged after discount for the items during the period from 01.11.2017 to 14.11.2017. Further, the base prices of the products which were not supplied during the period 01.11.2017 to 14.11.2017 were taken from the sales data for the period July-

2017 to October-2017. Hence, the above claim of the Respondent cannot be accepted.

23. The Respondent has also argued that the CGST Act and the Rules made thereunder did not prescribe any procedure or mechanism for calculation of profiteering as also the period of investigation, rendering the DGAP investigation arbitrary. In this regard, we observe that the 'Procedure and Methodology' for passing on the benefits of reduction in the rate of tax and ITC has been mentioned in Section 171 (1) of the CGST Act, 2017 itself which states as follows:- "*Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*" It is clear from the perusal of the above provision that it mentions "reduction in the rate of tax or benefit of ITC" which means that the benefit of tax reduction or ITC has to be passed on by a supplier since it is a sacrifice granted from the public exchequer, which cannot be misappropriated by him. It also means that the above benefit is to be passed on each product to each buyer and in case it is not passed on, the profiteered amount has to be calculated for which investigation has to be conducted on all such impacted supplies made to each recipient, thereby clearly implying that a supplier cannot claim that he has passed on more benefit to one customer, therefore he would pass less benefit to another customer than the benefit which is actually due to that customer. In other words, each

customer is entitled to receive the benefit of tax rate reduction or ITC on each product purchased by him. The word "commensurate" mentioned in the above Section gives the extent of benefit to be passed on by way of reduction in the prices which has to be computed in respect of each product supplied based on the extent of tax reduction as also the existing base price of the product before such tax rate reduction. The computation of commensurate reduction in prices is purely a mathematical exercise which is based upon the above parameters and hence it would vary from product to product and hence no fixed methodology can be prescribed to determine the amount of benefit which a supplier is required to pass on to a recipient or for computation of the profiteered amount. However, to further elaborate upon this legislative intent behind the law, this Authority has notified the 'Procedure and Methodology' vide its Notification dated 28.03.2018 under Rule 126 of the CGST Rules, 2017. However, no fixed formula which fits all the cases of profiteering can be set while determining such a "Methodology and Procedure" as the facts of each case are different. In one real estate project, date of start and completion of the project, price of the house/commercial unit, mode of payment of the price, stage of completion of the project, rates of taxes, amount of ITC availed, total saleable area, area sold and the taxable turnover realized before and after the GST implementation would always be different from the other project and hence the amount

of benefit of additional ITC to be passed on in respect of one project would not be similar to another project. Therefore, no set parameters can be fixed for determining methodology to compute the benefit of additional ITC which would be required to be passed on to the buyers of such units. Moreover, this Authority under Rule 126 of the CGST Rules, has the power to 'determine' Methodology & Procedure and not to 'prescribe' it. However, fixation of the commensurate price is purely a mathematical exercise that can be easily done by a supplier keeping in view the reduction in the rate of tax and his price before such reduction or the availability of additional ITC post implementation of GST. Further, the facts of the cases relating to the Fast Moving Consumer Goods (FMCGs), restaurants, construction and cinema houses are completely different and therefore, the mathematical methodology employed in the case of one sector cannot be applied in the other sector otherwise it would result in denial of the benefit to the eligible recipients. Moreover, the provisions of Section 171 (1), which are abundantly clear, unambiguous and mandatory, truly reflect the intent of the Central and State legislatures. The Respondent cannot deny the benefit of tax reduction to his customers on the above untenable ground as Section 171 provides a clear cut methodology to compute both the above benefits. It would also be relevant to mention here that Section 171 (2) of the CGST Act, 2017 and Rule 122, 123, 129 and 136 of the CGST Rules,

2017 provide the machinery to enforce the provisions of law in the form of this Authority, the Standing and Screening Committees, the DGAP and a large number of field officers of the Central and the State Taxes to implement the anti-profiteering provisions. Hence, the above argument of the Respondent is not tenable.

24. The Respondent has further contended that for calculating the average base price from 01.11.2017 to 14.11.2017, the DGAP has calculated the price after factoring the discount. The actual base price of the menu was much higher. Giving a discount was the norm in this competitive world and depends on various factors. It was the call of the business to decide upon the period and quantum of discount that was needed to be given to sustain in business and to attract more customers. Therefore, the average base prices of the items should be considered without excluding the discounts. The contention of the Respondent is not correct. It is clear that the effective price on which tax was levied was discounted price and hence, the discounted price was taken while determining the average base price of the item for the pre rate reduction period. The base prices of the products had been arrived at by dividing the total quantity supplied to the total taxable value charged post discount. Also, as per the sample invoices submitted by the Respondent vide submissions dated 11.11.2019, it was observed that he did not mention in the invoices that the discounts were given due to the GST rate

reductions. On the other hand, these invoices revealed that the discounts offered (Sub of the Day-SOTD) were as per the general discount pattern which was being followed by the Respondent in the course of his business. Therefore, the above discounts cannot be construed to have been given due to the GST rate reductions and hence, the above claim of the Respondent cannot be accepted.

25. The Respondent has also contended that the base price in respect of Sub of the Day (SOTD) was Rs. 110/- which was incorrectly mapped to Rs. 105/- by the DGAP in many cases while working out the base rate for the period from July-2017 to October 2017. The same needed to be corrected and all SOTD should be worked with Base Price of Rs. 110/- only for both the stores. However, the record of the case reveals that the Respondent, at no point in time, has furnished any invoice/ supply document that shows SOTD as an item supplied/ sold by him. Since no invoice mentions SOTD as an item supplied, there is no ground for accepting Respondent's contention regarding SOTD. Further, we find that for computing the extent of profiteering, the DGAP has taken, as the basis, the product-wise average price for the items supplied in the pre rate reduction period from the Respondent's invoices which the Respondent had himself submitted and not from any secondary data/ source. We also take note of the fact that the DGAP has compared the average pre rate reduction base prices with the actual post rate

reduction prices of all the products supplied by the Respondent, including SOTD, due to the reasons that it was not possible to compare the average base prices pre and post rate reduction as the post rate reduction the benefit has to be legally passed to each buyer on the actual transaction value received by the Respondent from each of such buyer. Further, it was also not possible to compare the actual to actual base prices pre and post rate reduction (of SOTD or any other product) as the same buyer may not have purchased the very same product during both the above periods and some of the buyers may have purchased some products during the post-rate reduction period and not during the pre rate reduction period or vice versa. Also, the Respondent has himself stated that he had charged different base prices to his customers for the same product on different days of any particular week/ month during the pre rate reduction period and therefore, the only alternative available was to compute the average base prices for the above period so that comparison could be made with the post rate reduction actual base prices. Therefore we do not find any merit in the claim of the Respondent.

26. The Respondent has contended that in India, M/s Subway Systems India Pvt. Ltd. charges 8% and 4.5% Royalty and Advertisement Charges respectively. When 18% GST was charged on the restaurant services, he used to pay to the franchisor, Royalty calculated as a percentage of the Total Sales

less GST @ 18% (i.e. on taxable value). However, under the Composition Scheme, he had started paying Royalty and Advertisement charges, calculated as a percentage of his total sales less GST @5%, which meant that in the composition scheme, his royalty cost directly increased by 1.77%. In this connection, it would be appropriate to refer to the definition of the profiteered amount given in the Explanation attached to Section 171.

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

27. The Respondent has further contended that after moving to the composition scheme w.e.f. 15.11.2017, he was disallowed ITC on Capital Goods. To calculate the profiteered amount, he needed to factor in the loss of ITC from capital goods. During the last financial year, he had lost the benefit of ITC available on capital purchases. It was clear that the Central Government vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017, had reduced the GST rate on the restaurant services from 18% to 5% w.e.f. 15.11.2017 with the condition that the ITC on the goods or services used in supplying the services was not taken. Therefore, post rate reduction the Respondent was not allowed to avail the ITC on capital goods. In the context of this contention of the Respondent, we find that the DGAP has already factored the fact of denial of ITC to the Respondent w.e.f. 15.11.2017 in the computation which is based on the comparison of ratios of the Total ITC available to the Net Taxable Turnover in the pre rate reduction regime with the post rate reduction regime. It is pertinent that for the pre-rate reduction period, ITC on capital goods, if any, availed by the Respondent, has already been accounted for in the computation. Hence, the contention of the Respondent is without any merit.

28. The Respondent has also contended that he ran BOGO offer regularly in Store No. 57692 and gave free Sub (item/product) for every single Sub purchased and the DGAP has calculated profiteering on the second Sub despite it was given free of cost

to the customers. The Respondent has also contended that the DGAP has not taken into account those invoices of the post–rate reduction period (15.11.2017 to 31.03.2019), wherein the transaction prices were lesser than the commensurate base prices of the products supplied by him, i.e. where he had passed on excess (more than commensurate) benefit to his customers/recipients. The above contention of the Respondent is not correct because the computation done by the DGAP is based on the transaction value as per the provisions of Section 15 of the CGST Act, 2017 and all discounts including the supply of free Sub, which do not form part of such value, cannot be included in the price of the product. The Respondent has himself submitted that the discounts offered by him were given following his general market practice in the course of his business, which every other similar franchisee was also doing to promote his sales. The excess benefit passed on one product can also not be set off against the other product since the benefit is required to be passed on to every buyer and no buyer can be denied the benefit on the ground that it has been passed on the other buyer. Therefore, the above contentions of the Respondent cannot be accepted.

29. The Respondent has contended that the inflation cost was approximately 6% and hence, profiteering should be calculated until 31.03.2018. In this regard, it is pertinent to mention here that the scope of profiteering is confined to the question of

whether the benefit accruing on account of rate reduction has been passed on to the recipients or not. The Respondent had no ground to increase his prices on the intervening night of 14/15th November 2017 on account of inflation as he had no data to substantiate the above increase on the above date. Therefore, the contention of the Respondent relating to the increase in his costs on account of inflation does not have any ramification on the computation of profiteering. Therefore, this contention of the Respondent cannot be accepted.

30. The Respondent has also contended that the profiteering amount i.e. Rs. 20,80,087/- was incorrect. As per Annexure-6 of the Respondent's submissions dated 18.10.2019, the profiteering has been worked out to be 12% for the Cilantro Store and 16% for his store No. 55117. In this connection, it is pertinent to mention that the DGAP has calculated the ratio of ITC to net outward taxable turnover based on the statutory Returns submitted by the Respondent and the profiteered amount has been calculated by the DGAP in line with the provisions of Section 171 (1) and (2) of the CGST Act, 2017. Hence, the above ratios computed by the Respondent are not correct and cannot be accepted.

31. The Respondent has also contended that the length of the period taken by the DGAP for his investigation was arbitrary as no such period has been prescribed under the Act to keep the base prices the same so the anti-profiteering provisions should

not be invoked. The DGAP while calculating profiteered amount has arbitrarily considered sales up to the period from November-2017 to March-2019 i.e. almost 16 months after the change in GST rate, which was an unduly long period. Therefore, the period of calculation for profiteering should be kept only up to 31.03.2018. In this context, we observe that in this case, while the rate of GST was reduced from 18% to 5% w.e.f. 15.11.2017, the Respondent increased the base prices of his products immediately thereafter and did not pass on the resultant benefit by a commensurate reduction in the prices of his supplies at any point of time till 31.03.2019. In other words, the violation of the provisions of Section 171 of the CGST Act 2017 has continued unabated in this case and the offence continues to date. The Respondent has nowhere produced any evidence to prove from which date the benefit was passed on by him. The fact that the Respondent has not complied with the law till 31.03.2019 implies that profiteering has to be computed for the entire period and hence we do not see any reason to accept this contention of the Respondent. We further observe that had the Respondent passed on the benefit before 31.03.2019, he would have been investigated only till that date. Therefore, the period of investigation i.e. from 15.11.2017 to 31.03.2019 has been rightly taken by the DGAP.

32. The Respondent has also claimed that the pricing of products depends on several commercial factors. In this connection, it

would be pertinent to mention that the provisions of Section 171 (1) and (2) of the above Act require the Respondent to pass on the benefit of tax reduction to the consumers only and have no mandate to look into fixing of prices of the products which the Respondent was free to fix. If there was an increase in his costs the Respondent should have increased his prices before 15.11.2017, however, it cannot be accepted that his costs had increased exactly on the intervening night of 14.11.2017/ 15.11.2017 when the rate reduction had happened which had forced him to increase his prices exactly equal to the reduction in the rate of such tax. Such an uncanny coincidence is unheard off and hence there is no doubt that the Respondent has increased his prices for appropriating the benefit of tax reduction to deny the above benefit to the consumers.

33. The Respondent has also claimed that the additional burden borne by the Respondent as GST has not been considered. In this connection, it would be appropriate to mention that the provisions of Section 171 (1) and (2) of the CGST Act, 2017 mandate that the benefit of reduction in the tax rate is to be passed on to the recipients/ customers by way of commensurate reduction in price, which includes both, the base price and the tax paid. In this connection, it would be appropriate to mention that the Respondent has not only collected excess base prices from the customers which they were not required to pay due to the reduction in the rate of tax but he has also compelled them to

pay additional GST on these excess base prices which they should not have paid. By doing so, the Respondent has defeated the very objective of both the Central as well as the State Governments which aimed to provide the benefit of rate reduction to the general public. The Respondent was legally not required to collect the excess GST and therefore, he has not only violated the provisions of the CGST Act, 2017 but has also acted in contravention of the provisions of Section 171 (1) of the above Act as he has denied the benefit of tax reduction to his customers by charging excess GST. Had he not charged the excess GST the customers would have paid less price while purchasing goods from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted.

34. The Respondent has further contended that right to trade was a fundamental right guaranteed under Article 19(1) (g) of the Constitution of India and the right to trade included the right to determine prices and such right which had been granted by the Constitution of India could not be taken away without any explicit authority under the law. Therefore, this form of price control was a violation of Article 19 (1) (g) of the Constitution of India. The above contention of the Respondent is not correct as this Authority or the DGAP has not acted in any way as a price

controller or regulator as they do not have the mandate to regulate the same. The Respondent is free to exercise his right to practice any profession or to carry on any occupation, trade or business, as per the provisions of Article 19 (1) (g) of the Constitution. He can also fix his prices and profit margins in respect of the supplies made by him. Under the provisions of Section 171 of the Act, ibid, this Authority has been only authorized to ensure that the benefit of tax reduction which is nothing but sacrifice of tax revenue made by the Government is passed on to the consumers who actually bear the impact of the tax and not pocketed by the Respondent. The intent of this provision is the welfare of the consumers who are voiceless, unorganized and vulnerable. This Authority is charged with the responsibility of ensuring that both the above benefits are passed on to consumers in line with the provisions of Section 171 read with Rule 127 and 133 of the CGST Rules, 2017. This Authority has in mo manner interfered with the business choices made by the Respondent. Therefore, the contention of the Respondent that these proceedings violate Article 19 (1) (g) of the Constitution, has no legal basis.

35. The Respondent has further contended that the DGAP, while calculating the profiteered amount, had not considered the prices of products which had been reduced by him and that the DGAP has considered such impact as zero, ignoring the negative values. In this regard, we observe that no 'netting off' can be

applied in the case of profiteering, as the benefit that has to be passed on to each customer has to be necessarily computed on each product supplied. Zeroing or netting off, as demanded by the Respondent, would imply that the amount of benefit not passed on certain supplies (to certain customers/ recipients) would be subtracted from the amount of any excess (more than commensurate) benefit passed on other products and the resultant amount would be determined as the profiteered amount. If this flawed methodology is applied the Respondent shall be entitled to subtract the amount of benefit which he has not passed on from the amount of such excess benefit which he has claimed to have passed, which will result in complete denial of benefit to the customers who were entitled to receive it. It has to be kept in mind that every recipient/ customer is entitled to the benefit of the tax rate reduction by way of reduced prices and Section 171 does not offer the Respondent to suo moto decide on any other modality to pass on the benefit of reduction in the rate of tax to his recipients. Therefore, any benefit of tax rate reduction passed on to a particular recipient or customer cannot be appropriated or adjusted against the benefit of tax rate reduction that ought to accrue to another recipient or customer. Therefore, the contention of the Respondent is not accepted.

36. The Respondent has relied upon the decision of this Authority in the case of M/s Flipkart vide Order No. 05/2018 dated 18th July 2018 wherein it had been recorded that withdrawal of discounts

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

37. Based on the above facts the profiteered amount is determined as Rs. 20,80,087/- as has been computed in Annexure-11 of the DGAP Report dated 13.09.2019. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. Further, since the recipients of the benefit, as determined, are not identifiable, the Respondent is directed to deposit an amount of Rs. 20,80,087/- in two equal parts of Rs. 10,40,043.50/- each in the Central Consumer Welfare Fund and the Maharashtra Consumer Welfare Fund as per the provisions of Rule 133 (3) (c) of the CGST Rules 2017, along with interest payable @ 18% to be calculated starting from

the dates on which the above amount was realized by the Respondent from his recipients till the date of its deposit. The aggregate amount of Rs. 20,80,087/- 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 SGST Commissioner.

38. It is evident from the above narration of facts that the 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 resorted to profiteering. Hence, he has committed an offence under section 171 (3A) of the CGST Act, 2017 and therefore, he is liable to penal action under the provisions of the above Section. Accordingly, a notice be issued to him 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.

39. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the Commissioner of SGST Maharashtra to monitor this order under the supervision of the DGAP by ensuring that the amount profiteered by the Respondent as ordered by this Authority is deposited in the CWFs of the Central and the Maharashtra State Governments as per the details given above. A report in compliance of this order shall be submitted to this

Authority by the concerned SGST Commissioner within a period of 4 months from the date of receipt of this order.

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

Sd/-
(Dr. B. N. Sharma)
Chairman

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

Sd/-
(Amand Shah)
Member(Technical)

Certified Copy

O/C

(A.K Goel)
Secretary, NAA

File No. 22011/ NAA/78/Cilantro /2019/1589-92 Dated: 13.03.2020

Copy To:-

1. M/s Cilantro Diners Pvt Ltd, Shop No 9, Riddhi Siddhi Heights, Chatrapati Chowk Road, Wakad, Pune-411057.
2. State Tax Officer, C-602, Cabin No. 437A, Vikrikar Bhavan, 4th Floor, GST Bhavan, Yervada, Pune-411006.
3. Director General Anti-Profiteering, Central Board of Indirect Taxes & Customs, 2nd Floor, Bhai Vir Singh Sahitya Sadan, Bhai Vir Singh Marg, Gole Market, New Delhi-110001.
4. Commissioner of Commercial Taxes, GST Bhavan, Mazgaon, Mumbai- 400 010.
5. Chief Commissioner of Central Goods & Services Tax, Pune zone GST Bhawan Ice House, 41A, Sasoon Road, Opp. Wadia college, Pune-411001.
6. Guard File.

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