

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

Case No. 19/2020
Date of Institution 18.09.2019
Date of Order 17.03.2020

In the matter of:

1. Assistant Commissioner of State Tax (Pune 3), 3rd Floor, GST Bhavan, 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 N. Rai Delights LLP, FL-19, Konark Puram, SOC SN-7-1,
Building-T, Kondhawa, KH Pune-411048.

Respondent

Quorum:-

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

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Present:-

1. None for the Applicant No. 1.
2. None for the Applicant No. 2.
3. None for the Respondent.

ORDER

1. The present Report dated 17.09.2019, received on 18.09.2019 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 from the Standing Committee on Anti Profiteering on 27.03.2019 by the DGAP, to conduct a detailed investigation in respect of an application originally examined by the Maharashtra State Screening Committee on Anti-profiteering filed 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.) despite reduction in the rate of GST from 18% to 5% w.e.f. 15.11.2017. It was alleged that the Respondent had increased the base prices of his products and had not passed on the



benefit of reduction in the GST rate from 18% to 5% w.e.f. 15.11.2017, affected vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 by way of commensurate reduction in prices, in terms of Section 171 of the CGST Act, 2017. The DGAP has reported that in the present case the summary sheet of the extent of profiteering was prepared by the Deputy Commissioner of State Tax, Pune.

2. The DGAP has reported that on receipt of the said reference from the Standing Committee on Anti-profiteering, a notice under Rule 129 was issued on 11.04.2019 (Annex-1), 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 non-confidential evidence/ information from 22.04.2019 to 24.04.2019, which formed the basis of the investigation, which was not availed of by the Respondent.
3. The DGAP has further 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 19.09.2019, in terms of Rules 129(6) of the CGST Rules.



4. The DGAP has also stated that in response to the notice dated 11.04.2019 and subsequent reminders, the Respondent submitted his replies vide his letters/e-mails dated 19.04.2019 (Annex-3), 11.05.2019 (Annex-4), 19.08.2019 (Annex-5), and 26.08.2019 (Annex-6); That vide the aforementioned e-mails/letters, the Respondent submitted the following documents/information:

- (a) Sales details for the period from July 2017 to March 2019.
- (b) Price list of products (pre and post 15.11.2017).
- (c) Copies of GSTR-1 and GSTR-3B Returns for the period from July 2017 to March 2019.
- (d) Copies of Electronic Credit Ledger for the period July 2017 to March 2019.
- (e) Summary details of Input Credit Register for the period from October 2017 to March 2019.

5. The DGAP has reported that in terms of Rule 130 of the CGST Rules 2017, the Respondent had been asked by the DGAP vide notice dated 11.04.2019 to indicate whether any information/ documents furnished were confidential. However, the Respondent did not classify any of the information/ documents furnished by him as confidential in terms of Rule 130 of the Rules, *ibid*.



6. The DGAP has stated that the reference from the Standing Committee on Anti-Profitteering, the various replies of the Respondent and the documents/evidence on record had been carefully examined. 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 commensurate 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 Central Government, on the recommendation of the GST Council, vide Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017(Annex-7), had reduced the GST rate on the restaurant service from 18% to 5% w.e.f. 15.11.2017 with the condition that ITC on the goods and services used in the supply of said service would not be availed. Since the present case was a case of reduction in the rate of tax, it was important to examine Section 171 of the CGST Act 2017 which governed the anti-profitteering provisions under GST. Section 171(1) reads as "*Any reduction in rate of tax on any supply of goods or services or the benefit of ITC shall be passed on to the recipient by way of commensurate reduction in prices.*" Thus, the legal requirement was abundantly clear that in the event of benefit of ITC or reduction in the rate of tax, there must be a commensurate reduction in the prices of the goods or services. Further, such a reduction could be in money terms only

so that the final price payable by a consumer got commensurately reduced. This was the legally prescribed mechanism for passing on the benefit of ITC or reduction in the rate of tax to the consumers under the GST regime. Moreover, it was also clear that Section 171 simply did not provide a supplier of goods or services, any other means of passing on the benefit of ITC or reduction in the rate of tax to the consumers.

8. The DGAP in his report has mentioned that the Respondent had been dealing with a total of 200 items while supplying restaurant services before 15.11.2017. It was also seen that the Respondent had been dealing with a total of 227 items during the period from 15.11.2017 to 31.03.2019. On comparing the average selling prices as per the details submitted by the Respondent for the period 01.10.2017 to 14.11.2017 and the actual selling prices post rate reduction i.e. w.e.f. 15.11.2017, it was observed that the GST rate of 5% had been charged on the increased base prices on 129 items, which established that though the tax amount was computed @18% before 15.11.2017 and @5% w.e.f. 15.11.2017, the fact was that because of the increase in base prices, the cum-tax price paid by the consumers was not reduced commensurately, inspite of the reduction in the GST rate. Therefore, the only remaining point for determination was whether the increase in base prices was solely on account of the denial of input tax.



9. The DGAP has also stated that the assessment of the impact of denial of ITC, which was an uncontested fact, required the 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-GST rate reduction period. For instance, if the ITC in respect of restaurant service was 10% of the taxable turnover of the Respondent till 14.11.2017 (which became unavailable w.e.f. 15.11.2017) and the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017, was up to 10%, it could be concluded that there was no profiteering. However, if the increase in the pre-GST rate reduction base prices w.e.f. 15.11.2017, was by 14%, the extent of profiteering would be $14\% - 10\% = 4\%$ of the turnover. Therefore, this exercise to work out the ITC in respect of the supply of restaurant service as a percentage of the taxable turnover of the products supplied during the pre-GST rate reduction period has to be carried out by taking into consideration the period from 01.07.2017 to 31.10.2017 and not up to 14.11.2017. That this had been done because there was no reversal of ITC on the closing stock of inputs/input services and capital goods as on 14.11.2017 by the Respondent, which was required under the provisions of Section 17 of the CGST Act, 2017 read with Rule 42 and 43 of the CGST Rules, 2017.
10. The DGAP has further reported that the ratio of ITC to the net taxable turnover had been taken for determining the impact of

denial of ITC (which was available to the Respondent till 31.10.2017). On this basis of the statutory documents made available by the Respondent, it was found that the ITC amounting to Rs. 81,264/- was available to the Respondent from the period July 2017 to October 2017 which was 6.32% of the net taxable turnover of restaurant service amounting to Rs. 12,86,453/- supplied during the same period. The said ITC was not available to the Respondent with effect from 15.11.2017 when the GST rate on restaurant service was reduced from 18% to 5%. A summary of the computation of ratio of ITC to the taxable turnover of the Respondent has been furnished by the DGAP as per Table-A below:-

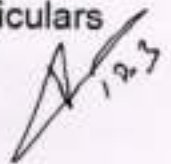
Table-A (Amount in Rs.)

Particulars	July 2017	August 2017	September 2017	October 2017	Total
ITC Availed as per GSTR-3B (A)	18178	20913	25754	16418	81264
Total Outward Taxable Turnover as per GSTR-3B (B)	270785	273731	522681	219256	1286453
The ratio of Input Tax Credit to Net Outward Taxable Turnover (C)= (A/B)					6.32%

11. The DGAP has further stated that the analysis of the details of item-wise outward taxable supplies during the period from 15.11.2017 to 31.03.2019, revealed that the base prices of 129 items supplied as a part of restaurant service had been increased by the Respondent to make up for the denial of ITC

post-GST rate reduction. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period 01.07.2017 to 14.11.2017 (pre-GST rate reduction) and 15.11.2017 to 31.03.2019 (Post-GST rate reduction) were compared and it was established that the Respondent had increased the base prices by more than 6.32% i.e., by more than what was required to offset the impact of denial of ITC in respect of 129 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 to the recipients by the Respondent. It was also clear that there had been no profiteering in respect of the remaining items on which there was either no increase in the base prices or the increase in base price was less or equal to the denial of ITC, or they were new products launched post-GST rate reduction.

12. The DGAP has also stated that given that this was a case of profiteering, the next issue to be examined was the amount of profiteering made in this case. For this purpose, only those items where the increase in base prices was more than what was required to offset the impact of denial of ITC, had been considered. The calculation was explained in Table-B below in case of one item "12" Chicken Slice Egg Breakfast S" for which average base price had been calculated during the pre-GST rate reduction period of 01.11.2017 to 14.11.2017 and then profiteering had been calculated considering the price particulars



given in the post-GST rate reduction invoice No. 1/A-27319 dated 17.04.2018, which is detailed in the following Table:-

Table-B (Amount in Rs.)

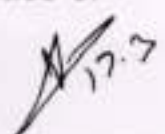
Name of item (A)	12" Chicken Slice Egg Bkfst S
Total quantity sold during 01.11.2017 to 14.11.2017 (B)	3
Sum of taxable value during 01.11.2017 to 14.11.2017 (C)	558.75
Average base price during 01.11.2017 to 14.11.2017 (D=C/B)	186.25
Base price with denial of input tax credit @6.32% (E=D*1.0632)	198.02
GST @ 5% (F= E*5%)	9.90
Commensurate price to be charged w.e.f. 15.11.2017 (G=E+F)	207.92
Selling price per unit as per Invoice No. 1/A-27319 dated 17.04.2018	220
Total profiteering (I=H-G)	12.08

13. The DGAP has further stated that based on the aforesaid pre and post-reduction in GST rates, 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, despite the reduction in GST rate from 18% to 5% (with denial of ITC) or in other words, the profiteered amount came to Rs. 1,49,896/- (including GST on the base profiteered amount).

The details of the computation were furnished by the DGAP in the Annex-8 of his report dated 17.09.2019. The DGAP has also stated that the said service had been supplied by the Respondent in the State of Maharashtra only.

14. 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 price or by way of not reducing the selling prices of the products commensurately, despite the reduction in GST rate from 18% to 5% w.e.f. 15.11.2017 stood confirmed against the Respondent. On this account, the Respondent had realized an additional amount to the tune of Rs. 1,49,896/- from the recipients which included both the profited amount and GST on the said profited amount and hence, the provisions of Section 171(1) of the CGST Act, 2017 had been contravened by the Respondent in the present case.

15. The above Report was considered by this Authority in its sitting held on 25.09.2019 and it was decided to accord an opportunity of hearing to the Respondent on 18.10.2019. Notice was also issued to the Respondent directing him to explain why the Report dated 17.09.2019 furnished by the DGAP should not be accepted and his liability for violation of the provisions of Section 171 of the CGST Act, 2017 should not be fixed. Further opportunities of hearings were granted to the Respondent on 08.11.2019, 27.11.2019, 11.12.2019 and 23.12.2019. However, the Respondent did not avail of any of the above opportunities of



hearing. Nonetheless, the Respondent sent his written submissions vide his email dated 08.11.2019. Further, since the present proceedings before this Authority were time-bound and since adequate opportunities for hearing had been given, this Authority decided to decide this case based on the available records, which included the above-mentioned submissions of the Respondent, whereby he has made the following contentions:-

- a. That under the Sub of the Day (SOTD) scheme, he was selling sandwiches at a fixed price for the day and that while the price of SOTD remained unchanged for the day, the particular sandwich which would be called SOTD was changed daily/regularly. Hence the item to be sold as SOTD kept changing regularly but the price thereof remained the same;
- b. That his SOTD offer price remained Rs. 110/- up to 14.11.2017, i.e. immediately before the reduction in the GST rate. However, the DGAP, while computing the amount of profiteering, has incorrectly considered the base price of SOTD as Rs. 105/- instead of Rs. 110/-; that since a wrong base price had been considered by the DGAP for the computation, it needed to be revisited since the impact of this flaw in the computation worked out to Rs. 8,545/-; that he wanted to submit a detailed working of the same along with copies of sale invoices issued by him in the

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month of November 2017, which reflect the correct base price at Rs. 110/-; that the revised calculation on this aspect was as per the Table below:-

Summary of SOTD Base Price Impact					(Amount in Rs.)
Item Name	Base Price as DGAP	Correct Base Price	Profiteering Amount as per DGAP	Profiteering Amount as per Our Calculation	Difference
SOTD 6in Aloo Patty or	105	110	2,217.93	8.00	(2,209.93)
SOTD 6in Chatpata or Ck	105	110	2,093.41	7.55	(2,085.86)
SOTD 6in Ckn Slice or M	105	110	1,533.09	5.53	(1,527.56)
SOTD 6in Ckn Tik or Cor	105	110	529.19	1.91	(527.28)
SOTD 6in Corn & Peas or	105	110	7.78	0.03	(7.75)
SOTD 6in Hara Bhara or	105	110	2,194.58	7.92	(2,186.66)
			8,575.98	30.94	(8,545.05)

- c. That as per his franchise agreement with the franchisor i.e. M/s Subway Systems India Pvt. Ltd., he was under legal obligation to pay royalty and advertisement charges @ 8% and 4.5% of his net sales respectively to M/s Subway India Private Limited and was issued a tax invoice for royalty and advertisement charges plus applicable GST. Post 14.11.2017, royalty payout had increased @1.769% and the same should be added while calculating commensurate base prices. He has also relied upon the judgement passed by this Authority in the case of **Kumar Gandhrav vs. KRBL Limited** (Order No. 03/2018 dated 04.05.2018). Calculation of increase in royalty payout % has been furnished by the Respondent as is given below:-

(Amount in Rs.)

Particulars (A)	Before 15.11.2017 (B)	Post 15.11.2017 (C)	Impact (B-C)
Basic Price	100	112.38	
Add: - GST@18% till 14.11.2017 Add: - GST@5% Post 14.11.2017	18	5.63	
Total Sale Price	118	118	
Add: - GST@12% on Royalty charged by Subway India	0.96	1.079	
Advertisement Expenses @4.5% on Net Sale	4.5	5.06	
Add: - GST@18% on Advertisement charged by Subway India	0.81	0.91	
Total Invoice Value including GST	14.27	16.039	1.769%

d. That the profiteered amount should be reduced by Rs. 41,559/- as per the month-wise impact of royalty on the profiteered amount, which is given below:-

(Amount in Rs.)

Month	Profiteering Amount as DGAP Report	Revised Profiteering Amount After Royalty Adjustment	Difference due to Royalty
Nov-17	12,123.15	8,658.59	(3,464.56)
Dec-17	9,933.84	7,122.88	(2,810.97)
Jan-18	14,643.61	10,479.40	(4,164.21)
Feb-18	11,939.56	8,622.77	(3,316.79)
Mar-18	11,160.30	7,938.52	(3,221.78)
Apr-18	8,661.39	6,153.25	(2,508.14)
May-18	7,252.89	5,412.26	(1,840.63)
June-18	5,938.30	4,417.93	(1,520.37)
July-18	5,770.24	4,300.47	(1,469.77)
Aug-18	11,607.95	8,253.50	(3,354.45)
Sept-18	8,311.31	6,073.50	(2,237.82)
Oct-18	7,154.67	5,124.70	(2,029.96)
Nov-18	10,179.79	7,298.25	(2,881.53)
Dec-18	7,409.53	5,295.56	(2,113.97)
Jan-19	2,637.27	1,818.78	(818.49)
Feb-19	6,468.28	4,809.57	(1,658.72)
Mar-19	8,703.85	6,556.47	(2,147.38)

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	149,895.94	108,336.41	(41,559.52)
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- e. That the DGAP, while calculating the profiteered amount, had wrongly added a 5% notional amount without explaining any reasons. This amount appeared as the GST component. The amount of GST had been charged and collected from customers and deposited with the government. Therefore, the addition of the above mentioned 5% amount should be removed and due to this, the profiteered amount should be reduced by Rs. 7138/-.
- f. That the DGAP ought to have considered the positive and negative price variations in respect of all the SKUs which were above and below the optimal price to arrive at the profiteered amount. Profiteered amount should be calculated after considering reduction as well as increases in the prices. The DGAP had calculated item-wise/SKU-wise analysis and calculated profiteering amount of Rs. 1,49,896/-. However, the DGAP had not taken into account the prices of those items where prices had been reduced as compared to optimal prices. Therefore, the profiteered amount should be calculated after taking into account the increase and decrease in the prices of his products. During the period November 2017 to March 2019, the total benefit passed to customers through reductions in prices was Rs. 84,631/-. Hence profiteered amount should be reduced

further by Rs. 84,631/-. The item-wise summary has been furnished by the Respondent as is given below:-

Summary of Items-Price Reductions		(Amount in Rs.)	
Product Name	DGAP Commensurate Base Price (Including Tax @5%)	Actual Sale Price	Benefit passed to the customers
2 Cheese Add6in	40.19	40.00	(4.54)
Cheese Add6in	20.09	20.00	(3.12)
12" Aloo Patty Sub	264.86	180.00	(763.71)
12" Chicken Tandoori Sub	312.13	250.00	(62.13)
12" ChknTikka Sub	312.13	180.00	(1,057.07)
12" ChknTikka Sub	312.13	250.00	(62.13)
12" PaneerTikka Sub	264.86	250.00	(14.86)
12" Rst Chicken FlatBd	312.13	250.00	(62.13)
12" Rst Chicken Sub	312.13	180.00	(792.81)
12" Rst Chicken Sub	312.13	250.00	(124.27)
2 Cheese Add6in	40.19	40.00	(3.40)
3 Cheese Add6in	60.28	60.00	(1.42)
4 Cheese Add6in	80.38	80.00	(1.13)
6" Aloo Patty Sub	141.78	125.00	(5,503.09)
6" Aloo Patty Sub	141.78	135.00	(47.44)
6" B.M.T. Sub	174.99	125.00	(349.93)
6" B.M.T. Sub	174.99	155.00	(99.95)
6" ChatpataChanaPatty Sub	127.82	125.00	(290.79)
6" Chicken Seekh Sub	165.50	155.00	(52.50)
6" Chicken Slice Sub	165.50	125.00	(2,146.52)
6" Chicken Tandoori Sub	165.50	125.00	(8,829.08)
6" Chicken Tandoori Sub	165.50	155.00	(126.00)
6" Chicken Teriyaki Sub	174.99	125.00	(649.86)
6" Chicken Teriyaki Sub	174.99	155.00	(99.95)
6" ChknTikka Sub	165.50	125.00	(15,592.64)
6" ChknTikka Sub	165.50	145.00	(451.01)
6" ChknTikka Sub	165.50	155.00	(84.00)
6" Corn&Peas Sub	141.78	125.00	(1,895.88)
6" Corn&Peas Sub	141.78	135.00	(20.33)
6" GreenPeasPatty Sub	127.82	90.00	(189.12)
6" GreenPeasPatty Sub	127.82	125.00	(5.65)
6" HaraBharaKabab Sub	127.82	90.00	(340.41)
6" HaraBharaKabab Sub	127.82	125.00	(508.18)
6" Mexican Bean Patty Sub	127.82	125.00	(765.09)
6" PaneerTikka Sub	141.78	125.00	(5,788.31)
6" PaneerTikka Sub	141.78	135.00	(74.55)
6" Rst Chicken Sub	165.50	125.00	(21,343.69)
6" Rst Chicken Sub	165.50	155.00	(210.01)
6" Subway Club Sub	174.99	125.00	(1,499.68)
6" Subway Club Sub	174.99	155.00	(139.93)

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6" Tuna Sub	174.99	125.00	(1,399.70)
6" Tuna Sub	174.99	155.00	(39.98)
6" Turkey & Chicken Slice	174.99	125.00	(749.84)
6" Veggie Delite Sub	127.82	125.00	(223.03)
6" Veggie Patty Sub	141.78	125.00	(2,483.10)
6" VegShammi Sub	141.78	125.00	(2,466.32)
B.M.T. Salad	174.99	150.00	(74.97)
Cheese Add6in	20.09	20.00	(5.67)
Cheese Add6in	20.09	20.00	(14.08)
Chicken Tandoori Salad	165.50	150.00	(263.51)
Chicken Teriyaki Salad	174.99	150.00	(574.76)
ChknTikka Salad	165.50	150.00	(635.52)
Cookie	37.83	25.00	(115.50)
Cookie	37.83	30.00	(86.17)
Fresh Value Meal (IN)	56.52	50.00	(3,094.97)
Fresh Value Meal (IN)	56.52	55.00	(12.13)
Med Fountain Drink	47.45	40.00	(349.93)
Rst Chicken Salad	165.50	150.00	(961.02)
Subway Club Salad	174.99	150.00	(599.75)
Tuna Salad	174.99	150.00	(149.94)
Turkey & Chicken Slice	174.99	150.00	(199.92)
Turkey Salad	174.99	150.00	(74.97)
			(84,631.09)

- g. That various issues, such as competition pricing, long term strategies for market penetration, the profit margin for sustaining in the market, life cycle of the product, economic and social conditions, cost of the products and capital expenditure etc. played a vital role at the time of fixing the products. Therefore, the commensurate base prices should be appropriately adjusted on account of general inflation.
- h. That DGAP has calculated profiteered amount up to the period from November 2017 to March 2019 i.e. the period of investigation was almost 16 months after the change in the GST rate on the impugned products, which was improper; that while no specific period had been prescribed

for computing the profiteered amount under the GST law, the period could not be so long; that the profiteered amount should be calculated up to 31.03.2018 since beyond that period any decision taken by him to increase the prices of his products should be purely considered a normal business decision and should not be considered to be profiteering; that he had increased the sale prices of his products on different dates after 15.11.2017, which was a normal business practice, required to be followed to meet out the increase in costs on account of general inflation etc; that since he was providing restaurant service, his inventory position was not for more than one week due to perishable nature of the items; that his raw materials were vegetables and foods items; and that the prices of vegetables and foods items kept changing on a day to day basis.

- i. 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.

16. We have carefully considered the Report of the DGAP, submissions made by the Respondent and the material placed

on the file. On examining the various submissions we find that the following issues need to be addressed:-

- a. Whether there was any violation of the provisions of Section 171 (1) of the CGST Act, 2017 in this case?
- b. If yes what was the additional benefit of ITC that had to be passed on to the recipients?

17. The Perusal of Section 171 of the CGST Act shows that it provides as under:-

- (1). *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."*
- (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.*
- (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 per cent of the amount so profiteered:

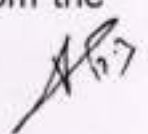
PROVIDED that no penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

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."

18. 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 also pertinent that Section 171 of the CGST Act 2017 provides that the "profiteered amount" is to be computed in respect of each supply

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made by a registered person and that the scope of profiteering is confined to the question of whether the 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 the increase in his costs on account of royalty, advertising charges, and the rise in the cost of his 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 was 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 he 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) was 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 became 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.

19. The Respondent has 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 while working out the base rate for the period from July 2017 to October 2017. However, the record of the case reveals that the Respondent, at no point in time, has furnished any invoice/ supply document that showed SOTD as an item supplied/ sold by him. Since no invoice mentioned SOTD as an item supplied, there was 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 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.

20. The Respondent has further contended that he pays royalty charges @8% and advertisement charges @4.5 on the total sales to M/s Subway India Pvt. Ltd. Post rate reduction, the royalty payout had been increased by 1.769% and therefore, the increase in royalty should be considered while calculating profiteering. In this connection, it would be appropriate to refer to the definition of the profiteered amount given in the Explanation attached to Section 171 which has been quoted above.

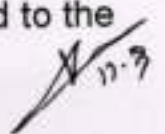
It is clear from the above explanation that an increase or decrease in the cost of a supplier or due to increase in royalty, advertisement charges has no ramification on the amount of profiteering which is computed in line with the provisions of Section 171 of the CGST Act. In case a supplier has not passed on the benefit of 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.

21. The Respondent has further contended that the DGAP while calculating the profiteered amount, has erroneously added 5% amount of GST which has been charged and collected from customers on the profiteered amount and deposited with the Government. Therefore, the addition of this 5% amount should be removed. In this context, it is pertinent 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



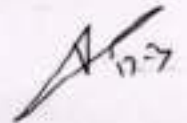
purchasing goods from the Respondent and hence the above amount has rightly been included in the profiteered amount as it denotes the amount of benefit denied by the Respondent. Therefore, the above contention of the Respondent is untenable and hence it cannot be accepted.

22. The Respondent has claimed that the DGAP had not taken into account the prices of those items where price has been reduced as compared to optimal prices. The DGAP should have considered the positive and negative price variations in respect of all the SKUs which were above and below the optimal price. In this context, it is pertinent to mention that no 'netting off' can be applied in the case of profiteering, as the benefit has to be passed on to each customer which is required 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

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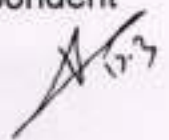
benefit of the tax rate reduction by way of reduced prices and Section 171 does not offer the Respondent to suo moto decide on any other modality to pass on the benefit of reduction in the rate of tax to his recipients. Therefore, any benefit of tax rate reduction passed on to a particular recipient 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.

23. The Respondent has further contended that various factor like competition pricing, long term strategies for market penetration, the profit margin for sustaining in the market, life cycle of the product, economic and social conditions, cost of the products and capital expenditure, etc. played a vital role at the time of fixing the products. Therefore, the commensurate base price should be appropriately adjusted on account of general inflation. 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 and other factors 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 and other factors does not have any



ramification on the computation of profiteering. Therefore, this contention of the Respondent cannot be accepted.

24. 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 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.

25. 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 including 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 the 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,

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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 no 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.

26. The Respondent has also cited the case of ***Kumar Gandharv Vs KRBL Ltd.*** supra in his support. Upon perusal of the above Order, it is observed that in that case, the rate of tax had increased and not reduced and since there was no reduction in the rate of tax, the provisions of Section 171 were not applicable in the above-cited case. However, in the present case, the rate of tax has been reduced and therefore, the above Order does not help the Respondent.

27. 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

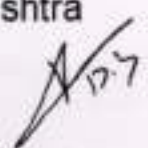
available to the Respondent during the period July 2017 to October 2017 is 6.32% of the net taxable turnover of restaurant services supplied during the same period. With effect from 15.11.2017, when the GST rate on restaurant service was reduced from 18% to 5%, the ITC was not available to the Respondent. It has been found that the Respondent had increased the base prices of different items by more than 6.32% i.e. by more than what was required to offset the impact of denial of ITC, supplied as a part of restaurant services to make up for the denial of ITC post-GST rate reduction and on comparison of pre and post GST rate reduction prices of the items sold in respect of items sold. Accordingly, the quantum of profiteering has been computed as Rs. 1,49,896/- as per Annexure-8 of the DGAP's Report dated 17.09.2019, which is correct and can be relied upon.

28. Based on the above facts the profiteered amount is determined as Rs. 1,49,896/- as has been computed in Annexure-8 of the DGAP Report dated 17.09.2019. Accordingly, the Respondent is directed to reduce his prices commensurately in terms of Rule 133 (3) (a) of the above Rules. The Respondent is also directed to deposit an amount of Rs. 1,49,896/- in two equal parts of Rs. 74,948/- each in the Central Consumer Welfare Fund and the Maharashtra State Consumer Welfare Fund, as the recipients are not identifiable, as per the provisions of Rule 133 (3) (c) of the above Rules along with 18% interest payable 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. 1,49,896/- shall be deposited 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, Maharashtra State.

29. 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 for the imposition of penalty 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.

30. Further, this Authority as per Rule 136 of the CGST Rules 2017 directs the SGST Commissioner, Maharashtra State to monitor this order under the supervision of the DGAP by ensuring that the amount profited 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 Commissioner SGST, Maharashtra

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State within a period of 4 months from the date of receipt of this order.

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



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

Sd/-
(Amand Shah)
Technical Member

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

Certified Copy

(A.K. Goel)
Secretary, NAA

File No. 22011/ NAA/79/N Rai/2019/1635-40 Dated: 17.03.2020
Copy To:-

1. M/s N Rai Delights LLP, FL-19, Konark Puram, SOC SN-7-1, Building-T, Kondhawa KH Pune-411048.
2. Assistant Commissioner of State Tax(Pune 3), 3rd 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.